



## U.S. COMMODITY FUTURES TRADING COMMISSION

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CFTC Letter 17-17  
No-Action  
March 24, 2017  
Division of Market Oversight

**Re: Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a)**

Dear Mr. Shields:

This letter responds to a request received from the Wholesale Markets Brokers' Association, Americas ("WMBAA")<sup>1</sup> that the Division of Market Oversight ("Division") extend the relief provided to its members and other industry participants under Commodity Futures Trading Commission ("CFTC" or "Commission") Letter No. 16-25.<sup>2</sup> Because the WMBAA and its members have been unable to develop a solution to meet the confirmation requirements in Commission Regulation 37.6(b), it requests this time to enable the Commission to undertake a rulemaking to establish a permanent swap execution facility ("SEF") confirmation solution for uncleared transactions executed on or pursuant to the rules of a SEF consistent with the terms of the no-action relief requested by the WMBAA. The no-action relief provided under CFTC Letter No. 16-25 will expire on 11:59 p.m. (Eastern Time) March 31, 2017. The Division continues to assess confirmation requirements, including establishing a permanent solution and will thus extend the no-action relief provided under CFTC Letter No.16-25 until the effective date of revised Commission regulations that establish a permanent, practicable SEF confirmation solution.

### Background

Commission Regulation 37.6(b) requires that a SEF "provide each counterparty to a transaction that is entered into on or pursuant to the rules of the [SEF] with a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction."<sup>3</sup> In the adopting release for the final part 37 rules, the Commission explained that, with respect to uncleared swaps, SEFs could satisfy the regulation's written confirmation requirement by incorporating by reference terms set forth in agreements

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<sup>1</sup> The WMBAA is an independent industry body that represents BGC Derivatives Markets, L.P.; GFI Swaps Exchange LLC; tpSEF, Inc.; and Tradition SEF, Inc. Each of these firms is registered with the Commission as a SEF.

<sup>2</sup> CFTC Letter No. 16-25 extended no-action relief provided under CFTC Letter No. 15-25.

<sup>3</sup> 17 C.F.R. §37.6(b).

previously negotiated by the counterparties, *provided* that such agreements had been submitted to the SEF ahead of execution.<sup>4</sup>

Commission regulations also require that a SEF maintain all agreements that are incorporated by reference in a confirmation. Commission Regulations 37.1000 and 37.1001<sup>5</sup> implement the requirement set forth in SEF Core Principle 10 that a SEF maintain records of all activities relating to the business of the facility, including a complete audit trail.<sup>6</sup> Commission Regulation 45.2(a) also requires that a SEF or designated contract market (“DCM”) “keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of such entity or person with respect to swaps, as prescribed by the Commission.”<sup>7</sup>

Section 45.3 of the Commission’s regulations requires that registered entities and swap counterparties report swap creation data to SDRs.<sup>8</sup> For swaps executed on or pursuant to the rules of a SEF or DCM, Commission Regulation 45.3(a)(1) requires the SEF or DCM to report all required swap creation data to an SDR as soon as technologically practicable after execution of the swap.<sup>9</sup> Swap creation data is comprised of all primary economic terms (“PET”) data for a swap and all confirmation data for a swap.<sup>10</sup> The primary economic terms of a swap are “all of the terms of a swap matched or affirmed by the counterparties in verifying the swap” and include, at a minimum, the terms for swaps in each asset class found in Appendix 1 to part 45.<sup>11</sup> Confirmation data is “all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap.”<sup>12</sup>

In response to requests from multiple parties,<sup>13</sup> on August 18, 2014, the Division issued CFTC Letter No. 14-108, which provided relief for SEFs from confirmation and recordkeeping

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<sup>4</sup> See Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,491 n.195 (June 4, 2013) (the proviso furthers counterparties’ ability “to ensure that nothing in the confirmation terms contradict” the terms contained in the incorporated agreements).

<sup>5</sup> 17 C.F.R. §§ 1000, 1001.

<sup>6</sup> CEA section 5h(f)(10); 7 U.S.C. 7b–3(f)(10).

<sup>7</sup> 17 C.F.R. §45.2(a).

<sup>8</sup> 17 C.F.R. §45.3.

