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CFTC Staff Issues Temporary No-Action Relief from Position Aggregation Requirements

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August 15, 2017 TO: ICI Members
Derivatives Markets Advisory Committee
ICI Global Trading & Markets Committee SUBJECTS: Derivatives
Trading and Markets RE: CFTC Staff Issues Temporary No-Action Relief from Position Aggregation Requirements

The staff of the Commodity Futures Trading Commission's Division of Market Oversight ("DMO") recently issued a letter providing temporary no-action relief to market participants from complying with certain position aggregation requirements.[1] The letter extends temporary relief previously granted to market participants in February permitting them to avoid filing notices when relying on certain aggregation exemptions[2] and broadens the scope of relief to cover other problematic aspects of the requirements.

Background

On December 16, 2016, the CFTC published the final rule on aggregation of positions (amending Commission Regulation 150.4) for purposes of the position limits regime.[3] The amendments, which became effective on February 14, 2017, determine which accounts and positions a person must aggregate for determining compliance with the applicable position limit requirements under Regulation 150.2. Under amended Regulation 150.4, market participants relying on certain exemptions from aggregation must file a notice with the Commission demonstrating compliance with the conditions for the claimed exemption. Generally, the notice must be made before the exemption from the aggregation is needed, and the filings are a pre-requisite for obtaining the exemption. Absent relief, market participants would have been required to file notices by February 14, 2017, to rely on certain aggregation exemptions under Regulation 150.4(c).

In February, DMO issued time-limited no action relief under which it would not recommend enforcement action against any person or entity that is eligible to rely on an exemption from aggregation for failing to comply with the notice filing requirements of Regulation 150.4(c). The relief initially was granted until August 14, 2017. Upon the expiration of the relief, each person that intends to rely on an exemption from aggregation under Regulation 150.4(b) would have been required to file a notice as required under Regulation 150.4(c).

Relief Granted

The no-action letter now extends the period that market participants have before they must make a notice filing to rely on a claimed position aggregation exemption. In addition, the letter expands relief related to the "independent account controller" exemption, the "owned entity" exemption, and the "substantially identical trading strategies" requirement of the position aggregation requirements, each as described below. The letter provides temporary relief for two additional years. The two-year relief period, which ends on August 12, 2019, will provide DMO with a reasonable period to assess the impact of relief and consider long-term solutions (*e.g.,* rulemaking in this area). The letter does not change the substantive conditions of the requirements, however, and market participants must continue to meet those conditions.

I. Notice Filing Requirement

The letter provides temporary no-action relief to a market participant from having to file a notice prior to relying on a position aggregation exemption, so long as the participant: a) complies with the applicable position limit; and b) files such a notice within five business days after receiving a request from the Commission or an exchange. Regulation 150(c)(1) requires that any notice that a market participant must file to rely on an exemption from aggregation under Regulation 150.4(b) include a "description of the relevant circumstances that warrant disaggregation" and a "statement of a senior officer of the entity certifying that the conditions set forth in the applicable aggregation exemption provision have been met." In providing relief, DMO noted the significant operational challenges and burdens market participants would face in describing the relevant circumstances that warrant disaggregation, certifying that the conditions of the exemption have been met, and updating the notices when material changes occur with respect to all entities for which disaggregation may be permitted, particularly because the notice generally must be submitted before the exemption from aggregation is needed and must address all disaggregated entities.

II. "Independent Account Controller" Exemption

The letter also expands the scope of the "independent account controller" exemption. Regulation 150.4(b)(4) allows an "eligible entity"[4] to file a notice seeking an aggregation exemption in certain accounts that an "independent account controller"[5] controls. The relief expands the term "independent account controller" to include a person that is an exempt commodity trading adviser and expands the scope of "eligible entities" to include any person that has authorized an independent account controller to act in a fiduciary capacity by independently controlling the trading in the person's positions and accounts (including foundations, endowments, and foreign pension vehicles). DMO noted that expanding the scope of the definitions temporarily will provide it with an opportunity to evaluate during the term of the relief whether any negative consequences result from expanding the exemption.

