FRIED FRANK

To Our Clients and Friends

# Memorandum

March 18, 2020

## *SEC Staff and NFA Issue Guidance Related to Working Remotely During COVID-19 Pandemic*

On March 16, 2020, the Staff of the Securities and Exchange Commission ("SEC") published two FAQs to address questions related to investment advisers who have implemented their business continuity plans in response to COVID-19. Specifically, the FAQs address whether temporary work locations need to be included as offices on an investment adviser's Form ADV and whether an investment adviser that receives inadvertent custody of client assets by mail or delivery at its office would be deemed to have custody of such client assets if it is unable to access its mail or deliveries at that location. On March 13, 2020, the National Futures Association ("NFA") issued a notice to its members addressing requirements for temporary work locations that have not been listed as branch offices on the Form 7-R and for which there will not be a designated branch office manager.

1. Form ADV

In addition to its principal office and place of business, an investment adviser is required to report all other offices from which it conducts its advisory business. The Staff's new FAQ provides that an investment adviser does not need to update its Form ADV to list temporary locations from which an investment adviser's employees conduct advisory business as part of the firm's business continuity plan due to circumstances related to COVID-19.[1]

2. Custody Rule

Investment advisers registered with the SEC are subject to Rule 206(4)-2 under the Investment Advisers Act of 1940 ("Custody Rule"). Under the Custody Rule, an investment adviser has custody of client assets if it has possession of client funds or securities unless it receives them inadvertently and returns them to the sender within three business days. The Staff's new FAQ provides that if an adviser's personnel are unable to access mail or deliveries at an office location due to the firm's business continuity plan in response to circumstances related to COVID-19, the adviser would not be considered to have received client assets at that location until its personnel are able to access the mail or deliveries at that location.[2]

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1 See Staff Responses to Questions About the Form ADV, Item 1.F.

2 See Staff Responses to Questions About the Custody Rule, Question II.1.

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3. Branch Offices

NFA, the primary industry self-regulatory organization for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs"), issued a notice to members addressing branch office requirements.[3] The notice delineates the circumstances under which it is permissible for a CPO's/CTA's employees, including registered associated persons ("APs"), to work temporarily from the employee's home or other remote locations that have not been listed as a branch office on the registrant's Form 7-R and for which there will not be a designated branch office manager at that location. NFA will not pursue a disciplinary action against firms that permit APs to temporarily work from locations not listed as a branch office and without a branch manager, provided that the firm implements alternative supervisory methods to adequately supervise the APs' activities, meets its recordkeeping requirements, and ensures that these procedures are documented.[4]

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**Authors:**

William J. Breslin

Jessica Forbes

David S. Mitchell

Stacey Song

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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[3] See NFA Notice I-20-12.

[4] Thus far, the Commodity Futures Trading Commission (the "CFTC") staff has issued a number of no-action letters in response to COVID-19 over the last few days, but these no-action letters do not address compliance obligations applicable to CPOs and CTAs. However, the CFTC staff may issue additional relief in the near future.

**Contacts:**


| | | |
|---|---|---|
| **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 |
| Lisa M. Schneider | +1.212.859.8784 | lisa.schneider@friedfrank.com |
| Stacey Song | +1.212.859.8898 | stacey.song@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 |