



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5000
Facsimile: (202) 418-5521
www.cftc.gov

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No-Action
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Division of Market Oversight
Division of Swap Dealer and Intermediary Oversight

Conditional No-Action Relief with respect to Swaps Trading on Certain Financial Markets that are Licensed in Australia and Overseen by the Australian Securities & Investments Commission

The Divisions of Market Oversight (“DMO”) and Swap Dealer and Intermediary Oversight (“DSIO”) (together, the “Divisions”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”) are jointly issuing this letter to provide conditional no-action relief for: (1) qualifying domestic financial markets operating in Australia that are licensed in Australia and regulated by the Australian Securities & Investments Commission (“ASIC”) (“Qualifying Australian Licensed Markets”)¹ from the swap execution facility (“SEF”) registration requirement set out in section 5h(a)(1) of the Commodity Exchange Act (“CEA” or “Act”)² and Commission regulation 37.3(a)(1);³ (2) parties executing swap transactions on Qualifying Australian Licensed Markets from (i) the trade execution mandate set out in section 2(h)(8) of the Act;⁴ and (ii) their obligations to report part 45 creation data and the initial part 43 data associated with such swap transactions once a Qualifying Australian Licensed Market begins reporting part 45 creation data and the initial part 43 data associated with swap transactions to a Commission-registered or provisionally-registered swap data repository (“SDR”), as if it were a SEF;⁵ and (3) swap dealers (“SDs”) and major swap participants (“MSPs”) executing swap

¹ The relief provided by this letter is only available to Qualifying Australian Licensed Markets. For purposes of this letter, DMO and DSIO define the term Qualifying Australian Licensed Market to mean domestic financial markets that have been licensed to operate in Australia by the relevant Minister in accordance with Chapter 7 of the Australian Corporations Act 2001 (“Australian Corporations Act”) (“Australian Licensed Markets”), that satisfy the conditions set out in this letter. ASIC is Australia’s corporate, markets and financial services regulator. See <http://www.asic.gov.au/asic/asic.nsf>. The full list of Australian Licensed Markets is *available at* <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/ASIC-Licensed%20domestic%20financial%20markets%20operating%20in%20Australia>.

² 7 U.S.C. § 7b-3(a)(1).

³ See 17 CFR 37.3(a)(1).

⁴ 7 U.S.C. § 2(h)(8).

⁵ See 17 CFR parts 43 & 45. An Australian Licensed Market’s obligation to report part 45 creation data and the initial part 43 data associated with swap transactions to a Commission-registered or provisionally-registered SDR, as if it were a SEF, is a condition of this letter. An Australian Licensed Market is not otherwise obligated to report such data under parts 43 and 45 of the Commission’s regulations.

transactions on Qualifying Australian Licensed Markets from (i) certain business conduct requirements under subpart H to part 23 of the Commission’s regulations, which sets forth business conduct standards for SDs and MSPs in their dealings with counterparties (the “External BCS”);⁶ (ii) the confirmation requirement under Commission regulation 23.501;⁷ and (iii) the swap trading relationship documentation requirements under Commission regulation 23.504.⁸

Such no-action relief would be triggered by DMO’s issuance of a letter acknowledging receipt of an Australian Licensed Market’s relief request to DMO that includes, in the form and manner described below, a certification that the Australian Licensed Market: (1) is subject to and compliant with regulatory requirements in Australia that are in accordance with certain SEF regulatory requirements concerning trading methodology; (2) is subject to and compliant with regulatory requirements in Australia that are comparable to, and as comprehensive as, certain SEF regulatory requirements concerning non-discriminatory access by market participants and an appropriate level of oversight; (3) meets certain reporting and clearing-related requirements; and (4) does not allow trading by U.S. persons⁹ who are not eligible contract participants (“ECPs”)¹⁰ on its platform. This no-action relief will expire upon the effective date of any final rules implementing the Commission’s authority, under CEA section 5h(g),¹¹ to exempt facilities that are “subject to comparable, comprehensive supervision and regulation on a consolidated basis by . . . the appropriate governmental authorities in the home country of the facility” from the SEF registration requirement of CEA section 5h(a)(1) and Commission regulation 37.3(a)(1).¹²

The conditional relief provided by this no-action letter to Qualifying Australian Licensed Markets generally tracks the conditional relief provided by CFTC No-Action Letter No. 14-46 to qualifying multilateral trading facilities overseen by competent authorities designated by European Union Member States (“Qualifying MTFs”).¹³

⁶ *Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties*, 77 Fed. Reg. 9734 (Feb. 17, 2012).

