FRIED FRANK

To Our Clients and Friends

Memorandum

April 3, 2020

CFTC Staff Issues Additional Temporary Relief to Market Participants in Response to COVID-19

On March 31, 2020, the staff of the Commodity Futures Trading Commission's (the "CFTC" or the "Commission") Division of Swap Dealer and Intermediary Oversight (the "DSIO") issued temporary no-action relief to certain non-U.S. affiliates of registered futures commission merchants (each, an "FCM") in view of the COVID-19 pandemic to permit any such affiliate to accept orders from U.S. persons for execution on U.S. futures exchanges (referred to as designated contract markets, each, a "DCM") without registration as an introducing broker ("IB") or qualifying for an exemption under CFTC Rule 3.10(c)(4), subject to certain terms and conditions.[1] This relief from IB registration also permits personnel at such affiliates which are exempt from IB registration pursuant to CFTC Rule 30.5 (each, a "30.5 Foreign Broker") to assist with servicing U.S. customers without registering as associated persons (each, an "AP") of the FCM. Given the disruption and dislocation caused by the COVID-19 pandemic, which has resulted in a significant number of APs working from home or other remote locations pursuant to their FCMs' business continuity plans, certain FCMs believe it may be more effective and efficient to service these customers through such 30.5 Foreign Brokers. For purposes of this letter, U.S. persons are those persons located in the United States, its territories, or possessions.

Section 4d(g) of the Commodity Exchange Act, as amended (the "CEA") requires any person acting in the capacity of an IB to register as such. An IB is generally defined as any person that, for compensation or profit, is engaged in soliciting or accepting orders for the purchase or sale of, among other financial instruments, futures contracts, and does not accept any funds, securities, or property to margin such contracts.[2] CFTC Rule 3.10(c)(4) provides an exemption from IB registration for a person located outside the U.S. to accept orders from U.S. customers for execution on a DCM, provided such person: (i) is exempt from registration as an FCM under CFTC Rule 30.10; (ii) is affiliated with a registered FCM; (iii) introduces only institutional customers on a fully-disclosed basis to a registered FCM for purposes of trading on a DCM; and (iv) does not solicit any person in the U.S. for trading on a DCM and does not handle customer funds for trading on a DCM. Also, such a person's affiliated FCM must file with the National Futures Association ("NFA") an acknowledgment that it will be jointly and severally liable for any violations of the CEA or the CFTC's rules by such person in connection with these introducing activities.

However, not all foreign affiliates of FCMs will have qualified for an exemption from registration as an FCM under CFTC Rule 30.10 because certain firms may not be qualified to handle customer funds in

1 See CFTC Letter No. 20-12 (Mar. 31, 2020).

2 See CEA Section 1a(31); CFTC Rule 1.3.

Copyright © 2020 Fried, Frank, Harris, Shriver & Jacobson LLP
A Delaware Limited Liability Partnership

their home jurisdiction and therefore are not eligible for such relief under CFTC Rule 30.10. Instead, 30.5 Foreign Brokers have qualified for the exemption from IB registration under CFTC Rule 30.5.[3] CFTC Rule 30.5 provides an exemption for a person located outside the U.S. acting as an IB in respect of foreign futures and options transactions if such person files a Form 7-R with NFA, designates an agent for service of process in the United States, and complies with certain other conditions. Note that this exemption is not applicable to the acceptance of orders for U.S. persons for purposes of trading on the U.S. futures markets. Thus, absent relief, 30.5 Foreign Brokers would not be able to rely on the exemption from IB registration in CFTC Rule 3.10(c)(4) and would have to register as IBs to engage in the introducing activities described in this letter. Similarly, in view of the timing exigencies and the relatively brief period of time involved, DSIO recognized that it would not be practicable for personnel of 30.5 Foreign Brokers to register as APs of their affiliated FCMs.

