



## U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581  
Telephone: (202) 418-6700  
Facsimile: (202) 418-5528  
[gbarnett@cftc.gov](mailto:gbarnett@cftc.gov)

Division of Swap Dealer and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Letter No. 12-15  
No-Action  
October 11, 2012  
Division of Swap Dealer and Intermediary Oversight

### Staff No-Action Positions: Registration Relief for Certain Persons

#### I. Introduction

The Commodity Exchange Act (“CEA”)<sup>1</sup> and the regulations of the Commodity Futures Trading Commission (“Commission” or “CFTC”) issued thereunder<sup>2</sup> require that a person who comes within the definition of any of the following terms must be registered with the Commission prior to engaging in business as such: introducing broker (“IB”), commodity pool operator (“CPO”), commodity trading advisor (“CTA”), floor broker (“FB”) or floor trader (“FT”).<sup>3</sup> Additionally, persons who come within the definition of the term “associated person” (“AP”) of a futures commission merchant (“FCM”), IB, CPO, or CTA must be registered with the Commission before engaging in business as such.<sup>4</sup> As is explained below, by this letter, the Division of Swap Dealer and Intermediary Oversight (“Division”) is providing temporary registration no-action relief where such persons are required to register solely by virtue of their involvement with swaps (“Swap Persons”)<sup>5</sup> or with the transition of certain contracts by the

---

<sup>1</sup> 7 U.S.C. 1 *et seq.* (2006). The CEA may be accessed through the Commission’s Web site, [www.cftc.gov](http://www.cftc.gov).

<sup>2</sup> 17 CFR Part 1 *et seq.* (2012). The Commission’s regulations similarly may be accessed through the Commission’s Web site. In particular, Part 3 of the regulations concerns the registration of intermediaries under the CEA.

<sup>3</sup> *See*, respectively, CEA Sections 1a(31), (11), (12), (22), and (23). *See also* CEA Sections 4d, 4e, and 4m, which respectively require the registration of IBs, FTs and FBs, and CPOs and CTAs.

<sup>4</sup> *See* CEA Section 4k.

<sup>5</sup> The Division has not included in its temporary registration no-action relief persons who will come within the definition of the term “futures commission merchant” in CEA Section 1a(28) solely by virtue of their involvement with swaps. This is because, unlike all of the other

Intercontinental Exchange, Inc. (“ICE”) and the New York Mercantile Exchange (“NYMEX”) to clearing as commodity futures and options transactions (“ICE/NYMEX Contracts Persons” and, together with Swap Persons, “Persons”).<sup>6</sup> This relief is subject to compliance with certain conditions and will terminate upon the registration of such Person with the Commission or five days after service of notice on such Person that it may be disqualified from registration under CEA Section 8a(2) or 8a(3).<sup>7</sup>

As also is explained below, by this letter, the Division is providing no-action relief to swap dealers (“SDs”) and major swap participants (“MSPs”) from the prohibition in CEA Section 4s(b)(6) such that an SD or MSP may permit a person associated with it to effect or be involved in effecting a swap transaction (also an “AP”) on its behalf, notwithstanding that the AP is subject to a statutory disqualification under CEA Section 8a(2) or 8a(3). While this relief does not have a termination date, like the other no-action relief provided by this letter, it is subject to compliance with certain conditions.

## **II. Background**

### *A. Temporary Registration No-Action Relief*

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.<sup>8</sup> Title VII of the Dodd-Frank Act established a comprehensive new regulatory framework for swaps and security-based swaps. On July 19, 2011, the Commission published in the *Federal Register* an Order which, for the reasons provided and subject to the conditions stated therein, delayed the

---

persons to whom this relief applies, FCMs can and do accept customer funds in their own name. Accordingly, the Division believes that a person who intends to engage in business as an FCM should be fully vetted before being permitted to engage in that business. This vetting will include, among other things, an assessment that the person satisfies the Commission’s minimum capital requirements and that it has adequate systems in place to ensure the proper segregation of customer funds in compliance with the CEA and Commission regulations.

