



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 13-04
No-Action
March 29, 2013
Division of Swap Dealer and Intermediary Oversight

Re: Staff Positions – Relief for Additional Agent Affiliates from Registration as an Introducing Broker under Section 4d or a Commodity Trading Advisor under Section 4m of the Commodity Exchange Act

Pursuant to CFTC Letter No. 12-70 (Dec. 31, 2012) (“Letter 12-70”), the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”) granted relief to Agent Affiliates (as defined in Letter 12-70¹) from the requirement to register as an IB or a CTA in connection with the Agent Affiliates’ Affiliate Support Activities on behalf of an Affiliate SD Counterparty in the circumstances and subject to the conditions set forth in Letter 12-70.² By this letter, the Division is extending the relief provided by Letter 12-70 to Agent Affiliates that engage in Affiliate Support Activities on behalf of certain affiliates not yet registered as an SD.

In Letter 12-70 the Division stated, among other things, that it would not recommend that the Commission commence an enforcement action against an Agent Affiliate or any employee thereof for failure to register as an IB or a CTA if the Agent Affiliate or employee engages in Affiliate Support Activities on behalf of an Affiliate SD Counterparty in connection with a swap entered or to be entered into by the Affiliate SD Counterparty. The relief was subject to a number of conditions, including, but not limited to, that the Agent Affiliate is registered or licensed with, or subject to regulation by, a financial services, prudential, or banking regulator in certain jurisdictions; that the Agent Affiliate is not subject to a Statutory Disqualification, the employee is not subject to a Statutory Disqualification, and no person in the supervisory chain of command of the employee is subject to a Statutory Disqualification; and that the Agent Affiliate and the Affiliate SD Counterparty execute in writing an undertaking by which they each agree to be jointly and severally liable for any violation of the CEA or Commission regulations by any employee of the Agent Affiliate engaged in any Affiliate Support Activity on behalf of the Affiliate SD Counterparty.

¹ Terms used but not otherwise defined in this letter have the meaning ascribed to such terms in Letter 12-70.

² Letter 12-70 is available on the Commission’s Web site, <http://www.cftc.gov>.

The Division limited the IB and CTA registration relief it provided to Agent Affiliates in Letter 12-70 to circumstances in which the Agent Affiliate engages in Affiliate Support Activities on behalf of an Affiliate SD Counterparty. The Division did not, however, provide similar relief where the Agent Affiliate engages in Affiliate Support Activities on behalf of an Affiliate DMD Counterparty.³

In response to additional concerns that have been raised with the Division subsequent to the issuance of Letter 12-70, the Division believes it is appropriate to grant relief from the requirement to register as an IB or a CTA to Agent Affiliates who engage in Affiliate Support Activities on behalf of an affiliate as counterparty to a swap, where (1) the affiliate has commenced application for registration as an SD through the filing of a completed Form 7-R or (2) the affiliate's swap dealing has exceeded the *de minimis* amount set forth in Regulation 1.3(ggg)(4)(i) such that the affiliate is no longer able to take advantage of the exception set forth in Regulation 1.3(ggg)(4)(i), but is nonetheless not within the definition of the term "swap dealer" pursuant to Regulation 1.3(ggg)(4)(iii)⁴ (each an "Affiliate Pending SD Counterparty"), subject to the conditions set forth below.⁵

³ See Letter 12-70, note 8. Of particular relevance to the relief being granted by this letter, the term "Affiliate DMD Counterparty," as used in Letter 12-70, refers to an affiliate counterparty that is excluded from the definition of the term "swap dealer" under the exception in Commission Regulation 1.3(ggg)(4) for certain persons who engage in a *de minimis* amount of swap dealing.

In granting relief in Letter 12-70, the Division distinguished between Agent Affiliates and Agent SDs with respect to their Affiliate Support Activities on behalf of Affiliate DMD Counterparties. In the case of Agent SDs, the Division *did* grant relief from the requirement to register as an IB or a CTA, subject to certain conditions, where an Agent SD (or its employee) engages in Affiliate Support Activities on behalf of an Affiliate DMD Counterparty.

⁴ Regulation 1.3(ggg)(4)(iii) provides that:

A person that has not registered as a swap dealer by virtue of satisfying the requirements of this paragraph (ggg)(4), but that no longer can take advantage of that *de minimis* exception, will be deemed not to be a swap dealer until the earlier of the date on which it submits a complete application for registration pursuant to Section 4s(b) of the Act, 7 U.S.C. 6s(b), or two months after the end of the month in which that person becomes no longer able to take advantage of the exception.

The CEA and the Commission's regulations issued thereunder may be accessed through the Commission's Web site.

