Clients&FriendsMemo

The Dodd-Frank Act May Require Registration as a "Commodity Pool Operator" and a "Commodity Trading Advisor" for Entities Associated with Securitization Transactions

July 23, 2012

Upon effectiveness of the U.S. Commodity Futures Trading Commission ("**CFTC**") final rules defining "swaps" under the Dodd-Frank Act, entities associated with securitization transactions may be required to register as commodity pool operators ("**CPOs**") and/or commodity trading advisors ("**CTAs**").[1] Absent exemptive relief, these registration requirements will apply irrespective of whether the "swaps" are subject to mandatory clearing under the Dodd-Frank Act.[2]

Based on the Dodd-Frank Act and current CFTC regulations, certain entities associated with public and certain private securitization transactions are not exempt and may have to register as CPOs and/or CTAs.

With respect to securitization transactions offered without registration under the Securities Act of 1933, as amended (the "Securities Act"), there is "*de minimis*" exemptive relief available from registration as a CPO and CTA. However, the availability of the relief is unclear due to uncertainty of the application of the exemptive relief to swaps and securitizations.

As there is no "grandfathering" provision, the registration requirement could apply to both past and future securitization transactions. In the context of securitizations of static asset pools utilizing swaps to hedge interest or currency risk, registration of parties associated with securitizations as CPOs and CTAs would seem to be an unintended consequence of the Dodd-Frank Act and ripe for CFTC relief. We will continue to update you as further guidance on this issue appears.

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[1] The final rules defining "swaps" were announced by the CFTC on July 10, 2012 and will become effective 60 days after publication in the Federal Register.

[2] *See* http://www.cadwalader.com/assets/client_friend/071112CFTCAdoptsFinalRulesandInterpretations.pdf.

Use of Swaps in Securitizations

Securitization vehicles or other vehicles that issue collateralized debt and loan obligations ("**CDOs**") and asset-backed securities, such as auto loan and credit card securitizations as well as residential and commercial mortgage loan securitizations ("**ABS**") are commonly structured to include interest rate or currency swaps and, in some instances, options. Often, the securitization vehicle (we will refer to CDOs and ABS as "**securitizations**") enters into swaps to hedge against fluctuations in interest rates or exchange rates or to tailor returns for specific classes of investors.

Securitization vehicles issuing ABS may enter into interest rate swaps or caps, which may be tranche-specific or may relate to the entire asset pool (or a specific sub-group of assets in the pool). These swaps are generally not secured by the securitization vehicle assets. However, as a practical matter, if the swaps relate to the entire asset pool, all the assets of the securitization vehicle issuing ABS are available to pay the swap counterparty prior to payments on the securitization vehicle's ABS securities.[3] Where swaps are structured to relate solely to a particular class of ABS (i.e., a "swapped class") issued in a larger transaction, it is typical that the swap counterparty has first priority to certain cashflows that would be available to such swapped class prior to any allocation of such payment to the swapped class itself. Since the swapped classes are usually highly rated (often rated "AAA" or the equivalent), the swap counterparty effectively has the benefit of a very high priority in the allocation of certain cashflows generated by the entire underlying asset pool.

Securitization vehicles issuing CDOs often enter into interest rate hedges and may enter into timing and currency swaps as well, depending on the mix of assets and liabilities and the way in which the related manager chooses to manage any mismatches between the vehicle's assets and liabilities. With respect to interest rate, timing and currency hedges, the swap counterparty is typically included as a secured party under the securitization vehicle's debt indenture.[4]

Securitization vehicles issuing CDOs also may gain exposure to some assets on a synthetic basis, by entering into credit default swaps.[5] In a credit default swap, the securitization vehicle will acquire the risk associated with one or more underlying debt or loan obligations by selling

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[3] In general, the swap counterparty is paid prior to holders of the ABS and therefore has priority in the assets of the securitization vehicle, subject to applicable administrative fees and expenses such as taxes and fees of the issuer and the fees and expenses of the trustee, servicer and special servicer.

