



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Market Oversight

November 15, 2013

To: All CFTC Registered Swap Execution Facilities and Applicants for Registration as a Swap Execution Facility

Division of Market Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities

The Division of Market Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) is issuing guidance (“Guidance”) to swap execution facilities (“SEFs”) and applicants for registration as a SEF concerning certain Commission regulations.¹ There are six areas addressed by this Guidance, which include: registration requirements under Commission regulation 37.3; consent to the jurisdiction of a SEF; a SEF’s use of proprietary data or personal information collected by the SEF from its market participants;² and member guarantees.³ In addition, although the Division addressed the types of actions a SEF may take during an emergency in its September 30 Guidance, this Guidance once again reiterates the requirements for taking emergency actions.⁴ Finally, this Guidance clarifies certain SEF reporting obligations.

1. Registration Requirement under Commission Regulation 37.3

Section 5h(a)(1) of the Commodity Exchange Act (“CEA”) provides that no person may operate a facility for the trading or processing of swaps unless the facility is registered as a SEF or designated contract market (“DCM”).⁵ Commission regulation 37.3(a)(1) requires the registration as a SEF or DCM of any person operating a facility that offers a trading system or platform on which more than one market participant has the ability to execute or trade swaps

¹ See “Division of Market Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities” (Sep. 30, 2013) [hereinafter “September 30 Guidance”].

² Market participant means a person that directly or indirectly effects transactions on a SEF. This includes persons with trading privileges on the SEF and persons whose trades are intermediated. See “Core Principles and Other Requirements for Swap Execution Facilities,” 78 Fed. Reg. 33,476 at 33,506 (June 4, 2013).

³ Member means an individual, association, partnership, corporation, or trust (i) owning or holding membership in, or admitted to membership representation on, a SEF; or (ii) having trading privileges on a SEF. See Commission regulation 1.3(q); 17 C.F.R. 1.3(q).

⁴ See September 30 Guidance at 3.

⁵ A foreign board of trade (“FBOT”) registered with the Commission pursuant to CEA Section 4(b)(1) and Part 48 of the Commission’s regulations satisfies this requirement. See, e.g., “Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations,” 78 Fed. Reg. 45291, 45352 (July 26, 2013) (noting that a “registered FBOT is analogous to a DCM and is subject to comprehensive supervision and regulation in its home country that is comparable to that exercised over a DCM by the Commission.”).

with more than one other market participant on the system or platform (a “multilateral swaps trading platform”).⁶

In the context of CEA Section 5h(a)(1) and Commission regulation 37.3(a)(1), the Division expects that a multilateral swaps trading platform that is itself a U.S. person or is located or operating in the United States will register as a SEF or DCM. The Division believes that, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commission has a strong supervisory interest in multilateral swaps trading activities that occur within the United States, regardless of the status of persons trading or executing swaps on the platform.

CEA section 2(i) provides that the swap provisions of the CEA, including any rules or regulations thereto, shall not apply to activities outside the United States unless those activities “have a direct and significant connection with activities in, or effect on, commerce of the United States.”⁷ Accordingly, the SEF/DCM registration requirement of CEA section 5h(a)(1) and Commission regulation 37.3(a)(1) may apply to a multilateral swaps trading platform that is located outside the United States where the trading or executing of swaps on or through the platform creates a “direct and significant” connection to activities in, or effect on, commerce of the United States.

The Division expects that a multilateral swaps trading platform located outside the United States that provides U.S. persons or persons located in the U.S. (including personnel and agents of non-U.S. persons located in the United States) (“U.S.-located persons”) with the ability to trade or execute swaps on or pursuant to the rules of the platform, either directly or indirectly through an intermediary, will register as a SEF or DCM.⁸ The Division believes that U.S. persons and U.S.-located persons generally comprise those persons whose activities have the requisite “direct and significant” connection with activities in, or effect on, commerce of the United States within the meaning of CEA section 2(i). The Division further believes that a multilateral swaps trading platform’s provision of the ability to trade or execute swaps on or through the platform to U.S. persons or U.S.-located persons may create the requisite connection under CEA section 2(i) for purposes of the SEF/DCM registration requirement.⁹

⁶ See Commission regulation 37.3(a)(1); 17 C.F.R. 37.3(a)(1).

⁷ 7 U.S.C. § 2(i)

⁸ In the Division’s view, factors that would be relevant in evaluating the SEF/DCM registration requirement of CEA Section 5h(a)(1) and Commission regulation 37.3(a)(1) as they apply to multilateral swaps trading platforms located outside the United States, would generally include, but not be limited to: (1) whether a multilateral swaps trading platform directly solicits or markets its services to U.S. persons or U.S.-located persons; or (2) whether a significant portion of the market participants that a multilateral swaps trading platform permits to effect transactions are U.S. persons or U.S.-located persons. Market participant means a person that directly or indirectly effects transactions on a SEF. This includes persons with trading privileges on the SEF and persons whose trades are intermediated. See “Core Principles and Other Requirements for Swap Execution Facilities,” 78 Fed. Reg. 33476, 33506 (June 4, 2013).

⁹ See Note 8, *supra*.

The Division notes that foreign-based platforms already registered with their home country may register as a SEF or DCM. The Division expects to work with such platforms that apply for registration and with home country regulators to determine whether alternative compliance arrangements are appropriate, in recognition of comparable and comprehensive home country regulation.

