



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

December 12, 2022

Matthew F. Kluchenek
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606

Re: **Walleye Capital LLC**
Waiver of disqualification pursuant to Rule 506(d)(2)(ii) of Regulation D
U.S. Commodity Futures Trading Commission order CFTC Docket No. 23-04

Dear Mr. Kluchenek:

This is in response to your letter dated December 12, 2022 (“Waiver Letter”), written on behalf of Walleye Capital LLC (“Walleye”) and constituting an application for a waiver of disqualification under Rule 506(d)(2)(ii) of Regulation D under the Securities Act of 1933 (“Securities Act”). In the Waiver Letter, Walleye requests relief from any disqualification that will arise as to Walleye under Rule 506 of Regulation D under the Securities Act as a result of the U.S. Commodity Futures Trading Commission entered order CFTC Docket No. 23-04 (the “CFTC Order”) instituting proceedings pursuant to Sections 6(c) and (d) of the Commodity Exchange Act (the “Act”), ordering that Walleye cease and desist from violating Section 4c(a)(5)(C) of the Act.

Assuming that Walleye complies with the CFTC Order, we have determined that Walleye has made a showing of good cause under Rule 506(d)(2)(ii) of Regulation D that it is not necessary under the circumstances to deny reliance on Rule 506 of Regulation D by reason of the entry of the CFTC Order. Accordingly, the relief requested in the Waiver Letter is hereby granted on the condition that Walleye complies with the terms of the CFTC Order. Any different facts from those represented in the Waiver Letter or Walleye’s failure to comply with the terms of the CFTC Order would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/

Tim Henseler
Chief, Office of Enforcement
Liaison
Division of Corporation Finance

December 12, 2022

Timothy Henseler, Esq.
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Re: *Walleye Capital LLC – Regulation D*

Dear Mr. Henseler,

We are writing on behalf of Walleye Capital LLC (“WC” or the “Firm”) in connection with the Firm’s settlement with the U.S. Commodity Futures Trading Commission (“CFTC”) relating to *In the Matter of Walleye Capital LLC*. The settlement resulted in an Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act (“CEA”), Making Findings, and Imposing Remedial Sanctions (the “Order”) against WC.

We understand that the Order will result in disqualifying private investment funds for which WC acts as investment manager from relying on Rule 506 of Regulation D under the Securities Act pursuant to Rule 506(d)(1)(iii)(B) of Regulation D under the Securities Act of 1933 (“Securities Act”), which provides that issuers and certain covered persons may not rely on Rule 506 of Regulation D when the issuer and/or covered persons are, in relevant part, the subject of a CFTC final order based on a violation of any law or rule that prohibits “fraudulent, manipulative, or deceptive conduct” entered within ten years before a sale. Accordingly, as discussed below, absent a waiver, WC, and the pooled investment funds for which it serves as investment manager, will be disqualified from claiming reliance on the exemptions from registration set forth in Regulation D for a period of ten years after entry of the Order.

On behalf of WC, we hereby respectfully request a waiver from the U.S. Securities and Exchange Commission (“SEC” or “Commission”) of any disqualification that will arise pursuant to Rule 506 of Regulation D with respect to WC as a result of the entry of the Order.

BACKGROUND

WC has submitted an Offer of Settlement that will agree to the Order, which has been presented by the staff to the CFTC.

WC is registered with the CFTC as a commodity pool operator. In addition, WC is registered with the SEC as an investment adviser.

The Order will find that a former employee of WC (“Trader A”) engaged in conduct that

violated CEA Section 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), and that WC is derivatively liable for Trader A's misconduct via CEA Section 2(a)(1)(B), 7 U.S.C. § 2(a)(1)(B) and CFTC Regulation 1.2, 17 C.F.R. § 1.2 (2021).¹ Under CEA Section 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), it is unlawful for "[a]ny person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that . . . is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." The misconduct at issue in the Order involved Trader A entering orders in soybean, soybean meal, and soybean oil futures contracts with the intent to cancel those orders before execution. Under CEA Section 2(a)(1)(B) and CFTC Regulation 1.2, principals are strictly liable for the actions of their agents, including their employees.

Without admitting or denying the findings in the Order, except as to the CFTC's jurisdiction over WC and the subject matter of the proceeding, WC will consent to the issuance of the Order and to (i) cease and desist from violating CEA Section 4c(a)(5)(C) and (ii) pay a civil monetary penalty in the amount of five hundred fifty thousand dollars (\$550,000).

DISCUSSION

As the investment manager of pooled investment funds that rely on Regulation D under the Securities Act—specifically Rule 506(b) thereunder—WC's disqualification will cause disqualification for WC's pooled investment funds (which, as discussed below, operate as "open-end" funds that conduct continuous offerings) to conduct private offerings of their interests in reliance on the exemptions set forth in Regulation D.

