



## U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581  
Telephone: (202) 418-6700  
Facsimile: (202) 418-5528  
[gbarnett@cftc.gov](mailto:gbarnett@cftc.gov)

Division of Swap Dealer and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Letter No. 12-70  
No-Action and Interpretation  
December 31, 2012  
Division of Swap Dealer and Intermediary Oversight

Re: Staff Positions – Relief for Certain Swap Dealers, *De Minimis* Dealers, Agent Affiliates, and Associated Persons from Registration as an Introducing Broker under Section 4d or a Commodity Trading Advisor under Section 4m of the Commodity Exchange Act, and Interpretation that Certain Employees of *De Minimis* Dealers are not an Introducing Broker as defined in Section 1a(31) of the Commodity Exchange Act

### I. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)<sup>1</sup> amended the definitions of the terms “introducing broker” (“IB”) and “commodity trading advisor” (“CTA”) in the Commodity Exchange Act (“CEA”)<sup>2</sup> to include any person who engages in, respectively, IB activities or CTA activities, in connection with swap transactions. The Commission has similarly amended the IB and CTA definitions in the Commission’s regulations to incorporate swap-related activities.<sup>3</sup> If a person comes within the definition of the

---

<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed through the website of the Commission, [www.cftc.gov](http://www.cftc.gov).

<sup>2</sup> The CEA is set forth at 7 U.S.C. § 1 *et seq.* The term “introducing broker” is defined in CEA Section 1a(31) and, as amended by the Dodd-Frank Act, it includes any person who is engaged in soliciting or in accepting orders for the purchase or sale of a swap and who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom. The term “commodity trading advisor” is defined in CEA Section 1a(12) and, as amended by the Dodd-Frank Act, it includes any person who, for compensation or profit, engages in the business of advising others as to the value of or the advisability of trading in any swap. The CEA also may be accessed through the website of the Commission.

<sup>3</sup> See Regulations 1.3(mm) and 1.3(bb), respectively, amended by the Commission to incorporate swap-related activities at 77 FR 66288 (Nov. 2, 2012). The regulations of the

term “introducing broker” or “commodity trading advisor” it is subject to registration as such under CEA Section 4d or 4m, respectively.<sup>4</sup> Registration includes, among other things, vetting of the applicant for registration (*e.g.*, as an IB or a CTA), its principals, and its associated persons (“APs”) to confirm that none of these persons is subject to a statutory disqualification under CEA Section 8a(2) or 8a(3) (“Statutory Disqualification”).<sup>5</sup> Typically, an applicant for registration as an AP must take and pass the National Commodity Futures Examination (“Series 3”). However, the Series 3 testing requirement is not applicable to APs whose activities are limited to swaps.<sup>6</sup>

As a result of the foregoing amendments to the IB and CTA definitions, the Division of Swap Dealer and Intermediary Oversight (“Division”) has received various registration no-action requests regarding certain swap dealers (“SDs”), persons who are excluded from the swap dealer definition (“*De Minimis* Dealers,” or “DMDs”),<sup>7</sup> SD affiliates who are not registered with the Commission in any capacity (“Agent Affiliates”), and the employees of these SDs, DMDs, and Agent Affiliates.

Broadly stated, based on the representations made to it in connection with these requests, the Division understands that SDs may deal in swaps through multiple affiliates, such that employees of one SD (an “Agent SD”) or an Agent Affiliate may engage in certain activities in support of an affiliated SD (an “Affiliate SD”) or affiliated DMD (an “Affiliate DMD”) in connection with a swap transaction to be entered by the Affiliate SD or Affiliate DMD as counterparty to the swap (“Affiliate SD Counterparty” or “DMD Counterparty,” respectively). These activities may include soliciting, negotiating, structuring, recommending, and/or accepting as agent, swap transactions (“Affiliate Support Activities”) on behalf of the Affiliate SD Counterparty or DMD Counterparty. Agent SDs and Agent Affiliates may engage in Affiliate Support Activities in connection with new swaps as well as with respect to a subsequent modification, termination or exercise of rights under an existing swap. They may receive compensation from an Affiliate SD Counterparty or Affiliate DMD Counterparty for Affiliate

---

Commission are found at 17 C.F.R. Part 1 *et seq.* and they also may be accessed through the website of the Commission.

