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Division of Market Oversight

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No-Action

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Division of Market Oversight

Time-Limited No-Action Relief for Temporarily Registered Swap Execution Facilities from Enforcement Responsibilities Under Commission Regulations 37.200(a), 37.200(b), 37.201(b)(1), 37.201(b)(3), 37.201(b)(5), 37.202(b) and 37.203

The Division of Market Oversight (“DMO”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”) is issuing this letter to provide time-limited no-action relief for temporarily registered swap execution facilities (“SEFs”) from any enforcement responsibilities under Commission regulations 37.200(a), 37.200(b), 37.201(b)(1), 37.201(b)(3), 37.201(b)(5), 37.202(b) and 37.203 with respect to market participants trading on those SEFs. This no-action relief shall commence on the date of issuance of this letter and shall expire on November 1, 2013.¹

I. Background

Section 5h of the Commodity Exchange Act (“CEA”), as added by the Dodd-Frank Act,² established a comprehensive regulatory framework for swaps trading, including: (i) registration, operation, and compliance requirements for SEFs and (ii) fifteen core principles.³ Applicants and registered SEFs are required to comply with the core principles as a condition of obtaining and maintaining their registration as a SEF.⁴ The Commission has promulgated rules to implement Section 5h of the CEA, and the compliance date for those rules is October 2, 2013.⁵

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 Thomson Reuters, Request under Rule 140.99 for Time-Limited No-Action Relief for Swap Execution Facilities to Comply with Commission Regulations §§ 37.6(b), 37.201(b), 37.202, 37.205(a), 43.3(b), and 45.3(a), at p. 4 (September 25, 2013) (“Thomson Reuters Letter”); and (2) Letter from WMBAA, Request for Time-Limited No-Action Relief from Certain Requirements of Part 37 of the Commission’s Regulations (September 26, 2013) (“WMBAA Letter”).

² Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

³ See 7 U.S.C. § 7b–3.

⁴ *Id.*

⁵ See Core Principles and Other Requirements for Swap Execution Facilities, Final Rule, 78 FR 33476, 33477, (Jun. 4, 2013).

One of the SEF core principles, core principle 2, requires a SEF to establish and enforce compliance with its rules, including the terms and conditions of the swaps traded or processed on or through the SEF and any limitations on access to the SEF.⁶ It also requires a SEF to establish and enforce trading, trade processing and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules.⁷ A SEF must also establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades.⁸ The Commission codified the statutory text of SEF core principle 2 in Commission regulation 37.200.⁹

Commission regulation 37.201(b) requires a SEF to establish and impartially enforce compliance with its rules, including, but not limited to, (1) the terms and conditions of any swaps traded or processed on or through the SEF, (2) access to the SEF, (3) trade practice rules, (4) audit trail requirements, (5) disciplinary rules, and (6) mandatory trading requirements.¹⁰

Commission regulation 37.202(b) requires SEFs to compel all persons accessing the SEF to consent to the SEF's jurisdiction prior to granting that person access to the SEF's facilities.¹¹

Commission regulation 37.203 sets forth requirements for a SEF's rule enforcement program and, in part, requires a SEF to establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules.¹²

II. Enforcement of SEF Rules and Onboarding Challenges

The Division has been informed by several temporarily registered SEFs that they are facing several obstacles to achieving compliance with their enforcement responsibilities under Commission Regulations 37.200, 37.201, 37.202, and 37.203 prior to October 2, 2013. According to these SEFs, the process of onboarding participants to their platforms (i.e. securing signed user agreements and consent to jurisdiction agreements) presents certain administrative and operational challenges for swaps market participants. These onboarding difficulties were also highlighted by several SEF representatives at the Commission's Technology Advisory

⁶ CEA section 5h(f)(2)(A); 7 U.S.C. 7b-3(f)(2)(A).

⁷ CEA section 5h(f)(2)(B); 7 U.S.C. 7b-3(f)(2)(B). This section also requires a SEF to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred.

⁸ CEA section 5h(f)(2)(C); 7 U.S.C. 7b-3(f)(2)(C).

⁹ 17 CFR 37.200.

¹⁰ 17 CFR 37.201(b).

¹¹ 17 CFR 37.202(b).

¹² 17 CFR 37.203.

Committee's Meeting ("TAC Meeting") on September 12, 2013.¹³ One of the challenges raised by SEFs has been that market participants have not had an adequate amount of time to review and agree to the particular documents necessary to gain access to a SEF, including the SEF's rulebook and user agreements.¹⁴ As a result, market participants have not had an adequate amount of time to establish their own policies and procedures necessary to comply with each SEF's rulebook and procedures,¹⁵ or to analyze and implement the key technological specifications as required by each SEF.¹⁶ Several SEFs have represented that, absent time-limited no-action relief, it is highly unlikely that all of their member firms' customers will complete the entire "onboarding process" by October 2, 2013.¹⁷

While recognizing the important regulatory objectives underlying the enforcement aspects of Commission regulations 37.200(a), 37.200(b), 37.201(b)(1), 37.201(b)(3), 37.201(b)(5), and 37.203, the Division nevertheless believes that market participants should be provided additional time to review SEF rulebooks and technological specifications before making any written consent to a SEF's jurisdiction under Commission regulation 37.202(b) and thereby subject themselves to the rules and requirements of such SEF. The Division further believes that SEFs should be provided additional time to ensure compliance with their enforcement responsibilities under Commission regulations 37.200(a), 37.200(b), 37.201(b)(1), 37.201(b)(3), 37.201(b)(5), and 37.203, due to remaining work related to customer legal documentation, processing customer information, and technological connectivity between SEFs, customers, swap data repositories, and third party regulatory service providers.

