



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5000
Facsimile: (202) 418-5521
www.cftc.gov

Division of Market Oversight

CFTC Letter No. 13-58
No Action
September 30, 2013
Division of Market Oversight

Time-Limited No-Action Relief to Temporarily Registered Swap Execution Facilities from Commission Regulation 37.6(b) for Non-Cleared Swaps in All Asset Classes

Ladies and Gentlemen:

This letter responds to requests received by the Division of Market Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission”) from multiple parties, including temporarily registered swap execution facilities (“SEF”) to provide time-limited no-action relief to SEFs from the transaction confirmation requirement within Commission regulation 37.6(b) for swaps that are not intended to be submitted for clearing (“Non-Cleared Swaps”).¹ This relief does not apply to the classes of interest rate and credit default swaps that are included within Commission regulation 50.4 and are Non-Cleared Swaps solely based on an exception, exemption, or other relief from required clearing.

I. Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”)² amended the Commodity Exchange Act (the “CEA” or the “Act”) to establish a comprehensive new regulatory framework for swaps. Amendments to the Act included the addition of, among other things, section 5h to the Act concerning a newly created regulated entity called a SEF. The Commission promulgated rules to implement CEA section 5h, which include registration, operation, and compliance requirements for SEFs (the “SEF Final

¹ 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 Asset Management Group of the Securities Industry and Financial Markets Association, Request for Relief Relating to Swap Execution Facility Implementation and Swap Trade Execution (Sep. 23, 2013) (the “SIFMA Letter”); (2) Letter from Bloomberg SEF, LLC, Request for No-Action Relief and Interpretive Guidance to Facilitate SEF Registration (Sep. 24, 2013) (the “Bloomberg Letter”); (3) Letter from Thomson Reuters SEF LLC, Request under Rule 140.99 for Time-Limited No-Action Relief for Swap Execution Facilities to Comply with Commission Regulations §§ 37.6(b); 37.201(b); 37.202; 37.205(a); 43.3(b); and 45.3(a) (Sep. 25, 2013) (the “Thomson Reuters Letter”); and (4) Letter from the Global FX Division of the Global Financial Markets Association, Request for Time-Limited Relief Relating to Commission Regulation Parts 37, 43, and 45 for FX Asset Class.

² Pub. L. 111-203, 124 Stat. 1376 (2010).

Rulemaking”).³ Section 37.6(b) of the SEF Final Rulemaking requires a SEF to provide each counterparty to a swap transaction with “a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction” (the “Confirmation Requirement”).⁴

II. Time-Limited No-Action Relief Requested for SEFs from the Confirmation Requirement within Commission Regulation 37.6(b) for Non-Cleared Swaps

The Division has received requests from multiple parties, including temporarily registered SEFs (collectively the “Requesters”) that the Division provide time-limited no-action relief to SEFs from providing confirmations for Non-Cleared Swaps under Commission regulation 37.6(b).

The Requesters contend that, absent time-limited no-action relief, SEFs will be unable to comply with the Confirmation Requirement for Non-Cleared Swaps because SEFs currently do “not have all the information necessary to capture all of the terms of the transaction....”⁵ According to certain Requesters, many Non-Cleared Swap transactions currently contain non-standardized terms that are agreed to between the counterparties in advance of execution through swap trading relationship documentation as described in Commission regulation 23.504.⁶ As Non-Cleared Swap transactions transition to trading on registered platforms, certain SEFs cite the need for additional time to incorporate such documentation and the non-standardized terms contained therein into a format capable of providing the required confirmations under Commission regulation 37.6(b).⁷ Additionally, certain SEFs note that in some instances, the necessary documentation has not yet been provided to the SEFs.⁸ Both of these factors hinder the SEFs’ current ability to comply with the Confirmation Requirement.

The Division believes that providing SEFs with time-limited no-action relief from the Confirmation Requirement of Commission regulation 37.6(b) will facilitate their ability to gather documentation, and develop procedures to provide the required confirmations, thus helping to ensure that SEFs are able to provide legally binding confirmations to swap counterparties. The Division does not believe that this relief should be available for swaps that are Non-Cleared Swaps solely because they are subject to an exception, exemption, or other relief from required

³ Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476 (Jun. 4, 2013).

⁴ 17 CFR 37.6(b).

⁵ Thomson Reuters Letter at 6.

⁶ Bloomberg Letter at 2-3; Thomson Reuters Letter at 6-7. Certain Requesters cite documents, such as ISDA form of master confirmation agreements, ETMA currency specific templates, credit support annexes, and prime brokerage give-up arrangements. The Division is not opining whether such documents fulfill the requirements under Commission regulation 23.504.