[4] Under normal circumstances, the swap counterparty is entitled to receive all payments senior to payments made to holders of the CDOs issued by the securitization vehicle. The swap counterparty is paid after the taxes and fees of the issuer and trustee are paid, and, often the swap counterparty is paid prior to the collateral or investment manager.

[5] Swaps referencing narrow-based security indices or single securities or loans are "security-based swaps" and are governed under the securities statutes and are not "swaps" under the CEA. Thus, a securitization vehicle entering into solely "security-based swaps" would not create a commodity pool but may be regulated instead under the securities statutes. Security-based swaps are outside the scope of this memorandum.

protection against the obligation in exchange for receiving a periodic payment and taking on the obligation to pay the counterparty (the buyer of protection) in connection with credit events (i.e. missed interest and principal payments) on the underlying reference obligations. Securitization vehicles issuing CDOs may also enter into derivatives based on broad-based credit default swap indices ("**CDX**"). A CDX is a credit default swap index with standardized terms and will generally include companies in a specific geographic region with similar credit characteristics. The swap counterparty is a secured party under the related debt indenture, as described above.

CDOs are marketed to investors through private sales under Section 4(2) of the Securities Act and/or Rule 144A thereunder. On the other hand, ABS are often marketed to investors through public securities offerings registered under the Securities Act.[6]

The Dodd-Frank Act Creates an Expansive Definition of "Swap" Which Will Have the Effect of Subjecting Entities Associated with Securitization Vehicles that Use Swaps to Regulation under the Commodity Exchange Act ("CEA")

The Dodd-Frank Act provides for an expansive definition of the term "swap".[7] Although the final CFTC regulations defining swaps are not yet effective, common swaps (and options) entered into by securitization vehicles will clearly fall within this definition. Specifically, "swap" includes:

- an agreement that provides for a payment based on the value of, without limitation, any *rates*, *currencies* or *securities* but that does not transfer ownership thereof, or an agreement that provides for payment based on an index or measure;
- an option on any property or an option that is tied to any quantitative measurement or a financial or economic measure; or
- any contract as to which any payment or delivery term is associated with any event or contingency associated with a potential financial, economic, or commercial consequence.

The swap definition further identifies the following transactions commonly known as swaps:

- interest rate swaps;
- rate floors and caps;
- currency swaps;
- foreign exchange swaps;

[6] However, in the case of single-asset ABS securitizations (i.e., a large hotel or shopping center) and ABS backed by floating rate mortgage loans, private securitizations are very common.

[7] Section 1a(47) of the CEA.

- debt index swaps; and
- credit default swaps.

The Dodd-Frank Act Amends the Definition of a Commodity Pool and Commodity Pool Operator to Include Investment Vehicles that Invest in Swaps

Definitions of Commodity Pool and CPO

The Dodd-Frank Act expands the definition of a commodity pool to include any form of enterprise operated for the purpose of trading in commodity interests, *including swaps*.[8] Similarly, the term "commodity pool operator" is expanded to include any person engaged in a business that is of the nature of a commodity pool or similar enterprise and in connection therewith, solicits, accepts, or receives from others, funds, securities, or property for the purpose of trading in commodity interests, *including any swaps*. [9]

The CFTC has taken an expansive view of the term "trading" in commodity interests, and thus a pooled investment vehicle that enters into swaps (but that does not actively trade them), will likely still fit within the definition of a commodity pool. If trading in swaps is a purpose (and not just a sole purpose) of the securitization vehicle, then the CTFC will likely take the position it is a commodity pool, no matter how limited in scope and regardless of whether undertaken for hedging or speculative purposes.[10]

Accordingly, despite the fact that most securitization vehicles do not primarily engage in investments in swaps, it is likely that the CFTC would consider these securitization vehicles to be commodity pools. As a result, entities associated with securitization vehicles may be required to register as CPOs under the CEA, absent an exemption from registration.

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[8] Section 1a(10)(A)(i) of the CEA.

