



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5977
Facsimile: (202) 418-5407
gbarnett@cftc.gov

Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 12-47
No-Action
December 10, 2012
Division of Swap Dealer and Intermediary Oversight

Barbara Wierzynski
General Counsel
Futures Industry Association
2001 Pennsylvania Avenue NW
Suite 600
Washington, DC 20006-1823

Re: Request for Time-Limited No-Action Relief for Certain Futures Commission Merchants from Compliance with Certain Requirements of Commission Regulation 3.3 Relating to Annual Reports by Chief Compliance Officers

Dear Ms. Wierzynski:

This letter is in response to your letter, dated November 20, 2012, to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the U.S. Commodity Futures Trading Commission (“Commission”), on behalf of certain futures commission merchant (“FCM”) member firms of the Futures Industry Association (“FIA”) for whom you requested no-action relief with respect to compliance with certain requirements in Commission Regulation 3.3 relating to the Annual Report (defined below). Your request for no-action relief was limited to FCMs that (1) were registered with the Commission as of June 4, 2012; and (2) are currently regulated by a U.S. prudential regulator or registered with the U.S. Securities and Exchange Commission (“Covered Firms”).

Regulatory Background

Section 732 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹ added Section 4d(d) of the Commodity Exchange Act (“Act”),² which requires each FCM to designate an individual to serve as its chief compliance officer (“CCO”), who must perform the duties and responsibilities required by Commission Regulations. Pursuant to that authority, the Commission has promulgated Commission Regulation 3.3, which, among

¹ Pub. L. 111-203, 124 Stat. 1376 (2010).

² 7 U.S.C. § 1 *et seq.*

other things, requires the designation of a CCO meeting certain qualifications and sets forth the duties and responsibilities of a CCO.³

One of the duties of a CCO of an FCM is to prepare and sign an annual report (“Annual Report”) required under paragraphs (e) and (f) of Commission Regulation 3.3.⁴ The Annual Report must cover the most recently completed fiscal year of the FCM, and must, at a minimum:

- Contain a description of the written policies and procedures, including the code of ethics and conflicts of interest policies, of the FCM;
- Review each applicable requirement under the Act and Commission Regulations, and with respect to each:
 - Identify the policies and procedures that are reasonably designed to ensure compliance with the requirement under the Act and Commission Regulations;
 - Provide an assessment as to the effectiveness of these policies and procedures; and
 - Discuss areas for improvement, and recommend potential or prospective changes or improvements to its compliance program and resources devoted to compliance;
- List any material changes to compliance policies and procedures during the coverage period for the report;
- Describe the financial, managerial, operational, and staffing resources set aside for compliance with respect to the Act and Commission Regulations, including any material deficiencies in such resources; and
- Describe any material non-compliance issues identified, and the corresponding action taken.⁵

The Annual Report must also include a certification by the CCO or chief executive officer (“CEO”) of the FCM that states that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the information contained in the Annual Report is accurate and complete.⁶

Prior to furnishing the Annual Report to the Commission, the CCO must provide the Annual Report to the board of directors or the senior officer of the FCM for its review, and record such action in the board minutes or otherwise, as evidence of compliance with the requirement.⁷

³ Commission Regulation 3.3 is applicable to FCMs, as well as to swap dealers and major swap participants.

⁴ 17 CFR 3.3(d)(6).

⁵ 17 CFR 3.3(e).

⁶ 17 CFR 3.3(f)(3).

⁷ 17 CFR 3.3(f)(1).

The Annual Report generally must be furnished electronically to the Commission not more than 90 days after the end of the fiscal year of the FCM, simultaneously with the submission of Form 1-FR-FCM, the Financial and Operational Combined Uniform Single Report (“FOCUS Report”), or the financial condition report, as required under section 4s(f) of the Act (“Financial Condition Report”), as applicable.⁸ However, the actual date on which the first Annual Report must be filed by an FCM may vary, depending on whether the FCM is registered with the Commission as of June 4, 2012, currently regulated by a U.S. prudential regulator, or currently registered with the SEC.

