



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-6700
Facsimile: (202) 418-5547
gbarnett@cftc.gov

Division of Swap Dealer
and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 12-49
No-Action
December 11, 2012
Division of Swap Dealer and Intermediary Oversight

Re: No-Action Relief: Alternative to Fingerprinting to Establish Fitness of Principals Residing Outside the United States

This letter is in response to requests from market participants received by the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) seeking relief from the fingerprinting requirement for principals of Commission registrants where those principals have not resided in the United States since reaching 18 years of age (“Non-U.S. Principals”). Except under certain specific circumstances,¹ Commission regulations require applicants for registration to submit the fingerprints of each natural person the applicant lists as a principal, and the fingerprints are used for the background fitness check for that principal.

Commission Regulation 3.10(a)(2) requires that an application for registration submitted by a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, swap dealer, major swap participant or leverage transaction merchant be accompanied by a Form 8-R for each natural-person who is a principal of the applicant, together with the fingerprints of that principal on a fingerprint card provided by the National Futures Association (“NFA”) for that purpose (the “Fingerprint Requirement”). NFA sends digital images of the fingerprints to the Federal Bureau of Investigation (“FBI”) to determine if the individual who submitted them has a criminal record.

In the United States, review of fingerprints by the FBI has provided a reliable and geographically consistent means for discerning criminal background information. NFA has informed Division staff that the usefulness of the Fingerprint Requirement is significantly

¹ See, e.g., Commission Regulation 3.21(c), under which any futures commission merchant, retail foreign exchange dealer, introducing broker, commodity trading advisor, commodity pool operator or leverage transaction merchant that has a principal who is an outside director may, in lieu of submitting a fingerprint card, file a notice with the Commission that such outside director meets certain requirements, including that such outside director is not engaged in solicitation. Commission regulations are found at 17 C.F.R. Ch. I (2012) and may be accessed through the Commission’s website, www.cftc.gov.

diminished outside the United States, where various national and regional law enforcement agencies have widely varying capabilities in terms of the information they are able to provide and the promptness with which they can provide it. The lack of a single fingerprint record repository outside of the United States (analogous to the FBI) further decreases the utility and efficiency of collecting fingerprints for purposes of conducting background fitness checks of persons residing abroad. As a result, NFA only submits the fingerprints to the FBI.

In addition, concerns have been raised by the industry that, in other jurisdictions, requiring the submission of fingerprints may contravene privacy laws, and that in the context of a multi-national financial services entity, the definition of “principal” under Commission regulations² may encompass a substantial number of persons who have no (or only remote) contact, control or influence over the entity’s activities that are subject to regulation.

After considering these concerns in light of the purposes of the Fingerprint Requirement, the Division believes that an applicant for registration should be permitted to comply with Commission Regulation 3.10(a)(2) with respect to a Non-U.S. Principal by submitting *either* a fingerprint card *or* a certification, signed by a person with authority to bind the applicant, that a reasonable criminal history background check using a reputable commercial service was conducted; such criminal history background check did not reveal any matters that constitute a disqualification under Sections 8a(2) or 8a(3) of the Commodity Exchange Act (“Act”)³, other than those disclosed; and that the applicant shall maintain, in accordance with Commission Regulation 1.31, records documenting that such criminal history background check was performed and the results thereof.

Accordingly, the Division will not recommend that the Commission commence any enforcement action against a registrant based solely upon the registrant’s failure to submit with its application for registration a fingerprint card for each Non-U.S. Principal, *provided that* the registrant lists each Non-U.S. Principal on its application, submits a Form 8-R each Non-U.S. Principal with the certification described above, and notifies NFA within 30 days after the filing of a Form 8-R that it has not submitted a fingerprint card for each Non-U.S. Principal. This position is, however, subject to compliance with the condition that the registrant keeps a copy of the certification, together with all supporting documents, pursuant to Commission Regulation 1.31. The Division notes that it will continue to explore alternatives for the Fingerprint Requirement in the context of Non-U.S. Principals, and that in the future it may revisit the process set forth in this letter (without prejudice to registrants who may already have availed themselves of the relief provided herein).

This letter is applicable to Commission registrants solely in connection with the requirement to provide fingerprints for Non-U.S. Principals. It does not excuse any registrant from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder.

² 17 C.F.R. 3.1.

³ 7 U.S.C. 12(a)(2) and (3).

The no-action relief provided herein contains a collection of information, as that term is defined in the Paperwork Reduction Act.⁴ Therefore, a control number for the collection must be obtained from the Office of Management and Budget. In accordance with 44 U.S.C. § 3506(c)(2)(A) and 5 C.F.R. §§ 1320.8 and 1320.10, the Division will, by separate action, prepare an information collection request for review and approval by OMB, and will publish in the *Federal Register* a notice and request for public comments on the collection burdens associated with the no-action relief. If approved, a Commission registrant may not rely on the Division's determination not to recommend an enforcement action to the Commission unless the Commission registrant provides the information the Division has determined is essential to the provision of no-action relief.

This letter is based upon the representations made to us and is subject to compliance with the conditions set forth above. Any different, changed or omitted material facts or circumstances might render this letter and the no-action position taken herein void. Further, this letter and the position taken herein represent the views of this 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 correspondence, please contact Katherine Driscoll, Associate Director, at (202) 418-5544 or Christopher Cummings, Special Counsel, at (202) 418-5445.

Very truly yours,

Gary Barnett
Director,
Division of Swap Dealer
and Intermediary Oversight

⁴ 44 U.S.C. § § 3501 *et. seq.*