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CFTC

CFTC Exempts MTFs from US Registration Requirements

The Commodity Futures Trading Commission's Division of Market Oversight (DMO) has issued CFTC Letter No. 14-15, which provides temporary no-action relief for (i) multilateral trading facilities (MTFs) overseen by regulators in the European Union from the requirement to register with the CFTC as a swap execution facility (SEF) and (ii) parties executing swaps on MTFs from the trade execution requirement set forth in Section 2(h)(8) of the Commodity Exchange Act (CEA). This temporary relief is available until the earlier of the date when DMO issues a letter granting an MTF's request pursuant to CFTC Letter No. 14-16 (as described below) or March 24, 2014. CFTC Letter No. 14-15 is available here.

Simultaneously, DMO and the CFTC's Division of Swap Dealer and Intermediary Oversight jointly issued CFTC Letter No. 14-16, which establishes relief for an MTF seeking an exemption from SEF registration requirements under the CEA and CFTC regulations. To obtain relief, an MTF must submit a request that certifies the following:

- The MTF complies with pre-trade price transparency requirements established by its home country regulator which are comparable to SEF requirements relating to order book and request for quote functionality.
- The MTF complies with impartial access and oversight requirements established by its home country regulator. The impartial access and oversight requirements must be comparable to SEF requirements relating to non-discriminatory access by market participants, rule enforcement, monitoring, emergency authority and system safeguards.
- The MTF complies with the block size requirements set forth in CFTC regulations and reports swap data in accordance with Parts 43 and 45 of CFTC regulations as if the MTF were a SEF.
- The MTF routes transactions that are required to be cleared pursuant to CEA and CFTC requirements to a derivatives clearing organization that is registered as such with the CFTC, is exempt from such registration or has received no-action relief with respect to such registration.
- The MTF does not allow trading on its platform by US persons who are not eligible contract participants.

DMO must issue a letter granting relief to the MTF for such relief to become effective. As noted in CFTC Letter No. 14-15, an MTF seeking relief should submit its request no later than March 10, 2014, to allow DMO sufficient time to make its determination before the March 24 deadline noted above.

CFTC Letter No. 14-16 also provides relief for parties executing swaps on qualifying MTFs from the trade execution and swap data reporting requirements in Section 2(h)(8) of the CEA and Parts 43 and 45 of CFTC regulations, respectively. The joint letter additionally provides relief to swap dealers and major swap participants executing swaps on qualifying MTFs from (i) certain external business conduct requirements under subpart H of Part 23 of CFTC regulations, (ii) the confirmation requirement under CFTC Regulation 23.501 and (iii) the swap trading relationship documentation requirement under CFTC Regulation 23.504.

CFTC Letter No. 14-16 is available here.

A more detailed analysis of the these no-action letters is available in the forthcoming Katten Client Advisory "CFTC Issues Relief for Cross-Border Trading of Swaps on Qualifying Multilateral Trading Facilities in the European Union."

CFTC Guidance Relating to Trading on SEFs and DCMs

The Commodity Futures Trading Commission and the CFTC's Division of Market Oversight (DMO) have issued the following guidance relating to the trading of swaps on swap execution facilities (SEFs) and designated contract markets (DCMs):

- CFTC Regulation 49.17(f)(2) allows the counterparties to a swap to access data and information maintained by a swap data repository. The CFTC has adopted an interim final rule to clarify that, for swaps executed anonymously on a SEF or DCM and cleared pursuant to CFTC regulations, the data and information accessible by a counterparty does not include the identity or legal entity identifier of the other party or its clearing member. The interim final rule will be effective upon publication in the *Federal Register*, and is available here.

- CFTC Regulation 37.202(b) provides that a SEF must require each market participant (including persons whose trades are intermediated) to consent to the SEF's jurisdiction prior to obtaining access to the SEF. DMO has issued guidance which clarifies that a SEF does not need to obtain such consent in writing and may satisfy this requirement if its rulebook provides that any person trading on the SEF (either directly or through an intermediary) consents to the jurisdiction of the SEF. DMO's guidance on this matter is available here.

- Certain interest rate and credit default swaps have been deemed to be made available to trade (MAT) and, beginning February 15, will become subject to the trade execution requirement set forth in Section 2(h)(8) of the Commodity Exchange Act (CEA). DMO has issued temporary no-action relief (i) with respect to the mandatory trade execution requirement for counterparties to "package transactions" and (ii) with respect to the manner of execution requirements for SEFs and DCMs (CFTC Regulation 37.9 and DCMs Core Principle 9, respectively), to the extent that they engage in or facilitate package transactions. For these purposes, a "package transaction" involves two or more instruments, at least one of which is a swap subject to the mandatory trade execution requirement. The no-action relief expires on May 15, 2014. The no-action letter is available here.

NFA Issues Notice to Members Regarding Member Obligations Under NFA Bylaw 1101 and Compliance Rule 2-36(d)

Under Commodity Futures Trading Commission regulations, any person claiming an exemption or exclusion from commodity pool operator (CPO) or commodity trading advisor (CTA) registration pursuant to CFTC Regulations 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5) or 4.14(a)(8) must annually reaffirm this exemption within 60 days of the end of each calendar year. National Futures Association (NFA) Bylaw 1101 and Compliance Rule 2-36(d) require NFA members that carry accounts for or transact business with any unregistered person to confirm that such person has filed a notice with NFA reaffirming the exemption on an annual basis.

