



## U.S. COMMODITY FUTURES TRADING COMMISSION

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CFTC Letter No. 13-83  
No-Action  
December 20, 2013  
Division of Swap Dealer and Intermediary Oversight  
Division of Clearing and Risk  
Division of Market Oversight

**Re: Request for No-Action Relief from Certain Regulations Applicable to Swap Dealers  
During Pendency of De-Registration Application**

Ladies and Gentlemen:

This letter is issued by the Division of Swap Dealer and Intermediary Oversight (“**DSIO**”), the Division of Clearing and Risk, and the Division of Market Oversight (collectively, the “**Divisions**”) of the Commodity Futures Trading Commission (“**Commission**”) in response to a request from the The Hongkong and Shanghai Banking Corporation Limited (“**HBAP**”)<sup>1</sup> received by DSIO in which HBAP requests that DSIO not recommend that the Commission take enforcement action against HBAP for a failure to comply with certain swap dealer regulations identified below during the period between the date when HBAP would be required to begin complying with such regulations and when HBAP’s deregistration as a swap dealer is determined. HBAP asserts in its request that without the requested relief it would otherwise need to begin complying with the regulations for which relief is requested after December 21, 2013, upon the expiration of exemptive relief provided in the Commission’s Exemptive Order Regarding Compliance With Certain Swap Regulations (“**July Exemptive Order**”).<sup>2</sup> HBAP

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<sup>1</sup> HBAP, incorporated under the laws of the Hong Kong S.A.R., is a wholly owned subsidiary of HSBC Holdings plc and is regulated by the Hong Kong Monetary Authority and the Hong Kong Securities and Futures Commission.

<sup>2</sup> 78 Fed. Reg. 43785 (July 22, 2013). This letter does not provide interpretative guidance or constitute an acceptance of the sufficiency of HBAP’s interpretation of, or compliance with, Commission Regulations.

submitted an application to withdraw from registration as a swap dealer to the National Futures Association (“NFA”) on December 3, 2013, the same day that HBAP submitted its request for no-action relief. As described below, in accordance with the Commission’s regulations it is likely that HBAP’s withdrawal from registration will not occur until a short period of time has elapsed after December 21, 2013.

### **Regulatory Background**

#### ***De Minimis Exception:***

Regulation 1.3(ggg)(4) provides a *de minimis* exception from registration for swap dealers meeting certain requirements. Specifically, “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 applied in accordance with paragraph (ggg)(4)(ii) of this section, and an aggregate gross notional amount of no more than \$25 million with regard to swaps in which the counterparty is a ‘special entity’ . . . .”<sup>3</sup>

#### **Withdrawal from Registration:**

Regulation 1.3(ggg)(4)(iv) provides that an entity that “currently is registered as a swap dealer may apply to withdraw that registration, while continuing to engage in swap dealing activity in reliance on this section, so long as that person has been registered as a swap dealer for at least 12 months and satisfies the conditions of paragraph (ggg)(4)(i) of this section.”<sup>4</sup>

Regulation 3.33 discusses the process and requirements for submitting an application to withdraw from registration as a swap dealer, and specifically states that, with certain exceptions, “[a] request for withdrawal from registration will become effective on the thirtieth day after receipt of such request by the National Futures Association, or earlier upon written notice from the National Futures Association (with the written concurrence of the Commission) of the granting of such request . . . .”<sup>5</sup>

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<sup>3</sup> 17 C.F.R. 1.3(ggg)(4)(i).

<sup>4</sup> 17 C.F.R. 1.3(ggg)(4)(iv).

<sup>5</sup> 17 C.F.R. 3.33(f).

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

In conjunction with its request to withdraw from registration as a swap dealer, HBAP is seeking no-action relief from the “Entity-Level and Transaction-Level Requirements . . . that may become applicable to HBAP in its capacity as a provisionally registered swap dealer upon the expiration of the Commission’s [July Exemptive Order] after December 21, 2013” (hereinafter, such requirements are referred to as the “**Subject Swap Dealer Requirements**”).<sup>6</sup>

On December 31, 2012, HBAP was determined to be provisionally registered as a swap dealer by NFA. HBAP asserts that between October 12, 2012 and December 21, 2012, it engaged in swap dealing activity with U.S. persons in an aggregate amount – when swap dealing activity of certain affiliates is included – that exceeded the *de minimis* threshold for registration. HBAP states that it has implemented internal policies to not engage in any new swap dealing activity with U.S. persons, subject to very limited exceptions. During the twelve month period prior to December 31, 2013, HBAP states that its swap dealing activity with U.S. persons is below the current *de minimis* threshold of \$8 billion. HBAP also asserts that since October 10, 2013, “the aggregate amount of dealing swaps by HBAP and any of its non-registered affiliates that are controlling, controlled by, or under common control with [HBAP] is [] below the *de minimis* threshold.”<sup>7</sup> In addition to reducing its swap dealing activity with U.S. persons, HBAP represented that it and its non-registered affiliates have also adopted several policies and procedures to ensure that they do not exceed the *de minimis* threshold in the future.

