



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 13-84
No-Action
December 30, 2013
Division of Swap Dealer and Intermediary Oversight

Re: Time-Limited No-Action Relief for Futures Commission Merchants, Swap Dealers, and Major Swap Participants from Compliance with the Timing Requirements of Commission Regulation 3.3(f)(2) Relating to Annual Reports by Chief Compliance Officers

Ladies and Gentlemen:

This letter is in response to two letters from the Futures Industry Association, each dated December 26, 2013, to the Division of Swap Dealer and Intermediary Oversight (“**Division**”) of the Commodity Futures Trading Commission (“**Commission**”) requesting relief from the timing requirements for submitting an Annual Report, as set forth in Commission Regulation (“**Regulation**”) 3.3(f)(2),¹ by (1) futures commission merchants (“**FCMs**”); and (2) swap dealers (“**SDs**”).² The requested relief would be applicable to the submission to the Commission of an Annual Report by the chief compliance officer (“**CCO**”) of such firms during calendar year 2014.³

Regulatory Background

Section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank Act**”)⁴ added Section 4s(k) to the Commodity Exchange Act (“**CEA**”),⁵ which requires each SD and major swap participant (“**MSP**”) to designate an individual to serve as its CCO, who must perform the duties and responsibilities required by Commission Regulations. In addition, section 732 of the Dodd-Frank Act added Section 4d(d) to the CEA, which imposes similar requirements on FCMs. Pursuant to that authority, the Commission has promulgated Regulation 3.3, which, among other things, requires that FCMs, SDs, and MSPs designate a CCO meeting certain qualifications and sets forth the duties and responsibilities of a CCO.

¹ 17 CFR 3.3(f)(2).

² You also requested that the Division issue an interpretative letter. The Division is not addressing the request for an interpretative letter in this no-action letter.

³ Although the request for relief was limited to FCMs and SDs, the Division believes it appropriate to extend the relief to major swap participants as well.

⁴ Pub. L. 111-203, 124 Stat. 1376 (2010).

⁵ 7 U.S.C. § 1 *et seq.*

One of the duties of a CCO is to prepare and sign an Annual Report.⁶ The Annual Report must cover the most recently completed fiscal year of the FCM, SD, or MSP, and at a minimum, must contain the information enumerated in Regulation 3.3, including a certification by the CCO or chief executive officer.⁷

Prior to a recent amendment to Regulation 3.3(f)(2),⁸ the Annual Report was required to be furnished electronically to the Commission not more than 90 days after the end of the fiscal year of the FCM, SD, or MSP, simultaneously with the submission of Form 1-FR-FCM, the Financial and Operational Combined Uniform Single Report (“**FOCUS Report**”), or the financial condition report, as applicable.⁹ If an FCM is also registered with the Securities and Exchange Commission as a securities broker-dealer (“**FCM/BD**”), the regulation requires the FCM to furnish the Annual Report to the Commission no later than 60 days after the end of the fiscal year, because the FOCUS Report must be submitted within that 60-day time period.¹⁰

In connection with recent amendments to the Commission’s customer protection rules, the Commission revised Regulation 3.3(f)(2) to require all FCMs, SDs, and MSPs to file the CCO Annual Report no later than 60 days after the end of the fiscal year, in order to conform with amendments to Regulation 1.10(b)(1)(ii) that require an FCM to file Form 1-FR-FCM no later than 60 days after fiscal year-end.¹¹ The effective date of the amendment to Regulation 3.3(f)(2) is January 13, 2014.¹²

Requested No-Action Relief

In your request, you state that the Annual Reports filed during calendar year 2014 will represent the first full-year, full-scope Annual Reports for most FCMs. In order to fulfill the requirements of Regulation 3.3(e),¹³ you state that firms will be required to conduct an extensive

⁶ 17 CFR 3.3(d)(6).

⁷ 17 CFR 3.3(f)(3).

⁸ Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 Fed. Reg. 68506, 68577 (Nov. 14, 2013).

⁹ 17 CFR 3.3(f)(2).

¹⁰ See 17 CFR 240.17a-(d)(5).

¹¹ See *supra* note 8. The amended regulation retained the requirement that the Annual Report be filed simultaneously with the submission of Form 1-FR-FCM, the FOCUS Report, or the financial condition report, as applicable.

