

CFTC Issues No-Action Relief for Certain Derivatives Market Participants in Response to COVID-19

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The U.S. Commodity Futures Trading Commission (“**CFTC**”) published several no-action letters issuing temporary relief to certain market participants in response to the Coronavirus/COVID-19 outbreak, which was declared a pandemic by the World Health Organization on March 11, 2020. The CFTC’s targeted relief efforts are designed to maintain continuity, integrity and liquidity of the derivatives markets during periods of social distancing and displacement of personnel from normal business sites, which the CFTC acknowledged has made compliance with certain regulatory requirements under the Commodity Exchange Act (“**CEA**”) and CFTC regulations particularly challenging.

Among such efforts, the CFTC’s Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) issued no-action letters stating that, subject to applicable conditions specified in each such letter, it would not recommend that the CFTC take enforcement action for violations of the following regulatory requirements:

- With respect to persons that are members of designated contract markets (“**DCMs**”) or swap execution facilities (“**SEFs**”) ([CFTC Letter No. 20-02](#)):
 - until June 30, 2020, any requirement to time-stamp pursuant to CFTC Regulation 1.35, if the personnel responsible are required to be absent from their normal business site, *provided that* a record of the date and time, to the nearest minute, is otherwise created and maintained in accordance with CFTC Regulation 1.35.
- With respect to futures commission merchants (“**FCMs**”) and introducing brokers (“**IBs**”) ([CFTC Letter No. 20-03](#)):
 - until June 30, 2020, any requirement to record oral communications pursuant to CFTC Regulation 1.35, if the personnel required to use recorded lines are required by the registrant’s written business continuity plan to be absent from their normal business site, *provided that* (1) a written record of the communication, including date, time, persons participating and subject matter of the conversation, is created and maintained as a written communication in accordance with CFTC Regulation 1.35 and (2) the FCM or IB takes affirmative steps to collect written materials described above and maintains them in its books and records in accordance with CFTC Regulation 1.31;
 - until June 30, 2020, any requirement to time-stamp pursuant to CFTC Regulation 1.35 or 155.3, if the personnel responsible are required by the registrant’s written business continuity plan to be absent from their normal business site, *provided that* a record of the date and time, to the nearest minute, is otherwise created and maintained in accordance with CFTC Regulation 1.35 or 155.3; and
 - any requirement to furnish annual reports pursuant to CFTC Regulation 3.3, *provided that* (1) the annual report was required to be furnished prior to September 1, 2020, and (2) the annual report is furnished no more than thirty (30) calendar days following the date on which the annual report would otherwise have been required to be furnished pursuant to CFTC Regulation 3.3.

- With respect to persons registered as floor brokers (“FBs”) ([CFTC Letter No. 20-04](#)), until June 30, 2020:
 - any requirement to record oral communications pursuant to CFTC Regulation 1.35, if the personnel required to use recorded lines are required by the written business continuity plan of any designated contract market to be absent from their normal business site, *provided that* (1) a written record of the communication, including date, time, persons participating and subject matter of the conversation is created and maintained as a written communication in accordance with CFTC Regulation 1.35, and (2) the FB takes affirmative steps to collect written materials described above and maintains them in its books and records in accordance with CFTC Regulation 1.31;
 - any requirement to time-stamp pursuant to CFTC Regulation 1.35 if the personnel responsible are required by the written business continuity plan of any designated contract market to be absent from their normal business site, *provided that* a record of the date and time, to the nearest minute, is otherwise created and maintained in accordance with CFTC Regulation 1.35;
 - any requirement to be physically located in any pit, ring, post or other place pursuant to the definition of “floor broker” in CFTC Regulation 1.3, if the FB is required by the written business continuity plan of any designated contract market to be absent from such place; and
 - any requirement to be registered as an IB solely due to the failure of an FB to be physically located in any pit, ring, post or other place pursuant to the definition of “floor broker” in CFTC Regulation 1.3, if the FB is required by the written business continuity plan of any designated contract market to be absent from such place.
- With respect to retail foreign exchange dealers (“RFEDs”) ([CFTC Letter No. 20-05](#)), until June 30, 2020:
 - any requirement to record oral communications pursuant to CFTC Regulation 1.35, if the personnel required to use recorded lines are required by the registrant’s written business continuity plan to be absent from their normal business site, *provided that* (1) a written record of the communication, including date, time, persons participating and subject matter of the conversation is created and maintained as a written communication in accordance with CFTC Regulation 1.35 and (2) the RFED takes affirmative steps to collect written materials described above and maintains them in its books and records in accordance with CFTC Regulation 1.31; and
 - any requirement to time-stamp pursuant to CFTC Regulation 1.35 or 5.18, if the personnel responsible are required by the registrant’s written business continuity plan to be absent from their normal business site, *provided that* a record of the date and time, to the nearest minute, is otherwise created and maintained in accordance with CFTC Regulation 1.35 or 5.18.
- With respect to swap dealers (“SDs”) ([CFTC Letter No. 20-06](#)):
 - until June 30, 2020, any requirement to record oral communications pursuant to CFTC Regulation 23.202, if the personnel required to use recorded lines are required by the registrant’s written business continuity plan to be absent from their normal business site, *provided that* (1) a written record of the communication, including date, time, persons participating and subject matter of the conversation is created and maintained as a written communication in accordance with CFTC

