Dodd-Frank CPO Registration Delayed for ABS Issuers
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The CFTC has delayed until December 31, 2012 the deadline for certain pooled investment vehicles, including issuers of asset-backed securities, to register as commodity pool operators (CPOs) or commodity trading advisors (CTAs) under the Dodd-Frank Act.

On October 11, 2012, the CFTC issued *No-action Letter 12-15* extending until December 31, 2012 the deadline for registration under the Dodd-Frank Act as a commodity pool operator (CPO) or commodity trading advisor (CTA) by any entity that would have been required to register solely by virtue of its swaps activity. This relief is primarily directed at securitization vehicles, including **collateralized loan obligations** (CLOs), in response to industry groups seeking an exclusion for asset-backed securities (ABS) issuers from these registration requirements. As of December 31, these entities must either register with the CFTC through the National Futures Association (NFA) or have provided the NFA with a notice of exemption from final *rules* that require them to register as CPOs or CTAs.

The **LSTA** recently addressed the impact that the expanded definitions of "commodity pool" and "commodity pool operator" under the final Dodd-Frank rules might have on advisors and managers of investment vehicles that issue CLOs. The expanded definition of "commodity pool" now includes enterprises operated "for the purposes of trading in commodity interests, including any... swap," which includes the **interest rate swaps** and currency swaps that ABS issuers, including CLOs, often enter into to hedge the transaction's currency and interest rate risk.

This means that CLOs with even a single swap outstanding could now be considered to be commodity pools subject to the Dodd-Frank CPO registration requirements (see *Legal Update, Final Rules Amending CPO, CTA Registration and Compliance Obligations Issued by CFTC*).

The final rules on CPO and CTA registration contain a *de minimis* exemption for notional amounts of swap activity that many ABS issuers may qualify for. Pooled investment vehicles with aggregate outstanding notional swap activity below the *de minimis* levels in each asset class are eligible for exemption from registration as CPOs/CTAs. The *de minimis* amount is determined by a formula for futures positions (found on page 33 of the *final rules*) or by the terms of *Part 45* of the CFTC's regulations for cleared swaps. Under the final rules, both the CLO manager and its advisor must register, but if a manager of a CLO is exempt as a CPO under the *de minimis* exemption, the advisor of the same CPO is automatically exempt as well. Practically speaking, the manager would likely seek the exemption.

On August 17, 2012, the American Securitization Forum (ASF) submitted a *comment letter* to the CFTC seeking relief for securitization vehicles from regulation as commodity pools. In particular, the ASF sought relief for CLOs that invest in at least 85% of their assets in loans or high quality liquid instruments and that only use swaps to hedge against interest rate or currency risk, or against cash flow or timing mismatches.

On October 10, 2012, the CFTC issued a response *letter* to the ASF and SIFMA granting permanent relief that excludes from the definition of "commodity pool" securitization vehicles that meet the following criteria:

- The issuer of the ABS is operated consistently with the conditions in **Regulation AB** or Rule 3a-7 of the **Investment Company Act of 1940** (whether or not the issuer's security offerings are in fact regulated under either), such that the issuer, pool assets and issued securities satisfy the requirements of either regulation.

- The entity's activities are limited to passively owning or holding:

  - a pool of receivables or other financial assets, which may be either fixed or revolving, that by their terms convert to cash within a finite time period; and

- any rights or other assets designed to assure the servicing or timely distributions of proceeds to securities holders.

- The entity's use of derivatives is limited to the uses of derivatives permitted under the terms of Regulation AB, which include credit enhancement and the use of derivatives such as interest rate and currency swap agreements to alter the "payment characteristics" of the cash flows from the issuing entity.

- The issuer makes payments to securities holders only from cash flows generated by its pool assets and other permitted rights and assets, and not from or otherwise based on changes in the value of the entity's assets.

- The issuer is not permitted to acquire additional assets or dispose of assets for the primary purpose of realizing gain or minimizing loss due to changes in market value of the vehicle's assets.

Therefore, "operators" of investment vehicles meeting these criteria need not register as CPOs.

The letter also indicates that the CFTC remains open to considering whether other securitization vehicles that do not meet these criteria might ultimately be exempted permanently from the definition of "commodity pool." For the time being, any ABS issuers, including issuers of CLOs, which do not meet the above criteria still fall within the "commodity pool" definition and would therefore need to either register with the NFA or provide the NFA with a notice of exemption.

The LSTA has also been working to have CLOs expressly exempted from the Volcker rule ban on banks owning or sponsoring commodity pools (for more on the Volcker rule and CLOs, see *Practice Note, Summary of the Dodd-Frank Act: Securitization: The Volcker Rule and CLO Exemption*).

For more on other issues currently facing CLO managers, see *Practice Note, Current Issues Facing CLO Managers*.

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