

CLIENT UPDATE

CFTC GRANTS ADDITIONAL TEMPORARY IB AND CTA REGISTRATION RELIEF FOR CERTAIN PERSONS

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On March 29, 2013, the Commodity Futures Trading Commission (the “CFTC”) issued a no-action letter (the “New Letter”)¹ expanding the no-action relief from the introducing broker (“IB”) and commodity trading advisor (“CTA”) registration requirements previously granted under CFTC Letter No. 12-70, dated December 31, 2012 (the “Original Letter”),² to certain additional persons that engage in Affiliate Support Activities (as defined in the Original Letter)³ on behalf of certain affiliates not yet registered with the CFTC as a swap dealer (“SD”).

BACKGROUND

Registration as an IB or CTA Based on Swap-Related Activities

Section 1a(31)⁴ of the Commodity Exchange Act (the “CEA”), as amended by the Dodd-Frank Wall Street Reform and Consumer

¹ CFTC No-Action Letter No. 13-04 issued on March 29, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6548-13>

² CFTC No-Action Letter No. 12-70 issued on December 31, 2012, <http://www.cftc.gov/PressRoom/PressReleases/pr6487-12>

See also our client memorandum “CFTC Extends Registration Relief and Grants Additional Relief for Certain Persons”: <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=ac080e69-5579-4415-be81-339723c01089>

³ Terms used but not otherwise defined in this memorandum have the meaning ascribed to such terms in the Original Letter.

⁴ Unless otherwise stated, all Section references are to sections of the CEA.

Protection Act (the “Dodd-Frank Act”), defines “introducing broker” to include any person engaged in soliciting or accepting orders for the purchase or sale of a swap and who does not accept any money, securities or property (or extend credit in lieu thereof) to margin, guarantee or secure any trades or contracts that may result therefrom.

Section 1a(12), as amended by the Dodd-Frank Act, defines “commodity trading advisor” to include any person who, for compensation or profit, engages in the business of advising others as to the value of or the advisability of trading in any swap. The CFTC has similarly amended the IB and CTA definitions in Regulations 1.3(mm) and 1.3(bb), respectively, to incorporate swap-related activities.

If a person comes within these definitions, it is subject to registration as an IB or CTA (as applicable) under Section 4d or 4m, respectively.⁵ Registration includes, among other things, vetting of the applicant for registration, its principals, and its associated persons (“APs”) to confirm that none of these persons is subject to a statutory disqualification under Section 8a(2) or 8a(3) (“Statutory Disqualification”).

Original Letter

The Original Letter stated, among other things, that the Division of Swap Dealer and Intermediary Oversight (“DSIO”) will not recommend that the CFTC commence an enforcement action against an Agent Affiliate or any employee thereof for failure to register as an IB or a CTA if the Agent Affiliate or employee engages in Affiliate Support Activities on behalf of an Affiliate SD Counterparty in connection with a swap entered or to be entered into by the Affiliate SD Counterparty, provided certain conditions are satisfied.

The Original Letter limited this relief to circumstances in which the Agent Affiliate engages in Affiliate Support Activities on behalf of an Affiliate SD Counterparty, and declined to provide similar relief where the Agent Affiliate engages in such activities on behalf of an affiliate swap counterparty that is excluded from the definition of the term “swap dealer” under the *de minimis* exception set forth in Regulation 1.3(ggg)(4) (an “Affiliate DMD Counterparty”).⁶

⁵ The CEA and the Regulations provide exemptions from registration as an intermediary for certain persons (e.g., Section 4m(1) and Regulation 4.14, providing exemptions from CTA registration). The Original Letter does not affect the availability of such an exemption to persons covered by such letter.

⁶ In the Original Letter, DSIO distinguished between Agent Affiliates and Agent SDs with respect to their Affiliate Support Activities on behalf of Affiliate DMD Counterparties. While DSIO did grant relief from the IB and CTA registration requirements, subject to certain conditions, where an Agent SD (or its employee) engaged in Affiliate Support Activities on behalf of an Affiliate DMD Counterparty, it did not grant such relief where an Agent Affiliate engaged in such activities on behalf of an Affiliate DMD Counterparty.

