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CFTC'S LATEST POSITION LIMITS PROPOSAL: IF AT FIRST YOU DON'T SUCCEED, TRY, TRY AGAIN

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Overview

- 1 Applicability of Proposed Limits
- 2 Bona Fide Hedging and Other Exemptions
- 3 Practical Effect on End-Users
- 4 Potential Topics for Comment

A DECADE OF RULEMAKING

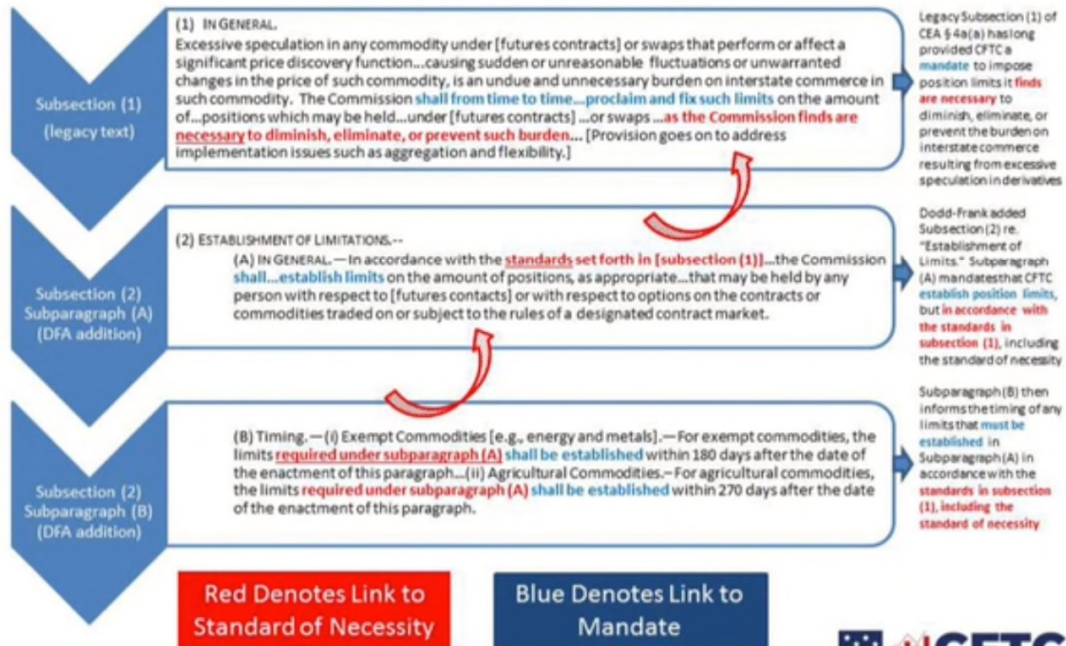
The background is a complex digital visualization. It features a dark blue color palette with various data representations: a red line graph with circular markers, a green bar chart, and a network of light blue lines connecting nodes. The overall aesthetic is futuristic and data-driven.

Historical Overview

- 2010: The first notice of proposed rulemaking was issued in 2010 and was subsequently withdrawn.
- 2011-2012: The second notice was issued, and the rules adopted, in 2011, but ultimately the rules were vacated by the US District Court for the District of Columbia because the court found that there were at least two plausible readings of the Act and, therefore, the court did not uphold the CFTC's interpretation of the statutory requirements regarding the imposition of position limits.
- 2013: The Commission issued a third notice, relating to aggregation of positions, and a fourth notice, relating to repropose position limits. The Commission then issued a revised reproposal pertaining to aggregation of positions and federal position limits, and adopted final rules on aggregation of positions.
- 2016: The Commission issued a supplemental rulemaking and another revised reproposal of its position limits regime.

Commissioner Stump: A Necessity Finding is a Prerequisite to Imposing Position Limits

Commodity Exchange Act § 4a(a): Finding Position Limits Necessary is a Prerequisite to the Mandate for Establishing Such



REFERENCED CONTRACTS



25 Core Referenced Futures Contracts

Core referenced futures contracts, which are 25 physically settled agricultural, metals, and energy futures and options on futures contracts.

