



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 12-60
No-Action
December 19, 2012
Division of Swap Dealer and Intermediary Oversight

Re: Time-Limited No-Action Relief: Request that Certain Swaps Not Be Considered in Calculating Aggregate Gross Notional Amount for Purposes of the Swap Dealer De Minimis Exception for Persons Engaging in Floor Trader Activities

Ladies and Gentlemen:

This letter is in response to a request dated December 11, 2012, from the Futures Industry Association Principal Traders Group (“FIA PTG”) to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”), in which FIA PTG requested relief that would allow firms to exclude certain cleared swaps from their aggregate gross notional amount of swap transactions in determining whether they may rely on the de minimis exception from swap dealer registration set forth in Commission Regulation 1.3(ggg)(4).¹ FIA PTG requested that market participants who would otherwise be entitled to take advantage of the relief provided by Commission Regulation 1.3(ggg)(6)(iv)² be permitted to trade in cleared swaps that are not traded on, or subject to the rules of, a designated contract market (“DCM”) or a swap execution facility (“SEF”) without having these swaps included in their aggregate gross notional amount of swaps transactions until the Commission finalizes the rules governing the registration and operation of SEFs.³

¹ See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” 77 Fed. Reg. 30596, 30744 (May 23, 2012) [hereinafter the “Entity Definition Rules”].

² *Id.* at 30746. Commission Regulation 1.3(ggg)(6)(iv) permits certain swaps that are entered into by floor traders registered with the Commission to not be considered for the purpose of determining whether such floor trader would be required to register as a swap dealer.

³ See Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. 1214 (proposed Jan. 7, 2011). The final trading rules with respect to DCMs became effective on August 20, 2012. Core Principles and Other Requirements for Designated Contract Markets, 77 Fed. Reg. 36611 (June 19, 2012).

Applicable Regulatory Requirements

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,⁴ in relevant part, added § 1a(49) to the Commodity Exchange Act (the “CEA” or “Act”), which defined the term “swap dealer” for purposes of the CEA.⁵ Section 1a(49)(D) of the CEA states that “[t]he Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt.”⁶

On April 18, 2012, the Commission, jointly with the Securities and Exchange Commission (“SEC”), issued final rules to further define “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and “eligible contract participant” (the “Entity Definition Rules”).⁷ Included in the Entity Definition Rules was Commission Regulation 1.3(ggg)(4)(i), which provides that a person shall not be deemed a swap dealer if the aggregate gross notional amount of their swap dealing activity falls below certain thresholds.⁸

The Entity Definition Rules also include a list of swaps that are not considered in determining whether a person is a swap dealer.⁹ In particular, Commission Regulation 1.3(ggg)(6)(iv) provides that:

[i]n determining whether a person is a swap dealer, each swap that the person enters into in its capacity as a floor trader as defined by section 1a(23) of the Act or on or subject to the rules of a swap execution facility shall not be considered for the purpose of determining whether the person is a swap dealer if the person:

- (A) Is registered with the Commission as a floor trader pursuant to § 3.11 of this chapter;

⁴ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁵ 7 U.S.C. § 1a(49).

⁶ 7 U.S.C. § 1a(49)(D).

⁷ See Entity Definition Rules, *supra* note 1.

⁸ *Id.* at 30744. Commission Regulation 1.3(ggg)(4)(i) provides that:

a person that is not currently registered as a swap dealer shall be deemed not to be a swap dealer as a result of its swap dealing activity involving counterparties, so long as the swap positions connected with those dealing activities into which the person—or any other entity controlling, controlled by or under common control with the person—enters over the course of the immediately preceding 12 months (or following the effective date of final rules implementing Section 1a(47) of the Act, 7 U.S.C. 1a(47), if that period is less than 12 months) have an aggregate gross notional amount of no more than \$3 billion, subject to a phase in level of an aggregate gross notional amount of no more than \$8 billion.

⁹ *Id.* at 30746. See Commission Regulation 1.3(ggg)(6).

