ROPES & GRAY

ALERT

Asset Management

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CFTC Staff Provides Relief from Position Limit Aggregation Rules, Including August 14, 2017 Filing Deadline

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Just days before a new notice filing requirement for certain position limit aggregation exemptions was to take effect, on August 10, 2017 the staff of the U.S. Commodity Futures Trading Commission (the "CFTC") Division of Market Oversight granted broad no-action relief to market participants subject to aggregation rules. The relief addresses not only the notice filing requirement, but also certain aspects of the aggregation exemption rules that did not reflect market realities and were unduly burdensome on market participants. This relief expires on August 12, 2019. *Notably, the relief from the filing requirement does not affect the requirement to comply with the aggregation rules themselves, and market participants must be prepared to make the filing within five days of a request.* The CFTC staff states in the no-action letter that it understands that exchanges intend to apply the same notice filing requirements for exchange position limits.

The relief is set forth in CFTC Letter No. 17-37, which applies to the final aggregation rule adopted in December 2016 (See our Alert for a discussion of this rule). While the final rule was set to take effect on February 14, 2017, the CFTC extended the compliance date for notice filings to August 14, 2017. Without this relief, market participants would have to make notice filings to disaggregate positions from those of another market participant with which the person has certain ownership or control relationships. This no-action relief presents welcome clarity and tailoring to the rules which, as in effect, would have imposed undue operational and monitoring burdens on asset managers and investors.

Relief from Filing Notice of Aggregation Exemption

The CFTC staff granted no-action relief from the requirement that a person file a notice of aggregation exemption with the CFTC under CFTC Regulation 150.4, or any applicable position limit, so long as the person (i) is otherwise in compliance with applicable position limits and position aggregation requirements and (ii) makes a notice filing within five business days of receiving a request from the CFTC or an exchange. The no-action letter also provides that any required filing will be limited to a particular account or position identified in the request. This relief is particularly helpful because many market participants found it difficult to compile and prepare a notice before it was needed that addressed all disaggregated entities, and that generally would have to be updated on an ongoing basis to effectively maintain disaggregation at the time it became necessary.

Streamlined Notice Filing for Owned Entity Aggregation Exemption

The CFTC staff also granted relief concerning the scope and content of the owned entity aggregation exemption notice filing. The relief permits persons to qualify for the owned entity exemption in cases where an owner (i) maintains the firewalls between itself and the owned entity as required by Rule 150.4(b)(2)(i)(A) with respect to derivatives positions (rather than all trades), (ii) limits the scope of its certifications to the information about the owned entity that it has and to the level of control it exerts over the owned entity's derivatives trading and (iii) only addresses its own business, rather than its business as well as the business of the owned entity, in circumstances where the owner is not aware – and should not be aware – of the derivatives trading activity of the owned entity. This relief reflects the reality for many market participants that an owner may not be able to exert influence over an entity in which it owns 10 percent or more in order to obtain information and impose compliance procedures.

Expanded Independent Account Controller Exemption

The CFTC staff's no-action letter clarified and expanded the scope of persons qualifying for the independent account controller exemption by adding commodity trading advisors exempt from registration as such to the independent account controller definition and expanding the definition of eligible entities to include, among others, foundations, endowments and non-U.S. pension plans that have authorized an independent account controller to act in a fiduciary capacity by independently controlling the trading for that entity.

Clarification of "Substantially Identical Trading Strategies"

Finally, the CFTC staff clarified that the aggregation requirement for "substantially identical trading strategies" is limited to circumstances where a person holds or controls the trading of positions in more than one account or pool with substantially identical trading strategies in order to willfully circumvent applicable position limits. This relief clarifies that aggregation of substantially identical trading strategies requires intentional conduct, and is particularly helpful because the final aggregation rule did not provide any definition or guidance as to what constituted a substantially identical trading strategy, and as a result market participants were unsure as to what was required for compliance.

Expiration of the Relief

As noted above, the relief expires on August 12, 2019. While the relief is in effect, the CFTC staff will evaluate whether the relief hinders its ability to conduct surveillance or adversely affects policy goals. In addition to assessing the impact of the relief, the staff will consider long-term solutions that would be implemented by a notice and comment rulemaking.

Please contact Deborah A. Monson, Jeremy A. Liabo, Lindsey K. Jones or the Ropes & Gray attorney who usually advises you with any questions you may have or if you would like any further information.