



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

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Director

CFTC Letter No. 13-29
No-Action
June 21, 2013
Division of Swap Dealer and Intermediary Oversight

Re: No-Action Relief: Alternative to Fingerprinting to Establish Fitness of Associated Persons Residing Outside the United States

Ladies and Gentlemen:

This letter is in response to a May 23, 2013 request from the National Futures Association (“NFA”), received by the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”), seeking relief from the fingerprinting requirement for associated persons of Commission registrants where those associated persons have not resided in the United States since reaching 18 years of age (“Non-U.S. Associated Persons”).¹ Except under certain specific circumstances,² Commission

¹ Under Commission Regulation 1.3(aa), an “associated person” is defined as any natural person who is associated in certain capacities with a futures commission merchant, an introducing broker, a commodity pool operator, a commodity trading advisor, a leverage transaction merchant, or a swap dealer or major swap participant. 17 C.F.R. § 1.3(aa).

² The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010), 124 Stat. 1376 (enacted July 21, 2010), added section 4s(a) to the Commodity Exchange Act (“CEA” or “Act”) to provide for the registration and comprehensive regulation of swap dealers (“SDs”) and major swap participants (“MSPs”). In the adopting release setting forth the final rules applicable to the registration of SDs and MSPs, the Commission specifically recognized that “CEA section 4s does not direct the Commission to adopt rules that provide for the registration of *associated persons* of SDs or MSPs.” Registration of Swap Dealers and Major Swap Participants, 77 FR 2613 (Jan. 19, 2012) (emphasis added). Accordingly, when the Commission issued its conforming amendments to 17 C.F.R. Part 3 governing the registration of intermediaries, it did not include persons associated with SDs or MSPs as a category of persons that are required to register as associated persons. Thus, such persons are not required to file a Form 8-R or submit fingerprints to the National Futures Association. See 17 C.F.R. §§ 3.12(a), (c). The Commission’s Regulations are found at 17 C.F.R. Ch. I, and may be accessed through the Commission’s website, www.cftc.gov.

In addition, Commission Regulation 3.12(h) sets forth specific categories of persons that are exempt from the requirement to register as an associated person. The most pertinent of these exemptions with respect to associated persons residing outside the United States is Commission Regulation 3.12(h)(1)(iv), which exempts a person that is “[e]ngaged in any activity as an associated person, as defined in § 1.3(aa) of this chapter, from a location outside the United States, its territories or possessions, and [that] limits such activities to customers located outside the United States, its territories or possessions.” 17 C.F.R. § 3.12(h)(1)(iv).

Regulations require each natural person that is associated with a registered entity to submit fingerprints that are used to conduct a background fitness check for that associated person.

Commission Regulation 3.12(a) requires any person associated with a futures commission merchant (“FCM”), retail foreign exchange dealer (“RFED”), introducing broker (“IB”), commodity trading advisor (“CTA”), commodity pool operator (“CPO”), or leverage transaction merchant to register as an associated person of that sponsoring FCM, RFED, IB, CTA, CPO, or leverage transaction merchant. Under Commission Regulation 3.12(c), except as otherwise provided, application for registration as an associated person in any capacity must be filed on a Form 8-R for each natural person who is associated with an FCM, RFED, IB, CTA, CPO, or leverage transaction merchant. And under Commission Regulation 3.12(c)(3), each Form 8-R filed by such associated person must be accompanied by the fingerprints of that associated person on a fingerprint card provided by the NFA for that purpose (the “Fingerprint Requirement”).

In the United States, review of fingerprints by the FBI has provided a reliable and geographically consistent means for discerning criminal background information. NFA has informed Division staff that the usefulness of the Fingerprint Requirement is significantly diminished outside of the United States, where various national and regional law enforcement agencies have widely varying capabilities in terms of the information they are able to provide and the promptness with which they can provide it. The lack of a single fingerprint record repository outside of the United States (analogous to the FBI) further decreases the utility and efficiency of collecting fingerprints for purposes of conducting background fitness checks of persons residing abroad. As a result, NFA only submits the fingerprints to the FBI. In addition, concerns have been raised by the industry that, in other jurisdictions, requiring the submission of fingerprints may contravene privacy laws.