⁷ *See* 17 CFR 23.501.

⁸ Nothing in this letter provides relief from the SD and MSP registration requirements.

⁹ For purposes of this letter, the term “U.S. person” has the meaning used in the Commission’s Cross-Border Guidance, 78 Fed. Reg. 45292, 45316–17 (July 26, 2013).

¹⁰ *See infra* note 47 and accompanying text.

¹¹ *See* 7 U.S.C. § 7b-3(g).

¹² In addition, DMO and DSIO retain the authority, in their discretion, to terminate or otherwise modify the terms of the no-action relief provided herein at any time, including upon a determination by DMO that the Australian Licensed Market’s certification is inaccurate.

¹³ CFTC No-Action Letter No. 14-46 (April 9, 2014) (“No-Action Letter 14-46”), *available at* <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-46.pdf>. For purposes of No-Action Letter 14-46, the term Qualifying MTFs means multilateral trading facilities (“MTFs”) overseen by competent

Like No-Action Letter 14-46, this no-action letter is structured in two basic parts: (1) Section I of the letter describes the conditional no-action relief being provided by DMO to Qualifying Australian Licensed Markets from the SEF registration requirement of CEA section 5h(a)(1) and Commission regulation 37.3(a)(1) and to parties executing swap transactions on Qualifying Australian Licensed Markets from the trade execution mandate of CEA section 2(h)(8); and (2) Section II of the letter describes the conditional no-action relief being provided by DSIO to SDs and MSPs executing swap transactions on Qualifying Australian Licensed Markets from certain specified business conduct and swap trading relationship documentation requirements under part 23 of the Commission's regulations.

I. Conditional no-action relief provided by DMO

A. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),¹⁴ Title VII of which amended the CEA to establish a comprehensive new regulatory framework for swaps. One key goal of the Dodd-Frank Act was to bring greater pre-trade and post-trade transparency to the swaps market.¹⁵ By requiring the trading of swaps on SEFs and DCMs, the Dodd-Frank Act enabled all market participants to benefit from viewing the prices of available bids and offers and from having access to transparent and competitive trading platforms. CEA section 5h, as added by the Dodd-Frank Act, established a comprehensive regulatory framework for swaps trading, including: (i) registration, operation, and compliance requirements for SEFs and (ii) fifteen core principles.¹⁶ Applicants and registered SEFs are required to comply with the core principles as a condition of obtaining and maintaining their registration as a SEF.¹⁷

authorities designated by European Union Member States, and as defined in The Markets in Financial Instruments Directive, that satisfy the conditions set out in No-Action Letter 14-46.

¹⁴ Public Law 111-203, 124 Stat. 1376 (2010), *available at* <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

¹⁵ Pre-trade transparency with respect to the swaps market refers to making information about a swap available to the market, including bid (offers to buy) and offer (offers to sell) prices, quantity available at those prices, and other relevant information before the execution of a transaction. Such transparency lowers costs for investors, consumers, and businesses; lowers the risks of the swaps market to the economy; and enhances market integrity to protect market participants and the public. The Dodd-Frank Act also ensures that a broader universe of market participants receive pricing and volume information by providing public and regulatory reporting of such information upon the completion of every swap transaction (*i.e.*, post-trade transparency). 78 Fed. Reg. at 33477.

¹⁶ *See* 7 U.S.C. § 7b-3.

¹⁷ *Id.*

1. SEF registration requirement

CEA Section 5h(a)(1), as added by the Dodd-Frank Act, provides that no person may operate a facility for the trading or processing of swaps unless the facility is registered as a SEF or DCM.¹⁸

CEA Section 2(i), added by the Dodd-Frank Act, provides that the swap provisions of the CEA, including any rules or regulations thereunder, will 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” or contravene such Commission rules or regulations as are necessary or appropriate to prevent evasion of the swaps provisions of the CEA enacted under Title VII of the Dodd-Frank Act.¹⁹ Accordingly, the SEF/DCM registration requirement of CEA section 5h(a)(1) and Commission Regulation 37.3(a)(1) applies 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.

