



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 12-29
No-Action
October 26, 2012
Division of Swap Dealer and Intermediary Oversight

Melissa MacGregor
Managing Director and Associate General Counsel
SIFMA
1101 New York Avenue, 8th Floor
Washington, D.C. 20005-4269

Re: Request for No-Action Relief for Swap Dealers and Major Swap Participants from Compliance with Certain Internal Business Conduct Requirements Found in Subpart F to Part 23 of the CFTC's Regulations

Dear Ms. MacGregor:

This letter is in response to your request dated August 10, 2012, to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (the “Commission”) on behalf of the Securities Industry and Financial Markets Association’s (“SIFMA”) member firms and other swap dealers (“SDs”) and major swap participants (“MSPs”) (collectively, the “Firms”), in which you requested no-action relief from certain recordkeeping requirements of subpart F to part 23 of the Commission’s Regulations (“Regulations”).¹ In the letter, you assert that there are several operational constraints that will prevent SDs and MSPs² from becoming fully compliant with certain requirements of subpart F to part 23 in a timely manner.³

¹ For the relevant text of the Regulations in part 23 of Title 17, *see* Swap Dealer and Major Swap Participant Recordkeeping, Reporting and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20128 (Apr. 3, 2012).

² For purposes of this correspondence, the term “SDs and MSPs” includes both swap entities that are registered with the Commission as an SD or MSP and those that are otherwise required to register with the Commission as an SD or MSP, but have failed to do so.

³ CFTC staff recently published a Frequently Asked Questions (“FAQs”) document detailing the timing of the SD registration rules. The document is located at <http://www.cftc.gov/PressRoom/PressReleases/pr6348-12>. As the FAQs document details, the earliest that a Firm would be required to register as an SD with the Commission is December 31, 2012.

The Commission promulgated subpart F to part 23 pursuant to sections 4s(f) and 4s(g) of the Commodity Exchange Act (“the Act”), 7 U.S.C. § 1 *et seq.*, as amended by section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010). Subpart F to part 23 imposes several requirements on SDs and MSPs, including the following:

- Regulation 23.201 sets forth the records of swaps activities that SDs and MSPs must maintain. Such records include full and complete swap transaction information. Moreover, Regulation 23.201(a) requires daily trading records for each swap to be kept in a manner that is readily accessible, identifiable and searchable by transaction and by counterparty;⁴
- Regulation 23.202 sets forth daily trading record requirements for swaps and related cash and forward transactions. Such records include trade information related to pre-execution, execution, and post-execution swap data and any related cash or forward transactions. Specifically, Regulations 23.202(a)(1) and (b)(1) require each SD and MSP to make and keep pre-execution trade information, including records of all oral and written communications provided or received concerning quotes, solicitations, bids, instructions, trading and prices, that lead to the execution of a swap (or lead to the conclusion of a related cash or forward transaction), whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media. Furthermore, Regulations 23.202(a) and (b) require SDs and MSPs to use Coordinated Universal Time (“UTC”) to timestamp a swap’s pre-execution, execution, and post-execution trade information, and any related cash and forward transactions;⁵
- Regulation 23.203 sets forth record retention and inspection requirements for SDs and MSPs. Pursuant to Regulation 23.203(a)(1), SDs and MSPs must keep all records required by the Act and Regulations at the principal place of business (or other designated principal office) of the SD or MSP.⁶

On behalf of the Firms, you have requested the following relief –

a. Required Telephonic Recording of Pre-Execution Trade Information

From Regulation 23.202(a), you are seeking:

- An additional six months after the Compliance Date for Firms to install systems to record relevant landline telephone conversations of substantially all relevant personnel located in the United States involved in swaps activity;

⁴ Regulation 23.201, 17 C.F.R. § 23.201; 77 Fed. Reg. at 20202-03.

⁵ Regulation 23.202, 17 C.F.R. § 23.202; 77 Fed. Reg. at 20203-04.

⁶ Regulation 23.203, 17 C.F.R. § 23.203; 77 Fed. Reg. at 20204.