Regulation 23.202 and (2) the SD takes affirmative steps to collect written materials described above and maintains them in its books and records in accordance with CFTC Regulation 1.31;

- until June 30, 2020, any requirement to time-stamp pursuant to CFTC Regulation 23.202, if the personnel responsible are required by the registrant's written business continuity plan to be absent from their normal business site, *provided that* a record of the date and time, to the nearest minute, is otherwise created and maintained in accordance with CFTC Regulation 23.202; and
- any requirement to furnish annual reports pursuant to CFTC Regulation 3.3, *provided that* (1) the annual report was required to be furnished prior to September 1, 2020, and (2) the annual report is furnished no more than thirty (30) calendar days following the date on which the annual report would otherwise have been required to be furnished pursuant to CFTC Regulation 3.3.
- With respect to certain insured depository institutions (“**IDIs**”) which, absent relief from the requirement to include certain commodity swaps when calculating whether it exceeds a “substantial position” threshold specified by the CFTC, would trigger such threshold and thereby require the IDI to register with the CFTC as a major swap participant (“**MSP**”) ([CFTC Letter No. 20-10](#)):
 - until September 30, 2020, if the IDI fails to include any swap in its “aggregate uncollateralized outward exposure” (“**AUOE**”) calculation that meets the following conditions (the “**Excluded Swaps**”):
 - 1) the swap is excluded from counting towards the *de minimus* threshold pursuant to paragraph (4)(i)(C) of the definition of “swap dealer” in CFTC Regulation 1.3, or from being considered swap dealing activity pursuant to paragraph (5) of the definition of “swap dealer”, each of which requires such swap to be entered into by the IDI with a customer in connection with originating a loan to that same customer; and
 - 2) the commodity underlying the swap is crude oil, natural gas, or natural gas liquids.
 - The DSIO reserved the right to extend the period of this relief for additional quarterly periods depending on prevailing market conditions, and such relief is subject to the condition that the IDI provides DSIO with its AUOE calculation including and excluding the Excluded Swaps:
 - A. as of the end of each calendar quarter during such relief, until its quarter-end AUOE including the Excluded Swaps exceeds the MSP registration threshold, if ever; and
 - B. as of the end of each calendar month thereafter for the remainder of the period of relief.
- With respect to commodity pool operators (“**CPOs**”) ([CFTC Letter No. 20-11](#)):
 - any requirement that a Small or Mid-Sized CPO file an annual report on Form CPO-PQR pursuant to CFTC Regulation 4.27, *provided that* such filing is made by May 15, 2020; any requirement that a Large CPO file a quarterly report on Form CPO-PQR for Q1 2020 pursuant to CFTC Regulation 4.27, *provided that* such filing is made by July 15, 2020;
 - any requirement that a CPO with an annual report due on or before April 30, 2020 file such report pursuant to CFTC Regulations 4.7(b)(3) or 4.22(c), *provided that* annual certified financial statements

are filed with the National Futures Association (NFA) and distributed to pool participants no later than 45 days after the due date for such report;¹ and

- any requirement that a CPO distribute periodic account statements to pool participants on a monthly or quarterly basis under CFTC Regulations 4.7(b)(2) or 4.22(b)(3), *provided that* such statements are distributed to participants within 45 days of the end of the reporting period for all reporting periods ending on or before April 30, 2020.

