

Public Statements & Remarks

Directive of Chairman Heath P. Tarbert on the Use of Staff Letters and Guidance

October 27, 2020

In the regular course of administering the Commodity Exchange Act (CEA) and Commission regulations, CFTC staff often receive inquiries from the public seeking guidance or clarification on how Commission rules and regulations may apply to specific facts and circumstances.^[1] Staff may respond to such inquiries through a variety of communications, including no-action, interpretive, and exemptive letters, as well as guidance and advisory statements (collectively, Staff Letters). Staff Letters vary in scope and format. For instance, a Staff Letter may simply convey an enforcement position, or it may articulate an explicit interpretation of applicable law and Commission regulations as they relate to a particular scenario. In all cases, the views articulated in Staff Letters (with the exception of exemptive letters) are informal and advisory, and the statements are not binding on the Commission itself.^[2]

Because they do not necessarily reflect the views or opinions of the Commission and are not subject to public notice-and-comment procedures, as Chairman, I direct CFTC staff to ensure that **Staff Letters are limited to those circumstances that are not suitable for a general rulemaking.**^[3] **In other words, Staff Letters should supplement, rather than replace, rulemakings.**

As part of my continued *commitment to providing transparency about CFTC business*,^[4] I believe it is appropriate to issue this directive to CFTC staff publicly. It is important that the public understand the guidelines I am setting forth for CFTC staff to follow—and the rationale behind them—when considering whether, and the manner in which, Staff Letters should be used to address public requests for relief, interpretation, or guidance.^[5]

No-Action Letters

A no-action letter is a statement issued by a division or office that it will not recommend enforcement action with respect to a proposed transaction or activity for failure to comply with a specific provision of the CEA or Commission rule, regulation, or order (together, regulations). Although it is not binding on any other division or office, or the Commission itself, a no-action letter is binding on the issuing division or office. A no-action letter may be relied upon only by the addressee of the letter.^[6] If the addressee of the letter complies with all conditions stated in the no-action letter, the issuing division or office would not recommend enforcement action based solely on the conduct described in the letter, unless the no-action letter is revoked or the division or office provides an adequate explanation of why the no-action letter is not applicable. The public at large—other than the addressee—may not rely upon the letter, but they may look to the letter as instructive of the views of the issuing division or office with regard to the particular scenario.

Generally, I believe no-action relief should be limited to the following circumstances:^[7]

- *Transitional Compliance Relief.* Market participants may experience operational or other difficulties that impede timely compliance with the CEA or a new or amended Commission regulation. In such cases, targeted, time-limited relief may be appropriate.
- *“Square Peg” Relief.* Market participants’ transactions or activities may raise a unique issue that is not contemplated by the CEA or CFTC regulations, or the application of CFTC regulations to a transaction activity may lead to unintended consequences. No-action relief tailored to either of these narrow circumstances may be appropriate.
- *Extraordinary Circumstances.* Market participants may face challenges in complying with the CEA or CFTC regulations during a market crisis or another extraordinary circumstance. Time-limited no-action relief if the CEA or CFTC regulations may be necessary to avoid significant market disruptions.

To be clear, a no-action letter should *not* establish a new policy. CFTC staff are hereby instructed to consider whether rulemaking would be a more appropriate vehicle for responding to an inquiry where a situation is encountered on a repeated basis and has industry-wide implications.

Interpretive Letters

An interpretive letter is a written statement with respect to a specific provision of a Commission regulation, provided in the context of a proposed transaction or activity.^[8] It is the vehicle by which staff explains its interpretation of ambiguous terms in the regulation.

Like a no-action letter, an interpretive letter is binding on only the issuing division or office. But, unlike a no-action letter, an interpretive letter may be relied upon by the public. Notably, however, an interpretive letter it is not binding on the public. Thus, for example, if the question or situation covered by the interpretive letter arises, the public could take a different approach without necessarily being in violation of the underlying requirement(s).

It is important that an interpretive letter be derived from the specific statutory provision or regulation; it may be used to add meaning or gloss to the underlying requirement(s). As with a no-action letter, an interpretive letter should not set new policy or otherwise alter the rights and obligations of any person. Were that to be the case, rulemaking would be more appropriate than using an interpretive letter.