<sup>9</sup> 17 C.F.R. § 45.3(a)(1).

<sup>10</sup> 17 C.F.R. §45.1 (“*Required swap creation data* means all primary economic terms data for a swap in the swap asset class in question, and all confirmation data for the swap.”).

<sup>11</sup> *Id.* (definition of “primary economic terms”).

<sup>12</sup> *Id.* (definition of “confirmation data”).

<sup>13</sup> CFTC Letter No. 14-108 responded to no-action relief requested in, among others, the following: (1) Jointly-submitted Letter from Bloomberg SEF LLC, ICE Swap Trade, LLC, INFX SEF, Inc., MarketAxess SEF Corporation, SwapEx, LLC, TeraExchange, LLC, 360T Trading Networks Inc., Thomson Reuters (SEF) LLC, and Global FX Division of the Global Financial Markets Association (GFMA), Request for Time-Limited No-Action Relief Relating to Confirmations for Swaps Not Required or Intended to Clear (March 7, 2014); (2) Letter from the International Swaps and Derivatives Association, Inc., Request for Relief for Confirmation Requirements under Part 37 for Swaps Executed on Swap Execution Facilities (March 10, 2014); and (3) Letter from the WMBA, Request for Relief from Certain Requirements under Parts 37 and 45 Related to Trade Confirmations for Swaps Not Required or Intended to be Cleared (March 12, 2014).

requirements set forth in Commission Regulations 37.6(b), 37.1000, 37.1001, and 45.2. The no-action letter stated that the Division would not recommend enforcement action against a SEF that, without first obtaining copies of the underlying previously-negotiated agreements between the counterparties to an uncleared transaction, incorporates such agreements by reference in the trade confirmation required under Commission Regulation 37.6(b). The letter also stated that the Division would not recommend enforcement action if a SEF failed to maintain a copy of the incorporated underlying agreements as required under Commission Regulations 37.1000, 37.1001 and 45.2(a).

On April 22, 2015, the Division issued CFTC Letter No. 15-25 to extend the relief provided by CFTC Letter No. 14-108 until March 31, 2016. The letter also provided additional relief for confirmation data reporting requirements under Commission Regulation 45.3. The Division issued CFTC Letter No. 16-25 on March 14, 2016, extending the relief provided by CFTC Letter No. 15-25.

### **Request for Extension of No-Action Relief**

In a letter dated March 7, 2017, the WMBAA requested an extension to the relief provided in CFTC Letter No. 16-25 and that the Commission undertake a rulemaking to establish a permanent confirmation solution consistent with the terms of the no-action relief requested by the WMBAA. According to the WMBAA, the relief granted in CFTC Letter No. 16-25 has not eased the operational concerns that prompted the original request for relief. Due to the complexity of the issue, the WMBAA states that SEFs have been unable to develop a practicable and cost-effective method to request, accept and maintain a library of every underlying previously-negotiated freestanding agreement between counterparties. According to the WMBAA, counterparties maintain many of these agreements in paper form, or scanned PDF files, making them impossible to quickly digitize in a cost-effective manner. The WMBAA states that the resource cost is significant when considering the number of different agreements that exist to accommodate the different parties and different asset classes. Therefore, it requests that CFTC Letter No. 16-25 be extended until the earlier of (1) March 31, 2018, or (2) the effective date of revised Commission regulations that establish a permanent SEF confirmation solution.

### **Extension of Time-Limited No-Action Relief**

Based on the representations in the WMBAA's request, the Division has determined to extend the no-action relief provided in CFTC Letter No. 16-25. During the extended period of relief, the Division will not recommend that the Commission take enforcement action if, in a confirmation provided pursuant to Commission Regulation 37.6(b), a SEF incorporates by reference terms from previously-negotiated agreements between the counterparties, without first having been supplied copies of such agreements. The Division also will not recommend that the Commission take enforcement action against a SEF for failure to maintain a copy of the agreements incorporated by reference in the SEF's confirmation, as required under Commission Regulations 37.1000, 37.1001 and 45.2(a). Additionally, during the extended period of relief, the Division will not recommend that the Commission take enforcement action against a SEF for

failure to report certain confirmation data pursuant to Commission Regulation 45.3(a) when such confirmation data is contained solely in the terms of the underlying agreements that are incorporated by reference in the SEF's 37.6(b) confirmation. A SEF must continue to report all terms the SEF is currently reporting pursuant to Part 45 of the Commission's regulations as of the time of the issuance of this letter, even if such terms are contained in the incorporated agreements.

