

CLIENT ALERT

# CFTC Provides MiFID II Relief to FCMs, Swap Dealers and IBs

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## AUTHORS

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In response to a request from the Futures Industry Association, the Division of Swap Dealer and Intermediary Oversight of the Commodity Futures Trading Commission has issued interpretive relief for futures commission merchants, swap dealers and introducing brokers that receive payments for research services separate and apart from brokerage execution payments.<sup>1</sup> The relief addresses the regulatory uncertainty with respect to commodity trading advisor registration that intensified as a result of the European Union's Markets in Financial Instruments Directive II ("MiFID II"). As of January 3, 2018, MiFID II will require investment managers subject to the laws of the European Union ("EU firms") to make separate payments for research to the brokers that provide such research. DSIO has clarified that receipt of separate payments for research services alone would not require an FCM, SD or IB to register as a CTA. As discussed below, the interpretive relief maintains the regulatory status quo on this issue for FCMs, SDs and IBs that are indirectly affected by MiFID II.

## Background

A CTA includes any person who receives compensation for advising others as to the value of trading in commodity interests or who promulgates analyses or reports concerning such interests.<sup>2</sup> FCMs and SDs are specifically excluded

<sup>1</sup> CFTC Letter No. 17-65 (December 11, 2017), Division of Swap Dealer and Intermediary Oversight ("DSIO"). For information about the relief provided by the SEC on MiFID II, please see our client alert entitled "No-Action Relief to Facilitate Cross-Border Implementation of MiFID II Research Provisions" (Nov. 17, 2017), available [here](#).

<sup>2</sup> 7 U.S.C. § 1a(12)(A)(i), § 1a(12)(A)(ii); CFTC Rule 1.3(bb).

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from the CTA definition provided that their commodity interest trading advice is “solely incidental to” the conduct of their businesses.<sup>3</sup> CFTC regulations similarly exempt from CTA registration any IB whose commodity interest trading advice is “solely in connection with” its business.<sup>4</sup> CFTC guidance has suggested, however, that an FCM, SD or IB would not qualify for these exceptions if it receives a separate fee for, or otherwise primarily profits from, advice provided to a counterparty.<sup>5</sup>

Many investment managers currently pay their brokers a bundled commission amount for both execution and research. MiFID II will require EU firms to separate such payments. In paying for research, an EU firm will be permitted under MiFID II to use its own funds or client funds that have been specifically set aside in “research payment accounts.” The FIA advised the CFTC that FCMs, SDs and IBs that distribute research to EU firms will be obligated to accept separate or unbundled payments as a condition of maintaining existing business relationships.

The FIA also advised the CFTC that the impact of MiFID II likely will extend beyond the EU. Global asset managers required to pay separate compensation in the EU may determine that bundling research and execution payments in other jurisdictions may give rise to certain fiduciary duty and/or conflict of interest concerns. As a result, many global managers may seek to implement a uniform compensation structure whereby research is paid for separately from execution services in all jurisdictions.

### **Summary of Interpretative Relief**

Under the relief, an FCM, SD or IB accepting separate compensation for research need not register as a CTA provided that its advisory and research activities otherwise remain “solely incidental to” or “solely in connection with” its business. DSIO states that the receipt of direct compensation for research or advisory services alongside execution fees is not, by itself, determinative of a CTA registration requirement.<sup>6</sup> Instead, DSIO notes that separate compensation is “merely a factor to be considered among the facts and circumstances related to the advisory activities provided.”

DSIO emphasized that FCMs, SDs and IBs still will have to independently conclude whether their research services are “solely incidental to” or “solely in connection with” their businesses. An entity that operates a separate advisory line of business, absent another exemption, still would have to register as a CTA.

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<sup>3</sup> 7 U.S.C. § 1a(12)(B)(iii), § 1a(12)(C); CFTC Rule 4.6(a)(3).

<sup>4</sup> CFTC Rule 4.14(a)(6).

<sup>5</sup> See Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 at 9740 (Feb. 17, 2012).

<sup>6</sup> The relief also extends to associated persons of FCMs, SDs and IBs when such associated persons are acting within the scope of their duties as employees of such entities.

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