The Division reminds swaps market participants, temporarily registered SEFs and SEF applicants of the CEA section 2(h)(8) trade execution requirement which requires a swap transaction subject to the clearing requirement to be executed on a DCM or a SEF, unless no DCM or SEF “makes the swap available to trade” or the swap transaction is subject to the clearing exception under CEA section 2(h)(7) (the end-user exception).¹⁰

The Division urges SEF applicants, temporarily registered SEFs and other multilateral swaps trading platforms to closely assess their operations in light of the SEF/DCM registration requirements of Commission regulation 37.3(a)(1). The Division continues to assess the manner in which temporarily registered SEFs and other multilateral swaps platforms, whether associated with temporarily registered SEFs or not, offer trading or execution services to variously situated persons.

2. Consent to SEF Jurisdiction

The Division understands that certain clearing members are not consenting to the jurisdiction of the SEF. Commission regulation 37.700 requires that SEFs “establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the [SEF], *including the clearance and settlement* of the swaps pursuant to section 2(h)(1) of the Act.”¹¹ To that end, the Division expects a clearing member that guarantees swaps intended to be cleared on a SEF to consent to the jurisdiction of the SEF.

3. Conditioning Access on Consent to Use Proprietary Data or Personal Information

The Division has learned that some SEF participation agreements or rulebooks contain a requirement that in order to access the SEF, an eligible contract participant (“ECP”) must consent to the SEF using data it collects from the ECP, including market data, propriety data, and personal data, for business or marketing purposes. These provisions are inconsistent with Commission regulation 37.7, which states that a SEF “shall not use for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of

¹⁰ See also Division of Swap Dealer and Intermediary Oversight Advisory “Applicability of Transaction-Level Requirements to Activity in the United States,” CFTC Letter No. 13-69 (Nov. 14, 2013) (“DSIO believes the Commission intended substituted compliance to be available, or Transaction-Level Requirements to not apply, where the activities of the non-U.S. SD take place outside the United States. In this regard, DSIO believes that, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commission has a strong supervisory interest in swap dealing activities that occur within the United States, regardless of the status of the counterparties.”).

¹¹ Commission regulation 37.700; 17 C.F.R. 37.700 (emphasis added).

any person, for the purpose of fulfilling its regulatory obligations” unless the SEF receives consent to use such data.”¹² Further, a “[SEF] shall not condition access to its market(s) or market services on a person’s consent to the swap execution facility’s use of proprietary data or personal information for business or marketing purposes.”¹³ These provisions inappropriately condition access to the SEF based upon consent to use data or information provided to the SEF.

4. Member Guarantees

The Division has received questions as to whether a SEF may require a member to guarantee trades executed by the member for its own account or for the account of other market participants. With respect to cleared trades, the Division notes that a guarantee from a clearing member is required to satisfy Commission regulation 37.700. An additional guarantee from a member is not required.

5. Emergency Actions

The Division notes that Commission regulation 37.800 requires a SEF to adopt rules that may be exercised in an emergency “in consultation or cooperation with the Commission, as is necessary and appropriate....”¹⁴ Emergency is defined in Commission regulation 40.1(h).¹⁵ The Division notes that some SEFs are assuming greater discretion to take action by defining emergency situations more broadly. For example, some SEFs reserve the right to suspend trading privileges under their emergency authority if, in their sole discretion, such action is in the best interest of the SEF. As stated in the September 30 Guidance,¹⁶ “such emergency action must be carried out pursuant to Core Principle 8 and part 40 of the Commission’s regulations.”¹⁷ Accordingly, the definition of “emergency” set forth in a SEF’s rulebook must be consistent with, and not broader than, the Commission’s definition.

6. SEF Reporting Obligations

The Division emphasizes that SEFs have reporting obligations under parts 43 and 45 for all assets classes, subject to any time-limited relief provided by the Division.¹⁸ Further, when a SEF reports swap data, it must report the legal entity identifier (“LEI”) of the SEF in the required “execution venue” field.

¹² See Commission regulation 37.7; 17 C.F.R. 37.7.

¹³ *Id.*

¹⁴ Commission regulation 37.800; 17 C.F.R. 37.800.

¹⁵ Commission regulation 40.1; 17 C.F.R. 40.1.

¹⁶ See September 30 Guidance at 2-3.

¹⁷ *Id.* at 3.

¹⁸ See “Extension of Certain Time-Limited No-Action Relief Regarding Swap Execution Facilities Provided by CFTC No-Action Letter Nos. 13-55 (amended), 13-56 and 13-58 for Swaps in the Foreign Exchange Asset Class,” CFTC Letter No. 13-68 (Nov. 1, 2013).

Finally, the Division reminds SEFs that they may make changes to their rulebooks at any time, pursuant to either the certification or approval procedures set forth in part 40 of the Commission's regulations, provided that such rule changes are not inconsistent with the Act or the Commission's regulations.

This Guidance supersedes any previous guidance issued by the Division on these topics to the extent that it is inconsistent with such guidance. This Guidance, and the positions taken herein, represent the views of the 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 Guidance, please contact Nancy Markowitz, Deputy Director, Division of Market Oversight, at (202) 418-5453 or nmarkowitz@cftc.gov, Jonathan Lave, Associate Director, Division of Market Oversight, at (202) 418-5983, jlave@cftc.gov, or Nhan Nguyen, Special Counsel, Division of Market Oversight, at (202) 418-5932 or nnguyen@cftc.gov.

Sincerely,


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