- (B) Enters into swaps with proprietary funds for that trader's own account solely on or subject to the rules of a designated contract market or swap execution facility and submits each such swap for clearing to a derivatives clearing organization;
- (C) Is not an affiliated person of a registered swap dealer;
- (D) Does not directly, or through an affiliated person, negotiate the terms of swap agreements, other than price and quantity or to participate in a request for quote process subject to the rules of a designated contract market or a swap execution facility;
- (E) Does not directly or through an affiliated person offer or provide swap clearing services to third parties;
- (F) Does not directly or through an affiliated person enter into swaps that would qualify as hedging physical positions pursuant to paragraph (ggg)(6)(iii) of this section or hedging or mitigating commercial risk pursuant to paragraph (kkk) of this section (except for any such swap executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction);
- (G) Does not participate in any market making program offered by a designated contract market or swap execution facility; and
- (H) Notwithstanding the fact such person is not registered as a swap dealer, such person complies with §§ 23.201, 23.202, 23.203, and 23.600 of this chapter with respect to each such swap as if it were a swap dealer.¹⁰

On July 18, 2012, the Commission approved, jointly with the SEC, final rules further defining the products terms "swap," "security-based swap," "security-based swap agreement," and "mixed swap."¹¹ The effective date of these joint final rules was October 12, 2012. All swaps entered into by a person after October 12, 2012, in connection with the person's swap dealing activities are relevant in determining whether the person meets the swap dealer definition and therefore must register with the Commission as a swap dealer.

Summary of Request for Relief

In its letter requesting relief, FIA PTG noted that "the Commission has not finalized its rules regarding SEFs, and thus there can be no swaps that trade on, or subject to the rules of, a SEF."¹² Additionally, it stated that "few, if any, swaps currently trade on, or subject to the rules of, a DCM."¹³ Therefore, any market participants that wish to deal in swaps could not qualify for the exception for floor traders provided in Commission Regulation 1.3(ggg)(6)(iv) and would be required to register as a swap dealer unless their dealing activity falls below the de minimis threshold.

¹⁰ *Id.* at 30746.

¹¹ Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48208 (Aug. 13, 2012).

¹² Letter from FIA PTG to Gary Barnett at 2 (Dec. 11, 2012).

¹³ *Id.* at 2.

To allow market participants to deal in certain cleared swaps prior to the issuance of final rules governing the registration and operation of SEFs without requiring such persons to register as swap dealers, FIA PTG requested relief for firms who have not registered a swap dealer affiliate and enter into swaps with proprietary funds that are submitted to a derivatives clearing organization (“DCO”) for clearing, and would be permitted to be transacted by a floor trader but for the fact that the swap is not transacted on a SEF or DCM. The requested relief would apply when computing the aggregate notional amount of swaps connected with an entity’s swap dealing activity based on the condition that the firm in good faith intends to apply as a floor trader based on reasonable assumptions made today regarding the future development of the cleared swaps markets in conjunction with the final trading rules surrounding DCMs and SEFs.¹⁴

Division No-Action Position

Based on the foregoing and the information provided by FIA PTG, the Division believes that granting relief for a limited time period is warranted to address the issues presented. Accordingly, the Division will not recommend that the Commission take an enforcement action against any entity for failure to include, prior to July 1, 2013,¹⁵ in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission Regulation 1.3(ggg)(4), a swap that is submitted to a registered DCO for clearing, provided that: (1) the entity does not have a registered swap dealer affiliate; (2) the entity entered into the swap using proprietary funds for its own account; and (3) the entity complies with the requirements set forth in Commission Regulations 1.3(ggg)(6)(iv)(D)-(H).¹⁶

This no-action relief is not self-executing; rather, an entity that is eligible for the relief must file a claim to perfect the use of the relief. A claim submitted will be effective upon filing, so long as the claim is materially complete.

Specifically, the claim of no-action relief must:

- a. State the name, main business address, and main business telephone number of the entity for which the relief is being claimed;
- b. Be electronically signed by a person authorized to bind the entity; and
- c. Be filed with the Division using the email address dsionoaction@cftc.gov, with the subject line of such email “Floor Trader,” prior to December 31, 2012.

¹⁴ *Id.* at 3.

¹⁵ The Division anticipates that the issue will be resolved by July 1, 2013. If the issue is not resolved as of July 1, 2013, the Division will consider extending the relief for an additional period of time.

¹⁶ Commission Regulation 1.3(ggg)(6)(iv)(G) states that, in order to qualify for the floor trader exception, a person must not participate in any market making program offered by a DCM or SEF. In order to qualify for the no-action relief provided in this letter, a person must not participate in any market making program offered by the trading platform on which the person’s swaps are transacted.

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 me at (202) 418-5977; Katherine Driscoll, Associate Director, at (202) 418-5544; Ward Griffin, Associate Chief Counsel, at (202) 418-5425; or Adam Kezsbom, Special Counsel, at (202) 418-5372.

Very truly yours,

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cc: Regina Thoele, Compliance
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