As of the date of this letter, WC's pooled investment funds that currently rely on Regulation D include Red Pasture LLC, Sea Hawk Multi-Strategy Fund LP and Sea Hawk Multi-Strategy Fund Ltd., Walleye Investments Fund LLC, Walleye Opportunities Fund LP, and Walleye Opportunities Fund Ltd. (collectively, the "Funds"). Each of these Funds is an "open-end" private fund; open-end private investment funds, such as the Funds, conduct continuous offerings and admit new investors (or additional investments by existing investors) on a periodic basis (e.g., monthly or quarterly, in the case of the Funds) while also permitting investors to redeem their investment or withdraw from the fund on a similar periodic basis. Each of the Funds relies on the exception from the definition of "investment company" provided in Section 3(c)(7) of the Investment Company Act of 1940, which, among other things, requires that each Fund not make a public offering of its securities. In order to comply with the Securities Act with respect to the continuous offerings of the Funds, the Funds each rely on Rule 506(b). In addition, WC is currently in the process of forming a new fund, which will rely on Rule 506(b) or (c). That fund is scheduled to launch during Q4 of 2022.

The Commission, or the Division of Corporation Finance ("Division"), acting pursuant to

¹ CEA Section 2(a)(1)(B), 7 U.S.C. § 2(a)(1)(B), and CFTC Regulation 1.2, 17 C.F.R. § 1.2 (2021), provide that the act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his or her employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust.

its delegated authority, has the authority to waive this disqualification upon a showing of good cause that such disqualification is not necessary under the circumstances.² WC respectfully requests that the Commission waive any disqualifying effects that the Order will have under Rule 506 of Regulation D as a result of its entry as to WC, on the following grounds:

1. *Nature of Violations in the Order and That They Did Not Involve the Offer and Sale of Securities*

The misconduct described in the Order relates to “spoofing” activity by Trader A, then an employee of WC, in soybean-related futures contracts, and WC’s vicarious liability for the actions of Trader A, its agent pursuant to CEA Section 2(a)(1)(B), 7 U.S.C. § 2(a)(1)(B) and CFTC Regulation 1.2, 17 C.F.R. § 1.2 (2021). As noted in the Order, this violation is a “strict liability” offense, and arises by virtue of the fact that “Trader A’s spoofing was committed within the scope of Trader A’s employment with WC.” The violation with respect to WC does not involve any offer or sale of securities, but only futures contracts subject to the regulation of the CFTC.

2. *The Misconduct Does Not Involve a Criminal Proceeding but Does Involve a Violation of a Scierter-Based Statutory Provision Imputed to WC*

The violations in the Order with respect to WC are not criminal in nature. That said, the misconduct by the WC employee that was imputed to WC under the CEA is a scierter-based statutory provision. Because the misconduct did not involve the offer or sale of securities, the higher burden to establish good cause discussed in the Division of Corporation Finance guidance on waivers is not triggered.³

3. *The Individual Responsible for the Underlying Misconduct is no Longer Associated with WC*

In considering who was responsible for the misconduct, the Division has stated that it would also consider, among other factors, whether (1) “the misconduct reflects more broadly on the entity as a whole” and (2) “the tone at the top of the party seeking the waiver condoned, encouraged or did not address the misconduct, or actions or omissions by the party seeking the waiver, or any of its affiliates, obstructed the regulatory or law enforcement investigation.”⁴

Here, pursuant to CEA Section 2(a)(1)(B) and CFTC Regulation 1.2, WC is responsible for the misconduct of its agents. The conduct at issue in the Order relates the misconduct of a single employee that is no longer employed by WC or exerts any influence on the operation of WC or any pooled investment fund managed by WC. Moreover, the Order will not indicate that WC in any way condoned, supported, or encouraged the misconduct or otherwise allege any issues with any “tone at the top.” Indeed, that is consistent with the fact that the Order will find WC

² See Rule 506(d)(2)(ii).

³ See Division of Corporation Finance, Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D (Mar. 13, 2015).

⁴ See *Id.*

liable under the CEA's strict liability provision.

4. *Duration of the Misconduct*

The misconduct described in the Order is limited to a short period of time—December 2018 through May 2019.

