FRIED FRANK

To Our Clients and Friends

Memorandum

April 29, 2020

CFTC and NFA Provide Temporary Relief from Fingerprinting Requirements in Response to COVID-19

On April 24, 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 in view of the COVID-19 pandemic that permits newly listed principals of futures commission merchants ("FCMs"), retail foreign exchange dealers ("RFEDs"), swap dealers ("SDs"), major swap participants ("MSPs"), introducing brokers ("IBs"), commodity pool operators ("CPOs"), commodity trading advisors ("CTAs"), and leverage transaction merchants ("LTMs") as well as those applying for registration as associated persons ("APs") to submit along with their registration application and Form 8-R a signed certification statement in lieu of a completed fingerprint card issued by the National Futures Association (the "NFA") as required under CFTC Rules 3.10 and 3.12, subject to certain terms and conditions.[1] The relief, which extends to U.S. applicants on a temporary basis certain fingerprinting accommodations previously only available to certain principals and APs residing outside of the United States, responds to a request by NFA, which has suspended its applicant fingerprinting service amid restrictions instituted by federal, state, and local governments as a result of the COVID-19 pandemic.[2]

CFTC Rule 3.10(a)(2) requires that each applicant for registration as an FCM, RFED, SD, MSP, IB, CPO, CTA and LTM submit to NFA an application and Form 8-R for each natural person listed as a principal of an applicant along with the fingerprints of the natural person on a fingerprint card issued by NFA. Likewise, CFTC Rule 3.12(c)(3) requires that each applicant for registration as an AP submit to NFA an application, Form 8-R, and an NFA fingerprint card.[3] NFA collects and submits principal and AP fingerprints to the Federal Bureau of Investigation to determine whether an individual has a criminal record that would constitute a statutory disqualification under Sections 8a(2) or 8a(3) of the Commodity Exchange Act (the "Act"). Firm and AP registrations are not granted until the required fingerprint cards are submitted and processed.

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1 See CFTC Letter No. 20-16 (Apr. 24, 2020).

2 CFTC Rule 3.21(e) permits a signed certification statement as an alternative to fingerprinting to evaluate the fitness of natural persons who are required to submit fingerprints under the Commission's regulations and who have not resided in the United States since reaching 18 years of age.

3 NFA Rules 204(a)(2)(A) and 206(a)(1)(A) impose similar fingerprinting requirements as CFTC Rules 3.10 and 3.12. Accordingly, NFA is providing temporary relief from these requirements for registrants and applicants for registration who satisfy the requirements of CFTC Letter No. 20-16. See NFA Notice I-20-20 (Coronavirus (COVID-19) Update---Relief from Fingerprinting Requirements).

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In recognition of the increased difficulty faced by market participants attempting to comply with the Commission's fingerprinting requirements during the COVID-19 pandemic, DSIO will not recommend that the Commission commence enforcement action against a registrant or applicant for registration based solely upon such registrant's or applicant's failure to submit with Form 8-R a fingerprint card for a newly listed principal or applicant for AP registration, subject to the following terms and conditions:

1. The registrant or applicant for registration listing such principal, or sponsoring such applicant for AP registration, causes a criminal history background check of such principal or applicant for AP registration to be performed;

2. The criminal history background check is of a type that would reveal all matters listed under Sections 8a(2)(D) or 8a(3)(D), (E), or (H) of the Act, and it does not reveal any matters that constitute a disqualification under Sections 8a(2) or 8a(3) of the Act, other than those disclosed to NFA;[4]

3. A person with authority to bind the registrant or applicant for registration listing such principal, or sponsoring such applicant for AP registration, signs and submits a certification that the background check was completed and that it did not disclose any matters that constitute a disqualification under Sections 8a(2) or 8a(3) of the Act; and

4. The registrant or applicant for registration listing such principal, or sponsoring such applicant for AP registration, maintains records documenting the completion and the results of the criminal history background check in accordance with Rule 1.31.

This relief will expire on the earlier of ninety (90) days from the date of CFTC Letter No. 20-16 or such other date as NFA notifies the public that it has resumed processing fingerprints. In this regard, NFA has undertaken to issue a public news release when it resumes the applicant fingerprint service. Principals and APs of registrants and applicants for registration relying on this relief must submit their fingerprints to NFA within thirty (30) days of its public announcement of the resumption of fingerprint processing.

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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:

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[4] For example, matters listed under Section 8a(2)(D) of the Act include certain enumerated categories of felony convictions within the preceding ten years and matters listed under Section 8a(3)(D) of the Act include felony convictions other than the enumerated categories in Section 8a(2)(D) of the Act.

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