NO-ACTION RELIEF

In response to certain additional concerns raised by commenters after the issuance of the Original Letter, the New Letter provides that, subject to certain conditions set forth below, DSIIO will not recommend that the CFTC commence an enforcement action against an Agent Affiliate or any employee thereof for failure to register as an IB or CTA if the Agent Affiliate or employee engages in Affiliate Support Activities on behalf of an affiliate in connection with a swap entered or to be entered by such affiliate where:

- such affiliate has commenced its application for registration as an SD through the filing of a completed Form 7-R; or
- such affiliate's swap dealing has exceeded the *de minimis* amount set forth in Regulation 1.3(ggg)(4)(i), but such affiliate is not within the definition of the term "swap dealer" pursuant to Regulation 1.3(ggg)(4)(iii) since it has not submitted a complete application for registration pursuant to Section 4s(b) and less than two months have elapsed since the end of the month in which such affiliate's swap dealing exceeded such *de minimis* amount (such affiliate, an "Affiliate Pending SD Counterparty").

The foregoing relief is subject to the following conditions:

- The Agent Affiliate must be registered or licensed with, or subject to regulation by, a financial services, prudential or banking regulator (including a self-regulatory organization) in the United States, a European Union member country, Switzerland, Canada, Japan, Hong Kong, Singapore or Australia (the "Regulated Entity Requirement");
- The Agent Affiliate and the Affiliate Pending SD Counterparty must be "majority owned affiliates" as described in Regulation 1.3(ggg)(6);⁷
- None of the Agent Affiliate, the employee or any person in the supervisory chain of command of such employee may be subject to a Statutory Disqualification;
- Any commodity interest trading advice provided by the Agent Affiliate and the employee must be provided in a manner solely incidental to the conduct of the business of the Agent Affiliate for which it is subject to regulation under the Regulated Entity Requirement;

⁷ Under Regulation 1.3(ggg)(6), counterparties to a swap are "majority-owned affiliates" if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the swap.

- Neither the Agent Affiliate nor the employee may be otherwise engaged in activity that would require registration as an IB, CTA or AP thereof;
- The Agent Affiliate and the Affiliate Pending SD Counterparty must execute a written undertaking (maintained at the Affiliate Pending SD Counterparty's main business office) by which they each agree to be jointly and severally liable for any violation of the CEA or the Regulations by an employee of the Agent Affiliate engaged in Affiliate Support Activities on behalf of the Affiliate Pending SD Counterparty, and the Agent Affiliate must consent to the jurisdiction of the CFTC to investigate and take enforcement action against the Agent Affiliate or an employee thereof engaged in such activities on behalf of the Affiliate Pending SD Counterparty for such a violation;
- The Affiliate Pending SD counterparty must be registered as an SD⁸ on a date (the "Registration Date") that is no later than two months after the earlier of: (1) the end of the month in which the Affiliate Pending SD Counterparty's swap dealing activity exceeds the *de minimis* amount set forth in Regulation 1.3(ggg)(4)(i) or (2) the end of the month in which the Affiliate Pending SD Counterparty has filed a complete Form 7-R with the National Futures Association;⁹
- The Agent Affiliate must have engaged in Affiliate Support Activities on behalf of the Affiliate Pending SD Counterparty on or before December 31, 2012; and
- The Affiliate Pending SD Counterparty must have been an Affiliate Pending SD Counterparty on or before December 31, 2013.

The foregoing relief is temporary in nature. Thus, once an Affiliate Pending SD Counterparty registers as an SD, an Agent Affiliate will no longer be able to claim such relief with respect to the Affiliate Pending SD Counterparty.¹⁰

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Please do not hesitate to contact us with any questions.

April 1, 2013

⁸ For purposes of the relief provided in the New Letter, provisional registration as an SD under Regulation 3.2(b)(3)(i) will be considered "registered."

⁹ Therefore, if the Affiliate Pending SD Counterparty fails to be registered as an SD by the Registration Date, the relief will not be available (retroactively) with respect to any Affiliate Support Activity by the Agent Affiliate, regardless of whether the Affiliate Pending SD Counterparty's failure to so register would otherwise constitute a violation of the CEA or the Regulations.

¹⁰ Although upon registration of the Affiliate Pending SD Counterparty as an SD, the Agent Affiliate may be able to rely on the relief granted under the Original Letter, the relief granted in the New Letter is not contingent upon the availability of such relief to the Agent Affiliate and will terminate in any case upon the registration of the Affiliate Pending SD Counterparty.