With respect to FCMs that (1) are registered with the Commission as of June 4, 2012; and (2) were currently regulated by a U.S. prudential regulator or registered with the SEC, the Commission stated in the Adopting Release for Commission Regulation 3.3 that such FCMs must comply with Commission Regulation 3.3 by September 30, 2012.⁹ Thus, as of September 30, 2012, pursuant to Commission Regulation 3.3(f)(2), such FCMs must electronically furnish the Annual Report to the Commission within 90 days after the end of the fiscal year of such FCMs, simultaneously with the submission of Form 1-FR-FCM, the FOCUS Report, or the Financial Condition Report, as applicable.¹⁰

Requested No-Action Relief

On behalf of the Covered Firms, you have requested no-action relief for each Covered Firm that fails to be fully compliant with Commission Regulation 3.3, if the Annual Report prepared by such Covered Firm’s CCO for the fiscal year ending on or before March 31, 2013, does not satisfy the requirements of Commission Regulation 3.3(e) in its entirety, provided that it satisfies the following requirements:

- The Annual Report contains the following information:
 - An introduction and an executive summary that contains:
 - A description of the Covered Firm’s business.
 - Identification of the CEO and CCO of the Covered Firm.
 - The time period of the Annual Report (*i.e.*, the full fiscal year of the Covered Firm).

⁸ 17 CFR 3.3(f)(2).

⁹ Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 41214, 42166 (July 12, 2012).

¹⁰ Pursuant to 17 CFR 240.17a-5(d), if such FCMs are currently registered with the SEC as securities brokers or dealers, then such FCMs must electronically furnish the Annual Report for the fiscal year to the Commission simultaneously with the submission of Form 1-FR-FCM or the FOCUS Report, as applicable, no later than 60 days after the date of such FCM’s audited financial statements are required to be submitted to the SEC, or, if applicable and if submitted prior to the submission of Form 1-FR-FCM or the FOCUS Report, the submission of the Financial Condition Report. *See* 17 CFR 3.3(f)(2); 17 CFR 1.10(b); 17 CFR 1.10(h); and 17 CFR 240.17a-5(d).

- Policies and procedures reasonably designed to ensure compliance with customer protection rules.¹¹
 - Identification and description of customer protection policies and procedures.
 - An assessment of effectiveness of such policies and procedures as of the Covered Firm's fiscal year end.
 - Discussion of areas for improvement of aforementioned policies and procedures.
 - Material noncompliance issues and corresponding actions taken in relation to customer protection rules.¹²
 - Description of material noncompliance issues.
 - Corrective actions.
 - CEO and/or CCO Certification(s) that states the following: "To the best of my knowledge and reasonable belief and under penalty of law, the information contained in the attached annual report pertaining to the period from October 1, 2012 through [fiscal year end] is accurate and complete."
- The Annual Report covers the full fiscal year of the Covered Firm, but the CEO/CCO certification is limited to the period from the October 1, 2012, through the Covered Firm's fiscal year end.
 - The Annual Report addresses the Commission's customer protection rules.¹³
 - The Annual Report is provided to the Covered Firm's board of directors or senior officer and furnished to the Commission no later than 90 days after the Covered Firm's fiscal year end. With respect to Covered Firms that are also securities brokers or dealers ("BDs") registered with the SEC, there is no requirement that the Annual Report be furnished to the Commission simultaneously with the submission of Form 1-FR-FCM, the FOCUS Report, or the Financial Condition Report.

In your request for no-action relief, you expressly limited such request to Covered Firms.

¹¹ For purposes of this no-action letter, the following sections of the Commission's Regulations will be considered customer protection rules for all Covered Firms: 1.10, 1.11, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 1.18, 1.20, 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, 1.27, 1.28, 1.29, 1.30, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36, 1.37, 1.38, 1.39, 1.49, 1.55, 1.58, 1.68, 30.5, 30.6, 30.7, 30.9 and 33.10.

For purposes of this no-action letter, the following sections of the Commission's Regulations will be considered customer protection rules only for Covered Firms that provide retail foreign exchange services: 5.2, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13, 5.14, 5.15, 5.17 and 5.18.

For purposes of this no-action letter, the following sections of the Commission's Regulations will be considered customer protection rules only for Covered Firms that provide single stock futures: 41.41, 41.42, 41.43, 41.44, 41.45, 41.46, 41.47, 41.48 and 41.49.

