



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Letter No. 13-61  
No-Action  
September 30, 2013  
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 September 24, 2013, from the Futures Industry Association Principal Traders Group (“**FIA PTG**”) to the Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) of the U.S. Commodity Futures Trading Commission (“**Commission**”), in which FIA PTG requested additional time-limited no-action relief that would allow firms to exclude certain cleared swaps from their aggregate gross notional amount of swap dealing activity in determining whether they may rely on the de minimis exception from swap dealer (“**SD**”) registration set forth in Commission Regulation (“**Regulation**”) 1.3(ggg)(4).<sup>1</sup> Specifically, FIA PTG requests that the Division extend the time-limited no-action relief that it issued on June 27, 2013 (pursuant to CFTC Letter No. 13-37),<sup>2</sup> which expires on October 2, 2013. FIA PTG contends that the extension is necessary because the conditions necessitating the earlier no-action relief have not been fully resolved. FIA PTG requests that market participants who would otherwise be entitled to take advantage of the relief provided by Regulation 1.3(ggg)(6)(iv)<sup>3</sup> 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 swap

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<sup>1</sup> 17 C.F.R. § 1.3(ggg)(4); 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. 30,596, 30,744 (May 23, 2012) [hereinafter the “Entity Definition Rules”].

<sup>2</sup> CFTC Letter No. 13-37, available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-37.pdf>. CFTC Letter No. 13-37 was an extension of previously-issued time-limited no-action relief that was issued by the Division on December 19, 2012. See CFTC Letter No. 12-60, available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-60.pdf>.

<sup>3</sup> 17 C.F.R. 1.3(ggg)(6)(iv); *Entity Definition Rules*, 77 Fed. Reg. at 30,746.

dealing activity until 90 days after the compliance date for the rules governing the registration and operation of SEFs.<sup>4</sup>

### **Applicable Regulatory Requirements**

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,<sup>5</sup> in relevant part, added § 1a(49) to the Commodity Exchange Act (“CEA” or “Act”), which defined the term “swap dealer” for purposes of the CEA.<sup>6</sup> 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.”<sup>7</sup>

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”).<sup>8</sup> Included in the Entity Definition Rules was 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.<sup>9</sup>

The Entity Definition Rules also include a list of swaps that are not considered in determining whether a person is a swap dealer.<sup>10</sup> In particular, 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

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<sup>4</sup> *Core Principles and Other Requirements for Swap Execution Facilities; Final Rule*, 78 Fed. Reg. 33,476 (June 4, 2013). 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. 36,611 (June 19, 2012).

<sup>5</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>6</sup> 7 U.S.C. § 1a(49).

<sup>7</sup> 7 U.S.C. § 1a(49)(D).

<sup>8</sup> See Entity Definition Rules, *supra* note 1.

<sup>9</sup> *Id.* at 30,744. 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.

<sup>10</sup> Entity Definition Rules, 77 Fed. Reg. at 30,746; see Regulation 1.3(ggg)(6), 17 C.F.R. § 1.3(ggg)(6).

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;
- (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.<sup>11</sup>

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."<sup>12</sup> 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 activity are relevant in determining whether the person meets the SD definition and therefore must register with the Commission as an SD.

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<sup>11</sup> *Id.* at 30,746; 17 C.F.R. § 1.3(ggg)(6)(iv).

<sup>12</sup> *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48,208 (Aug. 13, 2012).

In a letter dated December 11, 2012 requesting relief, FIA PTG stated that because the Commission had not, at that time, finalized its rules regarding SEFs, there could be no swaps to trade on, or subject to the rules of, a SEF.<sup>13</sup> Thus, any market participants that had wanted to deal in swaps would not have been able to qualify for the exception for floor traders provided in Regulation 1.3(ggg)(6)(iv) and would have been required to register as SDs unless their dealing activity fell below the de minimis threshold.

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.<sup>14</sup>

On December 19, 2012, the Division issued CFTC Letter No. 12-60, which granted no-action relief until July 1, 2013. Specifically, the Division stated that it would not recommend that the Commission take an enforcement action against any entity for failure to include, prior to July 1, 2013, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of 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 SD 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 Regulations 1.3(ggg)(6)(iv)(D)-(H).<sup>15</sup>

The no-action relief provided in CFTC Letter No. 12-60 was not self-executing; rather, an entity that was eligible for the relief had to file a claim to perfect the use of the relief. The Division stated that a claim submitted would be effective upon filing, so long as the claim was materially complete. Specifically, the claim of no-action relief had to:

- 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](mailto:dsionoaction@cftc.gov), with the subject line of such email “Floor Trader,” prior to December 31, 2012.

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<sup>13</sup> Letter from FIA PTG to Gary Barnett at 2 (Dec. 11, 2012).

