



## 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](http://www.cftc.gov)

CFTC Letter 15-25  
No-Action  
April 22, 2015  
Division of Market Oversight

**Re: Extension of No-Action Relief for SEF Confirmation and Recordkeeping Requirements under Commission Regulations 37.6(b), 37.1000, 37.1001, and 45.2, and Additional Relief for Confirmation Data Reporting Requirements under Commission Regulation 45.3(a)**

Ladies and Gentlemen:

On August 14, 2014, the Division of Market Oversight (“Division”) issued CFTC No-Action Letter 14-108 to provide relief for swap execution facilities (“SEFs”) from confirmation and recordkeeping requirements set forth in Commission Regulations 37.6(b), 37.1000, 37.1001, and 45.2. The no-action letter provided that the Division would not recommend enforcement action against a SEF that, without first obtaining copies of the underlying previously-negotiated agreements between the counterparties to a non-cleared transaction, incorporates such agreements by reference in the trade confirmation required under Commission Regulation 37.6(b). The letter also provided that the Division would not recommend enforcement action if a SEF failed to maintain a copy of the incorporated underlying agreements as required under Commission Regulations 37.1000, 37.1001, and 45.2(a).

### **Relief Requested**

Absent further action from the Division, No-Action Letter 14-108 will expire on September 30, 2015. In its letter dated April 15, 2015,<sup>1</sup> the Wholesale Markets Brokers’ Association, Americas (“WMBAA”)<sup>2</sup> has requested that the relief granted in No-Action Letter 14-108 be extended until March 31, 2016 with the addition of relief from certain swap data reporting requirements under Commission Regulation 45.3(a)(1). According to WMBAA, the relief granted in No-Action Letter 14-108 has not eased the operational concerns that prompted the original request for relief. Due to the complexity of the issue, WMBAA states that SEFs have been unable to develop a method to request, accept and maintain a library of every underlying previously-negotiated freestanding agreement between counterparties that is not cumbersome and cost prohibitive. According to WMBAA, many of these agreements are maintained in paper form, or scanned PDF files, making them impossible to quickly digitize in a

---

<sup>1</sup> Letter from Wholesale Markets Brokers’ Association Americas, Request for Relief from Certain Requirements under Parts 37 and 45 Related to Confirmations and Recordkeeping for Swaps Not Required or Intended to be Cleared (April 15, 2015).

<sup>2</sup> WMBAA is an independent industry body that represents BGC Derivatives Markets, L.P.; GFI Swaps Exchange LLC; ICAP SEF (US) LLC; ICAP Global Derivatives LTD; tpSEF, Inc.; and Tradition SEF, Inc. Each of the WMBAA member firms is temporarily registered with the Commission as a SEF.

cost-effective manner. WMBAA states that the resource cost is considerable when considering the number of different agreements that exist to accommodate the different parties and different asset classes. WMBAA believes that SEFs will be unable to comply with Commission regulations by September 30, 2015, and requests additional time until March 31, 2016, to develop a solution.

In addition, WMBAA also requests relief from the requirement set forth in Commission Regulation 45.3(a)(1) that SEFs report terms contained in the underlying previously-negotiated freestanding agreements that are confirmation data.<sup>3</sup> According to WMBAA, because SEFs do not possess the agreements, SEFs are unable to report terms incorporated by reference from these agreements. WMBAA requests relief from the reporting obligations until March 31, 2016 to allow more time to devise a solution to the reporting issues.