<sup>6</sup> For the purpose of this letter, the term “ICE/NYMEX Contracts” refers to: in the case of ICE, the transition of its cleared ICE OTC energy swap products to energy futures and options contracts traded on ICE Futures US and ICE Futures Europe; and in the case of NYMEX, the transition of certain energy transactions submitted for clearing through CME ClearPort via Exchange of Futures for Risk transactions to energy transactions executed off the centralized market but subject to NYMEX’s rules and submitted for clearing as futures and options transactions.

<sup>7</sup> CEA Sections 8a(2) and 8a(3) provide the grounds and procedures by which an application for registration may be denied.

<sup>8</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act also may be accessed through the Commission’s Web site.

effective dates of certain Dodd-Frank Act provisions.<sup>9</sup> In the release accompanying the Order, the Commission responded to a public comment raising the issue of when entities engaging in swap transactions would be required, based solely on their swaps activity, to register with the Commission as an FCM, IB, or CTA. The Commission stated,

The Dodd-Frank Act amended various intermediary definitions to cover swaps activity as well as futures transactions. The Commission confirms that if an entity is exclusively participating in the swaps market, it would not have to register . . . prior to the completion of the rulemaking further defining the term “swap.” In sum, the Commission will not require registration in an intermediary capacity in this situation until the further definition of the term “swap” becomes effective.<sup>10</sup>

On August 13, 2012, the Commission published in the *Federal Register* a joint rulemaking with the Securities and Exchange Commission which, among other things, further defined the term “swap.”<sup>11</sup> The effective date of this rulemaking is October 12, 2012. This means that absent the relief the Division is providing below, any person who *solely because of its swaps activity* comes within the definition of an IB, CPO, CTA, AP of any of the foregoing, AP

---

<sup>9</sup> Effective Date for Swap Regulation, 76 Fed. Reg. 42508, 42522 (July 19, 2011). The exemptive relief provided in the Order included an initial termination date of December 31, 2011, but was subsequently renewed by later Commission Orders. *See, e.g.*, Amendment to July 14, 2011 Order for Swap Regulation, 76 Fed. Reg. 80233 (Dec. 23, 2011); and Second Amendment to July 14, 2011 Order for Swap Regulation, 77 Fed. Reg. 41260 (July 13, 2012) (“Second Amended Effective Date Order”).

<sup>10</sup> 76 Fed. Reg. at 42519 (footnotes omitted).

Although the registration requirements for SDs and MSPs in CFTC Regulation 3.10 are also triggered by the effective date of the term “swap,” the Division is not making the temporary registration no-action relief provided by this letter for Swap Persons also available to SDs and MSPs. Pursuant to CEA Section 1a(49)(D), CFTC Regulation 1.3(ggg)(4) establishes a *de minimis* exception from the SD definition, thereby allowing a person who otherwise meets the criteria for being an SD to engage in a certain amount of swap dealing activity without being required to register as an SD. If a person exceeds the *de minimis* amount of swap dealing at the effective date of the swap definition, then CFTC Regulation 1.3(ggg)(4)(iii) provides that the person must register as an SD by no later than two months from the end of the month in which it exceeded the *de minimis* threshold, *i.e.*, December 31, 2012. Similarly, the definition of MSP in CFTC Regulation 1.3(hhh)(3) generally requires a person that meets the MSP definition as a result of its swaps activity in a fiscal quarter to register as an MSP no later than two months after the end of that quarter, with the earliest possible date by which the person should be registered as an MSP being February 28, 2013 (*i.e.*, two months from the quarter end on December 31, 2012).

