



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Market Oversight

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No-Action
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Division of Market Oversight

Time-Limited No-Action Relief for Swap Counterparties that are not Swap Dealers or Major Swap Participants, from Certain Swap Data Reporting Requirements of Parts 43, 45 and 46 of the Commission's Regulations

Ladies and Gentlemen:

This letter responds to requests received from multiple parties, by the Division of Market Oversight (the "Division") of the Commodity Futures Trading Commission (the "Commission"), to provide no-action relief to extend the date by which a swap counterparty that is not a swap dealer or a major swap participant, as such terms are defined in the Commodity Exchange Act¹ and the Commission's regulations thereunder (a "non-SD/MSP counterparty"), must be in compliance with its reporting obligations under the Commission's swap data recordkeeping and reporting rules.²

¹ 7 U.S.C. § 1, *et seq.*

² This letter responds to, but, for the reasons set forth herein, does not fully grant all no-action relief requested in, the following: (1) Letter from Sutherland, Asbill & Brennan LLP on behalf of the Commercial Energy Working Group, Request for No-Action Relief Extending the April 10, 2013 Compliance Date for Reporting Swap Transactions under Parts 43, 45 and 46 of the Commission's Regulations (March 1, 2013) (the "CEWG Letter"); (2) Letter from the Edison Electric Institute, the National Rural Electric Cooperative Association, the American Public Power Association, the Electric Power Supply Association and the American Gas Association in support of the CEWG Letter (March 8, 2013); (3) Letter from Mondelez International in support of the CEWG Letter (March 26, 2013); (4) Letter from the Institute of International Bankers in support of the CEWG Letter (March 28, 2013); (5) Letter from the International Swaps and Derivatives Association, Inc. and the Financial Services Roundtable, Request for No-Action Relief Extending 'Compliance Date 3' (March 28, 2013); and (6) Letter from The Coca-Cola Company in support of the CEWG Letter (March 31, 2013).

The Division notes that it has received the following additional requests for no-action relief from the reporting requirements of Part 46 of the Commission's regulations: (1) Letter from the Commodity Markets Council, Request for No-Action Relief: Commodity Futures Trading Commission ("CFTC") Part 46 Recordkeeping Requirements and CME Contingent EFS or EOO Transactions (March 20, 2013); and (2) Letter from the Futures Industry Association, Request Pursuant to Commission Regulation 140.99 for Certain No-Action Relief from Part 46 Requirements (March 26, 2013).

Solely for the reasons set forth herein, the Division has determined to provide to non-SD/MSP counterparties certain temporary no-action relief from the reporting requirements of Part 43, Part 45 and Part 46.

Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”)³ amended the Commodity Exchange Act to establish a comprehensive new regulatory framework for swaps. Amendments to the Commodity Exchange Act included the addition of provisions requiring the retention and reporting of data regarding swap transactions.⁴ Pursuant to these newly added provisions, the Commission added to its regulations Part 43,⁵ which sets forth rules for the real-time public reporting of swap transaction data; Part 45,⁶ which sets forth swap data recordkeeping rules, as well as rules for the reporting of swap transaction data to a registered swap data repository (“SDR”); and Part 46,⁷ which sets forth swap data recordkeeping and reporting rules for pre-enactment swaps⁸ and transition swaps⁹ (collectively, “historical swaps”).¹⁰

Swap counterparties have certain reporting obligations under each of Part 43, Part 45 and Part 46 (collectively, the “swap data reporting rules”). Pursuant to the compliance schedule set forth in

³ Pub. L. 111-203, 124 Stat. 1376 (2010).

⁴ See, e.g., Section 2(a)(13), which establishes requirements for the real-time reporting and public availability of swap transaction data; Section 21(b), which directs the Commission to prescribe standards for swap data recordkeeping and reporting; and Sections 4r and 2(h)(5), which, among other things, establish reporting requirements for swaps in effect as of the enactment of the Dodd-Frank Act, as well as swaps in effect after such enactment but prior to the effective date for compliance with the Commission’s final swap data recordkeeping and reporting rules.

