

CLIENT ALERT

CFTC Approves Exception to Delivering Annual Privacy Notices

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The Commodity Futures Trading Commission has revised its privacy rules to provide an exception to the annual privacy notice delivery requirement.¹ CFTC privacy rules generally apply to futures commission merchants, commodity trading advisors, commodity pool operators, introducing brokers, retail foreign exchange dealers, swap dealers and major swap participants, regardless of whether they are required to register with the CFTC (“Covered Persons”).

Effective May 28, 2019, Covered Persons will no longer be required to deliver annual privacy notices to customers as long as such persons

(1) to the extent they provide nonpublic personal information² to nonaffiliated third parties, do so only in accordance with the exceptions listed in the CFTC’s privacy rules;³ and

¹ 17 CFR Part 160, RIN 3038-AE80, Privacy of Consumer Financial Information - Amendment to Conform Regulations to the Fixing America’s Surface Transportation Act. (the “FAST Act”).

² “Nonpublic personal information” means: (i) personally identifiable financial information; and (ii) any list, description or other grouping of consumers, and publicly available information pertaining to them, that is derived using any personally identifiable financial information that is not publicly available information. “Personally identifiable financial information” includes information: (i) a consumer provides to a Covered Person to obtain a financial product or service; (ii) about a consumer resulting from any transaction involving a financial product or service between a Covered Person and a consumer; and (iii) the Covered Person otherwise obtains about a consumer in connection with providing a financial product or service to that consumer.

³ Commonly used exceptions include disclosure to service providers and disclosures required by law.

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- (2) have not changed their policies and practices with respect to the disclosure of nonpublic personal information from those stated in the most recent privacy notice provided to such customers.

Covered Persons still must provide a clear and conspicuous initial privacy notice accurately reflecting their privacy policies and practices to customers⁴ at the time that a customer relationship is established.

A Covered Person that finds it can no longer rely on the new exception must recommence delivering annual notices. The timing and content of such notices will depend upon whether the change to the Covered Person's practices would require such person to distribute a revised privacy notice to its customers.⁵

CFTC Rule 160.5, as amended, is consistent with amendments implemented in 2018 by the Consumer Financial Protection Bureau ("CFPB") with respect to the delivery of annual privacy notices by financial institutions subject to the CFPB's jurisdiction.⁶ To date, however, the Securities and Exchange Commission has not amended its privacy regulations.⁷ Thus, the SEC's rules may still require an entity to deliver annual notices, even if the rules of other regulators do not.

⁴ "Customer" means a consumer who has a customer relationship with a Covered Person. "Consumer" means an individual who obtains or has obtained from a Covered Person a financial product or service that is to be used primarily for personal, family or household purposes, or that individual's legal representative.

⁵ Revised privacy notices are required to be delivered if a Covered Person were to: (i) disclose a new category of nonpublic personal information to any nonaffiliated third party; (ii) disclose nonpublic personal information to a new category of nonaffiliated third party; or (iii) disclose nonpublic personal information about a former customer to a nonaffiliated third party, if that former customer has not had the opportunity to exercise an opt-out right regarding that disclosure.

⁶ Regulation P, 12 CFR §1016.5.

⁷ Regulation S-P, 17 CFR Part 248.

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