



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Market Oversight

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No-Action
September 30, 2013
Division of Market Oversight

Time-Limited No-Action Relief for Swap Execution Facilities and Designated Contract Markets from the One Business Day Product Review Period Requirement of Commission Regulation 40.2(a)(2) for Newly-Listed Swap Products

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 swap execution facilities (“SEFs”) and Designated Contract Markets (“DCMs”) from the one business day product review period requirement of Commission regulation 40.2(a)(2) for newly-listed swap products. This time limited no-action relief would commence on September 30, 2013 and expire on October 3, 2013 or, if there is a federal government shutdown on that date, the first business day after the conclusion of such shutdown.¹

I. Background

Under section 37.4 and part 40 of the Commission’s regulations, prior to listing a new swap for trading, SEFs and DCMs must either submit the product to the Commission for prior approval or self-certify to the Commission that the new product complies with the Commodity Exchange Act (“CEA”) and the Commission’s regulations.² Commission regulation 40.2(a)(2) requires a SEF or DCM that proposes to list a new swaps product pursuant to the self-certification procedures to provide notice and a copy of the terms and conditions of the swap one business day in advance of making the product available for trading.³ Accordingly, under the product self-certification procedures, Commission staff is ensured of having one full business day to conduct a preliminary evaluation of each swaps product and accompanying submission.

¹ This letter responds to and fully grants the no-action relief requested by: (1) the Wholesale Markets Brokers’ Association on behalf of various SEFs in a letter dated September 29, 2013; and (2) ELX Futures, L.P., a DCM, in a letter dated September 29, 2013.

² 17 CFR 37.4, 40.2 and 40.3.

³ 17 CFR 40.2(a)(2). For these purposes, a “business day” means “the intraday period of time starting at the business hour of 8:15 a.m. and ending at the business hour of 4:45 p.m. . . . Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect in Washington, DC, on all days except Saturdays, Sundays, and Federal holidays in Washington, DC.” 17 CFR 40.1(a).

II. Application of the One Business Day Review Procedure to SEFs and DCMs

The Division has been informed by certain SEFs and DCMs that they face several obstacles to achieving compliance with the product self-certification requirements of Regulation 40.2 with respect to new swaps products.

First, most of the entities who will be operating SEFs on October 2, 2013 have already been operating trading platforms for the trading of swaps pursuant to various exemptions and exclusions in the CEA prior to the repeal of those provisions by the Dodd-Frank Wall Street Reform and Consumer Protection Act (e.g., CEA Sections 2(d)(2), 2(h)(3) and 5d as those provision were in effect prior to July 16, 2011). Subsequently, these same entities have continued to operate those unregulated platforms pursuant to applicable Commission exemptive orders and staff no-action letters, the most recent of which will expire on October 2, 2013.⁴ The October 2nd expiration date coincides with the compliance date for the Commission's Part 37 regulations governing SEFs.⁵ The transitioning of the operations of these entities from an unregulated to a regulated environment will likely result in an unprecedented number of self-certified product filings by SEFs on September 30th, which is the last date on which a product can be self-certified to the Commission and be listed by October 2nd. SEFs represent that they face logistical challenges in meeting this deadline.

Second, the possible federal government shutdown on October 1, 2013 may also complicate the ability of both SEFs and DCMs to trade swaps products in a regulated environment. For instance, in the event of a government shutdown on October 1st, any swaps product self-certified to the Commission pursuant to Regulation 40.2(a)(2) on September 30th or later, could not be implemented until the business day following the first business day that government operations resumed as all review periods related to Part 40 filings would be tolled for the duration of any government shutdown.

The Division believes that the one business day review period for self-certified product submissions required by Commission Regulation 40.2(a)(2) could impede the ability of both SEFs and DCMs to begin trading swaps products in a regulated environment due to both the short time before the compliance date for the SEF final rules and the possible federal government shutdown.

III. Scope of No-Action Relief

⁴ See Effective Date for Swap Regulation, Final Order, 76 FR 42508 (July 19, 2011); Amendment to July 14, 2011 Order for Swap Regulation, Final Order, 76 FR 80233 (December 23, 2011); Second Amendment to July 14, 2011 Order for Swap Regulation, Final Order, 77 FR 41260 (July 13, 2012); 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>; CFTC No-Action Letter No. 13-28 (June 17, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/13-28.pdf>.

⁵ 17 CFR part 37.

In light of the above-described unique circumstance of applying Commission regulation 40.2(a)(2) to new swap product filings of SEFs and DCMs, DMO believes that no-action relief is necessary to prevent market interruption and to ensure continuity in the operations of SEFs and DCMs. Accordingly, DMO will not recommend that the Commission initiate an enforcement action against any currently registered SEF or DCM for violation of Commission Regulation 40.2(a)(2) if, during a time limited period, it lists any swap product for trading on the same day that it submits a self-certification of the product pursuant to Commission Regulation 40.2. This time limited no-action relief would commence on September 30, 2013 and expire on October 3, 2013 or, if there is a federal government shutdown on that date, the first business day after the conclusion of such shutdown.

This letter, and the no-action position taken herein, represents the views of DMO only, and does not necessarily represent the positions or views of the Commission or of any other division or office of the Commission. The no-action positions taken herein do not excuse any SEF or DCM from compliance with any other applicable requirements of the CEA or the Commission's regulations thereunder, including all of the other provisions of Regulation 40.2 regarding self-certified swap submission. In this connection, DMO particularly notes the requirements of: (1) Commission Regulation 40.2(a)(3)(vi) that SEFs and DCMs publish swap product submissions, including the terms and conditions of such products, on their websites; and (2) Commission Regulation 40.2(d) regarding the class certification of swap products based upon excluded commodities, as that term is defined in CEA Section 1a(19). As with all no-action letters, DMO retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

If you have any questions concerning this correspondence, please contact David P. Van Wagner, Chief Counsel, at (202) 418-5481, or Thomas Leahy, Associate Director, at (202) 418-5278.

Sincerely,

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