<sup>4</sup> The CEA and Commission regulations provide exemptions from registration as an intermediary for certain persons. For example, CEA Section 4m(1) and CFTC Regulation 4.14 provide various exemptions from registration as a CTA. This letter does not otherwise affect the availability of a registration exemption to any of the persons covered by this letter.

<sup>5</sup> The Commission has authorized the National Futures Association (“NFA”), a futures association registered as such under CEA Section 17, to perform the full range of registration functions with regard to applicants for registration.

<sup>6</sup> See NFA Registration Rule 401, available on the website of NFA, [www.nfa.futures.org](http://www.nfa.futures.org).

<sup>7</sup> Regulation 1.3(ggg)(4) provides an exception from the definition of the term “swap dealer” for certain persons who engage in a *de minimis* amount of swap dealing.

Support Activities performed by their employees in connection with cost and/or revenue allocation arrangements with the Affiliate SD Counterparty or Affiliate DMD Counterparty.<sup>8</sup>

## II. Agent SDs and Employees

Because Affiliate Support Activities include activities that may bring a person engaged in those activities within the IB and/or CTA definition, an Agent SD who engages in Affiliate Support Activities on behalf of an Affiliate SD Counterparty or a DMD Counterparty may be required to register as an IB or a CTA,<sup>9</sup> and its employees may be required to register as an associated person (“AP”) of the Agent SD in its capacity as an IB.<sup>10</sup> In this regard, the Division notes that in connection with its application for registration, the Agent SD, its principals and its APs will have been vetted to confirm that none of them is subject to a Statutory Disqualification.<sup>11</sup> The Division believes that relief from registration in the foregoing situations is appropriate where certain conditions are met.

Accordingly, the Division will not recommend that the Commission commence an enforcement action against an Agent SD or any employee thereof for failure to register as an IB or a CTA if the Agent SD or employee engages in Affiliate Support Activities on behalf of an Affiliate SD Counterparty or Affiliate DMD Counterparty in connection with a swap entered or

---

<sup>8</sup> While the Division is aware that Agent Affiliates may engage in Affiliate Support Activities on behalf of DMD Counterparties, the Division has not received any requests for registration relief on behalf of Agent Affiliates in this context and the Division is not granting any such relief in this letter.

<sup>9</sup> Although Regulation 4.6 excludes from the CTA definition a registered SD and its employees and principals where the commodity interest and swap advisory activities of the SD are solely incidental to the conduct of its business as an SD, the exclusion does not address SDs (such as Agent SDs) that engage in CTA activities on behalf of an Affiliate SD Counterparty or Affiliate DMD Counterparty.

<sup>10</sup> CEA Section 4k(1) makes it unlawful for a person to associate with an IB in soliciting customers’ orders unless the person is registered as an AP of an IB. Regulation 1.3(mm) provides an exclusion from the IB definition for, and therefore makes the prohibition inapplicable to, an AP of an SD acting in its capacity as an AP of the SD. The exclusion would not be available to an Agent SD that is not a natural person, because an “associated person” must be a natural person. *See* Regulation 1.3(aa).

CEA Section 4k(3) makes it unlawful for a person to associate with a CTA in soliciting discretionary trading accounts unless the person is registered as an AP of the CTA. The representations made to the Division in support of CTA registration relief under this and the other scenarios discussed below do not pertain to discretionary trading. Thus, registration as an AP of a CTA is not at issue under this scenario or any of the other scenarios discussed below.

