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Division of Swap Dealer and
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No-Action
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Division of Swap Dealer and Intermediary Oversight

Staff No-Action Positions: Relief for Swap Dealers and Major Swap Participants
from Compliance with Regulation 23.22(b) with Respect to:

- (1) Non-Domestic Associated Persons who Deal only with Non-Domestic Swap Counterparties;
and (2) Persons Employed in a Clerical or Ministerial Capacity

I. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹ amended the Commodity Exchange Act (“CEA”)² to provide, among other things, for the registration and regulation of swap dealers (“SDs”) and major swap participants (“MSPs” and, collectively with swap dealers, “Swap Entities”).³ One such amendment was new CEA Section 4s(b)(6), which states:

Except to the extent otherwise specifically provided by rule, regulation, or order, it shall be unlawful for a swap dealer or a major swap participant to permit any person associated with a swap dealer or a major swap participant who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knew, or in the exercise of reasonable care should have known, of the statutory disqualification.

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act also may be accessed through the website of the Commodity Futures Trading Commission (“Commission” or “CFTC”), www.cftc.gov.

² The CEA is set forth at 7 U.S.C. § 1 *et seq.* The CEA similarly may be accessed through the Commission’s Web site.

³ CEA Section 4s, 7 U.S.C. § 6s.

A related amendment that the Dodd-Frank Act made was to add a definition of “associated person of a swap dealer or major swap participant” in new CEA Section 1a(4), to provide as follows:

(A) In general. The term “associated person of a swap dealer or major swap participant” means a person who is associated with a swap dealer or major swap participant as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves—

- (i) the solicitation or acceptance of swaps; or
- (ii) the supervision of any person or persons so engaged.

(B) Exclusion. Other than for purposes of [CEA] section 4s(b)(6), the term “associated person of a swap dealer or major swap participant” does not include any person associated with a swap dealer or major swap participant the functions of which are solely clerical or ministerial.

Pursuant to CEA Section 4s, the Commission has adopted a comprehensive framework for the registration of Swap Entities.⁴ The Dodd-Frank Act did not, however, direct the Commission to adopt regulations that provide for the registration of associated persons (“APs”) of Swap Entities, and, thus, the Commission has not done so.⁵

Regulation 23.21 provides that a Swap Entity must register with the Commission in accordance with Part 3 of the CFTC’s regulations. Regulation 23.22 concerns the fitness of certain persons associated with a Swap Entity. Paragraph (a) of the regulation provides that for the purpose of Regulation 23.22, the term “person” means “an ‘associated person of a swap dealer or major swap participant’ as defined in section 1a(4) of the [CEA] and § 1.3(aa)(6).” Paragraph (b) of the regulation provides that:

No swap dealer or major swap participant may permit a person who is subject to a statutory disqualification under section 8a(2) or 8a(3) of the [CEA] to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knows, or in the exercise of reasonable care should know, of the statutory disqualification [“Prohibition”]

⁴ See 77 Fed. Reg. 2613 (Jan. 19, 2012).

⁵ Regulation 1.3(aa)(6), discussed in section II.B below, defines the term “associated person” in the context of an SD or an MSP.

The National Futures Association (“NFA”)⁶ has recommended to the Division of Swap Dealer and Intermediary Oversight (“Division”) that relief be issued to Swap Entities from compliance with the Prohibition in the context of: (1) non-domestic APs who deal only with non-domestic swap counterparties; and (2) persons employed in a clerical or ministerial capacity. As is explained below, by this letter the Division is providing such relief.

II. Background

A. Non-Domestic APs who Deal only with Non-Domestic Counterparties of Swap Entities

Paragraph (b) of Regulation 23.22 provides an exception from the Prohibition with respect to:

any person listed as a principal or registered as an associated person of a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant, or any person registered as a floor broker or floor trader, notwithstanding that the person is subject to a disqualification from registration under section 8a(2) or 8a(3) of the [CEA].

In adopting this exception, the Commission recognized that without it:

a person could be permitted to direct futures-related activities or solicit futures-related business with members of the retail public – *e.g.*, as, respectively, a principal or associated person of [a futures commission merchant or commodity pool operator] – but that same person would be barred from soliciting, accepting, or otherwise effecting or being involved in effecting swaps transactions with significantly more sophisticated clients as an associated person of [an SD or MSP].⁷

While CEA Section 4k and Regulation 3.12 generally require the registration of all APs who are associated with registrants that are not Swap Entities, Regulation 3.12(h)(1)(iv) provides an exception from this requirement for a person who engages in activity as an AP “from a location outside the United States, its territories or possessions, and limits such activities to customers located outside the United States, its territories or possessions.”⁸ This means, then,

⁶ Letter from Thomas W. Sexton, Senior Vice President and General Counsel, NFA, to Gary Barnett, Director of the Division, dated November 12, 2012. NFA is a registered futures association, and the sole association so registered, under CEA Section 17.

⁷ 77 Fed. Reg. at 2615.