2. November 15, 2013, DMO Guidance on SEF registration

In a guidance document published by DMO on November 15, 2013, DMO stated that a foreign multilateral platform with the requisite nexus to U.S. commerce under section 2(i) of the Act is required, absent an exemption, to register as a SEF or DCM pursuant to section 5h(a)(1) of the Act, and Commission regulation 37.3(a)(1). In pertinent part, DMO explained its view concerning which activities may 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):

[DMO] 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. [DMO] 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). [DMO] 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.

¹⁸ 7 U.S.C. § 7b-3(a)(1).

¹⁹ 7 U.S.C. § 2(i).

[DMO] notes that foreign-based platforms already registered with their home country may register as a SEF or DCM. DMO 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.²⁰

3. Trade Execution Mandate

The transaction-level requirements under the CEA include the requirement that a swap must be submitted to a registered or exempt DCO for clearing if the Commission has determined that the swap is required to be cleared, unless one of the parties to the swap is eligible for an exception to, or exemption from, the clearing requirement and elects not to clear the swap.²¹ Integrally linked to the clearing requirement is the trade execution requirement, as set out in section 2(h)(8) of the Act, which mandates that swaps required to be cleared and made available to trade must generally be traded on DCMs or SEFs. Specifically, section 2(h)(8) of the Act provides that, unless a clearing exception or exemption applies and is elected,²² a swap that is subject to a clearing requirement must be executed on a DCM, SEF, or SEF that is exempt from registration under CEA section 5h(f),²³ unless no such DCM or SEF makes the swap available to trade. Commission regulations implementing the process for a DCM or SEF to make a swap available to trade were published in the Federal Register on June 4, 2013.²⁴

²⁰ *Division of Market Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities*, November 15, 2013, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmosefguidance111513.pdf>.

In DMO'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. *Id.* See also 78 Fed. Reg. at 33506.

²¹ See CEA sections 2(h)(1)(A) (clearing requirement) and 2(h)(7) (end-user exception to the clearing requirement); see also Commission regulations 50.2, 50.4 and subpart C of part 50 (codifying exceptions and exemptions to the clearing requirement).

²² See CEA section 2(h)(8)(B) (end-user exception); See also *Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act*, 78 Fed. Reg. 33606 n.1 (Jun. 4, 2013) (inter-affiliate exemption).

²³ Although CEA section 2(h)(8)(A)(ii) refers to exemption from registration under CEA section 5h(f), it is DMO's view that this reference to 5h(f) is a mis-citation and should be interpreted to mean 5h(g). CEA section 5h(g) is the only provision in CEA section 5h that addresses exempting facilities from the SEF registration requirement.

²⁴ See generally 78 Fed. Reg. 33606. Under Commission Regulations 37.10 and 38.12, respectively, a SEF or DCM may submit a determination for Commission review that a mandatorily cleared swap is available to trade based on enumerated factors. To this date, the Commission has received five available-to-trade determinations, self-certified

B. Application of current law to Australian Licensed Markets

Australian Licensed Markets are licensed under subsection 795B(1) of the Australian Corporations Act by the relevant Minister, are overseen by ASIC, and operate financial markets for financial products, including swaps.²⁵ A “financial market” is defined in section 767A of the Australian Corporations Act to mean a facility through which offers to acquire or dispose of financial products are regularly made or accepted, or a facility through which offers or invitations are regularly made to acquire or dispose of financial products that are intended to result or may reasonably be expected to result, directly or indirectly, in the making of offers to acquire or dispose of financial products; or the acceptance of such offers.²⁶

Australian Licensed Markets are required to comply with licensee obligations, such as doing all things necessary to ensure that the market is fair, orderly and transparent on a continuing basis, and must at all times comply with any conditions on the license. ASIC’s functions in the regulation of financial markets include advising the Minister about applications for a market license, changes to operating rules and assessing and reporting to the Minister on market licensees’ compliance with their obligations.