<sup>11</sup> While the Commission has not required APs of SDs to register as such, Regulation 23.22 prohibits an SD from employing an AP that is subject to a Statutory Disqualification.

to be entered into by the Affiliate SD Counterparty or Affiliate DMD Counterparty, subject to the following conditions:

1. The Agent SD and the Affiliate SD Counterparty or Affiliate DMD Counterparty are “majority-owned affiliates” as described in Regulation 1.3(ggg)(6); and
2. The employee is an AP of the Agent SD, as defined in Regulation 1.3(aa)(6), the employee is not subject to a Statutory Disqualification, and no person in the supervisory chain of command of the employee is subject to a Statutory Disqualification; and
3. (a) The Agent SD and the employee provide commodity interest trading advice in a manner solely incidental to the conduct of the business of the Agent SD as an SD;<sup>12</sup> and  
(b) Neither the Agent SD nor the employee is otherwise engaged in activity that would require registration as an IB, CTA, or AP thereof; and
4. The Agent SD and the Affiliate SD Counterparty or Affiliate DMD Counterparty execute in writing an undertaking by which they each agree to be jointly and severally liable for any violation of the CEA or Commission regulations by any employee of the Agent SD engaged in any Affiliate Support Activity on behalf of the Affiliate SD Counterparty or Affiliate DMD Counterparty, and, in the case of an Affiliate DMD Counterparty, the Affiliate DMD Counterparty consents to the jurisdiction of the Commission to investigate and take enforcement action against the Affiliate DMD Counterparty for any violation of the CEA or Commission regulations in connection with the Affiliate Support Activity by any employee of the Agent SD on behalf of the Affiliate DMD Counterparty. The Agent SD must maintain the undertaking at its main business office and in accordance with Regulation 1.31.

### **III. Agent Affiliates and Employees**

Similarly, an Agent Affiliate who engages in Affiliate Support Activities on behalf of an Affiliate SD Counterparty may be required to register as an IB or a CTA, and its employees may be required to register as an AP of the Agent Affiliate acting in its capacity as an IB. In this regard, the Division notes that because an Agent Affiliate will not otherwise be registered with the Commission, none of the firm, its principals or its APs will have been vetted to confirm that none of such persons is subject to a Statutory Disqualification. Nonetheless, in prior situations raising similar issues and concerns, CFTC staff has provided registration no-action relief based on the particular facts presented to it, subject to certain conditions.<sup>13</sup>

---

<sup>12</sup> See, e.g., 77 FR 9734, 9739-9740 (Feb. 17, 2012) (discussing the “solely incidental” requirement set forth in Regulation 4.6(a)(3) for the exclusion from the CTA definition available therein).

<sup>13</sup> See, e.g., CFTC Staff Letter No. 03-13 (Mar. 19, 2003) (IB registration no-action position taken with respect to a New York State-chartered bank subject to regulation by a New York State banking authority and the Federal Reserve Board in connection with referrals by a limited number of bank employees to an affiliated futures commission merchant (“FCM”), where the

Accordingly, the Division will not recommend that the Commission commence an enforcement action against an Agent Affiliate or any employee thereof for failure to register as an IB or a CTA if the Agent Affiliate or employee engages in Affiliate Support Activities on behalf of an Affiliate SD Counterparty in connection with a swap entered or to be entered into by the Affiliate SD Counterparty, subject to the following conditions:

1. (a) The Agent Affiliate is registered or licensed with, or subject to regulation by, a financial services, prudential, or banking regulator (including a self-regulatory organization) in the United States, a country that is a member of the European Union, Switzerland, Canada, Japan, Hong Kong, Singapore, or Australia; and

(b) The Agent Affiliate and the Affiliate SD Counterparty are “majority-owned affiliates” as described in Regulation 1.3(ggg)(6); and

2. The Agent Affiliate is not subject to a Statutory Disqualification, the employee is not subject to a Statutory Disqualification, and no person in the supervisory chain of command of the employee is subject to a Statutory Disqualification; and

3. (a) The Agent Affiliate and the employee provide commodity interest trading advice in a manner solely incidental to the conduct of the business of the Agent Affiliate for which it is subject to regulation under Condition 1(a) of this Part III; and

