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Alert

CFTC Provides Position Aggregation Relief for Private Fund Managers and Others

August 11, 2017

On Aug. 10, 2017, the staff of the U.S. Commodity Futures Trading Commission issued no-action relief that makes existing exemptions from position limit aggregation more accessible to private fund managers (and other traders of futures and options contracts) and also obviates the need for a proactive notice filing to rely on such exemptions.[1]

Under this new guidance, the CFTC removed the requirement for a person seeking to claim one of several aggregation exemptions to make a notice filing; absent this relief, firms would have been required to make notice filings with the CFTC on Monday, Aug. 14. In the same letter, the CFTC staff also:

- Expanded the availability of certain aggregation exemptions, such as the "independent account controller" and "owned entity" exemption, and
- Substantially limited the requirement to aggregate where there is a "substantially identical trading strategy."

The various elements of relief in yesterday's letter are time-limited; they will remain effective for two years to give the CFTC staff time to evaluate whether permanent or modified relief is appropriate.

Notice Filing Relief

In December 2016, the CFTC finalized a rule (the "Aggregation Final Rule") that required firms relying on an exemption from aggregation for position limits purposes to make a notice filing as a condition of relying on the exemption.[2] However, before the Aggregation Final Rule went effective, the CFTC staff provided relief, postponing the notice filing requirement effective date to Aug. 14, 2017.[3] Yesterday's guidance staff further extended this relief until Aug. 12, 2019.

Pursuant to this relief, firms will only be required to make a notice filing if requested to do so by the staff of the CFTC or futures exchange, which would need to be made within five business days of

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[1] CFTC Letter 17-37; www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-37.pdf.

[2] Please see SRZ's Dec. 21, 2016 *Alert*, "Recent CFTC Rule Changes That Affect Hedge and Private Equity Fund Managers."

[3] Please see SRZ's July 11, 2017 *Alert*, "CFTC Regulatory Update."

receiving the request.[4] Given this "upon request" possibility, private fund managers and other traders should still analyze whether an aggregation exemption is necessary for their trading and investment programs[5] and – if so – be prepared to make a prompt notice filing.[6]

Expansion of the Owned Entity Exemption
A trader is required to aggregate the positions of entities in which it has a 10 percent or greater ownership, but the "owned entity exemption" is generally available where the covered trader does not have knowledge of the trades effected by the owned entity.

In yesterday's relief, the CFTC staff expanded upon the availability of this exemption by making it clear that the upper-tier owner will be eligible so long as it does not have knowledge of the *derivatives trading* of the owned entity (i.e., it does not have to certify that it has no knowledge of *all* trading by the owned entity).[7]

Expansion of the Independent Account Controller Exemption
The "independent account controller exemption" is available where an "eligible entity" authorizes an "independent account controller" (e.g., a sub-advisor) to independently control the trading of its accounts. The CFTC staff expanded this exemption by:

- Confirming that an independent account controller needs to be a commodity trading advisor, but does not necessarily need to be registered with the CFTC (i.e., the independent account controller can be an exempt CTA)[8]; and

- Effectively waiving certain elements of the "eligible entity" definition that were problematic to several categories of traders.[9]

Relief from the Substantially Identical Trading Strategy Aggregation Requirement
Historically, the CFTC only required aggregation on the basis of ownership or control. The Aggregation Final Rule added an additional requirement to aggregate where not otherwise required (i.e., where the ownership threshold has not been crossed or where there is no control) if there is "substantially identical" trading.[10]

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[4] Major U.S. futures exchanges also have notice requirements for aggregation exemptions. While the CFTC relief is not binding on the exchanges, the CFTC stated in the relief letter that it is its understanding that the exchanges intend to apply the same policy of only requiring a notice filing upon request from the exchange.

[5] "Recent CFTC Rule Changes That Affect Hedge and Private Equity Fund Managers" provides additional details concerning when an asset manager would generally need to avail itself of an aggregation exemption.

[6] The CFTC has also clarified in the relief that where a firm is requested to make a notice filing by the CFTC, it will only need to do so with respect to the specific positions being requested. For example, if CFTC staff requests a notice filing with respect to a specific owned entity, the firm will only need to include details of that specific owned entity, not other owned entities that it is disaggregating (and for which CFTC staff has not specifically requested a filing).

[7] CFTC staff also clarified that the certification concerning the lack of awareness of trading only needs to address that the owner itself, not the owned entity (i.e. that owned entity is not aware of the trading of the owner).

[8] This expansion of the definition is particularly helpful to managers of multi-manager funds who previously needed all of its sub-advisors to be registered CTAs in order to be permitted to disaggregate the positions of each sub-advisor.

[9] This expansion of the definition is helpful for non-registrants and non-U.S. firms that will many times not fit squarely into the eligible entity definition. For example, proprietary trading firms and foreign pension plans have had difficulty meeting the eligible entity definition.

[10] For example, a 10 percent investor in a fund, who is not otherwise required to aggregate the positions of the fund will nonetheless be required to do so where the fund has a "substantially identical" trading strategy to that of the investor.

In yesterday's relief, the CFTC staff provided relief from this requirement, provided that the person is not using this relief as a method to willfully circumvent applicable position limits.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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