If an Australian Licensed Market’s activities trigger a jurisdictional nexus under section 2(i) of the Act, then, absent regulatory relief, that Australian Licensed Market would need to register as a SEF or DCM.²⁷ CEA section 5h(a)(1) makes clear that “[n]o person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or as a designated contract market under this section.”²⁸ Additionally, since every Australian Licensed Market that executes swaps operates a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade swaps with more than one other market participant on the system or platform, an Australian Licensed Market would be required to register as a SEF or DCM pursuant to Commission regulation 37.3, if its activities trigger a jurisdictional nexus under section 2(i) of the Act.²⁹

pursuant to Commission regulation 40.6, for certain interest rate swaps and credit default swaps. All of the determinations were self-certified by operation of law, respectively, on January 16, 2014, January 22, 2014, January 27, 2014, January 29, 2014 and March 9, 2014. Pursuant to Commission regulations 37.12 and 38.11, transactions involving available-to-trade swaps therein will be subject to the trade execution mandate 30 days from the date upon which the determination was self-certified by operation of law. As a result of these certifications, transactions involving certain interest rate swap and credit default swap contracts became subject to the trade execution requirement, effective February 15, 2014, February 21, 2014, February 26, 2014, February 28, 2014 and April 8, 2014, respectively.

²⁵ See generally Australian Corporations Act, Part 7.2 (“Licensing of financial markets”).

²⁶ See Australian Corporations Act, section 767A.

²⁷ See *supra* notes 19-20 and accompanying text.

²⁸ 7 U.S.C. § 7b-3(a)(1).

²⁹ See 17 CFR 37.3(a)(1).

Furthermore, a party that executes a swap subject to the trade execution mandate set out in CEA section 2(h)(8) on an Australian Licensed Market would violate that section if the Australian Licensed Market is not registered as a DCM, SEF, or SEF that is exempt from registration under CEA section 5h (unless no such DCM or SEF has made the swap available to trade).

C. Application of the Path Forward Statement to Australian Licensed Markets

As discussed above, the conditional relief provided by this no-action letter to Qualifying Australian Licensed Markets generally tracks the conditional relief provided by No-Action Letter 14-46 to qualifying MTFs regulated in the EU. The conditional relief provided by No-Action Letter 14-46 to qualifying MTFs was largely premised on the Path Forward Statement announced on July 11, 2013, by then-CFTC Chairman Gary Gensler and Commissioner Michel Barnier of the European Commission (“EC”) expressing their mutual understandings on cross-border activities (“Path Forward Statement”).³⁰ The Path Forward Statement recognized certain common goals, namely: “to protect the public at large from the financial risks that led to bailouts and economic recession” and “to lower risk and promote transparency in a market that is truly global by agreeing to report all over-the-counter derivatives to trade repositories, to centrally clear OTC derivatives and, where appropriate, require trading on transparent and multilateral venues.”³¹

Although the Path Forward Statement specifically contemplates relief for MTFs regulated in the EU, DMO staff nonetheless believes that the purposes underpinning such relief similarly apply to Australian Licensed Markets. Therefore, DMO is providing similar conditional relief for Australian Licensed Markets. Just as for qualifying MTFs regulated in the EU, such relief would be available to Qualifying Australian Licensed Markets that have multilateral trading schemes, a sufficient level of pre- and post-trade price transparency, non-discriminatory access by market participants, and an appropriate level of oversight.³²

³⁰ Press Release pr6640-13, *Cross-Border Regulation of Swaps/Derivatives Discussions between the Commodity Futures Trading Commission and the European Union – A Path Forward*, July 11, 2013, available at <http://www.cftc.gov/PressRoom/PressReleases/pr6640-13>.

³¹ *Id.* See also No-Action Letter 14-46, at pp. 10-11, for a full discussion of DMO’s interpretation of the Path Forward Statement concerning MTFs regulated in the EU.