- An additional year after the Compliance Date for Firms to install systems to record relevant mobile telephone conversations of substantially all relevant personnel located in the United States involved in swaps activity;
- An additional year after the Compliance date for Firms to install systems to record relevant landline and mobile telephone conversations of substantially all relevant personnel involved in swaps activity and who are located outside the United States in locations where recording infrastructure and/or technology is currently readily available; and
- An additional year after records infrastructure and/or technology becomes available that meets internal control and data security requirements to implement systems to record relevant landline and mobile telephone conversations of substantially all relevant personnel located outside of the United States in locations where such infrastructure and/or technology is currently not readily available.

b. Requirement to Maintain All Transaction Records in a Manner “Identifiable and Searchable” by Transaction and Counterparty

From Regulations 23.201(a)(1), 23.202(a) and 23.202(b), you seek no-action relief regarding compliance with the requirement that SDs and MSPs create and maintain transaction records (including daily trading records) in a manner identifiable and searchable by transaction and counterparty. Moreover, you request that the Division permit SDs and MSPs to rely upon existing search capabilities to achieve compliance with the relevant regulations.

c. Required Use of UTC Timestamp when Recording Quotations Prior To and At the Time of Execution of a Swap

From Regulations 23.202(a)(1)(ii) and (a)(2)(iv) (applicable to swaps) and 23.202(b)(3) and (b)(4) (applicable to related cash or forward transactions), you seek an additional year after the Compliance Date for Firms to convert all legacy systems that record quotation or transaction times in local time into UTC. Moreover, you represent that during the interim time, each Firm would enable any time data previously recorded in local time to be convertible to UTC within a reasonable time after a regulatory request for such time data.

d. Mandatory Retention of Required Records at a Principal Place of Business

From Regulation 23.203(a)(1), you request no-action relief for any Firm that stores data required to be maintained pursuant to subpart F at either (i) its foreign branch or affiliate or (ii) on its supporting technology infrastructure, including its own (or external) data centers and third-party hosted technology systems, provided that, in each case, such data is retrievable from one or more locations of the Firm designated as a “principal place of business.” Moreover, if a Firm reasonably relies on legal advice indicating that transferring or providing access to data created or stored in a foreign jurisdiction would violate laws in the relevant non-U.S. jurisdiction where

the data is held, counterparties are located, or swap activity is conducted, you request that the Division recommend no-action against such Firm, based on principles of international comity.⁷

Conclusion

Based upon the representations made in your correspondence, the Division believes that granting SDs and MSPs relief from the requirements specified above for a limited period of time is warranted to address the issues presented. Accordingly, prior to **March 31, 2013**, the Division will not recommend that the Commission take an enforcement action against any Firm for failure to be fully compliant with (i) the requirement that SDs and MSPs make and keep records of all oral communications related to pre-execution swap trade information (and communications that lead to the conclusion of a related cash or forward transaction) pursuant to Regulations 23.202(a) and (b), (ii) the requirement that SDs and MSPs maintain all transaction records and daily trading records in a manner “identifiable and searchable” by transaction and counterparty pursuant to Regulations 23.201(a)(1), 23.202(a) and 23.202(b), (iii) the requirement that SDs and MSPs use a UTC timestamp when recording quotations prior to and at the time of execution of a swap pursuant to Regulations 23.202(a)(1)(ii), (a)(2)(iv), (b)(3) and (b)(4), and (iv) the requirement that SDs and MSPs retain swap records at their principal places of business or such other principal offices as designated by the SDs or MSPs. Between now and March 31, 2013, DSIO staff will continue to work with industry participants to clarify what is required to comply with the Commission Regulations addressed in this letter.⁸

In granting SDs and MSPs additional time to comply with the aforementioned requirements of Regulations 23.201, 23.202, and 23.203, the Division seeks to strike the appropriate balance between the statutory directives of section 731 of the Dodd-Frank Act and the need to provide market participants with sufficient time to adjust to regulatory changes.

This letter, and the positions taken herein, represent the view of this Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse the affected persons from compliance with any other applicable requirements contained in the Act or in the Regulations issued thereunder. Further, this letter, and the relief contained herein, is based upon the representations made to the Division. Any different, changed or omitted material facts or circumstances might render this letter void.

⁷ In your letter, you state that Regulation 23.203(a)(1) is ambiguous and, as a result, may present Firms with significant implementation challenges depending on how that Regulation is interpreted. The Division anticipates presenting the Commission with a proposed rule amendment that will clarify the principal place of business requirement found in Regulation 23.203(a)(1).

⁸ In developing further guidance on what is required to comply, DSIO staff will continue to consult with the Commission’s Division of Enforcement.

SIFMA

Page 5

Should you have any questions, please do not hesitate to contact me at (202) 418-5977; Frank Fisanich, Chief Counsel, at (202) 418-5949; Ward Griffin, Associate Chief Counsel, at (202) 418-5425; or Jason Shafer, Attorney-Advisor, at (202) 418-5097.

Very truly yours,

Gary Barnett

cc: Regina Thoele, Compliance
National Futures Association, Chicago