

By CFTC Comments Portal: <https://comments.cftc.gov>

December 17, 2018

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Proposed Rules (82 Fed. Reg. 52902) (October 18, 2018) (the “**Proposed Rules**”); RIN 3038-AE76

Dear Mr. Kirkpatrick:

As you know, Freddie Mac, a government-sponsored enterprise (“**Freddie Mac**”), has been issuing credit risk sharing securities in accordance with the mandate of our primary regulator, the Federal Housing Finance Agency, using a variety of different transaction structures. In one often-used structure, a special purpose trust established by Freddie Mac issues notes to third-party investors. For this structure, Freddie Mac has relied on the relief provided by the Division of Swap Dealer and Intermediary Oversight in the Commodity Futures Trading Commission (“**CFTC**”) Staff Letter 14-111, dated August 25, 2014 (the “**Letter**”) relating to an exemption from registration as a commodity pool operator that is drawn largely from the Commission’s rules at 17 C.F.R. § 4.13(a)(3) (“**Rule 4.13(a)(3)**”). Certain aspects of the Proposed Rules are relevant to our compliance with the terms of the Letter. We are pleased to provide comments on the Proposed Rules and thank you for the opportunity to do so.

The Commission has proposed to amend part (iii) of Rule 4.13(a)(3) to specifically permit non-U.S. person participants in pools for which the commodity pool operator is relying on the *de minimis* exemption set forth in Rule 4.13(a)(3), without regard to their financial sophistication. We support this proposed amendment, subject to the requested clarification described below. As the Commission has noted, the proposed amendment is consistent with positions already taken by the Staff, including those in CFTC Advisory 18-96 (Apr. 11, 1996) and CFTC Staff Letter 04-13 (Apr. 14, 2004) (“**Letter 04-13**”).

Notwithstanding the relief in the Letter, which contemplates the possibility that notes issued in reliance thereon would be offered and sold pursuant to Regulation S promulgated by the Securities and Exchange Commission (“**SEC**”), Freddie Mac has decided not to utilize Regulation S in its credit risk transfer transactions because of interpretive issues relating to differences in the way that non-U.S. persons are defined under CFTC and SEC rules. This decision reduces both the investor base for and the liquidity of the securities.

The definition of “U.S. person” under Regulation S differs from the definition of “Non-United States Person” under the CFTC’s rules at 17 C.F.R. § 4.7 (“**Rule 4.7**”) in ways that extend beyond the use of an affirmative term by the SEC and a negative term by the CFTC. These definitional differences can create significant compliance issues. In general, the overseas bond markets operate in a way that allows participants in the securities markets to maintain compliance with Regulation S, but the policies and procedures of banks and depositories are less focused on Rule 4.7 compliance. Thus, European depositories for book-entry securities¹ confirm that their holders are not “U.S. persons” under Regulation S, and utilize the Regulation S test to determine the ability to transfer securities in compliance with U.S. securities laws. We understand that the European depositories do not, however, evaluate any of the alternative definitions of “non-U.S. person” (or comparable terms) used by the CFTC or other U.S. regulatory agencies. Thus, issuers have no ability to confirm that securities in global form, transferred among investors who are not “U.S. persons” for purposes of Regulation S, are remaining in the hands of investors who are “non-U.S. persons” for purposes of the CFTC’s rules.

It is not clear under CFTC rules whether Freddie Mac would have an ongoing requirement to ensure that all participants in a pool issued in reliance on the Letter meet the requirements of that Letter at all times (rather than only at issuance). Because it is difficult to confirm that transfers of securities among non-U.S. persons outside the U.S. comply with the Rule 4.7 definition of a “Non-United States Person,” Freddie Mac has not issued in reliance on Regulation S but has caused its special purpose trust to offer and sell securities only to qualified institutional buyers as defined under the SEC’s Rule 144A.

In the Proposed Rules, the term “non-U.S. person” is used without definition. We are respectfully requesting that CFTC clarify that the phrase “non-U.S. person” means that a person who is not a “U.S. person” for purposes of Regulation S would likewise be a non-U.S. person for purposes of Rule 4.13(a)(3). We believe that allowing issuers to use the Regulation S definition of “U.S. person” in the context of commodity pools for which the operator satisfies the conditions of the *de minimis* exception, and thus is not actively regulated by the CFTC, would be appropriate and consistent with reducing regulatory burden in the capital markets. Moreover, because the CFTC is proposing to allow non-U.S. persons to invest in Rule 4.13(a)(3) funds and the regulatory difference between the CFTC’s and SEC’s relevant definitions is relatively small, we do not believe such an approach would undermine the CFTC’s regulatory goals.

In addition, we ask that the Commission clarify in the Statement of Basis and Purpose to the final rule that Freddie Mac (or, more generally, entities that have obtained exemptions from commodity pool operator registration based on no-action relief relating to Rule 4.13(a)(3)), will be able to sell securities under the Letter to the same range of investors as permitted to other unregistered commodity pool operators who rely on Rule 4.13(a)(3).

¹ The use of certificated securities rather than those held in global form in depositories would have the effect of severely impairing liquidity for affected investors.

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We appreciate your consideration of this matter, and are happy to discuss further at your convenience.

FEDERAL HOME LOAN MORTGAGE
CORPORATION

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