³² DMO has issued a series of no-action letters providing conditional time-limited relief for Australian-based trading platform Yieldbroker Pty Limited (Yieldbroker). See CFTC No-Action Letter No. 13-76 (December 20, 2013), CFTC No-Action Letter No. 14-70 (May 14, 2014), and CFTC No-Action Letter No. 14-105 (August 11, 2014). Yieldbroker is licensed as an exchange under an Australian Market License (“AML”) and is regulated by ASIC. Yieldbroker operates a multilateral trading platform in Australia which brings together multiple third-party buying and selling interests in swaps. Yieldbroker currently permits direct access to U.S. persons to transact in swaps on its platform.

Pursuant to CFTC No-Action Letter No. 14-105, DMO will not recommend that the Commission take enforcement action against Yieldbroker for failure to register as a SEF under section 5h(a)(1) of the Act or Commission Regulation 37.3(a)(1), or against any market participants for use of, or other relationships with, Yieldbroker, for the period expiring November 15, 2014. Such no-action relief shall remain contingent on Yieldbroker’s satisfaction of six conditions specified in CFTC No-Action Letter No. 13-76 throughout the time-limited relief period.

DMO believes this course of action builds upon the Commission’s traditional policy of recognizing comparable regulatory regimes based on international coordination and comity principles with respect to cross-border activities, as described in the Cross Border Guidance.³³ Such coordination is evidenced by ASIC’s status as a signatory to the *International Organization of Securities Commissions Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, dated May 2002, revised May 2012 (“IOSCO MMOU”).³⁴

The Australian legislative framework to implement OTC derivatives reforms commenced in January 2013, when the new Part 7.5A of the Corporations Act became effective.³⁵ Under the legislation, the relevant Minister has the power to prescribe certain classes of derivatives as being subject to an ASIC rule-making power in relation to mandatory transaction reporting to a derivative trade repository, mandatory clearing by a central counterparty (“CCP”), or mandatory execution on a trading platform.

A determination has since been made in Australia by the Treasurer under the Australian Corporations Act which mandates the reporting of transactions in five asset classes (interest rates, credit, equity, foreign exchange and commodity derivatives that are not electricity derivatives) to derivative trade repositories.³⁶ Subsequently, ASIC published the *ASIC Derivative Transaction Rules (Reporting) 2013*, which set out the requirements for counterparties to report derivative transaction and position information to derivative trade repositories.³⁷ This obligation commenced on October 1, 2013, and is being implemented in phases. To further implement OTC derivatives reform, the Australian government is currently consulting on a proposal to make trades between internationally active dealers in US dollar-, euro-, British pound-, Japanese yen- and Australian dollar-denominated interest rate derivatives subject to mandatory clearing requirements.

D. Scope of no-action relief provided by DMO

DMO is issuing this letter to provide conditional no-action relief for Qualifying Australian Licensed Markets from the registration requirement set out in section 5h(a)(1) of the Act and Commission regulation 37.3(a)(1). An Australian Licensed Market may obtain the relief

³³ See *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45292, 45342 (Jul. 26, 2013) (“Cross-Border Guidance”).

³⁴ The IOSCO MMOU is available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf>.

³⁵ See generally Australian Corporations Act, Part 7.5A, implemented through the Corporations Legislation Amendment (Derivative Transactions) Act (2012). The Corporations Legislation Amendment (Derivative Transactions) Act 2012 received Royal Assent on December 6, 2012, and commenced on January 3, 2013.

³⁶ Australian Corporations (Derivatives) Determination (2013).

³⁷ Rule 2.2.1, ASIC Derivative Transaction Rules (Reporting) 2013.

provided by this letter if (1) the Australian Licensed Market submits a relief request to DMO, consistent with the requirements of Commission regulation 140.99, that includes, in the form and manner described below, a certification that the Australian Licensed Market (a) is subject to and compliant with regulatory requirements in Australia that are in accordance with the SEF regulatory requirements concerning trading methodology as specified below, (b) is subject to and compliant with regulatory requirements in Australia that are comparable to, and as comprehensive as, the SEF regulatory requirements concerning non-discriminatory access by market participants and an appropriate level of oversight as specified below, (c) meets the reporting and clearing-related requirements specified below, and (d) does not allow trading by U.S. persons who are not ECPs on its platform; and (2) DMO has issued a letter acknowledging receipt of, and granting such relief request.³⁸