(b) Neither the Agent Affiliate nor the employee is otherwise engaged in activity that would require registration as an IB, CTA, or AP thereof; and

4. The Agent Affiliate and the Affiliate SD Counterparty execute in writing an undertaking by which they each agree to be jointly and severally liable for any violation of the CEA or Commission regulations by any employee of the Agent Affiliate engaged in any Affiliate Support Activity on behalf of the Affiliate SD Counterparty, and the Agent Affiliate consents to the jurisdiction of the Commission to investigate and take enforcement action against the Agent Affiliate or any employee of the Agent Affiliate engaged in any Affiliate Support Activity on behalf of the Affiliate SD Counterparty for any violation of the CEA or Commission regulations by such employee. The Affiliate SD Counterparty must maintain the undertaking at its main business office and in accordance with Regulation 1.31.

---

bank and the FCM were each wholly-owned by the same bank holding company); CFTC Staff Letter No. 97-85 (Oct. 8, 1997) (IB registration no-action position taken with respect to otherwise regulated affiliates of an FCM in connection with referrals by the affiliates’ employees to the FCM, where the FCM and the affiliates were each wholly-owned by the same bank holding company).

#### **IV. Employees of DMD Counterparties**

In connection with its consideration of the foregoing, the Division has received requests for registration relief for employees of DMD Counterparties who are engaged in IB activities on behalf of and in connection with a swap transaction to be entered into by the employer DMD Counterparty itself. Consistent with the fact that DMD Counterparties are excluded from the SD definition, and therefore are not required to register as an SD, the Division believes that if an employee of a DMD counterparty is engaged solely in such swap-related IB activities the employee would not come within the IB definition and, thus, the employee would not be subject to registration as an IB.

#### **V. Registration of APs of FCMs and IBs**

Finally, the Division has received requests that it grant no-action relief from AP registration for employees of a registered FCM or IB, where such employees are engaged in Affiliate Support Activities. The Division does not find that the mere fact that a person is engaging as an AP of an FCM or IB in swap activities with a firm affiliated with its employer FCM or IB is a basis on which to grant AP registration relief. Accordingly, the Division is declining to provide the requested relief.

Nonetheless, the Division is aware that FCMs and IBs who employ individuals who must be registered as an AP solely as a result of their involvement with swaps may be facing significant burdens in ensuring that registration applications for all such individuals have been filed by December 31, 2012.<sup>14</sup> In response, the Division has issued no-action relief that extends to March 31, 2013 the date by which registration applications for such APs must be filed.<sup>15</sup>

\*\*\*\*\*

This letter, and the positions taken herein, represent the positions of the Division only, and do not necessarily represent the positions or views 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 requirement contained in the CEA or in the Regulations of the Commission issued thereunder, including all antifraud provisions of the CEA and the Regulations. Further, this letter, and the relief provided hereby, is based upon the representations made to the Division in support of this relief. Any different, changed or omitted material facts or circumstances might render the relief provided hereby void.

---

<sup>14</sup> See CFTC Staff Letter No. 12-15 (Oct. 11, 2012), available on the website of the Commission.

<sup>15</sup> See CFTC Staff Letter No. 12-69 (Dec. 28, 2012), also available on the website of the Commission. This letter also extends to March 31, 2013, the date by which persons who must register (1) as an AP of a commodity pool operator or a CTA solely because of their involvement with swaps or (2) as an AP as a result of the transition of certain contracts by the Intercontinental Exchange, Inc. and the New York Mercantile Exchange to clearing as commodity futures and options transactions (as explained more fully in Staff Letter No. 12-15).

If you have any questions, please contact Barbara S. Gold, Associate Director, or Israel J. Goodman, Special Counsel, of my staff, at (202) 418-6700.

Very truly yours,

Gary Barnett  
Director  
Division of Swap Dealer and  
Intermediary Oversight