⁸ 72 Fed. Reg. 63976, 63979 (Nov. 14, 2007).

that an AP who may be subject to a statutory disqualification under CEA Section 8a(2) or 8a(3) is not prohibited from soliciting or accepting commodity futures or option accounts from customers located outside the United States. In proposing the regulation that resulted in the adoption of this exception, the Commission noted its historical position that –

Given this agency’s limited resources, it is appropriate at this time to focus [the Commission’s] customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users of the futures markets and that the protection of foreign customers of firms confining their activities to areas outside this country, its territories, and possessions may best be for local authorities in such areas.⁹

However, because APs of Swap Entities are not subject to a registration requirement, the exception in Regulation 3.12(h)(1)(iv) is inapplicable to the Prohibition. Thus, a Swap Entity would be subject to the Prohibition even with respect to an AP who engages in activity from a location outside the United States, and limits such activity to counterparties located outside the United States.

NFA has recommended that relief from the Prohibition equivalent to that available for all other APs under Regulation 3.12(h)(1)(iv) be available to Swap Entities with respect to their APs. In support of this action, NFA also notes the purpose of the exception from the Prohibition (stated above). The Division believes the recommendation NFA has made is reasonable, because it will align the treatment of each person who comes within the AP definition, regardless of whether such person is subject to a registration requirement.¹⁰

B. Persons Employed by Swap Entities in a Clerical or Ministerial Capacity

Regulation 1.3(aa)(6) defines the term “associated person” in the context of an SD or MSP as follows:

(aa) Associated person. This term means any natural person who is associated in any of the following capacities with:

* * *

⁹ 72 Fed. Reg. 15637, 15638 (Apr. 2, 2007) (citing 48 Fed. Reg. 35247, 35261 (Aug. 3, 1983)).

¹⁰ See CFTC Letter No. 12-15 (Oct. 11, 2012), where the Division stated that, subject to compliance with certain conditions, it would not recommend that the Commission commence an enforcement action against a Swap Entity for failure to comply with the Prohibition in Regulation 23.22(b) under the conditions set forth therein. This letter is also available at www.cftc.gov.

- (6) A swap dealer or major swap participant as a partner, officer, employee, agent (or any natural person occupying a similar status or performing similar functions), in any capacity that involves:
 - (i) The solicitation or acceptance of swaps (other than in a clerical or ministerial capacity); or
 - (ii) The supervision of any person or persons so engaged.

The exclusion in Regulation 1.3(aa)(6) from the definition of associated person of an SD or MSP for persons who act in a clerical or ministerial capacity is consistent with the definition (and exclusion for clerical or ministerial activity) in the other provisions in Regulation 1.3(aa) that define the term “associated person” in the context of other Commission registrants.¹¹

As stated above, Regulation 23.22, by its terms, applies to an AP of an SD or MSP “as defined in section 1a(4) of the [CEA] and § 1.3(aa).” Because Regulation 1.3(aa)(6) contains a general exclusion from the AP definition for a person employed in a clerical or ministerial capacity, and the exclusion in CEA Section 1a(4) should be read in conjunction with CEA Section 4s(b)(6), NFA also has recommended that relief from the Prohibition should be provided to Swap Entities with respect to persons who are employed in a clerical or ministerial capacity. The Division similarly agrees with this recommendation.

III. Division No-Action Positions

In light of the foregoing, the Division will not recommend that the Commission commence an enforcement action against an SD or MSP for failure to comply with Regulation 23.22(b) if the SD or MSP: (1) employs as an AP or otherwise permits a person to effect or be involved in effecting swaps on its behalf where, in either case, the person may be subject to a statutory disqualification under CEA Section 8a(2) or 8a(3), *provided* that the person is engaged in such activity from a location outside of the United States, its territories or possessions, and limits such activities to counterparties located outside the United States, its territories or possessions; or (2) employs in a clerical or ministerial capacity a person who may be subject to a statutory disqualification under CEA Section 8a(2) or 8a(3).

Except as expressly stated above, the relief provided by this letter does not excuse any Swap Entity or any other person employed by it (*i.e.*, an AP of the SD or MSP, a person who effects or is involved in effecting swaps on behalf of the SD or MSP, or a person employed in a clerical or ministerial capacity by the SD or MSP) from compliance with any other applicable provisions of the CEA and the Commission’s regulations issued thereunder. Moreover, this relief is subject to compliance with the conditions set forth above. The no-action positions provided in this letter represent the positions of the Division only, and do not necessarily represent the positions of the Commission or of any other office or division of the Commission.

¹¹ See also CEA Section 4k(1), 7 U.S.C. § 6k(1), which excludes from the requirement to register as an associated person of a futures commission merchant or an introducing broker a person involved with soliciting or accepting customer orders in a clerical capacity.

If you have any questions, please contact Barbara S. Gold or Christopher W. Cummings of my staff, at (202) 418-6700.

Very truly yours,

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Director
Division of Swap Dealer and
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