III. "Owned Entity" Exemption

In addition, the letter expands the scope of the "owned entity" exemption by allowing market participants relying on the exemption to focus only on the derivatives trading of the owned entity. Regulation 150.4(b)(2) provides that any person with an ownership or equity interest in an owned entity of 10 percent or greater need not aggregate the owned entity's accounts or positions, provided that the owning entity (to the extent that it is aware or should be aware of the activities and practices of the owned entity) and the owned entity

meet certain “firewall” conditions,[6] including that they do not have knowledge of the trading decisions of the other. Under the no-action relief, the owning entity need not represent that it does not have knowledge of *all* the trading decisions of the owned entity but only that it does not have knowledge of the owned entity’s *derivatives trading* decisions. The relief also permits the owning entity, when requested to provide a notice filing, to provide certifications only with respect to itself (and not the owned entity) in circumstances in which the owning entity is not and should not be aware of the derivatives trading activity of the owned entity. DMO noted that it was providing temporary no-action relief to allow staff to evaluate whether granting relief in this area would hinder its ability to conduct surveillance and, if so, could modify the terms of the relief granted.

IV. “Substantially Identical” Trading Requirement

Finally, the no-action letter addresses concerns about what it means for an account or pool to have “substantially identical trading strategies” with another account or pool. Regulation 150.4(a)(2) requires aggregation for persons holding or controlling the trading of positions in more than one account or pool with “substantially identical trading strategies.” The no-action relief provides that a person should not aggregate its positions with those of another person pursuant to the “substantially identical trading strategies” requirement, unless the person holds or controls the trading of positions in more than one account or pool with substantially identical trading strategies to *willfully circumvent applicable position limits.* In providing relief, DMO acknowledged the concerns of market participants about the lack of clarity surrounding the term “substantially identical trading strategies” and will evaluate the appropriateness of granting more permanent relief with respect to this requirement.

Jennifer S. Choi
Associate General Counsel

Kenneth Fang
Assistant General Counsel

endnotes

[1] *See* CFTC Staff Letter 17-37 (Aug. 10, 2017), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-37.pdf.

[2] For a description of the February no-action letter, see ICI Memorandum No. 30569 (Feb. 8, 2017), *available at* https://www.iciglobal.org/iciglobal/pubs/memos/memo30569.

[3] For a description of the CFTC’s position aggregation requirements, *see* ICI Memorandum No. 30478 (Dec. 14, 2016), *available at* https://www.iciglobal.org/iciglobal/pubs/memos/memo30478.

[4] The “eligible entity” definition covers a limited set of entities that can authorize an independent account controller independently to control all trading decisions on the eligible entity’s behalf. *See* Regulation 150.1(d). “Eligible entities” are limited to: commodity pool operators; vehicles excluded from the definition of “pool” or “commodity pool operator” under Regulation 4.5; limited partners; limited members, or shareholders in a commodity pool, the operator of which is exempt from registration under Regulation 4.13; commodity

trading advisors; banks or trust companies; savings associations; insurance companies; or separately organized affiliates of any of the above.

[5] The “independent account controller” definition covers a limited set of entities that an “eligible entity” authorizes independently to control trading decisions on behalf of an eligible entity. “Independent account controllers” are limited to: persons registered as futures commission merchants, introducing brokers, commodity trading advisors, or an associated person of any such registrant; or general partners, managing members, or managers of a commodity pool, the operator of which is excluded from registration under Regulation 4.5(a)(4) or 4.13, provided that such general partner, managing member or manager complies with the requirements of Regulation 150.4(c).

[6] *See* Regulation 150.4(b)(2)(i)(B)-(E) (setting forth certain firewall requirements between the owning entity and the owned entity).