In a letter dated December 11, 2012, the Division considered the foregoing concerns in light of the purposes of the Fingerprint Requirement in determining to grant no-action relief from the Fingerprint Requirement to principals of FCMs, RFEDs, IBs, CPOs, CTAs, SDs, MSPs, and leverage transaction merchants where those principals have not resided in the United States since reaching 18 years of age (“Non-U.S. Principals”).³ In its May 23, 2013 request for relief, NFA requested that the Division “issue analogous no-action relief to non-U.S. [associated persons].”⁴ Given that similar concerns apply to Non-U.S. Associated Persons as to Non-U.S. Principals, the Division has determined to grant no-action relief from the Fingerprint Requirement to such Non-U.S. Associated Persons.

The Division therefore believes that a sponsoring FCM, RFED, IB, CPO, CTA, or leverage transaction merchant should be permitted to comply with Commission Regulation 3.12(c)(3) with respect to a Non-U.S. Associated Person by submitting *either* a fingerprint card *or* a certification, signed by a person duly authorized by the sponsoring FCM, RFED, IB, CPO,

³ See CFTC Letter No. 12-49 (Dec. 11, 2012), which may be accessed through the Commission’s website, www.cftc.gov.

⁴ *Id.*

CTA, or leverage transaction merchant to bind the sponsoring registrant, certifying that: (1) a reasonable criminal history background check using a reputable commercial service was conducted; (2) such criminal history background check did not reveal any matters that constitute a disqualification under Sections 8a(2) or 8a(3) of the CEA, other than those disclosed; and (3) such sponsoring registrant shall maintain, in accordance with Commission Regulation 1.31, records documenting that such criminal history background check was performed and the results thereof.

Accordingly, the Division will not recommend that the Commission commence any enforcement action against a sponsoring FCM, RFED, IB, CPO, CTA, or leverage transaction merchant based solely upon the failure to submit a fingerprint card with a Form 8-R on behalf of a Non-U.S. Associated Person, *provided that* the sponsoring FCM, RFED, IB, CPO, CTA, or leverage transaction merchant submits a Form 8-R for each Non-U.S. Associated Person with the certification described above, and notifies NFA within 30 days after the filing of a Form 8-R that it has not submitted a fingerprint card for each Non-U.S. Associated Person. This position is, however, subject to compliance with the condition that the sponsoring FCM, RFED, IB, CPO, CTA, or leverage transaction merchant keeps a copy of the certification, together with all supporting documents, pursuant to Commission Regulation 1.31. The Division notes that it will continue to explore alternatives for the Fingerprint Requirement in the context of Non-U.S. Associated Persons, and that in the future it may revisit the process set forth in this letter (without prejudice to sponsoring registrants that may already have availed themselves of the relief provided herein).

This letter is applicable to Commission registrants solely in connection with the requirement to provide fingerprints for Non-U.S. Associated Persons that are sponsored by FCMs, RFEDs, IBs, CPOs, CTAs, and leverage transaction merchants. It does not excuse any of these registrants from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder.

The no-action relief provided herein contains a collection of information, as that term is defined in the Paperwork Reduction Act.⁵ Therefore, a control number for the collection must be obtained from the Office of Management and Budget. In accordance with 44 U.S.C. § 3506(c)(2)(A) and 5 C.F.R. §§ 1320.8 and 1320.10, the Division will, by separate action, prepare an information collection request for review and approval by OMB, and will publish in the Federal Register a notice and request for public comments on the collection burdens associated with the no-action relief. If approved, a Commission registrant may not rely on the Division's determination not to recommend an enforcement action to the Commission unless the Commission registrant provides the information the Division has determined is essential to the provision of no-action relief.

This letter is based upon the representations made to us and is subject to compliance with the conditions set forth above. Any different, changed or omitted material facts or circumstances might render this letter and the no-action position taken herein void. Further, this letter and the

⁵ 44 U.S.C. §§ 3501 *et seq.*

position taken herein represent the views of this Division only, and do not necessarily represent the views of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact Katherine Driscoll, Associate Director, at (202) 418-5544 or Vickie Olafson, Special Counsel, at (202) 418-6771.

Very truly yours,

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