This relief applies only to uncleared swap transactions executed on or pursuant to the rules of a SEF and is subject to the following conditions:

1. The SEF must have a rule in its rulebook that requires a SEF confirmation to state, where applicable, that it incorporates by reference the terms of the underlying previously-negotiated freestanding agreements between the counterparties.
2. The SEF must have a rule in its rulebook that states that in the event of any inconsistency between a SEF confirmation and the underlying previously-negotiated freestanding agreements, the terms of the SEF confirmation legally supersede any contradictory terms; the SEF must also have a rule that requires the SEF's confirmations to state the same.
3. The SEF must have a rule in its rulebook that requires its participants to provide copies of the underlying previously-negotiated freestanding agreements to the SEF on request.
4. The SEF must have a rule in its rulebook that requires the SEF to request from participants the underlying previously-negotiated freestanding agreements on request from the Commission and requires the SEF to furnish such documents to the Commission as soon as they are available.
5. A SEF must continue to report all PET data required under section 45.3(a)(1) of the Commission's regulations. For the purposes of this relief, the data that a SEF must still report pursuant to section 45.3(a)(1) includes, at a minimum:
  - a. All PET data required to be reported pursuant to Part 45 of the Commission's regulations. This includes the specific terms listed in the Tables of Minimum Primary Economic Terms Data in Appendix 1 to Part 45 of the Commission's regulations, as applicable to the particular swap;
  - b. All swap data that is readily available to the SEF and collected by the SEF currently in the regular course of facilitating the execution of transactions on its facility, or in the regular course of accepting transactions that counterparties execute off of the SEF facility pursuant to the rules of the SEF;
  - c. All swap data the SEF currently reports to any SDR in the regular course of reporting swaps pursuant to Commission regulations; and

- d. All swap data the SEF includes in the confirmation it sends to swap counterparties pursuant to section 37.6(b) of the Commission's regulations that is not incorporated by reference from the underlying previously-negotiated freestanding agreements.
6. For purposes of this relief, as of the time of issuance of this letter, a SEF may not modify its trading systems or protocols,<sup>14</sup> its reporting to an SDR (including reporting via a third-party service provider), or its confirmation process pursuant to Commission Regulation 37.6(b) in a way that reduces the amount of PET data it reports. The Division notes that a SEF is free to increase the amount of PET data it reports.

The relief shall expire **on the effective date of any changes in the regulation.**

Market participants should be aware that the no-action positions taken herein do not excuse affected persons from compliance with any other applicable requirements of the CEA or the Commission's regulations thereunder, in particular, the applicable swap data reporting requirements and clearing requirements. 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. 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.

If you have any questions concerning this correspondence, please contact Nancy Markowitz, Deputy Director, Division of Market Oversight, at (202) 418-5453 or [NMarkowitz@cftc.gov](mailto:NMarkowitz@cftc.gov); Dan Bucsa, Deputy Director, Division of Market Oversight, at (202) 418-5435 or [DBucsa@cftc.gov](mailto:DBucsa@cftc.gov); Jonathan Lave, Associate Director, Division of Market Oversight, at (202) 418-5983 or [JLave@cftc.gov](mailto:JLave@cftc.gov); or Ben DeMaria, Special Counsel, Division of Market Oversight, at (202) 418-5988 or [BDeMaria@cftc.gov](mailto:BDeMaria@cftc.gov).

Sincerely,

Amir Zaidi  
Director  
Division of Market Oversight

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<sup>14</sup> The Division notes that changes to SEF trading protocols fall within the definition of "Rule" in section 40.1 of the Commission's regulations. See 17 C.F.R. § 40.1(i) (the definition of "Rule"). As a result, any changes to SEF trading systems or protocols require a filing with the Commission pursuant to section 40.5 or 40.6 of the Commission's regulations. See 17 C.F.R. §§ 40.5 and 40.6.