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COVID-19 Update: CFTC Relief for the Derivatives Market

In the face of pandemic-related disruptions, CFTC staff have relieved exchanges, dealers, intermediaries, and other market participants from certain compliance requirements.

Last week, the US Commodity Futures Trading Commission (CFTC) issued various staff letters providing temporary, targeted no-action relief to help certain CFTC registrants and other market participants better navigate the unprecedented set of challenges posed by the novel coronavirus outbreak (COVID-19). In a related public message, CFTC Chairman Heath Tarbert laid out five key objectives that the CFTC intends to address during the COVID-19 crisis:¹

1. Monitor derivatives markets and their participants
2. Use the CFTC's regulatory framework to promote orderly and liquid markets
3. Respond swiftly to changing conditions with practical, targeted relief
4. Communicate consistently and transparently with all stakeholders
5. Maintain the CFTC's commitment to advancing strategic policy goals

Pursuant to the third key objective, CFTC registrants — as well as members of designated contract markets (DCMs) and swap execution facilities (SEFs) not otherwise registered with the CFTC in any capacity (DCM/SEF Members) and one particular insured depository institution (IDI) providing commodity derivatives products to US oil and natural gas exploration and production companies as noted below — will benefit from no-action relief issued by the CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO) and Division of Market Oversight (DMO), set forth in the following staff letters:

Issuing Division	No-Action Letter No.	Affected Market Participants
DSIO	20-02 ²	DCM/SEF Members
	20-03 ³	Futures commission merchants (FCMs) and introducing brokers (IBs)
	20-04 ⁴	Floor brokers (FBs)
	20-05 ⁵	Retail foreign exchange dealers (RFEDs)
	20-06 ⁶	Swap dealers (SDs)
	20-10 ⁷	Requesting IDI
	20-11 ⁸	Commodity pool operators (CPOs)

Issuing Division	No-Action Letter No.	Affected Market Participants
DMO	20-07 ⁹	SEFs
	20-08 ¹⁰	SEFs
	20-09 ¹¹	DCMs

The time-limited relief generally falls into three categories — recordkeeping, reporting, and registration — and applies across a broad range of market participants. Notwithstanding that each no-action letter does specify a date until which relief is granted (*i.e.*, an expiration date), CFTC staff specified in each that they expect affected market participants to resume compliance with the relevant regulatory obligations once the COVID-19-related risks subside.

On March 18, 2020, the National Futures Association (NFA) published a notice to its members providing that any FCM, IB, SD, and RFED members operating in compliance with the relief provided by DSIO under CFTC Letters No. 20-03 (for FCM and IB members), 20-05 (for RFED members) and 20-06 (for SD members) would be deemed to be in compliance with the NFA's analogous rules.¹² The NFA later published a notice to its CPO members providing that their compliance with the relief provided by DSIO under CFTC Letter No. 20-11 would be deemed to be in compliance with the NFA's analogous rules.¹³

For a discussion of separate COVID-19-related relief issued for NFA members earlier this month, see [COVID-19 and the Derivatives Markets: What NFA Members Need to Know](#).

Recordkeeping

Time-Stamps

Until June 30, 2020, FB, FCM, IB, RFED, and SD registrants, as well as DCM/SEF Members, may rely on CFTC staff relief from the obligation to record the execution date and time by time-stamp or other timing device, subject to the following conditions being satisfied in respect of each market participant relying on the no-action letters specified below:

- Under CFTC Letter No. 20-02, the relevant personnel (*i.e.*, those responsible for making such records) of affected DCM/SEF Members must be required to be absent from their normal business site (*i.e.*, working remotely or in socially-distanced locations).
- CFTC Letter No. 20-04 requires that affected FBs be working remotely pursuant to a DCM's written business continuity plan.
- Under CFTC Letters No. 20-03 (for FCMs and IBs), 20-05 (for RFEDs), and 20-06 (for SDs), relevant personnel must be working remotely in accordance with the affected registrant's written business continuity plan.

However, CFTC registrants and DCM/SEF Members relying on the no-action relief described above must otherwise create and maintain a record of the date/time (to the nearest minute) in accordance with certain other requirements enumerated in the CFTC's recordkeeping rules.