Additionally, the CFTC's Division of Market Oversight ("**DMO**") issued no-action letters stating that, subject to applicable conditions specified in each such letter, it would not recommend that the CFTC take an enforcement action for violations of the following regulations:

- With respect to SEFs ([CFTC Letter No. 20-07](#) and [CFTC Letter No. 20-08](#)):
 - until June 30, 2020, any requirements of CFTC Regulations 37.205(a) or (b), 37.400(b), 37.406, 37.1000(a)(1) or 37.1001, *provided that*
 - 1) the SEF continues to record voice communications at normal business sites;
 - 2) the SEF makes reasonable efforts to comply by having the required personnel create written or electronic records of oral communications, including date, time, persons participating and subject matter of the conversations as soon as practicable;
 - 3) the terms of all transactions executed on the SEF continue to be captured and recorded on the SEF systems regardless of the location of the personnel;
 - 4) orders entered into the SEF platform by personnel, regardless of location, will be retained in the SEF system's normal electronic audit trail and subject to existing credit and risk filters;
 - 5) relief from CFTC Regulation 37.400(b) is limited to instances where the SEF cannot conduct in-person real-time monitoring of personnel and is unable to comprehensively reconstruct all trading because the SEF lacks voice recordings of such personnel. Otherwise, CFTC Regulation 37.400(b) continues to apply;
 - 6) all requirements under CFTC Regulations 37.1000(a)(1) and 37.1001, including those related to swap data reporting, will continue to apply except for the requirements related to maintaining a complete audit trail; and
 - 7) record retention requirements under CFTC Regulations 37.1000(a)(1) and 37.1001 will continue to apply to all trading activity records created during the duration of this relief;

¹ This relief does not foreclose a CPO from requesting additional extension of time not to exceed a total of 180 days from the end of the pool's fiscal year consistent with CFTC Regulation 4.22(f).

- any failure to submit an ACR within the 60-day period pursuant to CFTC Regulation 37.1501(f)(2), *provided that* (1) the ACR was required to be submitted to the CFTC prior to September 1, 2020, and (2) the ACR is submitted no later than 120 days after the end of the SEF's fiscal year; or
- any failure to submit fourth quarter financial report within the 60-day period pursuant to CFTC Regulation 37.1306(d), *provided that* (1) the fourth quarter financial report was required to be submitted to the CFTC prior to September 1, 2020, and (2) the fourth quarter financial report is submitted no later than 120 days after the end of the SEF's fiscal year.
- With respect to DCMs ([CFTC Letter No. 20-09](#)):
 - until June 30, 2020, any failure to comply with audit trail requirements pursuant to CEA Sections 5(d)(4) and (10) and related CFTC Regulations to the extent non-compliance relates to displacement of personnel. The foregoing is subject to the following conditions:
 - 1) DCMs will require market participants affected by related CFTC relief ("**Affected Market Participants**") to continue to conduct customer business in accordance with the same exchange rules observed on trading floors or otherwise in compliance with the applicable related CFTC relief (as described above);
 - 2) Customer orders entered into trading platforms by Affected Market Participants will be retained in the DCM system's normal electronic audit trail and subject to existing credit and risk filters; and
 - 3) All other exchange rules will continue to apply to Affected Market Participant trading activity during the duration of any no-action relief.

Market participants should continue to monitor developments affecting the derivatives markets as well as further responses and other communications from the CFTC and other relevant regulatory agencies. For more information or any questions on the matters covered in this publication, please contact any of the lawyers listed below.

If you have any questions, please do not hesitate to contact [Matthew Frankle](#), [Brian Sung](#), and [Matthew Howes](#).