On December 3, 2013, pursuant to Regulation 1.3(ggg)(4), HBAP submitted a Form 7-W application to NFA seeking withdrawal from registration as a swap dealer on December 3, 2013. HBAP asserts that January 1, 2014 is the appropriate date for withdrawal from registration since it is 12 months after HBAP was provisionally registered.<sup>8</sup>

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<sup>6</sup> In accordance with HBAP’s request, the Subject Swap Dealer Requirements shall only include those entity-level and transaction-level requirements (as such terms are used in the July Exemptive Order) for which exemptive relief is provided in the July Exemptive Order through December 21, 2013. HBAP stated in its request that it is not “seeking relief from any Commission requirement to which HBAP was subject on or prior to December 20, 2013 . . . and will continue to comply with such requirements until the effective date of its withdrawal from swap dealer registration.”

<sup>7</sup> HBAP asserts that prior to October 10, 2013, it was permitted “to exclude from counting towards the *de minimis* threshold . . . (a) the dealing swaps of its U.S. affiliates, (b) the U.S.-facing dealing swaps of its non-U.S. affiliates that have engaged in swap dealing activities with U.S. persons as of the date of the January Order and (c) the dealing swaps of any affiliated swap dealers . . . . This aggregation relief was extended until October 9, 2013 by the [July Exemptive Order].”

<sup>8</sup> Regulation 1.3(ggg)(4)(iv) states that a swap dealer may apply to withdraw from registration after being registered for 12 months. Therefore, HBAP’s current registration withdrawal application is premature. However, DSIO is permitting HBAP’s application to move forward given the unusual circumstances involving the close proximity in time of when the Subject Swap Dealer Requirements will apply to HBAP and the pending application to withdraw from registration.

HBAP represents that it is a non-U.S. swap dealer that is eligible for relief under, and is complying with, the July Exemptive Order with respect to the Subject Swap Dealer Requirements. HBAP represents that having to implement policies and procedures, build compliance systems, and conduct outreach with counterparties to comply with the Subject Swap Dealer Requirements for an interim period before HBAP's withdrawal from registration as a swap dealer becomes effective would be impractical and present significant costs to HBAP with limited regulatory benefit because the period of compliance would be so short. Any such interim period for compliance would run from December 21, 2013 to the effective date of withdrawal from registration, which HBAP has requested to be January 1, 2014. Additionally, HBAP would have to inform counterparties and the market of its impending withdrawal from swap dealer registration, which would lead to confusion for affected counterparties.

HBAP requested that, due to the short period of time between when HBAP would need to begin complying with the Subject Swap Dealer Requirements and when its application to withdraw from swap dealer registration will be determined, the Divisions provide no-action relief with regard to the Subject Swap Dealer Requirements during that period. HBAP explicitly states that it is not "seeking relief from any Commission requirement to which HBAP was subject on or prior to December 20, 2013 . . . and will continue to comply with such requirements until the effective date of its withdrawal from swap dealer registration."

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

Based on the foregoing and the representations made in your letter requesting no-action relief, the Divisions believe that granting no-action relief is warranted.<sup>9</sup> Accordingly, the Divisions will not recommend that the Commission take an enforcement action against HBAP for failing to comply with the Subject Swap Dealer Requirements during the period beginning December 21, 2013 and ending on the earlier of the effective date of HBAP's withdrawal of registration as a swap dealer or the date on which the application for deregistration is withdrawn or rejected, provided that during such period HBAP does not enter into swaps that would be counted for purposes of determining compliance with the *de minimis* exception under regulation 1.3(ggg)(4).

This letter, and the positions taken herein, represent the view of the Divisions only, and do not necessarily represent the position or view of the Commission or of any other office 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 Commodity Exchange Act or in the regulations issued thereunder. The relief also does not create or confer any rights for or obligations on any person or persons subject to compliance with the Commodity Exchange Act that bind the Commission or any of its other offices or divisions. Further, this letter, and the

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<sup>9</sup> Because some of the Subject Swap Dealer Requirements include regulations typically administered by the Division of Market Oversight or the Division of Clearing and Risk, those Divisions are also providing the relief requested.

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 Gary Barnett, Director, DSIO, at (202) 418-5977, Erik Remmler, Deputy Director, DSIO, at (202) 418-7630, Ananda Radhakrishnan, Director, Division of Clearing and Risk, (202) 418-5188 or Vincent A. McGonagle, Director, Division of Market Oversight, (202) 418-5387.

Very truly yours,

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