



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Market Oversight

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No-Action
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Division of Market Oversight

No-Action Relief For Certain Commodity Trading Advisors and Investment Advisors From the Prohibition of Aggregation Under Regulation 43.6(h)(6) for Large Notional Off-Facility Swaps

Ladies and Gentlemen:

This letter responds to requests received from multiple parties by the Division of Market Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission”) for no-action relief from the aggregation prohibition in § 43.6(h)(6) for certain commodity trading advisors (“CTAs”) and investment advisors (“IAs”) with respect to large notional off-facility swaps.¹ In particular, the parties requested that the Division provide no-action relief from § 43.6(h)(6) for CTAs and IAs that otherwise meet the qualifications for aggregating orders of different accounts for purposes of satisfying the minimum block trade size or cap size requirement under § 43.6(h)(6)(i) and (ii). The requested relief would extend the exception provision permitting aggregation of orders by certain CTAs and IAs for block transactions subject to the rules of a swap execution facility (“SEF”) or designated contract market (“DCM”) to large notional off-facility swaps.

Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”)² amended the Commodity Exchange Act (“CEA”) to establish a comprehensive new regulatory framework for swaps. Among other things, § 2(a)(13)(E)(ii) and (iii) of the CEA respectively required the Commission to prescribe regulations specifying “the

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 Pacific Investment Management Company LLC (“PIMCO”), Request for Relief from the Aggregation Provision in the Final Block Trade Rule for Large Notional Swaps (June 27, 2013); (2) Letter from International Swaps and Derivatives Association, Inc. (“ISDA”), Request for Division of Market Oversight Staff Letter Pursuant to CFTC Regulation 140.99: Order Aggregation of “Large Notional Off-Facility Swaps” (July 24, 2013); and (3) Letter from the Asset Management Group of the Securities Industry and Financial Markets Association (“SIFMA”), Request for Relief Relating to Aggregation in Final Block Trade Rule (July 25, 2013).

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

criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts” and “the appropriate time delay for reporting large notional swap transactions (block trades) to the public.”³ Pursuant to these newly added provisions, the Commission added a new Part 43 to its regulations which sets forth rules for the real-time public reporting of swap transaction data and the appropriate minimum block sizes for large notional off-facility swaps⁴ and block trades.⁵ On January 9, 2012, the Commission published final rules under Part 43 pertaining to the “Real-Time Reporting of Swap Transaction Data.”⁶ The Real-Time Reporting Rules established a framework for the real-time public reporting of swap transaction and pricing data for swap transactions and established delays for public dissemination of transaction data for, among other things, block trades and large notional swaps. The rules also provided a framework for establishing cap sizes that mask the size of swap transactions above a certain threshold.

Subsequently, on May 31, 2013, the Commission published final rules under Part 43 pertaining to the “Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades.”⁷ In addition to establishing appropriate minimum block sizes and cap sizes, the Commission adopted § 43.6(h)(6) which prohibits “the aggregation of orders for different accounts in order to satisfy the minimum block size or cap size requirements[.]”⁸ However, § 43.6(h)(6) permits aggregation under limited circumstances if done on a DCM or SEF by a person who:

- (i) (A) is a [CTA] registered pursuant to Section 4n of the Act or exempt from such registration under the Act, or a principal thereof, and who has discretionary trading authority or directs client accounts,

³ 7 USC § 2(a)(13)(E).

⁴ “Large notional off-facility swap” is defined as an off-facility swap that has a notional or principal amount at or above the appropriate minimum block size applicable to such publicly reportable swap transaction and is not a block trade as defined in § 43.2 of the Commission’s regulations. 17 CFR § 43.2.

⁵ “Block trade” is defined as a publicly reportable swap transaction that: (1) Involves a swap that is listed on a registered swap execution facility or designated contract market; (2) Occurs away from the registered swap execution facility’s or designated contract market’s trading system or platform and is executed pursuant to the registered swap execution facility’s or designated contract market’s rules and procedures; (3) Has a notional or principal amount at or above the appropriate minimum block size applicable to such swap; and (4) Is reported subject to the rules and procedures of the registered swap execution facility or designated contract market and the rules described in this part, including the appropriate time delay requirements set forth in § 43.5 [of the Commission’s regulations]. *Id.*

⁶ Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (January 9, 2012) (“Real-Time Reporting Rule”).

⁷ 78 FR 32,866 (May 31, 2013) (“Swaps Block Rule”).

⁸ Appropriate minimum block size means the minimum notional or principal amount for a category of swap that qualifies a swap within such category as a block trade or large notional off-facility swap. 17 CFR § 43.2.

(B) is an [IA] who has discretionary trading authority or directs client accounts and satisfies the criteria of § 4.7(a)(2)(v) of the Commission's regulations, or

(C) is a foreign person who performs a similar role or function as the persons described in subparagraphs (A) or (B) and is subject as such to foreign regulation; and

(ii) has more than \$25,000,000 in total assets under management.

In the Final Swaps Block Rule release, the Commission clarified that the aggregation prohibition in § 43.6(h)(6) applies to the appropriate minimum block size and is intended to apply to large notional off-facility swaps as well.⁹ Because the exception to the aggregation prohibition for certain CTAs and IAs under § 43.6(h)(6) specifically applies to aggregation that is “done on a SEF or DCM,” parties are seeking no-action relief for CTAs and IAs that otherwise meet the qualifications of § 43.6(h)(6)(i) and (ii), so that such qualifying CTAs and IAs may be permitted to aggregate orders for the purpose of executing large notional off-facility swaps. The Division notes that aggregated orders must be executed as one swap transaction. The aggregation of **executed** orders for the purpose of reporting them either as block trades on a SEF or DCM, or as large notional off-facility swaps, violates the Commission's regulations.

