

Client Update

CFTC Proposes Rules Providing an Alternative to Fingerprinting for Foreign Natural Persons

NEW YORK

Byungkwon Lim
blim@debevoise.com

Emilie T. Hsu
ehsu@debevoise.com

Peter Chen
pchen@debevoise.com

On January 4, the Commodity Futures Trading Commission (the “CFTC”) proposed rules (the “Proposed Rules”) to amend existing CFTC regulations to establish an alternative for foreign natural persons who are required to provide fingerprints when applying for CFTC registration. The Proposed Rules would allow the registered firm of such foreign natural persons to complete a criminal history background check in lieu of submitting fingerprints of the natural person.

The Proposed Rules would generally codify CFTC Staff Letters 12-49¹ and 13-29² (the “CFTC No-Action Letters”) and, if adopted, would supersede those letters.

Comments on the Proposed Rules are due 30 days after publication of the Proposed Rules in the Federal Register.

PROPOSED RULES

The Commodity Exchange Act (“CEA”) and CFTC regulations require persons engaged in certain activities to register with the CFTC as a futures commission merchant (“FCM”), retail foreign exchange dealer (“RFED”), introducing broker (“IB”), commodity pool operator (“CPO”), commodity trading advisor (“CTA”), swap dealer (“SD”), major swap participant (“MSP”), leverage transaction merchant (“LTM”), floor broker (“FB”), or floor trader (“FT”) (such registrants, the “CFTC Registrants”). Currently, all natural persons who are principals or associated persons (“APs”) of CFTC Registrants or who are responsible for, or direct, the entry of orders from an FB’s or FT’s own account (such CFTC

¹ CFTC Staff Letter No. 12-49 (Dec. 11, 2012), available at: <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-49.pdf>.

² CFTC Staff Letter No. 13-29 (Jun. 21, 2013), available at: <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-29.pdf>.

Registrants, FBs and FTs, “Certifying Firms”) are required to submit a fingerprint card (the “Fingerprinting Requirement”) in connection with a fitness investigation conducted as part of the registration process to ensure that such natural persons meet minimum standards of fitness and competency. The Proposed Rules would provide exemptive relief from the Fingerprinting Requirement only for foreign natural persons, defined as natural persons who have not resided in the U.S. since reaching 18 years of age.

Under the Proposed Rules, a Certifying Firm’s obligation to provide a fingerprint card for a foreign natural person would be deemed satisfied if:

- such Certifying Firm causes a criminal history background check of such foreign natural person to be performed;
- such criminal history background check does not reveal any matters that constitute a disqualification under Sections 8a(2) or 8a(3) of the CEA,³ other than those disclosed to the National Futures Association (“NFA”); and
- a person authorized by such Certifying Firm submits, in reliance on such criminal history background check, a certification by such Certifying Firm to the NFA (the “NFA Certification”).

The NFA Certification must state that the conditions described above have been satisfied and be signed by a person authorized by such Certifying Firm to make the NFA Certification.

The criminal history background check must:

- be of a type that would reveal all matters listed under Sections 8a(2)(D) or 8a(3)(D), (E) or (H) of the CEA (which generally relate to criminal convictions) relating to the foreign natural person; and
- be completed not more than one year prior to the Certifying Firm submitting the NFA Certification.

The Proposed Rules also require that the Certifying Firm maintain, in accordance with CFTC regulations, records documenting each criminal history background check and the results thereof.

³ Examples of such disqualifications include: a person whose prior registration with the CFTC has been revoked, a person who is enjoined by court order from acting as a CFTC Registrant, a person with a conviction within ten years preceding the filing of the application for registration for a felony that arises out of the conduct of the business of a CFTC Registrant, etc.

CFTC NO-ACTION LETTERS

If adopted, the Proposed Rules would codify, with slight modifications, the relief currently provided by the CFTC No-Action Letters.

CFTC Staff Letter No. 12-49 provides an alternative to complying with the Fingerprinting Requirement for principals of LTMs, FCMs, RFEDs, IBs, CPOs, CTAs, SDs and MSPs that have not resided in the United States since reaching 18 years of age. To rely on such relief, a firm must submit, for each principal, either a fingerprint card (per the Fingerprinting Requirements) or a certification that states, among other things, that a reasonable criminal history background check using a reputable commercial service had been conducted and that such background check did not reveal any matters that constitute a disqualification under Sections 8a(2) or 8a(3) of the CEA, other than those disclosed to the NFA.

CFTC Staff Letter No. 13-29 provides similar no-action relief from the Fingerprinting Requirement for APs of FCMs, RFEDs, IBs, CTAs, CPOs and LTMs that have not resided in the U.S. since reaching 18 years of age.

There are two notable differences between the CFTC No-Action Letters and the Proposed Rules. First, the Proposed Rules offer a broader exemption from the Fingerprinting Requirements by extending the relief to certain foreign natural persons connected to FBs and FTs and generally with respect to all requirements for foreign natural persons to provide a fingerprint card under Part 3 of the CFTC regulations. Additionally, the CFTC No-Action Letters currently require “a reasonable criminal history background check using a reputable commercial service” to be performed to receive relief. The Proposed Rules instead require that the background check meet an objective standard: the check must be of a type that would reveal all matters listed under Sections 8a(2)(D) or 8a(3)(D), (E) or (H) of the CEA. Therefore, under the Proposed Rules, a Certifying Firm would no longer have to make a subjective determination of what is “reasonable” or “reputable” to benefit from the exemptive relief.

* * *

Please do not hesitate to contact us with any questions.