- | | | |
|------------------------------------|--------------------------|---|
| (1) CBOT Corn, | (10)CME Live Cattle, | (20)NYMEX Platinum, |
| (2) CBOT Oats, | (11)CBOT Rough Rice, | (21)NYMEX Palladium, |
| (3) CBOT Soybeans, | (12)ICE Cocoa, | (22)NYMEX Henry Hub Natural Gas, |
| (4) CBOT Soybean Meal, | (13)ICE Coffee C, | (23)NYMEX Light Sweet Crude Oil, |
| (5) CBOT Soybean Oil, | (14)ICE FCOJ-A, | (24)NYMEX New York Harbor ULSD Heating Oil, and |
| (6) CBOT Wheat, | (15)ICE US Sugar No. 11, | (25)NYMEX New York Harbor RBOB Gasoline. |
| (7) CBOT KC Hard Red Winter Wheat, | (16)ICE Sugar No. 16, | |
| (8) MGEX Hard Red Spring Wheat, | (17)COMEX Gold, | |
| (9) ICE Cotton No. 2, | (18)COMEX Silver, | |
| | (19)COMEX Copper, | |

Other Referenced Contracts

- **Linked contracts**, which include futures and options on futures contracts that are directly or indirectly linked to the price of a core referenced futures contract, or to the same commodity underlying a core referenced futures contract for delivery at the same location as specified in that core referenced futures contract.
 - To provide market participants with greater clarity as to which contracts may be included in the scope of linked contracts, CFTC staff will publish and periodically update a CFTC Staff Workbook that will provide a nonexclusive list of linked contracts. In this context, an example of “indirect linkage” would include cash settled futures contracts or options on futures that settle to a referenced contract.

Other Referenced Contracts

- **Economically equivalent swaps**, which include swaps with identical material contractual specifications, terms and conditions to a referenced contract.
- The definition of economically equivalent swaps is narrower than the linked contracts definition.
- For economically equivalent swaps, identical material contractual specifications, terms and conditions include a comparison of terms relating to the underlying commodity (commodity reference price and grade differentials) and the settlement method (physical vs. cash settlement), but disregard any differences between a swap and a referenced contract due to
 - notional amount or lot size,
 - post-trade risk management (e.g., cleared vs. not cleared, or margin terms), or
 - for physically settled swaps, delivery dates diverging by less than one calendar date, except in the case of physically settled natural gas swaps, where delivery dates may diverge by less than two calendar days (which will capture penultimate natural gas swaps within the economically equivalent swap definition).
- The Proposal says that this definition is generally consistent with the EU definition, with the exception that the CFTC definition refers to “identical *material* terms.”

Contracts *Not* Included

- Under the Proposal, referenced contracts would *not* include location basis contracts, commodity index contracts, swap guarantees, and trade options that meets the requirements of CFTC Regulation 32.3.

Spot Month Limits

- All 25 core referenced futures contracts are subject to spot month limits
- **Limit levels.** The proposed limit levels (see table, below) are generally higher than the existing CFTC (for agricultural contracts) and exchange-set (for energy and metals) position limits for these contracts.
- **Spot month versus non-spot month.** Other than the nine legacy agricultural contracts (where the Proposal include any and all month limits), the Proposed limits are only for the spot month.

Non-Spot Month Limits

- The Proposal adopts federal “single month” and “all months combined” non–spot month position limits (referred to as “non–spot month limits”) only for referenced contracts based on the nine legacy agricultural contracts that are currently subject to federal position limits
- For physical commodity contracts not subject to federal limits, exchanges would generally be required to set spot month limits no greater than 25 percent of deliverable supply, but would have flexibility to submit other approaches for CFTC review. Exchanges would have more flexibility in setting limits or accountability levels outside of the spot month.
- Legacy ag contracts are subject to single-month and all-months-combined limits
- The federal single-month and all-months-combined limits will be the same
- These non–spot month limits would permit netting of all positions in referenced contracts (regardless of whether such referenced contracts were physical delivery or cash settled) when calculating a trader's positions for purposes of the proposed non–spot month limits