¹² For a list of applicable customer protection rules, see *id.*

¹³ *Id.*

In requesting no-action relief, you noted that the CCOs of Covered Firms will have difficulty preparing and furnishing to the Commission an Annual Report that meets the requirements of paragraphs (e) and (f) of Commission Regulation 3.3 within the deadline, because many CCOs will have occupied that position for just a few months prior to the time they will be required to prepare the first Annual Report, given that many Covered Firms had not previously designated a CCO. You also noted that many new requirements for Covered Firms have recently become effective, which will require Covered Firms to expend additional time to develop and test new procedures and controls to comply with such new requirements. Furthermore, you noted that the policies and procedures of Covered Firms will need to change in order to address the possible new mix of products and customers, as well as changes to clearinghouse rulebooks. You also noted operational concerns in connection with the preparation of the Annual Report. Finally, you noted that it would be more appropriate to require CCOs only to certify as to the accuracy and completeness of information pertaining to periods after when they took office.

Time-Limited No-Action Relief Granted

Based on the foregoing and the representations made in your letter requesting no-action relief, the Division believes that granting time-limited no-action relief is warranted. Accordingly, the Division will not recommend that the Commission take an enforcement action against a Covered Firm that submits an Annual Report for the fiscal year that ends on or before March 31, 2013, that fails to satisfy the requirements of Commission Regulation 3.3(e) and (f), if, at a minimum, the following conditions are satisfied with respect to such Annual Report:¹⁴

- The Annual Report contains the following information:
 - An introduction and an executive summary that contains:
 - A description of the Covered Firm's business.
 - Identification of the CEO and CCO of the Covered Firm.
 - The time period covered by the Annual Report (*i.e.*, the full fiscal year of the Covered Firm).
 - A review of policies and procedures reasonably designed to ensure compliance with customer protection rules.¹⁵
 - Identification and description of customer protection policies and procedures.
 - An assessment of effectiveness of such policies and procedures as of the Covered Firm's fiscal year end.
 - Discussion of areas for improvement of aforementioned policies and procedures.
 - Description of material noncompliance issues and corresponding actions taken, including corrective actions, in relation to customer protection rules.¹⁶

¹⁴ Although the no-action relief was requested only with respect to paragraph (e) of Regulation 3.3, the Division is providing no-action relief covering paragraph (f) of Regulation 3.3 as well.

¹⁵ For a list of applicable customer protection rules, see *supra* note 11.

¹⁶ *Id.*

- CEO and/or CCO Certification(s) that states the following: “To the best of my knowledge and reasonable belief and under penalty of law, the information contained in the attached annual report pertaining to the period from October 1, 2012 through [*fiscal year end*] is accurate and complete.”
- The Annual Report covers the full fiscal year of the Covered Firm, but the CEO/CCO certification is limited to the period from the October 1, 2012, through the Covered Firm’s fiscal year end.
- The Annual Report is electronically furnished to the Commission no later than 90 days after the Covered Firm’s fiscal year end. With respect to Covered Firms that are also BDs registered with the SEC, there is no requirement that the Annual Report be furnished to the Commission simultaneously with the submission of Form 1-FR-FCM, the FOCUS Report, or the Financial Condition Report.
- The Covered Firm satisfies the requirements of subparagraphs (f)(1) and (f)(4) of Commission Regulation 3.3.

This no-action relief is limited only to the first Annual Report required to be furnished by a Covered Firm to the Commission for the fiscal year that ends on or before March 31, 2013.

This letter, and the positions taken herein, represent the view of this Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the Act or in the Regulations issued thereunder. Further, this letter, and the relief contained herein, is based upon the representations made to the Division. Any different, changed or omitted material facts or circumstances might render this no-action relief void.

Should you have any questions, please do not hesitate to contact Frank Fisanich, Chief Counsel, at 202-418-5949, or Ward Griffin, Associate Chief Counsel, at 202-418-5425.

Very truly yours,

Gary Barnett
Director
Division of Swap Dealer and
Intermediary Oversight

cc: Regina Thoele, Compliance
National Futures Association, Chicago