⁵ Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (January 9, 2012) (“Real-Time Reporting Rule”).

⁶ Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (January 13, 2012) (“Regulatory Reporting Rule”).

⁷ Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200 (June 12, 2012) (“Historical Swap Reporting Rule”).

⁸ A “pre-enactment swap” is a swap entered into prior to the enactment of the Dodd-Frank Act (July 21, 2010), the terms of which have not expired as of the date of enactment of the Dodd-Frank Act. See Historical Swap Reporting Rule at 35226.

⁹ A “transition swap” is a swap entered into on or after the enactment of the Dodd-Frank Act (July 21, 2010), and prior to the applicable compliance date for reporting historical swaps data pursuant to Part 46. See Historical Swap Reporting Rule at 35227.

¹⁰ See also Part 44 of the Commission’s regulations (Interim Final Rule for Reporting Pre-Enactment Swap Transactions, 75 Fed. Reg. 63080 (October 14, 2010); and Reporting Certain Post-Enactment Swap Transactions, 75 Fed. Reg. 78892 (December 17, 2010)), which established certain record retention requirements for historical swaps, pending the adoption of the Commission’s final rules, set forth at Part 46, regarding recordkeeping and reporting with respect to historical swaps.

the swap data reporting rules,¹¹ and taking into account certain no-action relief previously issued by Commission staff,¹² a swap counterparty that is registered or required to be registered as a swap dealer or a major swap participant is currently required to be in compliance with these reporting obligations.¹³ A non-SD/MSP counterparty is required to be in compliance with its reporting obligations under the swap data reporting rules by April 10, 2013.¹⁴

The Division has received requests, from market participants and other interested parties, to provide no-action relief to extend the date by which a non-SD/MSP counterparty must be in compliance with its reporting obligations under the swap data reporting rules. It has been submitted that the development of swap data reporting systems has been more challenging, technologically and operationally, for non-SD/MSP counterparties than for swap dealers and major swap participants. Concerns have also been expressed that the requirement to ensure that all historical swaps data is reported, pursuant to Part 46, by the same date upon which reporting obligations become effective pursuant to Part 43 and Part 45, has compounded the challenges faced by non-SD/MSP counterparties in finalizing their swap data reporting infrastructure.

The Division notes that, in establishing a later compliance date for non-SD/MSP counterparties under the swap data reporting rules, the Commission recognized that non-SD/MSP counterparties could potentially have more limited technological and operational capability, than swap dealers and major swap participants, upon which to leverage when developing their swap data reporting systems. The later compliance date provided non-SD/MSP counterparties with an additional period of time to finalize their internal reporting infrastructure and come into compliance with their swap data reporting obligations. The Division notes further, however, that while the swap data reporting rules established a single, later compliance date for reporting by

¹¹ See Real-Time Reporting Rule at 1228; Regulatory Reporting Rule at 2197; and Historical Swap Reporting Rule at 35226. See also CFTC Staff Responds to Questions on Timing of Swap Dealer Registration Rules, Commission Press Release 6348-12 (September 10, 2012), available at <http://www.cftc.gov/PressRoom/PressReleases/pr6348-12>; and Division Q & A – On Start of Swap Data Reporting (October 9, 2012), available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/startreporting_qa_final.pdf.

¹² See Time-Limited No-Action Relief for Swap Dealers from Certain Swap Data Reporting Requirements of Part 43, Part 45 and Part 46 of the Commission’s Regulations, Commission Letter No. 12-32 (November 19, 2012); and No-Action Relief for Swap Dealers from Certain Swap Data Reporting Requirements of Part 43, Part 45 and Part 46 of the Commission’s Regulations, Due to Effects of Hurricane Sandy, Commission Letter No. 12-41 (December 5, 2012) (the “Hurricane Sandy No-Action Letter”).