## Background

Commission Regulation 37.6(b) requires that a SEF “provide each counterparty to a transaction that is entered into on or pursuant to the rules of the [SEF] 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.”<sup>4</sup> In the adopting release for the final part 37 rules, the Commission expressed that, with respect to non-cleared swaps, SEFs could satisfy the regulation’s written confirmation requirement by incorporating by reference terms set forth in agreements previously negotiated by the counterparties, *provided* that such agreements had been submitted to the SEF ahead of execution.<sup>5</sup>

Commission regulations also require that a SEF maintain all agreements that are incorporated by reference in a confirmation. Commission Regulations 37.1000 and 37.1001<sup>6</sup> implement the requirement set forth in SEF Core Principle 10 that a SEF maintain records of all activities relating to the business of the facility, including a complete audit trail.<sup>7</sup> Commission Regulation 45.2(a) also requires that a SEF “keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of such entity or person with respect to swaps, as prescribed by the Commission.”<sup>8</sup>

---

<sup>3</sup> “Confirmation data” is defined as “all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap.” 17 C.F.R. §45.1.

<sup>4</sup> 17 C.F.R. §37.6(b).

<sup>5</sup> Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,491 n.195 (June 4, 2013) (the proviso furthers counterparties’ ability “to ensure that nothing in the confirmation terms contradict” the terms contained in the incorporated agreements).

<sup>6</sup> 17 C.F.R. §§ 1000, 1001.

<sup>7</sup> CEA section 5h(f)(10); 7 U.S.C. 7b-3(f)(10).

<sup>8</sup> 17 C.F.R. §45.2(a).

Section 45.3 of the Commission's regulations requires that registered entities and swap counterparties report swap creation data to SDRs.<sup>9</sup> For swaps executed on or pursuant to the rules of a SEF or Designated Contract Market ("DCM"), Commission Regulation 45.3(a)(1) requires the SEF or DCM to report all required swap creation data to an SDR as soon as technologically practicable after execution of the swap.<sup>10</sup> Swap creation data is comprised of all primary economic terms ("PET") data for a swap and all confirmation data for a swap.<sup>11</sup> The primary economic terms of a swap are "all the terms of a swap matched or affirmed by the counterparties in verifying the swap" and include, at a minimum, the terms for swaps in each asset class found in Appendix 1 to part 45.<sup>12</sup> Confirmation data is "all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap."<sup>13</sup>

### **No-Action Relief**

Based on the representations in WMBAA's request, the Division understands the difficulty facing SEFs to develop a cost-effective method to request, accept and maintain a library of every underlying previously-negotiated freestanding agreement between counterparties by September 30, 2015.<sup>14</sup> Accordingly, the Division has determined to extend the no-action relief provided in No-Action Letter 14-108. During the extended period of relief, the Division will not recommend that the Commission take enforcement action if, in a confirmation provided pursuant to Commission Regulation 37.6(b), a SEF incorporates by reference terms from previously-negotiated agreements between the counterparties, without first having been supplied copies of such agreements. The Division also will not recommend that the Commission take enforcement action against a SEF for failure to maintain a copy of the agreements incorporated by reference in the SEF's confirmation, as required under Commission Regulations 37.1000, 37.1001 and 45.2(a).

Additionally, based on the representations in WMBAA's request, the Division understands that SEFs are unable to report confirmation data contained solely in the terms of the underlying agreements that are incorporated by reference in the SEF's 37.6(b) confirmation because the SEFs do not possess the agreements. Accordingly, the Division will not recommend that the Commission take enforcement action against a SEF for failure to report such terms as confirmation data pursuant to Commission Regulation 45.3(a). However, a SEF must continue to report all terms the SEF is currently reporting pursuant to part 45 of the Commission's

---

<sup>9</sup> 17 C.F.R. §45.3.

<sup>10</sup> 17 C.F.R. § 45.3(a)(1).

<sup>11</sup> 17 C.F.R. §45.1 ("*Required swap creation data* means all primary economic terms data for a swap in the swap asset class in question, and all confirmation data for the swap.").

<sup>12</sup> *Id.* (definition of "primary economic terms").

<sup>13</sup> *Id.* (definition of "confirmation data").

<sup>14</sup> These agreements may include, but are not limited to, the International Swaps and Derivatives Association Master Agreement, the Schedule to the Master Agreement, and the Credit Support Annex to the Master Agreement.

regulations as of the time of the issuance of this letter, even if such terms are contained in the incorporated agreements.