The no-action relief is subject to the following terms and conditions: (i) the 30.5 Foreign Broker is an affiliate of a registered FCM; (ii) the 30.5 Foreign Broker is appropriately licensed in a jurisdiction for which the Commission has issued a comparability exemption under CFTC Rule 30.10; (iii) the 30.5 Foreign Broker introduces on a fully-disclosed basis to registered FCMs only institutional customers;[4] (iv) the 30.5 Foreign Broker accepts, but does not solicit orders from, and does not handle the customer funds of, any U.S. person for trading on a DCM; (v) subject to the relief provided by CFTC Staff Letter 20-03[5], the 30.5 Foreign Broker creates and maintains records required under CFTC Rule 1.35 with respect to its brokerage activities with U.S. persons and complies with CFTC Rule 1.31, including providing prompt access thereto to representatives of the Commission and the U.S. Department of Justice upon request; (vi) each FCM with which the 30.5 Foreign Broker is affiliated files with NFA an acknowledgement of joint and several liability for any violations of the CEA or the CFTC's Rules by the 30.5 Foreign Broker in connection with its introducing activities involving U.S. persons engaged in pursuant to the letter; and (vii) the 30.5 Foreign Broker gives notice to DSIO both when it begins to rely on this relief and in the event it ceases to rely on this relief before its expiration.

This relief will expire on September 30, 2020. DSIO noted that 30.5 Foreign Brokers are being granted this relief so that they may assist with U.S. customer order flows rather than to act in a sales and marketing capacity, which DSIO believes should only be handled by registered APs for customer protection reasons.

* * *

---

3 See CFTC Rule 30.5.

4 An institutional customer is defined in CFTC Rule 1.3 to mean an "eligible contract participant" as defined under CEA Section 1a(18).

5 See CFTC Staff Letter No. 20-03 (Mar. 17, 2020).

Authors:

William J. Breslin

David S. Mitchell

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

Contacts and COVID-19 Task Force Co-Heads:

London		
Gregg Beechey	+44.20.7972.9172	gregg.beechey@friedfrank.com
David Christmas	+44.20.7972.9222	david.christmas@friedfrank.com
Kate Downey	+44.20.7972.6221	kate.downey@friedfrank.com
Mark Mifsud	+44.20.7972.9155	mark.mifsud@friedfrank.com
Sam Wilson	+44.20.7972.9223	sam.wilson@friedfrank.com
New York		
Jonathan S. Adler	+1.212.859.8662	jonathan.adler@friedfrank.com
Lawrence N. Barshay	+1.212.859.8551	lawrence.barshay@friedfrank.com
Jeremy R. Berry	+1.212.859.8796	jeremy.berry@friedfrank.com
Gerald H. Brown, Jr.	+1.212.859.8825	gerald.brown@friedfrank.com
Jessica Forbes	+1.212.859.8558	jessica.forbes@friedfrank.com
Jonathan H. Hofer	+1.212.859.8583	jonathan.hofer@friedfrank.com
Bryan Hunkele	+1.212.859.8251	bryan.hunkele@friedfrank.com
Darren A. Littlejohn	+1.212.859.8933	darren.littlejohn@friedfrank.com
Robert M. McLaughlin	+1.212.859.8963	robert.mclaughlin@friedfrank.com
Todd J. McMullan	+1.212.859.8190	todd.mcmullan@friedfrank.com
David S. Mitchell	+1.212.859.8292	david.mitchell@friedfrank.com
Kenneth I. Rosh	+1.212.859.8535	kenneth.rosh@friedfrank.com
Joshua D. Roth (Co-Head)	+1.212.859.8035	joshua.roth@friedfrank.com
Lisa M. Schneider	+1.212.859.8784	lisa.schneider@friedfrank.com
Stacey Song	+1.212.859.8898	stacey.song@friedfrank.com
Gail Weinstein (Co-Head)	+1.212.859.8031	gail.weinstein@friedfrank.com
Steven M. Witzel (Co-Head)	+1.212.859.8592	steven.witzel@friedfrank.com
Jennifer A. Yashar (Co-Head)	+1.212.859.8410	jennifer.yashar@friedfrank.com
Washington, D.C.		
Richard I. Ansbacher	+1.202.639.7065	richard.ansbacher@friedfrank.com
William J. Breslin	+1.202.639.7051	william.breslin@friedfrank.com
Matthew W. Howard	+1.202.639.7494	matthew.howard@friedfrank.com
Walid Khuri	+1.202.639.7013	walid.khuri@friedfrank.com
Bradford R. Lucas	+1.202.639.7483	brad.lucas@friedfrank.com
Andrew P. Varney	+1.202.639.7032	andrew.varney@friedfrank.com
Rebecca N. Zelenka	+1.202.639.7260	rebecca.zelenka@friedfrank.com