Proposed Limits

Agricultural

Contract	Proposed Spot Month Limit	Proposed Any/All Month Limit
<i>Legacy agricultural</i>		
CBOT Corn (C)	1,200	57,800
CBOT Oats (O)	600	2,000
CBOT Soybeans (S)	1,200	27,300
CBOT Soybean Meal (SM)	1,500	16,900
CBOT Soybean Oil (SO)	1,100	17,400
CBOT Wheat (W)	1,200	19,300
CBOT KC Hard Red Winter Wheat (KW)	1,200	12,000
MGEX Hard Red Spring Wheat (MWE)	1,200	12,000
ICE Cotton No. 2 (CT)	1,800	11,900
<i>Other agricultural</i>		
CBOT Rough Rice (RR)	800	N/A
CME Live Cattle	600/300/200 <i>(step down over spot period)</i>	N/A
ICE Cocoa (CC)	4,900	N/A
ICE Coffee C (KC)	1,700	N/A
ICE FCOJ-A (OJ)	2,200	N/A
ICE U.S. Sugar No. 11 (SB)	25,800	N/A
ICE U.S. Sugar No. 16 (SF)	6,400	N/A

Metals

Contract	Proposed Spot Month Limit	Proposed Any/All Month Limit
COMEX Copper (HG)	1,000	N/A
COMEX Gold (GC)	6,000	N/A
COMEX Silver (SI)	3,000	N/A
NYMEX Palladium (PA)	50	N/A
NYMEX Platinum (PL)	500	N/A

Energy

Contract	Proposed Spot Month Limit	Proposed Any/All Month Limit
NYMEX Henry Hub Natural Gas (NG)	2,000* <i>(see conditional limit, above)</i>	N/A
NYMEX Light Sweet Crude Oil (CL)	6,000/5,000/4,000 <i>(step down over spot period)</i>	N/A
NYMEX New York Harbor ULSD Heating Oil (HO)	2,000	N/A
NYMEX New York Harbor RBOB Gasoline (RB)	2,000	N/A

BONA FIDE HEDGING



Overview

- Bona fide hedge positions have long been exempted from speculative position limits.
- The Proposal adopts a new “general” definition of bona fide hedging transactions and position for a referenced contracts hedge position that
 - represents a substitute for cash market transactions made or to be made, or positions taken or to be taken, at a later time in a physical marketing channel (“temporary substitute test”);
 - is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise (“economically appropriate test”); and
 - arises from the potential change in the value of actual or anticipated assets, liabilities, or services (“change in value requirement”). A transaction that satisfies the general definition would also need to be an enumerated bona fide hedging transaction, or be approved as a non-enumerated transaction, both of which are discussed below.

Enumerated Exemptions

1	Hedges of unsold anticipated production
2	Hedges of offsetting unfixed-price cash commodity sales and purchases
3	Hedges of anticipated mineral royalties
4	Hedges of anticipated services
5	Cross-commodity hedges
6	Hedges of inventory and cash commodity fixed-price purchase contracts
7	Hedges of cash commodity fixed-price sales contracts
8	Hedges by agents
9	Offsets of commodity trade options
10	Hedges of unfilled anticipated requirements
11	Hedges of anticipated merchandising

Enumerated Exemptions

- Existing enumerated bona fide hedges are carried over
- New Bona Fide Hedging Exemptions:
 - Hedges of anticipated mineral royalties
 - Hedges of anticipated services
 - Offsets of commodity trade options
 - Hedges of anticipated merchandising

Non-Enumerated Bona Fide Hedging Transactions

- Exchange application process for a non-enumerated bona fide hedge
- Approval of an application would apply to both exchange and federal limits (provided that the Commission (not the staff) does not object to the exchange's determination within:
 - 10 business days or
 - 2 business days in the case of "sudden or unforeseen" bona fide hedging needs
- Traders could also apply directly to the CFTC for a non-enumerated bona fide hedging exemption

Miscellaneous

- Elimination of the Risk-Management Exemption (for physical commodities) and adoption of Pass-Through Swap Exemptions.
- Elimination of the current restriction on holding bona fide hedges exempt from the federal position limits during the last five days of the spot month period. An exchange, in its discretion, could continue to apply the five-day rule to the limits established by the exchange.
- Guidance on whether or when a trader seeking to avail itself of a bona fide hedging exemption may measure risk on a gross basis rather than a net basis.
 - Measuring risk on a gross basis will be permitted if it would be consistent with the prior practice of the trader, is consistently applied to the trader's positions, and is not intended to evade applicable limits.