An Australian Licensed Market's no-action relief request letter must contain a list of those regulatory requirements in Australia that the Australian Licensed Market is subject to and compliant with that: (1) are in accordance with the SEF regulatory requirements concerning trading methodology as specified below, and (2) are comparable to, and as comprehensive as, the SEF regulatory requirements concerning non-discriminatory access by market participants and an appropriate level of oversight as specified below. This list must be accompanied by supporting explanations as to why such regulatory requirements are either in accordance with (for trading methodology requirements), or comparable to, and as comprehensive as (for access and oversight requirements), each specified SEF requirement. Such explanations must be set forth on a requirement-by-requirement basis and address each specified Commission regulation.³⁹ DMO has provided an addendum, attached to this no-action letter as appendix A, to be used by the Australian Licensed Market in making its certification to DMO.⁴⁰

In evaluating whether it satisfies the requirements concerning non-discriminatory access by market participants and an appropriate level of oversight as specified in section I.E.1.(ii)–(iii) of

³⁸ DMO's issuance of a letter acknowledging receipt of, and granting an Australian Licensed Market's relief request will not constitute a determination by DMO that the Australian Licensed Market: (1) is subject to and compliant with regulatory requirements established by ASIC that are in accordance with the SEF regulatory requirements concerning trading methodology; (2) is subject to and compliant with regulatory requirements in Australia that are comparable to, and as comprehensive as, the specified requirements applicable to SEFs concerning non-discriminatory access by market participants and an appropriate level of oversight; (3) meets the specified reporting and clearing-related requirements; and/or (4) does not allow trading by U.S. persons who are not ECPs on its platform.

³⁹ In explaining why such regulatory requirements are comparable to, and as comprehensive as, the specified SEF requirements concerning non-discriminatory access by market participants and an appropriate level of oversight, an Australian Licensed Market may include analysis prepared by ASIC as to the comparability and comprehensiveness of such regulatory requirements.

⁴⁰ Any Australian Licensed Market that submits a relief request or receives relief pursuant to this letter must cooperate with any DMO request for further explanation or support of the Australian Licensed Market's no-action relief request in order for DMO to determine whether such no-action relief request is appropriate and complete. DMO retains the discretion to make such a request of an Australian Licensed Market at any time before or after the issuance of a letter granting no-action relief to an Australian Licensed Market, as DMO may choose to issue a relief letter prior to completing an in-depth analysis of the subject Australian Licensed Market's no-action relief request.

this letter, an Australian Licensed Market should follow an outcomes-based approach whereby the Australian Licensed Market may certify that it is subject to and compliant with regulatory requirements in Australia that are comparable to, and as comprehensive as, the requirements for SEFs listed below if the particular requirements achieve the same regulatory objectives as those achieved by the particular SEF regulatory provisions.⁴¹ Notably, an Australian Licensed Market would not have to maintain requirements identical to those for SEFs in order to be subject to a comparable, comprehensive set of requirements to those applicable to SEFs.

DMO will not recommend that the Commission take enforcement action against a Qualifying Australian Licensed Market for failure to register as a SEF under section 5h(a)(1) of the Act or Commission regulation 37.3(a)(1). A Qualifying Australian Licensed Market has a duty to inform DMO promptly of any material change, or failure to comply with the requirements listed below, that would render its certification inaccurate. DMO clarifies that any Qualifying Australian Licensed Market receiving the relief provided by this letter may also rely on the relief provided to SEFs by CFTC No-Action Letter 13-81⁴² to the extent that such an Australian Licensed Market complies with the same terms and conditions applicable to SEFs under Letter 13-81.

In addition, if the trade execution requirement of section 2(h)(8) of the CEA is triggered for a particular swap, DMO will not recommend that the Commission commence an enforcement action against any parties executing transactions in such swap on an Australian Licensed Market that receives the relief provided in this letter, for failure to comply with such trade execution requirement.⁴³ DMO will maintain a current list on the CFTC's website of Qualified Australian Licensed Markets that have been provided with relief pursuant to this letter. Market participants are advised to consult with such list prior to executing any transaction in a swap subject to the trade execution requirement of CEA section 2(h)(8).

