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Latest CFTC Action on LIBOR Transition

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In its last regulatory action for 2022, on December 23, the U.S. Commodity Futures Trading Commission ("CFTC") published its staff no-action letter No. 22-21 ("NAL") allowing commodity brokers – Futures Commission Merchants ("FCMs") – to invest their customer funds in investment instruments that contain an adjustable rate of interest that is benchmarked to Secured Overnight Financial Rate ("SOFR") instead of London Interbank Offered Rate ("LIBOR"). This NAL expanded CFTC's previous similar relief to also apply to Derivatives Clearing Organizations ("DCOs") investing customer funds.

The CFTC was compelled to issue this relief because its Regulation 1.25 provides a list of specific instruments where customer funds may be invested by FCMs and DCOs, and has a specific reference to only the LIBOR-linked investments while it does not expressly allow SOFR-linked investments relating to three types of customer derivatives accounts: (1) futures accounts, (2) cleared swaps accounts and (3) foreign futures and options accounts. These investments are significant: according to research from the Futures Industry Association ("FIA"), in 2022 FCMs held approximately $350 billion of customer funds in futures accounts and approximately $152 billion of customer funds in cleared swaps accounts. The CFTC also provides updated customer funds numbers broken down by the FCMs.

The NAL extends relief for FCMs and DCO until December 31, 2024 or the date when the CFTC issues a final rule addressing LIBOR transition issues. CFTC Commissioner Mersinger suggested that instead of issuing no-action relief, the CFTC should have issued a comprehensive SOFR transition rule as well as a comprehensive rule on investment of customer funds as referred to in CFTC's regulatory agenda for 2022.

Earlier in 2022, on August 12, the CFTC issued final rules updating the set of interest rate swaps that are required to be submitted for clearing under CFTC's Part 50 regulations to include SOFR-linked swaps and swaps based on other critical risk-free reference rates.