[9] Section 1a(11)(A)(i)(I) of the CEA.

[10] *See* 46 Fed. Reg. 26,004, 26,005-06 (May 8, 1981); *see also* CFTC Interpretive Letter No. 75-17, Comm. Fut. L. Rep (CCH) ¶ 20, 112 (Nov. 4, 1975). At least one court has applied a four factor test in determining whether an entity is a commodity pool: (i) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity interests, (ii) common funds used to execute transactions on behalf of the entire account, (iii) participants share *pro rata* in accrued profits or losses from the commodity interests trading and (iv) the transactions are traded by a CPO in the name of the pool rather than the name of any individual investor. *Lopez v. Dean Witter Reynolds, Inc.,* 805 F.2d 880, 884 (9th Cir. 1986). While it is possible that a court applying the statutory definition would determine that a securitization vehicle is not a commodity pool, it is unlikely that the CFTC would agree.

Static Pools May Still be Considered Commodity Pools by the CFTC

Securitization vehicles that issue ABS typically enter into swaps at closing with a set termination date. There is generally no expectation that, absent an early termination event or default, the swap will be replaced or altered over time since the pool is typically a static pool of assets. Thus the securitization vehicle is not "trading" in swaps following the closing date. There is no direct precedent or interpretation by the CFTC as to whether such inactivity in "trading" swaps will remove such securitization vehicles from the definition of commodity pool. However, given the fact that the CFTC views even *de minimis* amounts of investments in commodity interests by a pooled investment vehicle to bring that vehicle within the definition of a commodity pool, it is likely that the CFTC would come to the same view regarding securitization vehicles that issue ABS, despite the fact that the swaps are not actively traded.[11]

Conversely, securitization vehicles that issue CDOs generally have the ability to enter into swaps post-closing and often do change swaps exposure throughout the course of the transaction.

Who is the CPO?

The CPO is generally an entity "engaged in the business that is of the nature of a commodity pool" and who markets interests in a commodity pool and receives customer funds for investment in the pool. The CFTC will also consider the day-to-day operation of a commodity pool in order to determine CPO status. In general, any person who has the authority to retain or change a commodity pool's CTA is a CPO of that commodity pool.[12]

The application of the CPO attribution rules to ABS securitization vehicles is unclear. Given that until the enactment of the Dodd-Frank Act, ABS securitization vehicles that entered into swaps were not considered commodity pools, no precedent or guidance exists. The securitization vehicle's depositor and the depositor's affiliates typically sponsor, form and market interests in the securitization vehicle. They are "engaged in the business that is of the nature of a commodity pool." They coordinate (and perhaps purchase or originate) assets deposited into the securitization vehicle and structure and cause the securitization vehicle to enter into swap transactions. As such, it is likely that the depositor of the securitization vehicle or its affiliates would be deemed to be the securitization vehicle's CPO. Other possible CPOs for ABS securitization vehicles include the trustee, servicer or the special servicer. However, the trustee mostly performs administrative functions (e.g., cashiering and reporting), and usually will only act upon the direction of the holders

[11] For private ABS transactions, swaps often relate only to a portion of the vehicle's assets or only to one or two of the classes issued in such ABS transaction. It is unclear in these circumstances and adds to an increasingly complicated facts and circumstances analysis, whether the commodity pool exists at the swapped class level or at the vehicle level.

[12] *See* 1985 CPO Release, 50 Fed. Reg. 15, 868, 15, 871 (Apr. 23, 1985); *see also* CFTC Interpretive Letter No. 75-17, Comm. Fut. L. Rep (CCH) ¶ 20, 112 (Nov. 4, 1975).

of the securities or the servicer. With respect to the servicer and special servicer, while these entities are important to the day-to-day maintenance of the securitization vehicle's assets, they do not sponsor, or engage in the business that is of a nature of a commodity pool, nor do they solicit or accept funds for the commodity pool. Additionally, it is unlikely that agents hired to provide services to a commodity pool would be considered to be CPOs. For future ABS securitizations, these ambiguities may be avoided, as parties may be able to designate the CPO. However, for past securitizations the CPO will continue to be unclear and determined on a facts and circumstances analysis.