5. *Remedial Steps Undertaken by WC*

WC has taken remedial steps to address the misconduct at issue in the Order and other similar conduct that could give rise to manipulative or disruptive trading practices. Specifically, WC's remedial actions include the following:

- On October 3, 2022, the Firm commenced its annual online compliance training for all employees (the "2022 Training"). That training addressed disruptive trading practices, including spoofing and manipulation, and included new content that was not addressed in the Firm's 2021 compliance training—namely, the type of conduct alleged with respect to Trader A (e.g., cross-market spoofing). This training will occur on an annual basis or as developments require. Further, on or around October 27, 2022, the Firm will conduct an additional training session for relevant personnel that is specific to disruptive trading practices, including spoofing and manipulation. The training will expand on the concepts addressed in the 2022 Training and include, among other things, discussions of various trading scenarios. The training will be conducted in a live session (via a video broadcast to all the Firm's offices) and attendance will be mandatory. This training will occur on an annual basis or as developments require.
- WC has updated its derivatives-related compliance policies and procedures, including its Commodity Pool Operator (CPO) Compliance Manual and Futures Trading Compliance Manual. In particular, the Futures Trading Compliance Manual has been revised to further address disruptive trading practices, including spoofing and manipulation, and now addresses various forms of cross-calendar, cross-product and cross-market spoofing schemes. It also includes an enhanced discussion of the role of trade surveillance by the Firm and exchanges, which surveillance is designed to detect and prevent such activity.
- WC enhanced its trading surveillance system, including the implementation of tightened parameters for identifying potentially disruptive conduct. For example, the Firm tightened its surveillance parameters relating to order placements and cancellations in single commodity futures contracts and related commodity futures contracts in an effort to better identify potential spoofing conduct. Although WC acknowledges that the newly enhanced parameters would not have prevented Trader A's misconduct, WC believes that the newly enhanced parameters, if applied during the relevant time period, would have detected Trader A's misconduct. Under WC's trading surveillance system, trading activity that exceeds

those parameters is automatically flagged for review by WC's Compliance Department.

WC thus has taken concrete steps to remediate the misconduct at issue in the Order.

6. *Disqualification Would Have a Material Impact on WC, the Funds, and their Investors*

WC currently acts, and in the future desires to continue to act, as investment manager to the Funds, which are offered in reliance on Rule 506(b) of Regulation D. As explained above, the Funds are offered and sold on a continuous basis in reliance on Rule 506(b) under Regulation D.⁵ WC's disqualification would have an immediate and ongoing adverse impact on WC, the Funds, and the current investors in the Funds.

WC's Funds include the Walleye Opportunities Fund, which, as of Dec. 31, 2021, had approximately \$3.8 billion in regulatory assets under management (and all of WC's private investment funds, in the aggregate, had \$7.5 billion in regulatory assets under management as of Dec. 31, 2021). As explained above, each of the Funds is an "open-end" fund that is offered and sold on a continuous basis, accepting new investors and permitting redemptions each month or quarter. Private investment funds, such as the Funds (and especially those private investment funds that are "open-end" funds), routinely rely on the certainty afforded by Rule 506(b) in order to ensure their securities offerings remain exempt from registration under the Securities Act. An inability of the Funds to rely on Rule 506(b) would introduce a measure of risk to the Funds and their investors. Further, any disqualification would also mean that WC could not launch new pooled investment funds that seek to rely on Rule 506(b), including the fund currently in development and scheduled for launch during Q4 2022.

To the extent the Funds are able to continue offering interests without reliance on Regulation D, WC nonetheless expects that it would involve a substantial increase in costs to comply not only with the requirements of an alternative exemption under the Securities Act of 1933, but also, importantly, under state "blue sky" laws. The Funds currently have investors in 33 states.

The Funds and their investors are likely to bear additional, material costs related to complying with Section 4(a)(2) and state "blue sky" laws. In addition, some prospective investors may not wish to invest in the Funds, and some third party intermediaries may not wish to be involved in transactions with the Funds, if the Funds rely on Section 4(a)(2) of the Securities Act due to the lack of certainty it affords. As to WC itself, it believes it would suffer significant reputational harm if it is unable to manage pooled investment funds that rely on Regulation D.

The negative impacts discussed above would present a disproportionate and significant hardship to WC, the Funds and its investors in light of the underlying misconduct at issue.

⁵ In addition, WC is currently contemplating the formation and launch of additional open-end funds, which offerings would also rely on Rule 506(b) or (c).

REQUEST FOR WAIVER

In light of the nature of the violations in the Order, the fact that the underlying misconduct did not involve a securities offering, the remedial measures WC has taken, and the immediate impact of the failure to receive a waiver on the Funds' ongoing securities offerings, WC respectfully submits that it has shown good cause that relief from the Rule 506 disqualification should be granted.

Accordingly, we respectfully urge the Division, on behalf of the Commission, or the Commission, pursuant to Rule 506(d)(2)(ii), to waive the disqualification provisions in Rule 506 under the Securities Act applicable to WC as a result of the entry of the Order.

We appreciate your consideration of this request. Please feel free to contact me with any questions.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Matthew Kluchenek". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Matthew Kluchenek

cc: Jim Moeller
Adil Elamri
Adam Kanter