<sup>11</sup> Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Recordkeeping, 77 Fed. Reg. 48208 (Aug. 13, 2012).

of an FCM, FB or FT on that date must be registered as such on October 12, 2012 or cease engaging in the activities that bring it within the applicable definition until it is in fact registered as such.<sup>12</sup> Also, absent the relief the Division is providing below, an ICE/NYMEX Contracts Person must be registered in order to do business as such. The purpose of this temporary no-action relief, then, is to further the Commission's stated objective to "ensure that market practices will not be unduly disrupted during the transition to the new regulatory regime,"<sup>13</sup> to provide Swap Persons and ICE/NYMEX Contracts Persons with sufficient time for the completion of the registration process as applicable to them, and to relieve the pressure the Division anticipates will be placed on the registration system as a result of the sudden influx of the numerous registration applications that must be filed by the Persons.

In this regard, the Division notes that Swap Persons and ICE/NYMEX Contracts Persons, who have not previously been subject to registration with and regulation by the Commission, will be unfamiliar with the process by which a person becomes a Commission registrant. Also, the Division is mindful of the need to strike an appropriate balance between the regulatory objectives of registering persons intermediating transactions subject to the jurisdiction of the Commission and providing those persons with sufficient time to comply with their new regulatory requirements. By issuing this letter, the Division intends to provide assurance that as long as a Person files an application for registration on or before December 31, 2012, and complies with the other conditions set forth below, engaging in activities requiring registration with the Commission before the Person has been registered with the Commission will not, in and of itself, result in the Division recommending that the Commission commence an enforcement action against the Person.

This letter also will enable the National Futures Association ("NFA"), which by virtue of past Commission delegations is the entity to which a Person must submit its registration application for processing, to perform the registration function in an orderly manner.<sup>14</sup> Without the relief provided by this letter, NFA would face the task of processing potentially hundreds of, and possibly several thousand, registration applications submitted by Swap Persons during the days leading up to and on October 12, 2012, as well as registration applications from ICE/NYMEX Contracts Persons. Because registration is not effective instantaneously with the submission of a registration application, the temporary no-action position taken in this letter will: (1) help to avoid business interruptions by providing relief to those Swap Persons who, due to

---

<sup>12</sup> Both the CEA and Commission regulations provide exemptions from registration for certain persons. For example, CEA Section 4m and CFTC Regulation 4.14 provide various exemptions from registration as a CTA. This letter does not apply to or otherwise affect the availability of any registration exemption to a Swap Person.

<sup>13</sup> Second Amended Effective Date Order, 77 Fed. Reg. at 41261.

<sup>14</sup> *See, e.g.*, 49 Fed. Reg. 39593 (Oct. 9, 1984), whereby the Commission delegated to NFA the authority to perform the full range of registration functions with regard to applicants for and persons registered as an FCM, CPO, or CTA. Although CEA Section 17 provides that "[a]ny association of persons may be registered with the Commission as a registered futures association," to date, NFA is the sole association that has applied for and has been granted registration as a futures association with the Commission.

the unavoidable operational and resource constraints NFA would face in processing and approving that many registration applications at one time, are unable to become registered by October 12, 2012; and (2) alleviate the pressure on NFA to immediately process the large number of registration applications and review the Forms 1-FR-IB and Guarantee Agreements it otherwise would likely be receiving on or immediately prior to that date.

*B. Statutory Disqualification No-Action Relief*

CEA Section 4s(b)(6) states:

Except to the extent otherwise specifically provided by rule, regulation, or order, it shall be unlawful for a swap dealer or major swap participant to permit any person associated with a swap dealer or major swap participant who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knew, or in the exercise of reasonable care should have known, of the statutory disqualification.

While CEA Section 4s(b) generally requires the Commission to provide for the registration of SDs and MSPs and prohibits statutorily disqualified APs from effecting swaps on behalf of an SD or MSP, it does not direct the Commission to provide for the registration of APs of SDs and MSPs, and the Commission has not done so.<sup>15</sup> However, as stated above, CEA Section 4k requires APs of FCMs, IBs, CPOs, and CTAs to be registered with the Commission, a process commenced by submitting a registration application to NFA. In certain circumstances, NFA uses the discretion delegated to it by the Commission to allow persons who are otherwise statutorily disqualified under CEA Section 8a(2) or 8a(3) to nonetheless register as APs of FCMs, IBs, CPOs, and CTAs.<sup>16</sup> Because APs of SDs and MSPs are not required to register with