Until such time when a Qualifying Australian Licensed Market begins reporting swap transactions to a Commission-registered or provisionally-registered SDR, as if it were a SEF, counterparties will continue to retain all applicable reporting responsibilities for off-facility

⁴¹ The regulatory objectives sought by each applicable SEF requirement might not be readily apparent upon review of the relevant rule text alone. Accordingly, Australian Licensed Markets should review the final and proposed SEF Rulemaking Federal Register releases to facilitate analysis of the regulatory outcome that each applicable SEF requirement is intended to achieve. *See* SEF Final Rulemaking; *see also Core Principles and Other Requirements for Swap Execution Facilities*, Proposed Rules, 76 Fed. Reg. 1214 (Jan. 7, 2011).

⁴² *See* CFTC No-Action Letter No. 13-81 (December 23, 2013), available at <http://www.cftc.gov/ucm/groups/public/@llettergeneral/documents/letter/13-81.pdf>.

⁴³ As noted below, an Australian Licensed Market cannot qualify for the relief provided in this letter unless it provides execution methods for Required Transactions in a manner that complies with the requirements of Commission regulation 37.9(a)(2)(i), *i.e.* in accordance with an order book, or with an order book in conjunction with a request for quote ("RFQ") system. 17 CFR 37.9(a)(2)(i). A Required Transaction means any transaction involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act. 17 CFR 37.9(a)(1).

swaps⁴⁴ pursuant to parts 43 and 45 for swap transactions executed on or pursuant to the rules of the Qualifying Australian Licensed Market, including part 45 creation data and the initial part 43 data associated with such swap transactions.

Upon a Qualifying Australian Licensed Market's initiation of reporting part 45 creation data and the initial part 43 data in connection with swap transactions executed on or pursuant to the rules of the Qualifying Australian Licensed Market to a Commission-registered or provisionally-registered SDR, as if it were a SEF, counterparties to such swap transactions will be relieved from any applicable requirement to report part 45 creation data and the initial part 43 data associated with such swap transactions. However, such counterparties will under no circumstances be relieved from any applicable subsequent reporting requirements under parts 43 and 45 pertaining to off-facility swaps, including, but not limited to, continuation/post-creation data reporting requirements pursuant to part 45 and subsequent reporting requirements pursuant to part 43, in connection with any swap transaction executed on or pursuant to the rules of the Qualifying Australian Licensed Market.⁴⁵

The no-action positions taken herein do not excuse affected persons from compliance with any other applicable clearing-related requirements of the CEA or the Commission's regulations thereunder, in particular, pre-execution credit check requirements and straight-through processing requirements.⁴⁶

Nothing in this no-action letter contemplates relief from the requirement of CEA section 2(e) that platforms that permit swaps trading by U.S. persons who are not ECPs must register as DCMs.⁴⁷ Accordingly, an Australian Licensed Market that wishes to qualify for the relief provided by this letter must additionally certify that it does not allow trading by U.S. persons who are not ECPs on its platform.

This no-action relief will expire upon the effective date of any final rules implementing the Commission's authority, under CEA section 5h(g), to exempt facilities which are "subject to

⁴⁴ Commission regulation 45.1 defines "off-facility swap" to mean a swap not executed on or pursuant to the rules of a SEF or designated contract market ("DCM").

⁴⁵ DMO notes that counterparties to swap transactions executed on or pursuant to the rules of a Qualifying Australian Licensed Market will not be subject to any new continuation data reporting obligations under the terms of this letter. DMO wishes to clarify that, under the terms of this letter, there will be no difference in treatment of counterparties with respect to continuation data reporting for swap transactions executed on or pursuant to the rules of a Qualifying Australian Licensed Market, when compared to continuation data reporting for swap transactions executed on or pursuant to the rules of a SEF.

⁴⁶ The applicable pre-execution credit check requirements are set forth under § 1.73 and § 23.609 of the Commission's regulations. The applicable straight-through processing requirements are set forth under § 1.74, § 23.610, § 37.702(b), § 38.601, and § 39.12(b)(7) of the Commission's regulations.