Recording of Oral Communications

Until June 30, 2020, FB, FCM, IB, RFED, and SD registrants may rely on relief from the CFTC's oral communications recordkeeping requirement (*i.e.*, over taped lines), subject to the following conditions being satisfied in respect of each registrant relying on the no-action letters specified below:

- CFTC Letter No. 20-04 requires that affected FBs be working remotely pursuant to a DCM's written business continuity plan.
- Under CFTC Letters No. 20-03 (for FCMs and IBs), 20-05 (for RFEDs), and 20-06 (for SDs), relevant personnel must be working remotely in accordance with the affected registrant's written business continuity plan.

However, CFTC registrants relying on the no-action relief described above must otherwise create and maintain a written record of the oral communication satisfying certain other requirements enumerated in the CFTC's recordkeeping rules.

Audit Trail Requirements

Until June 30, 2020, registered SEFs and DCMs may rely on the following relief related to their audit trail compliance obligations:

- CFTC Letter No. 20-07 relieves registered SEFs from certain audit trail requirements, recordkeeping requirements related to maintaining a complete audit trail and monitoring requirements related to audit trail reconstruction, subject to certain enumerated conditions. In addition, a SEF's non-compliance with such obligations must arise from the SEF's inability to record voice communications as a result of relevant personnel working remotely.
- CFTC Letter No. 20-09 relieves DCMs from certain audit trail and related requirements, subject to certain enumerated conditions. In addition, a DCM's non-compliance with such obligations must relate to the displacement of DCM members from the DCM's trading floor and/or other designated premises from which customer orders may be placed.

Reporting

Annual CCO Reports

With respect to annual chief compliance officer (CCO) reports that would otherwise be due before September 1, 2020:

- CFTC Letters No. 20-03 and 20-06 provide FCMs and SDs, respectively, with up to 30 additional calendar days to file their annual CCO reports with the CFTC.
- CFTC Letter No. 20-08 provides SEFs with up to 60 additional calendar days to furnish their annual CCO reports with the CFTC.

In addition, the NFA has separately provided RFEDs with up to 30 additional calendar days to furnish an annual CCO report — which would otherwise be due between March 31, 2020, and September 1, 2020 — to the NFA.¹⁴

SEF Quarterly Financials

CFTC Letter No. 20-08 provides SEFs with up to 60 additional calendar days to furnish quarterly financial reports for the quarter ending December 31, 2019 (Q4 2019) — which would otherwise be due before September 1, 2020 — to the CFTC.

Commodity Pool Reporting

CFTC Letter No. 20-11 extends the filing deadline for certain commodity pool reports and account statements, as follows:

- For Form CPO-PQR:
 - Small and mid-sized CPOs now have until May 15, 2020, to file their 2019 annual reports on Form CPO-PQR.
 - Large CPOs now have until July 15, 2020, to file their quarterly reports on Form CPO-PQR, for the quarter ending March 31, 2020 (Q1 2020).
- CPOs have an additional 45 days to file any pool annual reports that would otherwise be due on or before April 30, 2020.
- CPOs have an additional 15 days to distribute any periodic (*i.e.*, monthly or quarterly) account statements to pool participants in respect of any reporting periods ending on or before April 30, 2020.

In addition, the NFA has separately extended the deadline for commodity trading advisors to file their quarterly reports on Form PR, until June 30, 2020, for Q1 2020. The NFA has also extended the deadline for its CPO members to file their quarterly reports on Form PQR, until (i) May 15, 2020, for Q4 2019, and (ii) July 15, for Q1 2020.¹⁵

Registration

Floor Broker Physical Location Requirement

Until June 30, 2020, FBs working remotely pursuant to a DCM's written business continuity plan may rely on the following relief under CFTC Letter No. 20-04:

- Relief from the “physical location” requirement set forth in the FB definition under CFTC Rule 1.3
- Relief from the requirement to register as an IB by virtue of the FB not satisfying the physical location requirement described above