---

<sup>15</sup> In this regard, DSIO notes that the Form 7-R that an applicant for SD or MSP registration must file contains the following certification:

If the applicant is an applicant for registration as an SD or MSP, the applicant undertakes that, no later than ninety (90) days following the date this Form 7-R is filed, it will be and shall remain in compliance with the requirement of Section 4s(b)(6) of the [CEA] that, except to the extent otherwise provided by rule, regulation or order, the applicant may not permit any person associated with it who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the applicant, if the applicant knows, or in the exercise of reasonable care should know, of the statutory disqualification.

<sup>16</sup> These circumstances could include, for example, the age and seriousness of the conviction or offense, or the relevance of the offense to determining the fitness of the person to participate in financial markets or customer dealings, among many others. Additionally, NFA takes into account whether the applicant makes immediate disclosure of the disqualification.

the Commission, however, NFA is not able to exercise similar discretion with respect to statutory disqualifications of their APs.

In order to avoid disparate or inconsistent treatment of APs based on the products with which they are involved, the markets in which they participate, or the category of registrant for whom they work, the Division is providing relief that would allow a statutorily disqualified AP of an SD or MSP to effect or be involved in effecting swaps on the SD or MSP's behalf, subject to certain conditions outlined below. This relief is consistent with the exception the Commission adopted in CFTC Regulation 23.22(b), which states that the prohibition against statutorily disqualified APs of SDs and MSPs does not apply to APs of FCMs, IBs, CPOs, or CTAs who are already registered despite a statutory disqualification. In adopting that exception from the prohibition, the Commission explained that its action was designed to avoid the "anomalous result" where –

a person could be permitted to direct futures-related activities or solicit futures-related business with members of the retail public . . . but that same person would be barred from soliciting, accepting, or otherwise effecting or being involved in effecting swaps transactions with significantly more sophisticated clients as an associated person of an SD or MSP.<sup>17</sup>

Similarly, the Division is seeking to avoid a situation where two people with identical backgrounds containing the same statutory disqualification are treated differently because one person is an AP of an FCM, IB, CPO, or CTA, and the other person is an AP of an SD or MSP. Absent the relief granted herein, the former could be permitted to register as an AP of the FCM, IB, CPO, or CTA, while the latter would not be permitted to effect or be involved in effecting swaps on their employer's behalf. Accordingly, by this letter, the Division is providing no-action relief to SDs and MSPs that allows them to permit an AP to effect or be involved in effecting swaps despite such AP being subject to a statutory disqualification under CEA Section 8a(2) or 8a(3), *provided* that NFA provides notice to the SD or MSP that, had the person applied for registration as an AP, NFA would have granted such registration. The Division expects NFA will carry out this function in a reasonably prompt manner.

### **III. Division No-Action Positions**

#### *A. Temporary Registration No-Action Relief*

The Division will not recommend that the Commission commence an enforcement action against a person for failure to be registered as an IB, CPO, CTA, AP of any of the foregoing, AP of an FCM, FB, or FT, where the requirement to be registered as such arises solely from the swaps activity of such person, or from the person being involved with ICE/NYMEX Contracts, provided:

---

<sup>17</sup> 77 Fed. Reg. 2613, 2615 (Jan. 12, 2012).

