

CLIENT MEMORANDUM

CFTC Proposes Revisions to Chief Compliance Officer Obligations

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AUTHORS

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On May 3, 2017, the Commodity Futures Trading Commission (“CFTC”) approved for publication in the Federal Register proposed amendments to its rules describing the obligations of the chief compliance officer (“CCO”) for swap dealers (“SD”), major swap participants (“MSP”), and futures commission merchants (“FCM”).¹ The CFTC noted that it proposed the amendments to harmonize its CCO rules with similar Securities and Exchange Commission (“SEC”) rules applicable to security-based swap dealers where it believed the differences would reduce regulatory burden for market participants while continuing to provide the protections that the rules were intended to accomplish.² Comments to the proposed rule are due on July 7, 2017. The CFTC’s proposed amendments to CFTC Rule 3.3 include the following:

- **“Senior Officer.”** CFTC Rule 3.3(a)(1) requires that the CCO report directly to the board of directors or the senior officer of the SD, MSP, or FCM. The current rule does not define “senior officer.” The CCO Proposal would codify its understanding of senior officer to be the chief executive officer or the equivalent. The CFTC

¹ *Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments*, 82 Fed. Reg. 21,330 (May 8, 2017) (“CCO Proposal”).

² *See Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 Fed. Reg. 29,960, 29,964 (May 13, 2016).

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requires that the CCO have a direct reporting line to the board or highest executive level to ensure the CCO's independence.

- **Duty to Administer Policies and Procedures.** CFTC Rule 3.3(d)(1) requires the CCO to administer the SD's, MSP's, or FCM's policies and procedures that are reasonably designed to ensure compliance with the Commodity Exchange Act ("CEA") and CFTC regulations. The CCO Proposal would clarify that the CCO is responsible for administering the policies and procedures specifically relating to the business of the SD, MSP, or FCM, and not all aspects of the registrant's business that may be subject to CFTC rules.
- **Resolving Conflicts of Interest.** CFTC Rule 3.3(d)(2) requires the CCO, in consultation with the board of directors or the senior officer, to resolve any conflicts of interest that may arise. The CCO Proposal would clarify that the CCO must take "reasonable steps" to resolve conflicts. This change would make explicit an implied reasonableness standard and would recognize that resolution of non-material conflicts need not always require the CCO's direct expertise or directly involve the board or senior officer. The Commission is of the view that the CCO should not be required to personally resolve or consult with the board or senior officer with respect to every potential conflict. Rather, routine conflicts could be resolved in the normal course of business consistent with the CCO's general administration of policies and procedures.
- **Maintaining Policies and Procedures.** CFTC Rule 3.3(d)(3) obligates the CCO to take reasonable steps to ensure compliance with the CEA and CFTC Rules related to the SD/MSP's swaps activities, or the FCM's business. The CCO Proposal clarifies that the CCO's responsibility includes ensuring that the SD/MSP/FCM "maintains and reviews written policies and procedures reasonably designed to achieve compliance" with the CEA and CFTC rules. The CFTC designed this amendment to provide additional clarity concerning the scope of the CCO's responsibility.
- **Remediation of Noncompliance.** CFTC Rules 3.3(d)(4) and (5) impose an obligation on the CCO to establish procedures, in consultation with the board or the senior officer, for the remediation and closing of noncompliance issues. The CCO Proposal would remove the requirement to consult with the board or senior officer as superfluous and would further clarify that the policies and procedures must be "reasonably designed" to achieve the stated purpose, meaning that various groups should be consulted, as appropriate, in carrying out the CCO's duties. Finally, CFTC Rule 3.3(d)(4) provides for remediating noncompliance issues identified through specific methods. The CCO Proposal would amend the provision to include noncompliance issues identified "through any means."
- **Annual Report.** CFTC Rules 3.3(e) and (f) require that the CCO prepare and file an annual report with the CFTC. The CCO Proposal would revise various aspects of the annual report, including:
 - Clarifying the written policies and procedures that the annual report should address;

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- Removing the requirement to specifically identify and assess “each applicable requirement under the Act and Commission regulations” against the registrant’s policies and procedures. The CFTC proposes replacing this with a requirement to provide a “detailed discussion of [the registrant’s] annual assessment and recommended improvements.” The Commission notes that registrants may continue to use a chart to present findings and other information pursuant to Rule 3.3(e). However, this would not “alleviate the requirement to provide meaningful, substantive discussion where required”;
- Limit the assessment of the description of the financial, managerial, operational, and staffing resources to resources allocated to the specific activities for which the registrant is registered; and
- Require that the CCO deliver the annual report to the board audit committee (or equivalent), the board of directors, and the senior officer prior to furnishing it to the CFTC.

The CCO Proposal represents the first rule proposal under Acting Chairman Giancarlo’s administration. The stated goal of the CCO Proposal is to move away from a check-the-box approach and decrease unnecessary burdens. Although the CCO Proposal includes some helpful changes, certain aspects of it would benefit from industry feedback to ensure that each of the proposed changes in fact alleviate regulatory burden as opposed to requiring market participants to significantly change the processes they may have now formalized over the last few years.

If you have any questions regarding this memorandum, please contact Athena Eastwood (202-303-1212, aeastwood@willkie.com), Neal E. Kumar (202-303-1143, nkumar@willkie.com) or the Willkie attorney with whom you regularly work.

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