For securitization vehicles that issue CDOs, the analysis is simpler, since a CDO securitization vehicle is generally organized as an off-shore corporation. In these instances, the board of directors or officers of the corporation would be considered to be the CDO's CPO.[13] Typically, however, the investment manager agrees to assume the role of CPO as a matter of contract.

Consequences of being a CPO

The CEA requires that a non-exempt pool operator: (i) register as a CPO with the CFTC; (ii) become a member of the National Futures Association ("**NFA**") by filing a Form 7-R; and (iii) comply with extensive regulations. A registering CPO must file with the NFA information concerning its ten percent direct and indirect owners.[14] In addition to registration of the CPO with the NFA, each "associated person" of a CPO (e.g., personnel and their supervisors who solicit funds, securities or property for participation in a commodity pool) and "principals" (broadly, officers, directors and ten percent owners) must also register with the NFA by filing Form 8-R.[15] Associated persons are also required to pass an NFA exam, generally, the Series 3. A CPO is also required to provide a disclosure document for each commodity pool to each prospective participant in such pool,[16] comply with numerous reporting requirements, position limits, and activity restrictions such as anti-manipulation and a prohibition on commingling of assets of any pool it operates with the property of any other person.[17] The application of many of these requirements to securitizations is unclear (e.g., periodic reporting concerning the commodity pool's changes in net asset value, trading strategy and performance data).

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[13] CFTC Interpretative Letter No. 75-11, Comm. Fut. L. Rep. (CCH) ¶ 20,098 (Sept. 19, 1975).

[14] See CFTC Rule 3.10(a) and Form 7-R.

[15] See CFTC Rule 3.12; *see also* Section 4k of the CEA and CFTC Rule 1.3(aa)(3).

[16] See CFTC Rule 4.21(a). This disclosure document generally requires information to be provided about the commodity pool, the CPO and the CTA, a description of the pool's trading strategy and performance data for the past five years for all other pools operated by the CPO or its trading manager.

[17] *See* CFTC Rules 4.20, 4.22(a) and (b), Part 15 and 155 and Rules 180.1 and 180.2

The Dodd-Frank Act Amends the Definition of Commodity Trading Advisor to Include Persons who Provide Advice as to Investments in Swaps

Definition of CTA

The Dodd-Frank Act expands the definition of commodity trading advisor to include any person who for compensation, engages in the business of advising others, either directly or indirectly, as to the value of, or the advisability of, trading any contract of sale of a commodity *or swap*.[18] Accordingly, absent an exemption from registration, each securitization vehicle must identify its "commodity trading advisor" and that entity will be required to register under the CEA to the extent such advisers provide advice as to the advisability of investing in swaps.

Who is the CTA?

The determination of the CTA for ABS securitization vehicles is unclear. Given that ABS securitization vehicles typically enter into swaps on the closing date, the CTA may be the entity that structured the swap and caused the securitization vehicle to enter into the swap. Typically the depositor and its affiliates (which may include the sponsor) perform this function for ABS securitization vehicles. Other potential CTAs include the trustee, the servicer or the special servicer. Given that until the enactment of the Dodd-Frank Act, ABS securitization vehicles that entered into swaps were not considered commodity pools, no precedent or guidance exists.

With respect to a CDO, the investment manager of the private fund will likely be considered the pool's CTA.

Consequences of being a CTA

The CEA requires that a non-exempt commodity trading advisor register as a CTA with the CFTC, become a member of the NFA by filing a Form 7-R and comply with extensive regulations.[19] In general a registering CTA must file with the NFA the same information as a registering CPO and each "associated person" and "principal" of a CTA must also register with the NFA (including passing the Series 3 exam).[20] CTAs must furnish prospective clients (i.e., the CPO) with a disclosure document describing their trading program and obtain a signed acknowledgment of

[18] Section 1a(12)(A)(i) of the CEA.