1. On or before December 31, 2012 (the “Temporary Registration No-Action Relief Filing Date”), the person completes and files with NFA a registration application, including as appropriate, Forms 7-R and 8-R, as well as a fingerprint card for each of its principals and APs (collectively, an “Application for Registration”).<sup>18</sup>
2. In the case of a person who has filed an Application for Registration as an IB by the Temporary Registration No-Action Relief Filing Date, on or before March 31, 2013, the person files with NFA a Form 1-FR-IB or Guarantee Agreement, in accordance with the requirements of CFTC Regulation 1.10(a)(2)(ii).<sup>19</sup>
3. In the case of a person who has filed an Application for Registration as an FB or FT by the Temporary Registration No-Action Relief Filing Date, on or before March 31, 2013, the person provides to NFA documentation of its trading privileges on a designated contract market or swap execution facility, in accordance with the requirements of CFTC Regulation 3.11.
4. Subject to the foregoing and the relief provided by this letter, on and after December 31, 2012, the person is subject to and makes a good faith effort to comply with the CEA and the Commission’s regulations applicable to its activities as an IB, CPO, CTA, AP of any of the foregoing, AP of an FCM, FB or FT as if the person was in fact registered in such capacity.

This registration no-action position will terminate on the date on which NFA provides notice in accordance with CFTC Regulation 3.2(c) that the person is registered as an IB, CPO, CTA, AP, FB or FT, as the case may be, or five days after service by NFA of a notice on such person pursuant to NFA Registration Rule 504 that the person may be disqualified from registration under CEA Section 8a(2) or 8a(3).<sup>20</sup>

#### *B. No-Action Relief from Statutory Disqualification Prohibition*

The Division will not recommend that the Commission commence an enforcement action against an SD or MSP for permitting a person associated with it who is subject to a statutory disqualification under CEA Section 8a(2) or 8a(3) to effect or be involved in effecting swaps on its behalf, provided:

---

<sup>18</sup> NFA Registration Rule 401 generally requires that each person applying to be registered as an AP must take and pass the National Commodity Futures Examination (“Series 3 Exam”). NFA recently has adopted in new Registration Rule 401(e) an exception to this requirement for an AP who solely is involved with certain swaps activities, as specified in the rule. NFA’s rules may be accessed on NFA’s Web site, [www.nfa.futures.org](http://www.nfa.futures.org).

<sup>19</sup> The Division notes that this temporary no-action relief applies to the requirement in CFTC Regulation 1.10(a)(2)(ii) generally applicable to IBs to file a Form 1-FR-IB or Guarantee Agreement concurrently with the filing of its registration application.

<sup>20</sup> See Part 500 of NFA’s registration rules, “Proceedings to Deny, Condition, Suspend and Revoke Registration.”

1. The SD or MSP notifies NFA that the SD or MSP has determined that a person associated with it is subject to a statutory disqualification under CEA Section 8a(2) or 8a(3), and submits to NFA information that identifies the person and the matter underlying the statutory disqualification to which the person is subject.
2. Based solely on the information that the SD or MSP submits, NFA will notify the SD or MSP whether or not NFA would have granted the person registration as an AP.
3. Where the person associated with the SD or MSP is effecting or involved in effecting swaps on behalf of the SD or MSP at the time the SD or MSP files a Form 7-R with NFA, the SD or MSP must provide the notification and information to NFA no later than 90 days following the date it files the Form 7-R. The SD or MSP may permit the person to effect or be involved in effecting swaps on behalf of the SD or MSP until such time as NFA notifies the SD or MSP whether or not NFA would have registered the person as an AP. Following a notification by NFA that it would not have registered the person as an AP, the SD or MSP may no longer permit the person to effect or be involved in effecting swaps on its behalf.
4. Where the person does not effect or is not involved in effecting swaps on behalf of the SD or MSP at the time the SD or MSP files the Form 7-R, the SD or MSP may not permit the person to effect or be involved in effecting swaps on behalf of the SD or MSP prior to receiving notice from NFA that NFA would have granted the person registration as an AP.

Except as expressly stated above, the relief provided by this letter does not excuse any person from compliance with the CEA and the Commission's regulations. Moreover, the relief is subject to compliance with the conditions set forth above. The no-action positions provided in this letter represent the positions of this Division only, and do not necessarily represent the positions of the Commission or of any other office or division of the Commission.

If you have any questions, please contact Barbara S. Gold or Elizabeth Miller of my staff, at (202) 418-6700.

Very truly yours,

Gary Barnett  
Director