Annual Renewals of Hedge Exemptions

- Market participants must reapply for an exemption at least annually by updating the original application

EFFECT ON END-USERS



Conditional Spot Month Limit for Natural Gas

- The Proposal would establish a conditional spot month limit only for Henry Hub natural gas referenced contracts that will permit traders to acquire position levels in cash-settled contracts that are five times the spot month limit for such contract (2,000 contracts) per DCM (and in economically equivalent swaps) if such positions are exclusively in cash-settled contracts and provided that:
 - for cash-settled contracts in the spot month, the trader does not hold or control positions in cash-settled contracts in the spot month that exceed the conditional position limit (10,000 contracts net long or short per DCM *plus* 10,000 contracts in economically equivalent swaps); and
 - the trader does not hold or control any positions in the physical delivery natural gas referenced contract in the spot month.

Elimination of Form 204

- The proposal eliminates Form 204
- CFTC staff would have access to cash-market information such market participants submit as part of their application to an exchange for an exemption from exchanges-set limits (filed on an annual basis)

TOPICS FOR COMMENT



Topics for Comment

- Comment Period ends on April 29, 2020
 - It is our understanding, as of this time, that staff does not intend to extend the comment period.
- Compliance date
 - The proposal would require market participants and exchanges to comply with new position limits rules, if the proposal is adopted as a final rule, no later than 365 days after publication of the final rules in the Federal Register.

Referenced Contracts

- Are the definitions of linked contracts and economically equivalent swaps sufficiently precise to allow traders and compliance staff to know with certainty which contracts must be aggregated for speculative position limits?
- How will traders monitor their swaps activities to capture economically equivalent swaps?
- Notably, the proposal states:
 - Because settlement type would be considered to be a material “contractual specification, term, or condition,” a cash-settled swap could only be deemed economically equivalent to a cash-settled referenced contract, and a physically-settled swap could only be deemed economically equivalent to a physically-settled referenced contract; however, a cash-settled swap that initially did not qualify as “economically equivalent” due to no corresponding cash-settled referenced contract (i.e., no cash-settled look-alike futures contract), could subsequently become an “economically equivalent swap” if a cash-settled futures contract market were to develop.
 - In addition, a swap that either references another referenced contract, or incorporates its terms by reference, would be deemed to share identical terms with the referenced contract and therefore would qualify as an economically equivalent swap.
- Explaining the last sentence, the proposal states: “For example, a cash-settled swap that either settles to the pricing of a corresponding cash-settled referenced contract, or incorporates by reference the terms of such referenced contract, could be deemed to be economically equivalent to the referenced contract.”

The Limits

- Has the Commission established the spot and non-spot month limits appropriately to balance the need for market liquidity and price discovery against the prevention of excessive speculation?
- Will the higher limits accommodate increased levels of speculative positions in a way that adversely affects markets?
- Should the limits be phased in?
- Notable that CFTC Commissioner Dan Berkovitz cautioned that higher limits could enable “substantially more speculative positions” with potentially adverse results. Do end-users actually think that’s the case?

Bona Fide Hedging Transactions

- Is the enumerated list of bona fide hedging transactions appropriately inclusive?
- Is the list potentially subject to abuse by traders circumventing position limits?
- Is the approval process for bona fide hedging transactions practicable and sufficiently sensitive to the timing needs of traders?
- Does the exchange approval process present legal certainty on whether current exchange-permitted practices are bona fide hedges?
- Is the process transparent?