[19] *See* CFTC Rule 3.10 and Form 7-R.

[20] *See* CFTC Rules 3.12(a) and 3.12(c).

receipt.[21] The forms of disclosure and recordkeeping requirements are similar to those required of a CPO.

The CFTC Rescinded the Qualifying Investor Exemption, which would have Provided an Exemption from Registration as a CPO and CTA for Entities Associated with Private Securitization Vehicles

The Rescission of the Qualifying Investor Exemption and the Qualifying Investor Exemption Requirements

Prior to recent CFTC rescission, the Qualifying Investor Exemption[22] provided an exemption from registration as a CPO if:

(i) investors in the pool were limited to persons that the CPO reasonably believed at the time of investment were either:

- natural persons who were "qualified eligible persons" ("**QEPs**") (which includes "qualified purchasers" and "knowledgeable employees," as defined in the U.S. Investment Company Act of 1940 (the "**ICA**")); or
- non-natural persons who, among other things, were QEPs (which includes "qualified purchasers"); and

(ii) interests in the pool were exempt from registration under the Securities Act and such interests were sold without marketing to the public in the United States.

Because private securitization vehicles are offered and sold in transactions exempt from registration under the Securities Act and in private transactions to investors who are all "qualified purchasers," CPOs of private securitization vehicles could, but for the rescission of the Qualifying Investor Exemption, have relied on it to provide an exemption from registration.

As to CTA registration, the CFTC also rescinded a parallel exemption for CTAs providing commodity trading advice to CPOs exempt under the Qualifying Investor Exemption.

The Qualifying Investor Exemption was Inapplicable to Public Securitizations

[21] *See* CFTC Rule 4.31.

[22] *See* the former CFTC Rule 4.13(a)(4)

While the Qualifying Investor Exemption, were it still in effect today, would have benefitted CPOs of private securitization vehicles, it would have been inapplicable to CPOs of securitization vehicles issuing ABS that were marketed to investors through registered public offerings of the securities under the Securities Act. A core requirement of the Qualifying Investor Exemption was that interests in the commodity pool were exempt from registration under the Securities Act and were not marketed to the public.

The Qualifying Investor Exemption has Sunset Provisions for Existing Funds Relying on the Exemption

The CFTC rescinded the Qualifying Investor Exemption effective as of April 24, 2012. Entities relying on the exemption prior to April 24, 2012 have until December 31, 2012 to effect a registration as a CTA and CPO, as applicable, or otherwise find applicable exemptions. The CFTC has recently granted no-action relief for CPOs and CTAs of newly-formed commodity pools that are able to comply with the Qualifying Investor Exemption, but which were not launched as commodity pools prior to April 24, 2012; these CPOs have until December 31, 2012 to register as a CPO or CTA or otherwise find an application exemption.[23] This no-action relief, however, is not self-executing; CPOs and CTAs must submit a claim to take advantage of the no-action relief. Whether or not CPOs or CTAs of private securitization vehicles launched prior to April 24, 2012 can rely on the no-action letter by complying with the Qualifying Investor Exemption until December 31, 2012, or instead must register (or otherwise perfect an applicable exemption) before the effectiveness of the final rules defining "swaps" is unclear.

Entities Involved with CDO Securitization Vehicles or Privately Placed ABS transactions that Engage in a *De Minimis* Amount of Trading in Swaps Have a Limited Exemption from Registration as a CPO and CTA

The *De Minimis* Exemption[24] from registration as CPOs and CTAs for entities associated with securitization vehicles that issue CDOs or private ABS transactions requires that:

(i) the interests in the pool are exempt from registration under the Securities Act and such interests are sold without marketing to the public in the United States;

(ii) the trading activity of the pool in swaps satisfies one of two standards:

- the aggregate initial margin and premiums required to establish swap positions (whether for hedging or speculative purposes), determined at the time the most recent position was

[23] *See* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-03.pdf.

