

October 23, 2020

Re: *Notification Protocol for CFTC Orders Implicating SEC Regulation A and D*

The respective Chairmen of the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) hereby establish a one-year pilot program to set out and formalize the practice and agreement between the Chairmen relating to CFTC orders that implicate the “bad actor disqualification” provisions of Regulations A and D under the Securities Act of 1933. *See* Rule 262(a) of Regulation A and Rule 506(d)(1) of Regulation D, 17 C.F.R. §§ 230.262(a), 506(d)(1) (SEC Disqualification Rules).

Under the SEC Disqualification Rules, persons or entities are disqualified from availing themselves of certain exemptions from registration for securities offerings if certain triggering events occur: *i.e.*, if they are found to have committed certain securities violations, certain other specified violations, or are subject to certain associational or industry bars. Included among the triggering events for disqualification from these exemptions are certain final orders issued by the CFTC.

Even where a triggering event has occurred, however, the SEC Disqualification Rules set forth circumstances under which the disqualification will not arise, including, as relevant here, where the CFTC advises in writing that a disqualification should not arise as a consequence of the CFTC order. Specifically, SEC Rules 262(b)(3) and 506(d)(2)(iii) provide that the disqualification provisions shall not apply if before the relevant sale of securities the “regulatory authority that entered the relevant order . . . advises in writing (whether contained in the relevant judgment, order or decree or separately to the [Securities and Exchange] Commission or its staff) that disqualification . . . should not arise as a consequence of such order.” 17 C.F.R. §§ 230.262(b)(3), 506(d)(2)(iii). At times with notice to the SEC and where appropriate, the CFTC has included in its orders, and may so include in the future, language advising the SEC that disqualification should not arise as a result of a particular CFTC final order.

Through this letter, the Chairmen of the SEC and CFTC agree to use their reasonable efforts to formalize and memorialize the coordination of their respective staffs with respect to CFTC orders that may implicate the SEC Disqualification Rules. Specifically, the Chairmen agree to use their reasonable efforts to put in place the following process:

1. The CFTC, through a designated Division of Enforcement staff member (designated CFTC staff member) will provide notice to the SEC, through a designated Division of Corporation Finance staff member (designated SEC staff member), as soon as practicable after the CFTC becomes aware that a CFTC order may implicate the SEC Disqualification Rules.

2. The designated CFTC staff member will provide the designated SEC staff member with all information relevant to the SEC Disqualification Rules, including: (a) the name of the proposed respondent; (b) the specific violations included in the anticipated CFTC order; (c) the CFTC staff's best estimate of the earliest date on which the anticipated CFTC order will be issued; and (d) whether the proposed respondent has submitted to the CFTC a written request for a waiver from the SEC's Disqualification Rules, and if so, the designated CFTC staff member will provide the designated SEC staff member a copy of that written request.
3. As soon as practicable after receipt of the information from the designated CFTC staff member, as outlined in paragraph 2 above, the designated SEC staff member shall request any additional information that the designated SEC staff member reasonably believes is necessary to effectuate the terms of this letter.
4. Information shared between the CFTC and SEC pursuant to this letter is subject to applicable privilege protections, including the protections provided by 15 U.S.C. § 78x(f)(1).
5. The SEC Division of Corporation Finance (Division), through the designated SEC staff member, will then communicate to the CFTC, through the designated CFTC staff member, whether the Division: (a) does not object to a waiver of automatic disqualification under the SEC's Disqualification Rules; (b) has comments to provide, including comments on any written request for a waiver, or declines to provide a view, in connection with a potential waiver of automatic disqualification under the SEC's Disqualification Rules; or (c) objects to a waiver of automatic disqualification under the SEC's Disqualification Rules.
6. The Division will endeavor to provide the CFTC its view or comments, as set out in paragraph 5 above, within forty-five days after receiving the information from the CFTC, as outlined in paragraph 2 above. Should the Division not communicate to the CFTC, as contemplated in paragraph 5 above, within the applicable forty-five-day period or any extended time period agreed to by the CFTC staff and SEC staff pursuant to paragraph 7(b) below, the CFTC's policy will be to automatically provide language advising that disqualification should not arise as a consequence of the CFTC order.

7. Notwithstanding the timeframes set forth above:
- a. If the CFTC staff believes that expedited treatment of a waiver determination within a given CFTC order is necessary, such timeframes may be reduced by agreement of the staff of the respective Commissions with respect to such determination, in consultation with the respective Chairmen.
  - b. If CFTC or SEC staff believe circumstances warrant extending the timeframes set forth in this letter for a waiver determination within a given CFTC order, those timeframes may be extended by agreement of the staff of the respective Commissions with respect to such determination, in consultation with the respective Chairmen.
8. This letter does not apply to circumstances where a person or entity has submitted a waiver request to the Division with respect to a disqualification that has occurred or may occur as a result of a CFTC action.

This letter is effective upon execution and will remain in effect for one-year after the execution date. The only parties to this letter are the SEC and CFTC Chairmen, and it can be unilaterally terminated by either party or any future Chair. This letter has no third party beneficiaries, it is not intended to be, and may not be, relied upon to create any rights, substantive or procedural, enforceable by law by any party, nor does it create any specific obligations or safe harbors for market participants or anyone else. This letter is not binding on either the SEC Commissioners or CFTC Commissioners.

The SEC and CFTC Chairmen look forward to continuing to work cooperatively together on this and all other matters.



Jay Clayton  
Chairman  
Securities and Exchange Commission



Heath P. Tarbert  
Chairman  
Commodity Futures Trading Commission