Practical Considerations

- This is the first time swaps and futures will be aggregated for purposes of position limits.
 - Operationally, how will your firm aggregate futures and swaps?
 - Can you do this on a global scale taking into account exchange-imposed limits and limits tracked across exchanges under the CEA and ESMA?
 - How will you determine which swaps are economically equivalent swaps?
- Is the most significant barriers to effective position limit monitoring access to data both in terms of capturing the data and consolidating it?
- What exemptions are available to your trading activities? Does your trading fit within the scope of these exemptions or does the Commission need to make changes to the rule text?

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Michael M. Philipp counsels financial services clients in futures and securities transactions. He also advises them in derivatives regulation, legislation, compliance, and enforcement matters. United States and foreign exchanges and clearing organizations, banks, investment managers, proprietary trading firms, brokerage firms, and end users turn to Michael for guidance in connection with exchange-traded and over-the-counter derivative instruments. He also represents foreign exchanges and clearinghouses in their US offerings of futures and equity options products and derivatives clearing activities.

Michael has experience working with clients on issues related to the Dodd–Frank Wall Street Reform and Consumer Protection Act, as well as US Commodity Futures Trading Commission (CFTC) registration and compliance-related issues. These issues include trade practices, swap reporting and clearing, registration of swap execution facilities (SEFs), futures exchanges, clearing organizations, and swap data repositories (SDRs); retail and eligible contract participant forex (ECP FX) transactions; and futures commission merchant (FCM), swap dealer, commodity pool operator (CPO) and commodity trading advisor (CTA) registrations and compliance. Michael has experience in conducting internal compliance investigations, as well as representing clients in exchange and CFTC inquiries and proceedings, including matters involving allegations relating to disruptive trading practices, such as spoofing and market manipulation. He also provides assistance to firms that are negotiating bilateral and cleared swap documentation.

Before joining Morgan Lewis, Michael worked as an in-house attorney for the Chicago Mercantile Exchange (CME). There he served as counsel to the CME’s regulatory trade practice, compliance, and arbitration committees

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Brendan R. Kalb utilizes his in-house asset management and corporate legal experience to counsel clients on issues relating to the establishment and ongoing operation of global hedge funds, private equity funds, commodity pools, UCITS funds, hybrid customized vehicles, and separately managed accounts, along with providing regulatory, compliance, and trading advice to managers investing in various asset classes in the United States and abroad. He also has deep experience advising on the structuring and operation of various registered fund products, including liquid alternative funds.

Prior to joining Morgan Lewis, Brendan was the managing director and general counsel at AQR Capital Management, LLC, a systematic global asset management firm based in Greenwich, CT, where he was responsible for managing the full spectrum of the firm's legal affairs, including involvement in all aspects of US and overseas regulatory exams, product structuring, derivatives and operational risk management, quantitative investment practices, drafting of investment guidelines and restrictions, creation and update of compliance policies and procedures, as well as implementation and interpretation of international rules and regulations regarding trading and marketing.

Prior to joining AQR in 2004, he worked as an investment management associate in the New York office of an international law firm, where he regularly represented registered investment companies, investment advisers, commodity pool operators, commodity trading advisors, and broker-dealers. Earlier in his career, Brendan gained experience as an associate in the financial services and investment management department of a regional law firm, where he dealt in related matters with respect to investment advisers, including commodity pool operation, management company structuring, fund marketing and advertising, employment agreements, joint ventures, and seed capital arrangements.

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Levi McAllister advises clients in the natural gas, petroleum, and electric power sectors of the energy industry. Levi's practice focuses on compliance with regulatory provisions administered by the Federal Energy Regulatory Commission (FERC), the Commodity Futures Trading Commission (CFTC), and state public utility commission that affect the energy industry. He also advises clients on transactional matters concerning acquisitions, divestitures, mergers, and development of gas, petroleum, and electric generating infrastructure, with a particular focus on energy storage resource facilities.

In the natural gas and petroleum sectors, Levi handles administrative litigation before FERC for shippers affected by the rates, terms, and conditions of service applicable to transport on natural gas, crude oil and liquids pipelines. He represents entities that trade, produce, deliver, or ship natural gas, crude oil, and liquids in matters concerning pipeline safety and storage and the related regulations and requirements administered by the Pipeline and Hazardous Materials Safety Administration. Levi also counsels clients engaged in domestic and international transactional matters concerning natural gas, crude oil, or liquids infrastructure in negotiating transportation, storage, and commodity purchase and sale agreements.