¹³ Swap dealers were required to be in compliance with their reporting obligations with respect to: (1) credit swaps and interest rate swaps (i) under Part 43 and Part 45, on December 31, 2012, and (ii) under Part 46, on January 30, 2013; and (2) equity swaps, foreign exchange swaps and other commodity swaps under (i) Part 43 and Part 45, on February 28, 2013, and (ii) under Part 46, on March 30, 2013. Major swap participants were required to be in compliance with their reporting obligations under all of the swap data reporting rules, with respect to all swap asset classes, on February 28, 2013. See *supra* notes 11 and 12. The Division notes that Commission staff has also issued interpretive guidance and no-action relief relating to certain specific requirements of the swap data recordkeeping and reporting rules, copies of which are available on the Commission’s website at www.cftc.gov. See also Final Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 858 (January 7, 2013).

¹⁴ See *supra* notes 11 and 12.

non-SD/MSP counterparties with respect to all swap asset classes, the Commission recognized, in its establishment of the compliance schedule for swap dealers and major swap participants, that due to differences in the levels of pre-existing automation and data normalization, coming into compliance with reporting obligations with respect to equity swaps, foreign exchange swaps and other commodity swaps could potentially be more challenging than coming into compliance with reporting obligations with respect to interest rate swaps and credit swaps.¹⁵

In adopting the swap data reporting rules, the Commission also recognized non-SD/MSP counterparties that are financial entities, as such term is defined in Section 2(h)(7)(C) of the Commodity Exchange Act (“financial swap counterparties”),¹⁶ as being more likely than non-SD/MSP counterparties that are not financial entities, as such term is defined in Section 2(h)(7)(C) of the Commodity Exchange Act (“non-financial swap counterparties”), to have pre-existing technological capability upon which to leverage when developing their swap data reporting systems. Noting that financial swap counterparties were more likely to have automated systems in place to facilitate swap data reporting,¹⁷ in both Part 45 and Part 46 the Commission allocated reporting responsibility for a swap transaction between a non-financial swap counterparty and a financial swap counterparty, to the financial swap counterparty.¹⁸

¹⁵ See Regulatory Reporting Rule at 2194.

¹⁶ Pursuant to Section 2(h)(7)(C)(i) of the Commodity Exchange Act, the term “financial entity” means: (I) a swap dealer; (II) a security-based swap dealer; (III) a major swap participant; (IV) a major security-based swap participant; (V) a commodity pool; (VI) a private fund as defined in Section 202(a) of the Investment Advisers Act of 1940; (VII) an employee benefit plan as defined in paragraphs (3) and (32) of Section 3 of the Employee Retirement Income Security Act of 1974; or (VIII) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956. Pursuant to Section 2(h)(7)(C)(iii), the term “financial entity” shall not include an entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.

Pursuant to Section 2(h)(7)(C)(ii) of the Commodity Exchange Act, the Commission has, for purposes of the exception to the clearing requirement set forth at Section 2(h)(7)(A) of the Act (the “clearing exception”), exempted from the definition of a “financial entity” a person that is a “financial entity” solely because of Section 2(h)(7)(C)(i)(VIII) of the Act, if such person: (i) is organized as a bank, as defined in Section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in Section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and (ii) has total assets of \$10,000,000,000 or less on the last day of such person’s most recent fiscal year. See End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42559, 42591 (July 19, 2012). Any such person that the Commission has exempted from the definition of a “financial entity” for purposes of the clearing exception shall be considered to be a non-financial swap counterparty for purposes of the reporting relief provided by the Division in this no-action letter.

¹⁷ See Regulatory Reporting Rule at 2617

¹⁸ See Regulatory Reporting Rule at 2207; and Historical Swap Reporting Rule at 35229.