The Division emphasizes that while this letter relieves SEFs from certain enforcement responsibilities with respect to participants in their markets, this letter does not relieve SEFs from their current regulatory responsibility to establish and maintain the rules, systems and procedures necessary to carry out those enforcements responsibilities.

The Division notes that virtually all entities that will have achieved SEF temporary registration status as of October 2nd are uniquely situated because they are in the process of transitioning their current customer bases and existing swap trading activity from their current un-regulated trading platforms operating pursuant to CFTC No-Action Letter 13-28 to their fully-regulated SEF platforms.¹⁸

¹³ The transcript for the September 12, 2013 TAC Meeting is still pending as of the date of this letter's publication and will be available at http://www.cftc.gov/PressRoom/Events/opaevent_tac091213. A video of the TAC Meeting's SEF-related session is available at <http://www.cftc.gov/Exit/index.htm?http://youtu.be/wuumPDcjwag>.

¹⁴ See e.g., *Thomson Reuters Letter* at p. 4.

¹⁵ *Id.*

¹⁶ *Id.* at p. 5.

¹⁷ *WMBAA Letter*, at p. 2.

¹⁸ See CFTC No-Action Letter No. 13-28 (June 17, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-28.pdf>. No-Action Letter 13-28 allows swap trading facilities that were unregulated prior to Dodd Frank to continue operating, without any undue

III. Scope of No-Action Relief

The Division is issuing this no-action letter to provide time-limited relief for temporarily registered SEFs from any enforcement responsibilities under Commission regulations 37.200(a), 37.200(b),¹⁹ 37.201(b)(1), 37.201(b)(3), 37.201(b)(5), 37.202(b) and 37.203 with respect to the activities of market participants who trade on or through such SEFs. Under this relief, the Division will not recommend that the Commission take any action against SEFs that provide temporary access to market participants who do not sign onboarding documentation, including user agreements and consent to jurisdiction agreements, until 12:01 am EST November 1, 2013.

The no-action relief in this letter only applies to a SEF's enforcement responsibilities under Commission regulation 37.200(a), 37.200(b), 37.201(b)(1), 37.201(b)(3), 37.201(b)(5), 37.202(b) and 37.203. This letter does not relieve a SEF from any other requirements applicable to SEFs under the Act or the Commission's Regulations.

The no-action relief in this letter only applies to entities that have achieved temporary registration status as SEFs as of October 2nd. This no-action relief shall commence on the date of issuance of this letter and shall expire on November 1, 2013 at 12:01 am EST.

Conclusion

The no-action relief in this letter is limited to the application of Commission regulations to SEF enforcement responsibilities under 37.200(a), 37.200(b), 37.201(b)(1), 37.201(b)(3), 37.201(b)(5), 37.202(b) and 37.203 with respect to the activities of market participants who trade on or through such SEFs. This no-action relief applies only to the entities described herein.

This letter, and the no-action position taken herein, reflects the views of the Division only, and not necessarily the position or views of the Commission or of any other division or office of the Commission's staff. The no-action position taken herein does not excuse affected persons from compliance with any other applicable requirements of the CEA or the regulations thereunder. As

disruption, during the pendency of, and transition to compliance with, the SEF final rules. The relief under No-Action Letter 13-28 commenced on July 1, 2013, and shall expire on the compliance date of the SEF final rulemaking, which is October 2, 2013, and superseded all terms and conditions of CFTC No-Action Letter 12-48, which also provided relief for pre-Dodd-Frank Act trading platforms. *See* CFTC No-Action Letter No. 12-48 (December 11, 2012), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/12-48.pdf>. Under No-Action Letter 13-28, a swap trading facility that wishes to avoid an interruption in operations on October 2, 2013, must as of that date be granted either temporary registration status as a SEF or be granted full registration status as either a Designated Contract Market or a SEF.

¹⁹ Notwithstanding any relief from enforcement responsibilities under Commission regulation 37.200(b), a SEF must provide any eligible contract participant and any independent software vendor with impartial access to its markets and market services, consistent with the requirements of Commission regulations 37.201(b)(2), and 37.202(a) and (c).

with all no-action letters, the Division retains the authority, in its discretion, to further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein.²⁰

If you have any questions concerning this correspondence, please contact David Van Wagner, Chief Counsel, Division of Market Oversight, at (202) 418-5481 or dvanwagner@cftc.gov, Nancy Markowitz, Deputy Director, Division of Market Oversight, at (202) 418-5453 or nmarkowitz@cftc.gov, or David Pepper, Attorney Advisor, Division of Market Oversight, at (202) 418-5565 or dpepper@cftc.gov.

Sincerely,

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²⁰ Commission guidance or action taken during the pendency of this no-action relief, could supersede the relief granted herein.