⁵ While to date the Division has received but one formal request for the relief it is granting herein, in light of the purpose and nature of the relief – *i.e.*, to avoid undue business disruption

Accordingly, the Division will not recommend that the Commission commence an enforcement action against an Agent Affiliate or any employee thereof for failure to register as an IB or a CTA if the Agent Affiliate or employee engages in Affiliate Support Activities on behalf of an Affiliate Pending SD Counterparty in connection with a swap entered or to be entered into by the Affiliate Pending SD Counterparty, subject to the following conditions:⁶

1. (a) The Agent Affiliate is registered or licensed with, or subject to regulation by, a financial services, prudential, or banking regulator (including a self-regulatory organization) in the United States, a country that is a member of the European Union, Switzerland, Canada, Japan, Hong Kong, Singapore, or Australia; and

(b) The Agent Affiliate and the Affiliate Pending SD Counterparty are “majority-owned affiliates” as described in Regulation 1.3(ggg)(6); and

2. The Agent Affiliate is not subject to a Statutory Disqualification, the employee is not subject to a Statutory Disqualification, and no person in the supervisory chain of command of the employee is subject to a Statutory Disqualification; and

3. (a) The Agent Affiliate and the employee provide commodity interest trading advice in a manner solely incidental to the conduct of the business of the Agent Affiliate for which it is subject to regulation under Condition 1(a); and

(b) Neither the Agent Affiliate nor the employee is otherwise engaged in activity that would require registration as an IB, CTA, or AP thereof; and

4. The Agent Affiliate and the Affiliate Pending SD Counterparty execute in writing an undertaking by which they each agree to be jointly and severally liable for any violation of the CEA or Commission regulations by any employee of the Agent Affiliate engaged in any Affiliate Support Activity on behalf of the Affiliate Pending SD Counterparty, and the Agent Affiliate consents to the jurisdiction of the Commission to investigate and take enforcement action against the Agent Affiliate or any employee of the Agent Affiliate engaged in any Affiliate Support Activity on behalf of the Affiliate Pending SD Counterparty for any violation of the CEA or Commission regulations by such employee. The Affiliate Pending SD Counterparty must maintain the undertaking at its main business office; and

by providing time-limited relief – the Division believes that the relief should broadly be available to Agent Affiliates engaging in Affiliate Support Activities on behalf of Affiliate Pending SD Counterparties, as provided for below.

⁶ Conditions 1 through 4 closely follow conditions set forth in Letter 12-70.

5. The Affiliate Pending SD Counterparty is registered as an SD⁷ on a date (“Registration Date”) that is no later than two months after the earlier of: (a) the end of the month in which the Affiliate Pending SD Counterparty is no longer able to take advantage of the exception in Regulation 1.3(ggg)(4)(i); or (b) the end of the month in which the Affiliate Pending SD Counterparty has commenced application for registration as an SD by filing a complete Form 7-R with the National Futures Association;⁸ and

6. (a) The Agent Affiliate has, on or before December 31, 2012, engaged in Affiliate Support Activities on behalf of the Affiliate Pending SD Counterparty⁹ and;

(b) The affiliate counterparty for whom the Agent Affiliate is providing Affiliate Support Activities is an Affiliate Pending SD Counterparty, as defined above, on or before December 31, 2013.

The relief granted herein is temporary in nature. That is, once an Affiliate Pending SD Counterparty registers as an SD, an Agent Affiliate will no longer be able to claim the relief provided herein with respect to the Affiliate Pending SD Counterparty.¹⁰ Moreover, the relief granted herein is available only to Agent Affiliates with respect to Affiliate Support Activities on behalf of an Affiliate Pending SD Counterparty, but not with respect to such activity on behalf of other Affiliate DMD Counterparties.

This letter, and the positions taken herein, represent the positions of the Division only, and do not necessarily represent the positions or views of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse any person relying on it from compliance with any other applicable requirement contained in the

⁷ For purposes of this letter and the relief provided herein, provisional registration as an SD under Regulation 3.2(b)(3)(i) will be considered “registered.”

⁸ Accordingly, if the Affiliate Pending SD Counterparty fails to be registered as an SD by the Registration Date, the relief will not be available (retroactively) with respect to any Affiliate Support Activity by the Agent Affiliate, regardless of whether the Affiliate Pending SD Counterparty’s failure to so register would otherwise be a violation of the CEA or the Commission’s regulations.

⁹ Thus, for example, if the Agent Affiliate or the Affiliate Pending SD Counterparty for which the Agent Affiliate wishes to provide Affiliate Support Activities is an entity formed after December 31, 2012, the relief granted by this letter would not be available to that Agent Affiliate.

¹⁰ Although upon registration of the Affiliate Pending SD Counterparty as an SD, the Agent Affiliate may be able to avail itself of the relief granted under Letter 12-70 to an Agent Affiliate who engages in Affiliate Support Activities on behalf of an Affiliated SD Counterparty, the relief provided herein is not contingent upon the availability of that relief to the Agent Affiliate, and the relief granted herein will terminate in any case upon the registration of the Affiliate Pending SD Counterparty.

CEA or in the Commission's regulations issued thereunder, including all antifraud provisions of the CEA and the regulations.

If you have any questions, please contact Barbara S. Gold, Associate Director, or Israel J. Goodman, Special Counsel, at (202) 418-6700.

Very truly yours,

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