MSP *De Minimis* Threshold Calculation

Given the volatility in oil prices, certain IDIs (which are not currently registered as major swap participants (MSPs)) are experiencing larger than typical market exposure on the commodity hedges that they have entered into with their customers. In order to assist with the market fluctuation and ensure that such commodity market participants continue to hedge in the market, the CFTC provided relief from certain MSP registration threshold calculations for a particular IDI. Specifically, the CFTC provided that, in making its MSP registration threshold calculations, the requesting commodity derivatives provider (a major IDI) may exclude — until September 30, 2020, or such later date as specified in CFTC Letter No. 20-10 — commodity swaps entered into with commercial loan customers, which swaps:

- Either (i) are excluded from the *de minimis* threshold calculation for SD registration or (ii) would not be considered swap dealing activity, in each case, by virtue of such swaps being entered into in connection with originating a loan to the customer in question
- Are based on the price of crude oil, natural gas or natural gas liquids

Unlike the other no-action relief discussed herein, which constitutes general no-action relief, the relief under CFTC Letter No. 20-10 was issued by DSIO solely for the benefit of the major IDI that petitioned CFTC staff therefor. However, this relief may signal other IDIs — which seek to continue providing commodity hedging services to their commercial loan customers without triggering the MSP registration requirement — to request similar no-action relief.

Conclusion

Compliance with many CFTC requirements has been severely strained in the wake of COVID-19 because of registrant displacement, social distancing efforts, and the unexpected need to execute emergency measures and business continuity plans. The CFTC's extensive no-action relief is designed to relieve regulatory pressure on market participants at a time when resources are being relocated and redirected, and will work to promote order and liquidity in the US derivatives markets.

While the relief described above is tremendously helpful to affected market participants, the CFTC may need to publish additional guidance and issue further relief addressing additional concerns that remain or may arise in the coming weeks or months as the market continues to adjust to an indefinitely strained work environment. Depending on the duration of COVID-19 measures, compliance with upcoming regulatory compliance deadlines may prove difficult — for example, SDs and large buy-side derivatives market participants, which are subject to “phase 5” of the regulatory initial margin (IM) phased-in compliance schedule under the CFTC and prudential regulators' respective uncleared swap margin rules, may struggle to implement necessary IM contractual and custodial arrangements in advance of the September 2020 compliance deadline. Also, notwithstanding the myriad of reporting relief described herein, CFTC staff have not yet extended certain other upcoming reporting deadlines for CFTC registrants (e.g., quarterly SD risk exposure reports).

Latham & Watkins will continue to monitor and report on COVID-19-related developments in the derivatives space.

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Endnotes

- ¹ CFTC Chairman Heath Tarbert Provides COVID-19 Response Update, YOUTUBE (March 17, 2020), <https://www.youtube.com/watch?v=PVVjp9UBUBq>; see *Coronavirus*, COMMODITY FUTURES TRADING COMM'N, <https://www.cftc.gov/coronavirus> (last visited March 22, 2020).
- ² CFTC No-Action Letter No. 20-02, No-Action Positions for Certain Members of Designated Contract Markets and Swap Execution Facilities to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic (March 17, 2020), <https://www.cftc.gov/csl/20-02/download>.
- ³ CFTC No-Action Letter No. 20-03, No-Action Positions for Futures Commission Merchants and Introducing Brokers to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic (March 17, 2020), <https://www.cftc.gov/csl/20-03/download>.
- ⁴ CFTC No-Action Letter No. 20-04, No-Action Positions for Floor Brokers to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic (March 17, 2020), <https://www.cftc.gov/csl/20-04/download>.
- ⁵ CFTC No-Action Letter No. 20-05, No-Action Positions for Retail Foreign Exchange Dealers to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic (March 17, 2020), <https://www.cftc.gov/csl/20-05/download>.
- ⁶ CFTC No-Action Letter No. 20-06, No-Action Positions for Swap Dealers to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic (March 17, 2020), <https://www.cftc.gov/csl/20-06/download>.
- ⁷ CFTC No-Action Letter No. 20-10, No-Action Position for Excluding Certain Commodity Swaps from Major Swap Participant Registration Threshold Calculation of an Insured Depository Institution (March 20, 2020), <https://www.cftc.gov/csl/20-10/download>.
- ⁸ CFTC No-Action Letter No. 20-11, No-Action Positions for Commodity Pool Operators in Response to the COVID-19 Pandemic (March 20, 2020), <https://www.cftc.gov/csl/20-11/download>.
- ⁹ CFTC No-Action Letter No. 20-07, No-Action Positions for Swap Execution Facilities to Facilitate Physical Separation of Voice Trading Personnel in Response to the COVID-19 Pandemic (March 17, 2020), <https://www.cftc.gov/csl/20-07/download>.
- ¹⁰ CFTC No-Action Letter No. 20-08, No-Action Positions for Swap Execution Facilities to Extend Submission Timeframes for Annual Compliance Reports and Fourth Quarter Financial Reports in Response to the COVID-19 Pandemic (March 17, 2020), <https://www.cftc.gov/csl/20-08/download>.
- ¹¹ CFTC No-Action Letter No. 20-09, No-Action Relief to Designated Contract Markets to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic (March 17, 2020), <https://www.cftc.gov/csl/20-09/download>.
- ¹² Nat'l Futures Ass'n, Notice I-20-13, Coronavirus (COVID-19) Update—Regulatory Relief (March 18, 2020), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5216> (NFA Notice I-20-13).
- ¹³ Nat'l Futures Ass'n, Notice I-20-15, Coronavirus (COVID-19) Update—Regulatory Relief for CPOs and CTAs (March 23, 2020), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5218> (NFA Notice I-20-15).
- ¹⁴ See NFA Notice I-20-13.
- ¹⁵ See NFA Notice I-20-15.

