

MEMO# 32868

October 27, 2020

CFTC Chairman Tarbert Issues Directive on the Use of Staff Letters and Guidance

[32868]

October 27, 2020 TO: ICI Members

ICI Global Members

Derivatives Markets Advisory Committee

Registered Fund CPO Advisory Committee SUBJECTS: Compliance

CPO/CTA

Derivatives

International/Global

Investment Advisers

Trading and Markets RE: CFTC Chairman Tarbert Issues Directive on the Use of Staff Letters and Guidance

On October 27, Commodity Futures Trading Commission (CFTC or “Commission”) Chairman Heath Tarbert issued a public directive (“Directive”) to the CFTC staff on the use of staff no-action, interpretive, and exemptive letters, as well as guidance and advisory statements (collectively, “Staff Letters”).[\[1\]](#) Chairman Tarbert explains that, because Staff Letters do not necessarily reflect the views or opinions of the Commission and are not subject to public notice and comment, they “are limited to those circumstances that are not suitable for a general rulemaking.” The Chairman emphasizes that Staff Letters “should supplement, rather than replace, rulemakings,” and that “rulemaking should be the agency’s default policymaking vehicle.”

The Directive sets forth the following guidelines for the CFTC staff to follow when considering whether a Staff Letter should be used to respond to a public request for relief, interpretation, or guidance. The Chairman states that the guidelines will remain in effect until augmented, amended, or withdrawn by him, the Commission, or any future Chairman or Commission.

No-Action Letters

A no-action letter is binding on the issuing division or office, but not on any other division, office, or the Commission. Only the addressee of a no-action letter may rely on it and, if the addressee complies with all the conditions in the letter, the issuing division or office would not recommend enforcement action based solely on the conduct described in the letter, unless the no-action letter is revoked or the division or office provides an adequate explanation of why the letter is not applicable. The public, however, may look to the letter

for insight regarding the views of the issuing division or office. The Chairman emphasizes that no-action relief should not establish a new policy, and generally should be limited to the following circumstances:

- *Transitional compliance relief* – targeted, time-limited relief to address operational or other difficulties that impede timely compliance with the Commodity Exchange Act (CEA) or a new or amended Commission regulation.
- *“Square peg” relief* – narrowly tailored relief to address unintended consequences of the application of the CEA or CFTC regulations to market participants’ transactions or activities.
- *Extraordinary circumstances* – time-limited no-action relief from the CEA or CFTC regulations to address challenges market participants may face in complying with regulatory requirements during a market crisis or other extraordinary circumstance.

Chairman Tarbert instructs the CFTC staff to consider whether rulemaking would be more appropriate to respond to an inquiry that involves a recurring situation that has industry-wide implications.

Interpretive Letters

An interpretive letter is a vehicle for the Commission staff to explain its interpretation of ambiguous terms in a Commission regulation, in the context of a proposed transaction or activity. An interpretive letter is binding only on the issuing division or office. It may be relied upon by the public, but is not binding on the public. The Chairman explains, for example, that if the situation described in the interpretive letter arose, the public could take a different approach without necessarily being in violation of the relevant regulatory requirement. An interpretive letter should not set new policy or otherwise alter the rights and obligations of any person but may be used to “add meaning or gloss” to a regulatory requirement.

Staff Guidance, Advisories, and FAQs

Staff guidance, advisories, and FAQs communicate the Commission staff’s expectation regarding how regulated parties may comply with a particular requirement, or inform regulated parties about the staff’s regulatory priorities. They represent the view of only the issuing division or office. Staff guidance, advisories, and FAQs are not binding on the public and failure to conform to them does not necessarily mean a party is in violation of the applicable regulation. Chairman Tarbert notes that staff guidance should advise the public prospectively of the manner in which the staff proposes to implement a provision of the CEA or Commission regulations.

Exemptive Letters

An exemptive letter is a vehicle for the Commission staff to provide relief when the Commission itself has exemptive authority that has been delegated to the staff. Unlike the other Staff Letters, an exemptive letter binds the Commission. Only the addressee of the letter may rely on the relief, although the letter may provide insight to the public regarding the views of the issuing division or office, and the Commission. Chairman Tarbert explains that exemptive letters may contain conditions, but those conditions should not effectively amend existing regulations. He instructs the CFTC staff that if a potential exemptive letter would provide relief that could be applicable to parties other than the requestor, or the conditions of relief are broader than existing regulations, rulemaking would be more appropriate.

Sarah A. Bessin
Associate General Counsel

endnotes

[1] The Directive is *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbetstatement102720?utm_source=govdelivery.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.