[24] CFTC Rule 4.13(a)(3)

established, will not exceed 5 percent of the liquidation value of the pool's portfolio (taking into account unrealized profits and losses) (the "**5 Percent Test**"); *or*

- the aggregate net notional value of the pool's swap investments (whether for hedging or speculative purposes) does not exceed 100 percent of the portfolio's liquidation value (the "**Notional Test**"). For purposes of the Notional Test, the CFTC's rule-making provides for netting of swaps cleared on the same designated clearing organization, where appropriate. A pool's liquidation value generally is taken to mean a measurement of the pool's daily net asset value;

(iii) investors in the commodity pool be limited to persons that the CPO reasonably believes at the time of investment are either "accredited investors" or QEPs; and

(iv) interests in the commodity pool are not marketed as a vehicle for trading in commodity futures or options, including swaps.

CTAs of securitization vehicles that issue CDOs or private ABS transactions may avail themselves of a parallel exemption for CTAs that provide commodity trading advice to CPOs exempt under the *De Minimis* Exemption. Similarly, CPOs that also act as CTAs may avail themselves of the Rule 4.14(a)(5) exemption from registration if they are also exempt from registration as a CPO under the *De Minimis* Exemption.

The De Minimis Exemption is Inapplicable to Public Securitizations

While the *De Minimis* Exemption may benefit the CPOs and CTAs of private securitization vehicles, it is inapplicable to securitizations marketed to investors through public offerings of ABS securities under the Securities Act. A core requirement of the *De Minimis* Exemption is that interests in the commodity pool are exempt from registration under the Securities Act and are not marketed to the public.

Application of the De Minimis Exemption

For securitization vehicles that are CDOs or private ABS transactions that enter into swaps, application of the 5 Percent Test may be unclear due to uncertainty of the application of the exemptive relief to swaps and securitizations as opposed to exchange traded derivatives.

As discussed above, the hedge or swap counterparty in a CDO transaction is generally included as a secured party under the securitization vehicle's debt indenture and is entitled to receive all payments senior to payments on its securities.

Similarly, in private ABS transactions, including swaps, the swap counterparty generally is accorded a relatively senior position in the transaction waterfall which effectively gives the counterparty a very senior claim to cashflows generated by the entire underlying asset pool. It is unclear how the CFTC would interpret these scenarios– the *De Minimis* Exemption tests are designed to approximate the level of activity in the commodities markets (which now includes swaps). The *De Minimis* Exemption was drafted to measure trading levels in exchange traded derivatives where initial margin or premiums is clear. Recognizing that a securitization vehicle's entire asset pool is effectively "available" to satisfy a swap counterparty's claim for payment does not serve as a proxy for measuring such vehicle's level of trading activity in the same sense as the level of initial margin in the context of futures contracts or options thereon. Conversely, it is unclear as to whether the CFTC would interpret a pledge of the private securitization vehicle's entire asset pool or senior position of the swap counterparty in the securitization vehicle's waterfall as "initial margin" within the meaning of the exemption. Until the CFTC provides some clarity on this point, the 5 Percent Test may not be clear enough to provide legal certainty as to whether a CPO of a securitization vehicle that issues CDOs or private ABS can avail itself of the exemption.

Both the 5 Percent Test and the Notional Test pose interpretive ambiguities relevant to the nature of CDO and private ABS securitization vehicles. These tests are more appropriately tailored for entities that mark-to-market their assets on a daily basis and produce a daily net asset value. However, for cash-flow CDO securitization vehicles, the purpose of the vehicle is to insulate investors from market value risk – this is the reason for the complex series of trading restrictions. As such, there is no requirement for CDO securitization vehicles to mark-to-market the value of their portfolio. If these tests are truly to be applied to private securitization vehicles, the vehicles would have to seek out bids from pricing services and other dealers for their assets. Until the CFTC provides some clarity as to how securitization vehicles such as CDO securitization vehicles are to apply these tests, given that a CDO securitization vehicle's purpose is predicated on *not* marking to market the value of its assets on a daily basis, it unclear that a CPO of a private securitization vehicle can avail itself of the *De Minimis* Exemption.