No-Action Relief for Financial Swap Counterparties

Consistent with the Commission's recognition, in adopting the swap data reporting rules, that financial swap counterparties were more likely than non-financial swap counterparties to have pre-existing systems in place to facilitate reporting, and given the additional period of time that the later April, 10, 2013, compliance date has already provided to financial swap counterparties to finalize their internal swap data reporting infrastructure, the Division believes that financial swap counterparties have been provided with a sufficient amount of time to come into compliance with their swap data reporting obligations, under Part 43 and Part 45, with respect to interest rate swaps and credit swaps. However, consistent with the Commission's recognition, in establishing the compliance schedule for swap dealers and major swap participants under the swap data reporting rules, that commencement of reporting could potentially be more challenging with respect to equity swaps, foreign exchange swaps and other commodity swaps, the Division believes that it is appropriate to provide financial swap counterparties with a limited period of no-action relief to come into compliance with their Part 43 and Part 45 reporting obligations with respect to these three swap asset classes.

Accordingly, the Division will not recommend that the Commission take enforcement action against a financial swap counterparty for failing to report swap transaction data with respect to equity swaps, foreign exchange swaps and other commodity swaps, pursuant to Part 43 or Part 45 of the Commission's regulations, until 12:01 a.m. eastern time on May 29, 2013.¹⁹ As a condition of relying on this no-action relief, a financial swap counterparty must, by 12:01 a.m. eastern time on June 29, 2013, backload and report to an SDR all swap transaction data, for the period from April 10, 2013, to May 29, 2013, that the financial swap counterparty would have been required to report pursuant to Part 45 in the absence of this no-action relief.

The Division also believes that providing financial swap counterparties with a transitional time period to complete their reporting of historical swaps data pursuant to Part 46, will help to ensure the smooth commencement of reporting by financial swap counterparties under the swap data reporting rules. Accordingly, the Division will not recommend that the Commission take enforcement action against a financial swap counterparty for failing to report historical swaps data, for all swap asset classes, pursuant to Part 46 of the Commission's regulations, until 12:01 a.m. eastern time on September 30, 2013.²⁰

¹⁹ This period of no-action relief is approximately equivalent to the period of no-action relief from reporting obligations with respect to equity swaps, foreign exchange swaps and other commodity swaps, that the Division provided to swap dealers in the Hurricane Sandy No-Action Letter.

²⁰ Any swap entered into by a financial swap counterparty prior to 12:01 a.m. on April 10, 2013, for which the financial swap counterparty has reporting responsibility, will be reportable by the financial swap counterparty in accordance with Part 46 of the Commission's regulations.

No-Action Relief for Non-Financial Swap Counterparties

Consistent with the views expressed by the Commission when allocating reporting responsibilities under the swap data reporting rules, the Division believes that non-financial swap counterparties were likely to have had the least pre-existing technological capability upon which to leverage when finalizing their swap data reporting infrastructure. The Division believes that providing a limited period of no-action relief from reporting obligations under Part 43 and Part 45, with respect to all swap asset classes, will enable non-financial swap counterparties to consult further with the SDRs to which they will be reporting data, and with their swap dealer, major swap participant and financial swap counterparties, regarding the issues faced and the solutions implemented within a “live” reporting environment, so that non-financial swap counterparties can leverage off of this experience when finalizing their own reporting systems and procedures.

Accordingly, the Division will not recommend that the Commission take enforcement action against a non-financial swap counterparty for failing to report swap transaction data pursuant to Part 43 or Part 45 of the Commission’s regulations:

- (i) With respect to interest rate swaps and credit swaps, until 12:01 a.m. eastern time on July 1, 2013, on the condition that, by 12:01 a.m. eastern time on August 1, 2013, the non-financial swap counterparty backload and report to an SDR all transaction data, for the period from April 10, 2013, to July 1, 2013, that the non-financial swap counterparty would have been required to report pursuant to Part 45 in the absence of this no-action relief; and
- (ii) With respect to equity swaps, foreign exchange swaps and other commodity swaps, until 12:01 a.m. eastern time on August 19, 2013, on the condition that, by 12:01 a.m. eastern time on September 19, 2013, the non-financial swap counterparty backload and report to an SDR all transaction data, for the period from April 10, 2013, to August 19, 2013, that the non-financial swap counterparty would have been required to report pursuant to Part 45 in the absence of this no-action relief.