	Requirement	CFTC Letter No.	Market Participant(s)	CFTC Regulation	NFA Notice	NFA Rule	Expiration	CFTC No-Action Relief	NFA Relief	Additional Conditions
Recordkeeping	Time-Stamps	20-02	Designated Contract Market (DCM) / Swap Execution Facility (SEF) Members	Rule 1.35	N/A	N/A	June 30, 2020	Relief from requirement to record date/time by time-stamp or other timing device; however, registrant must otherwise create and maintain a record of the date/time (to the nearest minute) in accordance with enumerated requirements	N/A	Responsible personnel are required to be absent from their normal business site (i.e., working remotely)
		20-04	Floor Broker (FB)							FB must work remotely per a DCM's written business continuity plan
		20-03	Futures Commission Merchant (FCM); Introducing Broker (IB)	Rule 1.35 ; Rule 155.3		Compliance Rule 2-10 ; Compliance Rule 2-26			Deemed compliance with analogous NFA compliance rules for NFA members complying with the CFTC's no-action relief, for the time period provided therein	Relevant personnel must work remotely per registrant's written business continuity plan
		20-05	Retail Foreign Exchange Dealer (RFED)	Rule 1.35 ; Rule 5.18	I-20-13	Compliance Rule 2-10 ; Compliance Rule 2-36				
		20-06	Swap Dealer (SD)	Rule 23.202		Compliance Rule 2-49				
	Recording of Oral Communications	20-04	FB		N/A	N/A	June 30, 2020	Relief from oral communications recordkeeping requirement (i.e., over taped lines); however, registrant must create and maintain a written record satisfying certain enumerated conditions	N/A	FB must work remotely per a DCM's written business continuity plan
		20-03	FCM; IB	Rule 1.35		Compliance Rule 2-10				Deemed compliance with analogous NFA compliance rules for NFA members complying with the CFTC's no-action relief, for the time period provided therein
		20-05	RFED		I-20-13					
		20-06	SD	Rule 23.202		Compliance Rule 2-49				