Staff Guidance, Advisories, and FAQs

Staff guidance, advisories, and FAQs communicate staff's expectation regarding how regulated parties may comply with a particular requirement, or inform regulated parties about staff's regulatory priorities. They represent the view of only the issuing division or office, and are not binding on any other division or office, the Commission itself, or the public. Failure to conform to guidance, an advisory, or an FAQ does not necessarily mean that the party is in violation of the applicable regulation.

Staff guidance, advisories, and FAQs should not set new policy, but rather explain how the law would apply to a unique circumstance or market event. In essence, staff guidance should advise the public prospectively of the manner in which staff proposes to implement the underlying provision of the CEA or Commission regulation. As with no-action relief, CFTC staff are hereby instructed to consider whether rulemaking would be a more appropriate vehicle.

Exemptive Letters

An exemptive letter is a written grant of relief issued by a division or office when the Commission itself has exemptive authority that has been delegated to the staff.^[9] As opposed to other Staff Letters, an exemptive letter binds the Commission. Only the addressee of the letter may rely upon the relief. As is the case for other Staff Letters, an exemptive letter addresses unique facts and circumstances set forth in the letter. Although the public may not rely upon the letter, they may look to the letter as instructive of the views of the issuing division or office with regard to the particular course of conduct, and as a basis for understanding the views of the Commission.

An exemptive letter may include conditions that are traceable to the relevant regulation. For example, an exemptive letter may be conditioned upon the addressee meeting certain criteria or complying with alternative measures to mitigate a regulatory gap. However, as this is outside the rulemaking process, the staff should take care not to set conditions that effectively amend existing regulations. CFTC staff are hereby instructed that, in the event a potential exemptive letter would provide relief that could be applicable to parties other than the requestor, or the conditions of relief are broader than existing regulations, rulemaking would be more appropriate.

Conclusion

One of the CFTC's core values is *clarity*:^[10] to provide transparency to market participants about our rules and processes. Staff Letters give a measure of clarity, but we generally serve our markets best when the Commission itself acts with the benefit of public input and dialogue. Public input is particularly important when novel or complex issues are involved. As a result, I believe that rulemaking should be the agency's default policymaking vehicle.

Accordingly, CFTC staff are instructed to limit Staff Letters to the relatively narrow sets of circumstances described in this directive, and to use the notice-and-comment rulemaking process for all other policymaking initiatives. These guidelines shall remain in effect until augmented, amended, or withdrawn by myself, the Commission, or any future Chairman or Commission.

[1] The procedures for requesting exemptive, no-action and interpretive letters are found in section 140.99 of the Commission's regulations at title 17, Code of Federal Regulations, 17 C.F.R. § 140.99.

[2] Depending on the type of relief, it may be binding only on the issuing division or office. Such relief would also be binding on a successor division in the event of an agency reorganization.

[3] Rulemaking may also be appropriate for Commission exemptive action pursuant to section 4(c) of the CEA, 7 U.S.C. § 6(c). See 63 Fed. Reg. 3285 (Jan. 22, 1998); 63 Fed. Reg. 68,175 (Dec. 10, 1998). Exemptions under CEA section 4(c) are outside the scope of this document.

[4] Statement of Chairman Heath P. Tarbert Before the December 10, 2019 Open Meeting: Tripling Down on Transparency, <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121019>.

[5] The CFTC may issue Staff Letters in response to requests from trade associations or groups that represent similarly situated persons – i.e., persons or entities that share the same or substantially the same facts and circumstances.

[6] A request for a no-action letter may be made on behalf of a beneficiary. "Addressee" as used here means the beneficiary of the no-action letter.

[7] As noted earlier, the CFTC may issue no-action letters in response to requests from trade associations or groups that represent similarly situated persons.

[8] Distinctions between interpretive letters and other Staff Letters may be blurred at times. Some letters advising no-action positions may be based on staff's interpretation of the CEA or Commission regulations.

[9] Exemptive letters should cite to the delegating authority. Exemptions issued under CEA section 4(c) are not covered here.

[10] <https://www.cftc.gov/About/AboutTheCommission>.

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