Consistent with the relief from reporting obligations under Part 46 that the Division has provided herein to financial swap counterparties, the Division believes that providing non-financial swap counterparties with a transitional time period to complete their reporting of historical swaps data pursuant to Part 46, will help to ensure the smooth commencement of reporting by non-financial swap counterparties under the swap data reporting rules. Accordingly, the Division will not recommend that the Commission take enforcement action against a non-financial swap counterparty for failing to report historical swaps data, for all swap asset classes, pursuant to Part 46 of the Commission’s regulations, until 12:01 a.m. eastern time on October 31, 2013.²¹

²¹ Any swap entered into by a non-financial swap counterparty prior to 12:01 a.m. on April 10, 2013, for which the non-financial swap counterparty has reporting responsibility, will be reportable by the non-financial swap counterparty in accordance with Part 46 of the Commission’s regulations.

Conclusion

The no-action positions taken by the Division herein with regard to financial swap counterparties and non-financial swap counterparties, respectively, do not extend to other types of entities with reporting obligations under the swap data reporting rules.²² Any entity that becomes a swap dealer or a major swap participant is required to be in full compliance with its reporting obligations under the swap data reporting rules by the date upon which it becomes a swap dealer or major swap participant.²³

The no-action positions taken by the Division herein in no way affect the recordkeeping obligations of non-SD/MSP counterparties under the swap data reporting rules. Records regarding any swap entered into by a non-SD/MSP counterparty prior to 12:01 a.m. eastern time on April 10, 2013, must be maintained by such non-SD/MSP counterparty in accordance with Part 46 of the Commission's regulations. Records regarding any swap entered into by a non-SD/MSP counterparty on or after 12:01 a.m. on April 10, 2013, must be maintained by such non-SD/MSP counterparty in accordance with Part 43 and Part 45 of the Commission's regulations. In order to comply with the recordkeeping requirements of Part 45, a non-SD/MSP counterparty must, by April 10, 2013, obtain a CFTC Interim Compliant Identifier ("CICI").²⁴

This letter, and the no-action positions taken herein, represent the views of the Division only, and do not necessarily represent the positions or views of the Commission or of any other division or

²² See, e.g., Regulation 45.3(a), which requires swap creation data for a swap executed on or pursuant to the rules of a swap execution facility or designated contract market to be reported by such swap execution facility or designated contract market, as soon as technologically practicable after execution. The obligation of a swap execution facility or designated contract market to report swap creation data for swaps executed on a swap execution facility or designated contract market is not affected by the no-action relief provided herein.

²³ An entity will become a swap dealer on the earlier of: (i) the date upon which it submits a complete application for registration as a swap dealer; or (ii) the date that is two months after the end of the month in which the entity's swap dealing activities exceed, in the aggregate, one of two prescribed gross notional amount thresholds, on which date the entity will be required to apply to be registered as a swap dealer. An entity will become a major swap participant on the earlier of: (i) the date upon which it submits a complete application for registration as a major swap participant; or (ii) the date that is two months after the end of the quarter in which the entity meets the criteria of a major swap participant as a result of its swap activities in such quarter, on which date the entity will be required to apply to be registered as a major swap participant. See Further Definition of 'Swap Dealer,' 'Security-Based' Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant,' and 'Eligible Contract Participant,' 77 Fed. 30596 (May 23, 2012).

²⁴ See Regulatory Reporting Rule at 2204. See also Division of Market Oversight and Office of Data and Technology Advisory Regarding Upcoming Legal Entity Identifier Deadline (March 15, 2013), available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmo_odtadvisory.pdf; and Division Q & A – On Start of Swap Data Reporting (October 9, 2012), available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/startreporting_qa_final.pdf.

A CICI may be obtained through the CICI Utility web portal available at www.ciciutility.org.

office of the Commission's staff. The no-action positions taken herein do not excuse affected persons from compliance with any other applicable requirements of the Commodity Exchange Act or the Commission's regulations thereunder. As with all no-action letters, the Division retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

If you have any questions concerning this correspondence, please contact Nora Flood, Attorney Advisor, at (202) 418-5354.

Very truly yours,

Richard A. Shilts
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