	Requirement	CFTC Letter No.	Market Participant(s)	CFTC Regulation	NFA Notice	NFA Rule	Expiration	CFTC No-Action Relief	NFA Relief	Additional Conditions
Recordkeeping (continued)	Audit Trail Requirements	20-07	SEF	Rule 37.205 ; Rule 37.400 ; Rule 37.406 ; Rule 37.1000 ; Rule 37.1001	N/A	N/A	June 30, 2020	Relief from certain audit trail requirements, recordkeeping requirements related to maintaining a complete audit trail and monitoring requirements related to audit trail reconstruction, subject to certain enumerated conditions	N/A	Non-compliance arises from SEF's inability to record voice communications as a result of relevant personnel working remotely
		20-09	DCM	Rule 1.35				Relief from certain audit trail and related requirements, subject to certain enumerated conditions		Non-compliance relates to the displacement of DCM members from the DCM's trading floor and/or other designated premises from which customer orders may be placed
Reporting	Chief Compliance Officer (CCO)	20-03	FCM	Rule 3.3		Notice I-12-21 ; Notice I-13-07	Sept. 30, 2020	Relief provides registrants with up to 30 additional calendar days to furnish an annual CCO report to the CFTC	Deemed compliance with analogous NFA compliance rules for NFA members complying with the CFTC's no-action relief, for the time period provided therein	Such report was otherwise due before Sept. 1, 2020
		20-06	SD	Rule 3.3	I-20-13	Compliance Rule 2-49				
		20-08	SEF	Rule 37.1501	N/A	N/A	Oct. 30, 2020	Relief provides SEFs with up to 60 additional calendar days to furnish an annual CCO report to the CFTC	N/A	
		N/A	RFED	N/A	I-20-13	Compliance Rule 2-36	Sept. 30, 2020	N/A	Notice provides RFEDs with up to 30 additional calendar days to furnish an annual CCO report to the NFA	

	Requirement	CFTC Letter No.	Market Participant(s)	CFTC Regulation	NFA Notice	NFA Rule	Expiration	CFTC No-Action Relief	NFA Relief	Additional Conditions	
Reporting (continued)	Financial Reporting	20-08	SEF	Rule 37.1306	N/A	N/A	Oct. 30, 2020	Relief provides SEFs with up to 60 additional calendar days to furnish its financial report to the CFTC for quarter ended Dec. 31, 2020 (Q4 2019)	N/A	Such report was otherwise due before Sept. 1, 2020	
	Commodity Pool Reporting	20-11	Commodity Pool Operator (CPO)	Rule 4.7; Rule 4.22		Compliance Rule 2-13	June 14, 2020	Relief provides CPOs with up to 45 additional calendar days to (i) file pool annual reports with the NFA and (ii) distribute such reports to pool participants	Deemed compliance with analogous NFA compliance rules for NFA members complying with the CFTC's no-action relief, for the time period provided therein	Such report was otherwise due on or before April 30, 2020	
								Relief provides CPOs with up to 15 additional calendar days to distribute periodic (i.e., monthly or quarterly) account statements to pool participants		Relevant reporting period ended on or before April 30, 2020	
							May 15, 2020	Relief provides small and mid-sized CPOs until May 15, 2020 to file an annual report on Form CPO-PQR to the CFTC	Notice provides CPOs with up to 45 additional calendar days to file a quarterly Form PQR with the NFA for Q4 2019		
		July 15, 2020	Relief provides large CPOs until July 15, 2020 to file a quarterly report on Form CPO-PQR to the CFTC for quarter ended March 31, 2020 (Q1 2020)	Notice provides CPOs with up to 45 additional calendar days to file a quarterly Form PQR with the NFA for Q1 2020.							
		N/A	Commodity Trading Advisor (CTA)	N/A			I-20-15	June 30, 2020	N/A	Notice provides CTAs with up to 45 additional calendar days to file a quarterly Form PR with the NFA for Q1 2020	

	Requirement	CFTC Letter No.	Market Participant(s)	CFTC Regulation	NFA Notice	NFA Rule	Expiration	CFTC No-Action Relief	NFA Relief	Additional Conditions
Registration	Location	20-04	FB	Rule 1.3	N/A	N/A	June 30, 2020	FBs relieved from "physical location" requirement under "floor broker" definition	N/A	FB must work remotely per a DCM's written business continuity plan
								FBs relieved from IB registration requirement by virtue of not satisfying aforementioned "physical location" requirement		
	MSP De Minimis Threshold	20-10	Insured Depository Institution (IDI)	Rule 1.3	N/A	N/A	Sept. 30, 2020	Requesting IDI may exclude certain commodity swaps entered into with commercial loan customers, from such IDI's major swap participant (MSP) registration threshold calculations	N/A	Underlying commodity of the swap must be crude oil, natural gas or natural gas liquids
										By virtue of such swaps being entered into in connection with originating a loan to the customer in question, they either (i) are excluded from the SD <i>de minimis</i> threshold calculation or (ii) would not be considered swap dealing activity