



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Clearing and Risk

CFTC Letter No. 12-35
No-Action
November 28, 2012
Division of Clearing and Risk

RE: Time-Limited No-Action Relief from the Clearing Requirement for Swaps Between Affiliated Counterparties

Today the Commission is issuing its first clearing requirement determinations for credit default swaps and interest rate swaps (“clearing requirement determination”). These determinations and attendant rules will become effective 60 days after publication in the Federal Register. Under section 2(h)(1)(A) of the Commodity Exchange Act (“CEA”), “it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization [DCO] that is registered under [the CEA] or a [DCO] that is exempt from registration under [the CEA] if the swap is required to be cleared.”

Without further action by the Commission, all persons not able to claim an exception from clearing pursuant to section 2(h)(7) or the Commission’s regulations would be required to clear all swaps subject to the clearing requirement determination pursuant to the compliance schedule outlined by the Commission. Subject to certain conditions, section 2(h)(7) permits non-financial entities and small financial institutions, as defined by the Commission, that are using swaps to hedge or mitigate commercial risk to elect not to clear swaps that are required to be cleared under section 2(h)(1)(A) of the CEA. No other exceptions are expressly provided for under the CEA and all other financial entities must clear swaps that are subject to the clearing requirement.

On August 21, 2012, the Commission published for public comment a notice of proposed rulemaking to exempt swaps between two affiliated counterparties from required clearing, subject to certain conditions (the “proposed inter-affiliate exemption”).¹ The Commission received 14 comment letters on its proposal. Many commenters noted the importance of exempting these swaps from the clearing requirement and expressed support for the proposal. The Commission has not yet finalized the proposed inter-affiliate exemption.

Based on the information provided by these parties, the Division believes that time-limited no-action relief is warranted in order to alleviate the uncertainty for market participants during the period between when the clearing requirement becomes effective and when the Commission finalizes its proposed inter-affiliate exemption.

¹ See Clearing Exemption for Swaps Between Certain Affiliated Entities, 77 FR 50425, Aug. 21, 2012.

In view of the foregoing, the Division is issuing this notice of no-action relief. The Division will not recommend that the Commission commence an enforcement action against a person for failure to comply with the requirement under section 2(h)(1)(A) of the CEA and Part 50 to clear a credit default swap or interest rate swap, provided that the following conditions are met:

- (1) Either one counterparty to the swap is a majority owner of the other counterparty, or a third party is a majority owner of both counterparties to the swap. For this purpose, "majority owner" means the owner directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership;
- (2) The financial statements of both counterparties and the third party majority owner, if any, are reported for accounting purposes on a consolidated basis; and
- (3) Both counterparties agree to not clear the swap.

This no-action relief will remain in effect until the earlier of April 1, 2013, or the effective date of a Commission rulemaking finalizing the proposed inter-affiliate exemption.

This letter, and the positions taken herein, represent the view of the 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 CEA or in the Commission's regulations issued thereunder. Further, this letter, and the relief contained herein, is based upon the information available to the Division. Any different or changed material facts or circumstances might render this letter void.

If you have any questions, please do not hesitate to contact Erik Remmler, Associate Director, at 202-418-7630, or Sarah Josephson, Deputy Director, at 202-418-5684.

Sincerely,

Ananda Radhakrishnan
Director