In the electric power sector, Levi counsels electric utilities on issues arising in the development or procurement of energy storage resources. He has assisted both investor-owned utilities and project developers in drafting and negotiating power purchase and tolling agreements for the procurement of energy storage resources. In addition, Levi advises clients on issues pertaining applicable organized wholesale market rules and participation in those markets, the development, acquisition or divestiture of electric generation and electric storage resources, and compliance with FERC's rules administered under the Federal Power Act (FPA).

Levi's practice reflects significant experience advising clients subject to FERC and CFTC investigations of physical and financial energy commodity trading. He advises clients on lawful gas, power, and petrochemical trading strategies and advocates before FERC in non-public and litigated proceedings alleging fraudulent or manipulative trading activity in violation of the Natural Gas Act (NGA) and FPA, and before the CFTC in non-public and litigated proceedings alleging fraudulent or manipulative futures and derivatives trading in violation of the Commodity Exchange Act (CEA). Levi draws on this experience to develop company compliance programs, pursue internal investigations, and develop energy compliance training programs.

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Katherine Dobson Buckley focuses her practice on the application of derivatives in trading, legal, and regulatory issues. She represents hedge funds, investment advisors, mutual funds, endowments and other market participants in complex cross-border and US futures, derivatives, prime brokerage, custodial, and commodities transactions.

Katherine has experience with International Swaps and Derivatives Association Master Agreements (ISDAs), Prime Brokerage Agreements, Master Repurchase Agreements (MRAs), Master Securities Loan Agreements (MSLAs), and Master Securities Forward Transaction Agreements (MSFTAs), as well as clearing, custody, options and futures account agreements, and related trading documentation. She also advises financial firms and other market participants on US and cross-border regulatory issues, including registration and exemption requirements with the US Commodity Futures Trading Commission (CFTC) and requirements of the Dodd-Frank Act provisions applicable to derivatives transactions.

Katherine spent time on secondment at the general counsel division of Credit Suisse, where she negotiated sophisticated derivative transactions. Katherine also worked as a law clerk for the US Securities and Exchange Commission, researching regulatory and securities fraud issues.

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Jedd H. Wider focuses on global private investment funds and managed accounts, particularly global hedge, private equity, secondary, and venture capital funds. As co-leader of the global hedge funds practice, he represents leading financial institutions, fund managers, and institutional investors in their roles as fund sponsors, placement agents, and investment entities. He assists clients through all stages of product development and capital raising as well as customized arrangements, seed and lead investor arrangements, and joint ventures. He specializes in all aspects of secondary transactions, and complex financial structurings.

Jedd concentrates on all aspects of bespoke fund products and arrangements including funds of one and managed accounts and regularly advises clients on all aspects of regulatory compliance.

Members of the international media often seek out Jedd for his views on the hedge fund and private equity fund industries and capital markets. His analysis can be found in US and international publications, including The Wall Street Journal, The Economist, and Financial Times, as well as on television networks such as Bloomberg and CNN.

Jedd lectures and serves as a panelist on private investment fund topics for trade programs and organizations around the world. He has delivered speeches and presentations to numerous private fund conferences such as the Hedge Fund Institutional Forum, Dow Jones Private Equity Analyst Limited Partners Summit, Endowments & Foundations Roundtable, Association of Life Insurance Counsel, National Association of Public Pension Fund Attorneys (NAPPA), West Legalworks, InfoVest21 Hedge Fund Conference, the Annual Euromoney Summit of European Hedge Funds in London, Capital Roundtable Fund Conferences, the Annual International Conference on Private Investment Funds in London, the Wharton Private Equity and Venture Capital Conference, the On Point Investors and Hedge Fund Risk Summit, and the Lazard Capital Markets Hedge Fund Conference.