For synthetic CDO securitization vehicles that solely gain exposure to debt obligations by receiving exposure to CDX or a basket of securities or loans that fall within the definition of "swaps", the *De Minimis* Exemption will not be available.

Requirements to Claim the De Minimis Exemption

To claim the *De Minimis* Exemption, a presumptive CPO is required (i) to file a notice of eligibility with the NFA, (ii) to provide a cautionary statement to investors that the CPO is exempt from registration and therefore is not required to comply with disclosure and reporting requirements applicable to registered CPOs, and (iii) to agree to provide certain books and records and other information to the CFTC upon request. The final rules defining "swaps" were just announced by the

CFTC on July 10, 2012 and will become effective 60 days after publication in the Federal Register and entities associated with securitization vehicles will have to comply with the registration provisions or otherwise determine themselves eligible for the *De Minimis* exemption.[25]

Since Securitization Vehicles Engage in Swap Transactions, it is Likely that the Dodd-Frank Act will Require Registration as a CPO or CTA for Parties Associated with Securitizations Absent CFTC Exemptive Relief

Following the effective date of the final CFTC regulations defining swaps, common swaps entered into by securitization vehicles will fall within the definition of "swaps". As such, and absent exemptive relief, entities associated with securitization transactions may be required to register as CPOs and CTAs.

While the designation of the CPO and CTA for these vehicles is unclear given that until the enactment of the Dodd-Frank Act, securitization vehicles that entered into swaps were not considered commodity pools, we believe that the list of potential CPOs and CTAs can be narrowed down to a select few entities. As discussed above, it is likely that the CPO and CTA of an ABS securitization vehicle will be the depositor for the trust or its affiliates. The securitization vehicle's depositor and the depositor's affiliates typically sponsor, form and market interests in the securitization vehicle. They are "engaged in the business that is of the nature of a commodity pool." They coordinate (and perhaps purchase or originate) assets deposited into the securitization vehicle and structure and cause the securitization vehicle to enter into swap transactions. As such, it is likely that the depositor of the securitization vehicle or its affiliates would be deemed to be the securitization vehicle's CPO and CTA.

In order to avoid any ambiguities we suggest that the CPO and CTA be designated prior to formation and marketing of the trust's interests. While the analysis for CDO securitization vehicles is simpler given the corporate form of such entities, parties associated with CDO securitizations should adopt current practices by other private funds by effectively designating the investment manager as the CPO and CTA.

As the law currently stands, absent exemptive relief, parties associated with public securitization transactions likely will have to register as CPOs and/or CTAs. With respect to securitization transactions offered without registration under the Securities Act, the *De Minimis* Exemption is an

[25] The no-action letter referred to in footnote 23 omits to provide relief for CPOs of commodity pools that were in existence prior to the rescission of the Qualifying Investor Exemption and the amendments to the CEA to include swaps within the definition of commodity pool, CPO and CTA. As such, there is an ambiguity as to whether CPOs and CTAs of private securitization vehicles in existence prior to the rescission of the Qualifying Investor Exemption will be required to register as CPOs and CTAs upon the effectiveness of the definition of "swaps" as opposed to by December 31, 2012 as provided in the no-action letter for newly launched pools. This omission seems to be logically inconsistent with the no-action relief.

available form of exemptive relief. However, the availability of the relief is unclear due to uncertainty of the application of the exemptive relief to swaps and securitizations – it is apparent that the CFTC did not consider application of these exemptive provisions in the context of securitization vehicles. Until the CFTC provides some clarity on these points, the availability of the relief is unclear due to uncertainty of the application of the exemptive relief to swaps and securitizations.

The American Securitization Forum is preparing a response to the CFTC to the legislative and regulatory changes relating to commodity pools that may have an impact on securitization vehicles going forward. Cadwalader is contributing to this effort. We will continue to update you as further guidance on this issue appears.

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