Recognizing that it may be difficult to conclusively determine whether a person that was previously relying upon the foregoing exemptions or exclusions has filed such notice with NFA, NFA has stated that NFA members will not be charged with violating NFA Bylaw 1101 or Compliance Rule 2-36(d) if they do business with such persons between January 1 and March 31, 2014. If an NFA member learns that a person does not intend to file a notice affirming an exemption within the 60-day period, it must obtain a satisfactory written explanation or put a plan in place to cease transacting business with such person.

The NFA Notice to Members is available here.

CFTC Issues No-Action Relief Regarding 30.7 Accounts

On January 10, the Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission issued time-limited relief to a registered futures commission merchant (FCM) with respect to certain of the requirements in CFTC Regulation 30.7 relating to the foreign futures and foreign options secured amount. Amendments to CFTC Regulation 30.7(c), which became effective on January 13, require an FCM to

deposit 30.7 ("secured amount") customer funds under the laws and regulations of the foreign jurisdiction that provide the greatest degree of protection to such funds. Funds deposited by the FCM for its foreign futures customer omnibus accounts with the FCM's bank affiliates in London and Hong Kong are presently treated as deposits under their respective jurisdiction's "bank exemptions," rather than the applicable jurisdiction's client money rules.

Without taking a position on whether funds held pursuant to the "bank exemption" would be consistent with Rule 30.7(c), DSIO granted the FCM relief from the requirements of Regulation 30.7(c) to provide the FCM with sufficient time to complete an assessment of whether the client money rules of London and Hong Kong provide a higher degree of protection for 30.7 customer funds relative to the jurisdiction's "bank exemptions." The relief is contingent on the FCM at all times holding in properly designated 30.7 accounts in US depositories: (i) money and securities equal to or greater than the funds held in the London and Hong Kong omnibus accounts that are subject to "bank exemptions," and (ii) additional money and securities required to constitute the FCM's targeted residual financial interest in the 30.7 accounts. The FCM must report the result of its assessment to the DSIO by May 12, 2014; the relief will expire on September 10, 2014.

CFTC Letter No. 14-08 is available here.

LITIGATION

SEC Files Insider Trading Action Despite Unknown Tipper

On February 6, the Securities and Exchange Commission filed insider trading charges against Hao He a/k/a Jimmy He in federal district court in Atlanta, Georgia. The SEC alleged that He obtained material, nonpublic information about Sina Corporation (Sina), a private issuer headquartered in Shanghai, China, from an unknown insider during a visit to China and in subsequent phone calls between October 10, 2012 and November 5, 2012. On November 13–14, 2012, He purchased $162,000 in short-term, put option contracts in Sina securities, expiring on November 17, 2012. In order for the purchase to be profitable, the stock price had to decline within the term of the options. On November 15, 2012, Sina announced that it beat analyst forecasts for third quarter earnings, but unexpectedly gave negative guidance for the fourth quarter. The following day, Sina's stock declined 8.5 percent, and He sold all of his put option contracts for $331,530. The SEC alleged that He violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and sought an injunction barring him from engaging in similar transactions, disgorgement of illegally obtained profits with interest and civil monetary penalties. On February 7, the day after filing the complaint, the SEC announced that He consented, without admitting or denying the allegations, to a final judgment enjoining him from violating Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 thereunder, and requiring him to pay $169,819 in disgorgement of profit plus prejudgment interest of $6,155, and a $169,819 penalty. The settlement is subject to court approval.

Securities and Exchange Commission v. Hao He a/k/a Jimmy He, Case No. 1:14-cv-00344-MHS (N.D. Ga., filed Feb. 6, 2014).

New York Federal Court Dismisses Derivative Suit Against Sons of Norway Executives

On February 6, the US Court for the Eastern District of New York dismissed a derivative suit against the CEO, general counsel and former international president of Sons of Norway, a fraternal organization. Former members of a local lodge brought claims relating to breach of fiduciary duty, defamation and intentional infliction of emotional distress. Plaintiffs alleged that the defendants failed to adequately investigate or intervene in the lodge's mismanagement, which allegedly jeopardized its tax status as a charitable organization. The court held that plaintiffs lacked standing to bring a derivative suit because they failed to make a demand on the board of directors before bringing suit and failed to show why demand would have been futile, as required under Minnesota law. Plaintiffs conceded that they did not make the demand, but argued that such demand would have been futile because the CEO served on the board, and because a majority of the board had sided with the defendants during the internal investigation. The court ruled that the 12-person board was not interested or independent, asserting that plaintiffs failed to allege that the CEO could veto board decisions or that the board's participation in the internal investigation rendered it incapable of fairly addressing the demand. The court dismissed the defamation and intentional infliction of emotional distress claims, and denied plaintiff's request for leave to amend.

Thorsen v. Sons of Norway, Civ. No. 13-cv-2572 (E.D.N.Y. Feb. 6, 2014).

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