⁷ Bloomberg Letter at 2-3; Thomson Reuters Letter at 6-7.

⁸ See Thomson Reuters Letter at 6-7.

clearing.⁹ Unlike the swaps described by the Requesters, these swaps are standardized and are uncleared only because of a counterparty's election of an exception, exemption, or other relief from required clearing. The Division notes that in order for a SEF to offer functionality related to an exception, exemption, or other relief from required clearing, the SEF must have rules in place that facilitate the proper election of the exception, exemption, or other relief and provide the required information to a swap data repository.¹⁰

Accordingly, subject to the conditions below, the Division will not recommend that the Commission commence an enforcement action against a SEF that does not provide a confirmation to a swap transaction's counterparties pursuant to Commission regulation 37.6(b), for transactions executed on or pursuant to the rules of the SEF for the period from October 2, 2013 to 12:01 a.m. eastern time on **October 30, 2013** for Non-Cleared Swaps in the foreign exchange ("FX"), interest rate, and credit asset classes, and from October 2, 2013 to 12:01 am eastern time on **December 2, 2013** for Non-Cleared Swaps executed in the equity and other commodity asset classes.

This relief does not extend to Non-Cleared Swap transactions in any asset class for which a SEF is currently able to provide a confirmation in compliance with Commission regulation 37.6(b) or to swap transactions in any asset class intended to be submitted for clearing. Further, this relief does not apply to the classes of interest rate and credit default swaps that are included within Commission regulation 50.4 and are Non-Cleared Swaps solely based on an exception, exemption, or other relief from required clearing.

III. Conditions of Relief

This relief is conditional. In order for a temporarily registered SEF to rely on this relief for transactions for which the SEF is unable to provide a confirmation to each counterparty to a transaction as is required by Commission regulation 37.6(b), the SEF must:

1. Provide notice to the counterparties to the transaction that the swap transaction has not been confirmed by the SEF¹¹; and

⁹ See Commission regulations 50.50, 50.51, and 50.52; No-Action Relief from the Clearing Requirement for Swaps Entered into by Eligible Treasury Affiliates, CFTC Letter No. 13-22 (June 4, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/13-22.pdf>.

¹⁰ See, e.g., Commission regulations 50.50(b), 50.51(c), and 50.52(c); Reporting Conditions of CFTC Letter No. 13-22.

¹¹ The Division notes that Commission regulation 23.501(a)(4)(iii) states that "[i]f a swap dealer or major swap participant receives notice that a swap transaction has not been confirmed by a [SEF] ... the swap dealer or major swap participant shall execute a confirmation for such swap transaction as soon as technologically practicable, but in any event no later than the times established for confirmation..." The Division also notes that "confirmation" is defined in Commission regulation 43.2 to mean "the consummation (electronic or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation shall be in writing (electronic or otherwise) and shall legally supersede any previous agreement (electronic or otherwise) relating to the swap."

2. Have arrangements with all swap counterparties for which the SEF is unable to provide the required confirmations, including non-swap dealers, non-major swap participants, and non-financial entities, that ensure that the swap counterparties provide the SEF with the required transaction confirmations in order to allow the SEF to comply with its reporting and recordkeeping obligations under parts 43 and 45 of the Commission's regulations.¹² This is covered by an approved Paperwork Reduction Act collection.¹³

IV. Conclusion

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 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. The no-action positions taken by the Division herein in no way affect the reporting and recordkeeping obligations of SEFs under the swap data reporting rules.¹⁴

If you have any questions concerning this correspondence, please contact Nancy Markowitz, Deputy Director, Division of Market Oversight, at (202) 418-5453 or nmarkowitz@cftc.gov, Amir Zaidi, Special Counsel, Division of Market Oversight, at (202) 418-6770 or azaidi@cftc.gov, or Roger Smith, Attorney Advisor, Division of Market Oversight, at (202) 418-5344 or rsmith@cftc.gov.

Sincerely,

David Van Wagner
Chief Counsel
Division of Market Oversight

Nancy Markowitz
Deputy Director
Division of Market Oversight

¹² The Division notes that it granted time-limited no-action relief from certain swap data reporting requirements of parts 43 and 45 of the Commission's regulations. See DMO Letters 13-55 and 13-56.

¹³ 44 U.S.C. 3501 *et seq.* Collection 3038-0049 ("Procedural Requirements for Requests for Interpretative, No-Action and Exemptive Letters").

¹⁴ Subject to the relief granted in DMO Letters 13-55 and 13-56.