¹² The CCO Annual Report requirement is triggered on the date on which the firm’s fiscal year ends. Because the effective date of the amendment is January 13, 2014, the amendment to Regulation 3.3(f)(2) will not apply to CCO Annual Reports covering the fiscal year that ends on December 31, 2013. Accordingly, for firms with a fiscal year-end of December 31, 2013, the Annual Report for fiscal year 2013 must be furnished electronically to the Commission not more than 90 days after the end of the fiscal year, simultaneously with the submission of Form 1-FR-FCM, the FOCUS Report, or the financial condition report, as applicable.

¹³ Regulation 3.3(e) provides that the Annual Report must, at a minimum:

review and documentation process involving personnel across the FCM business, which will entail the gathering and analysis of numerous FCM policies and procedures and review of changes thereto, analysis of the results of testing and assessments, identification of non-compliance issues during the prior year, determination of any planned improvements, and meeting with, and/or obtaining sub-certifications from, personnel at various levels of the FCM, up to and including senior supervisory and management personnel.

You represent that FCM/BDs already have similar processes in place in connection with annual report requirements for broker-dealers under the rules of FINRA and various exchanges, and that these processes typically continue through the first quarter of the year and culminate with the execution of the CEO Certification, which for most firms occurs on or near 90 days after the fiscal year-end. You represent that FCM/BDs would benefit from using the same extensive processes for assembling and verifying information in connection with the CCO Annual Report that they already have in place for their broker-dealer annual reports, which in many cases will involve gathering information from the same front and back office units, and meetings with some of the same senior management. Thus, being on the same timeline would be efficient and beneficial.

Finally, you represent that annual testing plans by internal audit or compliance departments used in connection with annual report preparation and content are often not concluded until the end of the fiscal year, and the resulting reports may not be issued until sometime during the first quarter of the following fiscal year. You believe that firms will need additional time to prepare and analyze the results of these reviews as they will contribute to a firm's assessment of the effectiveness of its policies and procedures, and will help to identify any material non-compliance issues and resulting remediation plans.

For the foregoing reasons, you request no-action relief permitting all FCMs with an Annual Report due in calendar year 2014 to submit such report 90 days after the FCM's fiscal year-end, without being required to submit it at the same time as the Form 1-FR-FCM or FOCUS Report, as applicable. You also request the same relief for SDs.

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- Contain a description of the written policies and procedures, including the code of ethics and conflicts of interest policies;
 - Review each applicable requirement under the Act and Commission Regulations, and with respect to each, identify the policies and procedures that are reasonably designed to ensure compliance with the requirement under the Act and Commission Regulations; provide an assessment as to the effectiveness of these policies and procedures, and discuss areas for improvement; and recommend potential or prospective changes or improvements to the compliance program and resources devoted to compliance;
 - List any material changes to compliance policies and procedures during the coverage period for the report;
 - Describe the financial, managerial, operational, and staffing resources set aside for compliance with respect to the Act and Commission Regulations, including any material deficiencies in such resources; and
 - Describe any material non-compliance issue identified and the corresponding action taken.

See 17 CFR 3.3(e).

Limited No-Action Relief Granted

Based on the foregoing and the representations made in your letter requesting relief, the Division believes that granting time-limited no-action relief is warranted. Accordingly, the Division will not recommend that the Commission take an enforcement action against an FCM, SD, or MSP, or against a CCO of such firm, with an Annual Report that is required to be furnished to the Commission in calendar year 2014, for failure to furnish such report to the Commission within the relevant time period prescribed in Regulation 3.3(f)(2), *provided that* such Annual Report is furnished to the Commission no later than 90 days after the end of the firm's fiscal year.

Additionally, the Division will not recommend that the Commission take an enforcement action against an FCM, SD, or MSP, or against a CCO of such firm, with an Annual Report that is required to be furnished to the Commission in calendar year 2014, for failure to furnish such Annual Report simultaneously with the Form 1-FR-FCM or FOCUS Report, as applicable.

This no-action relief is limited to the Annual Report required to be furnished by FCMs, SDs, and MSPs during calendar year 2014.

This letter, and the positions taken herein, represent the view of the 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.

Should you have any questions, please do not hesitate to contact Frank Fisanich, Chief Counsel, at 202-418-5949, Ward Griffin, Associate Chief Counsel, at 202-418-5425, or Marcia Blase, Special Counsel, at 202-418-5138.

Very truly yours,

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