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Leveraging her experience as a lawyer at the US Commodity Futures Trading Commission (CFTC), Sarah V. Riddell advises domestic and foreign exchanges, derivatives clearing organizations, swap execution facilities, and other financial institutions on a broad range of regulatory matters, including CFTC registration and compliance. Sarah also assists hedge fund clients with CFTC and National Futures Association (NFA) registration, compliance, and examination questions. While at the CFTC, Sarah worked on Dodd-Frank-related rulemakings and participated in examinations of derivatives clearing organizations, including those designated as systemically important.

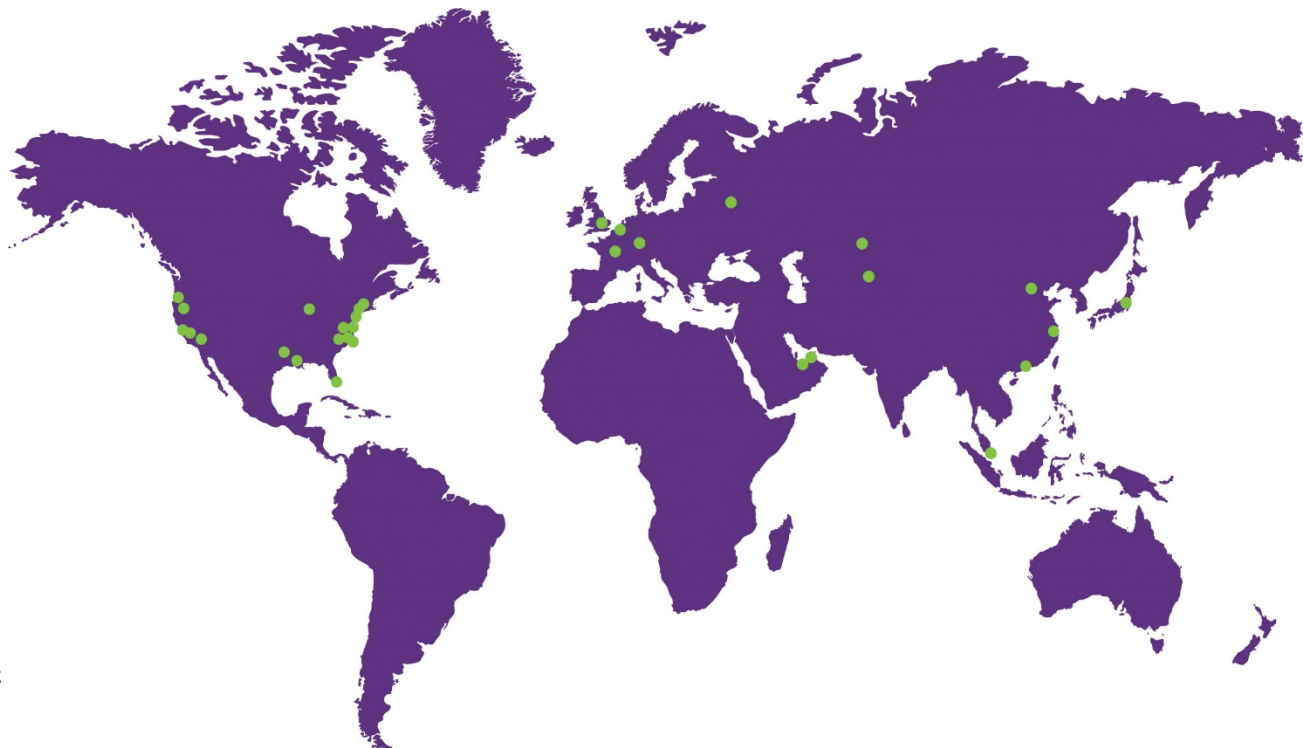
In addition, Sarah helps clients understand and comply with the NFA's Information Systems Security Program interpretive notice and the New York Department of Financial Services Cybersecurity Regulation, as well as related cybersecurity questions. Sarah has assisted clients who have experienced cybersecurity attacks, assisted in the cybersecurity investigation including an assessment of the forensic analysis about the incident, and drafting and submitting notifications to customers and regulatory agencies.

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