Time-Limited No-Action Relief for Large Notional Off-Facility Swaps

The Swaps Block Trade Rule becomes effective on July 30, 2013, at which point qualifying CTAs and IAs can only aggregate orders for the purposes of executing block trades on SEFs and DCMs. Currently, few DCMs list swaps for trading, and those offerings are limited in terms of product scope. The compliance date for the SEF rules in Part 37 of the Commission's regulations is October 2, 2013.¹⁰ Consequently, based on the limited swap offerings currently available on DCMs, and the lack of swap offerings by SEFs, it is not practicable for CTAs and IAs to aggregate orders for the purpose of satisfying the appropriate minimum block size or cap thresholds. Thus, the Division will grant time-limited no-action relief until October 1, 2013 at 11:59 p.m. Eastern time, from the aggregation prohibition in § 43.6(h)(6) for large notional off-facility swaps and cap size requirements for qualified persons subject to each of the following conditions:

(i) The aggregation of orders is done by a person who:

⁹ Some requesters stated that, while the Commission clarified in the Swaps Block Rule that it intends to include large notional off-facility swaps in the aggregation prohibition, it was unclear in that release whether the permitted aggregation for certain CTAs and IAs also applies to large notional off-facility swaps. The Division believes that the text of § 43.6(h)(6) shows that the Commission intended to permit aggregation only for transactions on a DCM or SEF done by a person who meets the requirements of § 43.6(h)(6)(i)-(ii).

¹⁰ See Final Rule, Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476 (June 4, 2013); CFTC Letter No. 13-28 (June 17, 2013).

- (1)(A) is a CTA registered pursuant to Section 4n of the Act or exempt from such registration under the Act, or a principal thereof, and who has discretionary trading authority or directs client accounts;
 - (B) is an investment adviser who has discretionary trading authority or directs client accounts and satisfies the criteria of § 4.7(a)(2)(v) of the Commission's regulations; or
 - (C) is a foreign person who performs a similar role or function as the persons described in subparagraphs (A) or (B) and is subject as such to foreign regulation; and
- (2) has more than \$25,000,000 in total assets under management;
- (ii) The aggregated transaction is appropriately reported pursuant to Parts 43 and Part 45 of the Commission's regulations as a "large notional off-facility swap," subject to the cap size thresholds;¹¹ and
 - (iii) The aggregated orders are executed as one swap transaction.¹²

The Division will not recommend that the Commission take enforcement action against any person who aggregates orders to execute large notional off-facility swaps and who satisfies the above conditions until 11:59 p.m. on October 1, 2013.

No-Action Relief for Swaps that are Not Listed or Offered for Trading on a SEF and DCM

The Division believes that the text of § 43.6(h)(6) indicates that the Commission intended only to permit the aggregation of orders for block trades on a DCM or SEF. The Division notes that for swaps listed or offered for trading on a SEF or DCM, this will allow certain CTAs and IAs the benefits of aggregating orders, such as time delays for swap data reporting, while also promoting transactions on SEFs and DCMs. However, the Division understands that the aggregation of orders will not be possible if a SEF or DCM does not list the swap for trading. Therefore, the Division will grant time-limited no-action relief, until further notice by the Division, from the aggregation prohibition in § 43.6(h)(6) for large notional off-facility swaps and cap size requirements for qualified persons subject to each of the following conditions:

- (i) The orders being aggregated are orders for swaps that: (1) are not listed or offered for trading on a SEF; and (2) are not listed or offered for trading on a DCM;

¹¹ The Division notes that certain CTAs and IAs qualifying under § 43.6(h)(6) are also permitted to aggregate orders on a SEF or DCM, subject to the requirements of the rule.

¹² As noted above, the aggregation of **executed** orders for the purpose of reporting them as block trades or large notional off-facility swaps is in violation of the Commission's regulations.

- (ii) The aggregation of orders is done by a person who:
 - (1)(A) is a CTA registered pursuant to Section 4n of the Act or exempt from such registration under the Act, or a principal thereof, and who has discretionary trading authority or directs client accounts;
 - (B) is an investment adviser who has discretionary trading authority or directs client accounts and satisfies the criteria of § 4.7(a)(2)(v) of the Commission's regulations; or
 - (C) is a foreign person who performs a similar role or function as the persons described in subparagraphs (A) or (B) and is subject as such to foreign regulation; and
- (2) has more than \$25,000,000 in total assets under management;
- (iii) The aggregated transaction is appropriately reported pursuant to Parts 43 and Part 45 of the Commission's regulations as a "large notional off-facility swap," subject to the cap size thresholds;¹³ and
- (iv) The aggregated orders are executed as one swap transaction.¹⁴

The Division will not recommend that the Commission take enforcement action against any person who aggregates orders to execute large notional off-facility swaps and who satisfies the above conditions, until further notice by the Division.

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.

¹³ The Division notes that certain CTAs and IAs qualifying under § 43.6(h)(6) are also permitted to aggregate orders on a SEF or DCM, subject to the requirements of the rule.

¹⁴ As noted above, the aggregation of **executed** orders for the purpose of reporting them as block trades or large notional off-facility swaps is in violation of the Commission's regulations.

If you have any questions concerning this correspondence, please contact Roger Smith, Attorney Advisor, Division of Market Oversight, RSmith@CFTC.gov or (202) 418-5344.

Sincerely,

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