<sup>14</sup> *Id.* at 3.

<sup>15</sup> Regulation 1.3(ggg)(6)(iv)(G) states that, to qualify for the floor trader exception, a person must not participate in any market making program offered by a DCM or SEF. 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 transaction.

In CFTC Letter No. 13-37, the Division provided additional time-limited no-action relief, extending the no-action relief that was granted in CFTC Letter No. 12-60 until the compliance date for the Commission's final SEF rules (October 2, 2013).<sup>16</sup> Similar to the relief provided in CFTC Letter No. 12-60, an entity that was eligible for the relief in CFTC Letter No. 13-37 was required to file a claim to perfect the use of the relief.

### **Summary of Request for Relief**

FIA PTG states that additional time-limited no-action relief is needed because “[t]he SEF structure remains in its infancy, with several temporarily approved SEFs not beginning operations until October 2, the date the current no-action relief expires, and negligible liquidity on those that are operational.”<sup>17</sup> FIA PTG also contends that “there is a lack of clarity around timing of the SEF applicants that have yet to receive temporary registration.”<sup>18</sup> FIA PTG further contends as follows:

These conditions provide no opportunity for market participants who intend to use the floor trader exclusion to adjust to the new market and no time for liquidity in swaps to actually move onto SEFs. Further, given the wide variations in the SEF rulebooks and user agreements, and the Commission's cursory completeness review process for temporary registration, we believe many rules will continue to evolve. Some of the provisions, such as those that require bilateral execution agreements, may not be acceptable to all market participants and impair the ability to comply with the conditions in the floor trader exclusion. For these reasons, we request that the Commission confirm that it will not initiate an enforcement action against firms if, prior to 90 days after the compliance date of the final rules governing the registration and operation of SEFs, each such firm excludes certain cleared swaps from its aggregate gross notional amount of swaps transactions in determining whether such person may rely on the *de minimis* exception from swap dealer registration set forth in Commission Rule 1.3(ggg)(4).<sup>19</sup>

Accordingly, FIA PTG asks the Division to continue to not recommend enforcement actions if firms that do not have registered SD affiliates exclude swaps entered into with proprietary funds that are submitted to DCOs for clearing from the aggregate notional amount of swaps connected with an entity's swap trading activity, under the condition that the firm in good

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<sup>16</sup> *Core Principles and Other Requirements for Swap Execution Facilities; Final Rule*, 78 Fed. Reg. 33,476 (June 4, 2013).

<sup>17</sup> Letter from FIA PTG to Gary Barnett at 2 (September 24, 2013).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (citations omitted).

faith intends to apply as a floor trader based on reasonable assumptions made today regarding the future development of the cleared swaps market. FIA PTG states that extending this no-action relief would allow those market participants who in good faith intend to apply for registration as floor traders to continue to undertake dealing activities in cleared swaps and facilitate the efficient migration of bilateral swap markets to centrally-cleared environments.

### **Division No-Action Position**

Based upon the information provided by FIA PTG, the Division believes that additional time-limited no-action relief is warranted. Accordingly, the Division hereby extends the no-action relief that was granted in CFTC Letter Nos. 12-60 and 13-37 (and described in this letter above) for an additional 30 days, until **November 1, 2013**.<sup>20</sup> Specifically, the Division will not recommend that the Commission take an enforcement action against any entity for failure to include, **prior to November 1, 2013**, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of 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 SD 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 Regulations 1.3(ggg)(6)(iv)(D)-(H).

As with the relief granted in CFTC Letter Nos. 12-60 and 13-37, the relief granted in this letter is not self-executing. Rather, an entity that is eligible for the relief must file a claim to perfect the use of the relief in the manner prescribed by CFTC Letter Nos. 12-60 and 13-37, except that, in addition to (i) stating the name, main business address, and main business telephone number of the entity for which the relief is being claimed and (ii) being electronically signed by a person authorized to bind the entity, claims for relief must be filed with the Division using the email address [dsionoaction@cftc.gov](mailto:dsionoaction@cftc.gov), with the subject line of such email "Floor Trader," prior to October 2, 2013. However, if an entity that is eligible for the relief has previously filed a claim to perfect the use of the relief in the manner prescribed by CFTC Letter Nos. 12-60 and 13-37, the entity need not file a new claim to perfect the use of the relief provided in this letter.

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.

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<sup>20</sup> To the extent that FIA PTG requested relief beyond the 30-day period granted through this no-action letter, the request is denied.

Should you have any questions, please do not hesitate to contact me at (202) 418-5977; Frank Fisanich, Chief Counsel, at (202) 418-5949; or Ward Griffin, Associate Chief Counsel, at (202) 418-5425.

Very truly yours,

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