This relief applies only to non-cleared swap transactions executed on or pursuant to the rules of a SEF and is subject to the following conditions:

1. The SEF must have a rule in its rulebook that requires a SEF confirmation to state, where applicable, that it incorporates by reference the terms of the underlying previously-negotiated freestanding agreements between the counterparties.
2. The SEF must have a rule in its rulebook that states that in the event of any inconsistency between a SEF confirmation and the underlying previously-negotiated freestanding agreements, the terms of the SEF confirmation legally supersede any contradictory terms; and the SEF must also have a rule that requires the SEF's confirmations to state the same.
3. The SEF must have a rule in its rulebook that requires its participants to provide copies of the underlying previously-negotiated freestanding agreements to the SEF on request.
4. The SEF must have a rule in its rulebook that requires the SEF to request from participants the underlying previously-negotiated freestanding agreements on request from the Commission and requires the SEF to furnish such documents to the Commission as soon as they are available.
5. A SEF must continue to report all PET data as is required under section 45.3(a)(1) of the Commission's regulations. For the purposes of this relief, the data that a SEF must still report pursuant to section 45.3(a)(1) includes, at a minimum:
  - a. All PET data required to be reported pursuant to Commission Regulation 45. This includes the specific terms listed in the Tables of Minimum Primary Economic Terms Data in Appendix 1 to Part 45 of the Commission's regulations, as applicable to the particular swap;
  - b. All swap data that is readily available to the SEF and collected by the SEF currently in the regular course of facilitating the execution of transactions on its facility, or in the regular course of accepting transactions that counterparties execute off of the SEF facility pursuant to the rules of the SEF;
  - c. All swap data the SEF currently reports to any SDR in the regular course of reporting swaps pursuant to Commission regulations; and
  - d. All swap data the SEF includes in the confirmation it sends to swap counterparties pursuant to section 37.6(b) of the Commission's regulations that is not incorporated by reference from the underlying previously-negotiated freestanding agreements.

6. For purposes of this relief, as of the time of issuance of this letter, a SEF may not modify its trading systems or protocols,<sup>15</sup> its reporting to an SDR (including reporting via a third-party service provider), nor its confirmation process pursuant to Commission Regulation 37.6(b) in a way that reduces the amount of PET data it reports. The Division notes that a SEF is free to increase the amount of PET data it reports.

The relief shall expire at **11:59pm, Eastern Daylight Time, on March 31, 2016.**

Market participants should be aware that the no-action positions taken herein do not excuse affected persons from compliance with any other applicable requirements of the CEA or the Commission's regulations thereunder, in particular, the applicable swap data reporting requirements and clearing requirements. 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. 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 Nancy Markowitz, Deputy Director, Division of Market Oversight, at (202) 418-5453 or [nmarkowitz@cftc.gov](mailto:nmarkowitz@cftc.gov); Dan Bucsa, Deputy Director, Division of Market Oversight, at (202) 418-5435 or [DBucsa@cftc.gov](mailto:DBucsa@cftc.gov); Jonathan Lave, Associate Director, Division of Market Oversight, at (202) 418-5983 or [jlave@cftc.gov](mailto:jlave@cftc.gov); or Ben DeMaria, Special Counsel, Division of Market Oversight, at (202) 418-5988 or [BDeMaria@cftc.gov](mailto:BDeMaria@cftc.gov).

Sincerely,

Vincent A. McGonagle  
Director  
Division of Market Oversight

---

<sup>15</sup> The Division notes that changes to SEF trading protocols fall within the definition of "Rule" in section 40.1 of the Commission's regulations. See 17 C.F.R. § 40.1(i) (the definition of "Rule"). As a result, any changes to SEF trading systems or protocols require a filing with the Commission pursuant to section 40.5 or 40.6 of the Commission's regulations. See 17 C.F.R. §§ 40.5 and 40.6.