⁴⁷ 7 U.S.C. § 2(e). Only ECPs, as defined in Commission regulation 1.3(m), may execute a swap on a SEF. 17 CFR 37.702(a). The Commission addressed the scope of the term U.S. person in its Cross-Border Guidance, 78 Fed. Reg. 45292.

comparable, comprehensive supervision and regulation on a consolidated basis by . . . the appropriate governmental authorities in the home country of the facility” from the SEF registration requirement of CEA section 5h(a)(1) and Commission regulation 37.3(a)(1).

DMO and DSIO retain the authority, in their discretion, in consultation with the Australian Licensed Market and ASIC, to terminate or otherwise modify the terms of the no-action relief provided herein, including upon a DMO and/or DSIO determination (i) that the Australian Licensed Market’s certification is inaccurate, or (ii) that a significant proportion of the market participants that an Australian Licensed Market permits to effect transactions are U.S. persons and (iii) that a significant proportion of the growth of an Australian Licensed Market’s trading volume since issuance of this no-action letter is attributable to U.S. persons. In the event DMO and/or DSIO makes such a determination, DMO and/or DSIO would provide the Australian Licensed Market with a reasonable notice period prior to effecting such modification or removal of the relief provided by this letter.

E. Requirements for an Australian Licensed Market seeking relief pursuant to this no-action letter

An Australian Licensed Market will qualify for the relief provided in this letter upon DMO’s issuance of a no-action relief letter acknowledging the Australian Licensed Market’s certification that the Australian Licensed Market:

- (1) is subject to and compliant with regulatory requirements in Australia that are in accordance with the SEF regulatory requirements concerning trading methodology specified in section I.E.1.(i) of this letter;
- (2) is subject to and compliant with regulatory requirements in Australia that are comparable to, and as comprehensive as, the requirements applicable to SEFs as specified in section I.E.1.(ii)–(iii) of this letter;
- (3) meets the reporting and clearing-related requirements specified in section I.E.2. of this letter; and
- (4) does not allow trading by U.S. persons who are not ECPs on its platform.

1. SEF-related requirements

The requirements that are applicable to SEFs and that would be applied to Australian Licensed Markets seeking no-action relief are categorized under five factors that underpin the SEF Final Rules: a multilateral trading scheme; a sufficient level of pre-trade price transparency; a sufficient level of post-trade price transparency; non-discriminatory access by market participants; and an appropriate level of oversight.

(i) A multilateral trading scheme and sufficient level of pre-trade price transparency

- (a) An Australian Licensed Market must certify that it maintains an order book that is subject to, and in compliance with, regulatory requirements in Australia that are in accordance with the order book definition in Commission regulation 37.3(a)(3) and

which is available as an execution method for all swaps traded on the Australian Licensed Market.⁴⁸

(b) An Australian Licensed Market must certify that any Required Transaction, as defined by Commission regulation 37.9(a)(1),⁴⁹ that is not a block trade, as defined by Commission regulation 43.2,⁵⁰ is executed on the Australian Licensed Market in a manner that complies with regulatory requirements in Australia that are in accordance with the requirements of Commission regulation 37.9(a)(2)(i).⁵¹

(c) An Australian Licensed Market must certify that it maintains appropriate minimum block sizes and requirements related to block trades in a manner that complies with regulatory requirements in Australia that are in accordance with the requirements of Commission regulation 43.6.⁵²

(ii) Non-discriminatory access by market participants

An Australian Licensed Market must certify that it is subject to and compliant with regulatory requirements that ensure non-discriminatory access by market participants that are comparable to, and as comprehensive as, Commission regulation 37.202 (Access requirements).⁵³

(iii) An appropriate level of oversight

An Australian Licensed Market must certify that it is subject to and compliant with oversight requirements that are comparable to, and as comprehensive as, the oversight rules applicable to SEFs as listed below.

⁴⁸ 17 CFR 37.3(a)(3).

⁴⁹ 17 CFR 37.9(a)(1).

⁵⁰ 17 CFR 43.2.

⁵¹ 17 CFR 37.9(a)(2)(i). Under Commission regulation 37.9(a)(2)(i), Required Transactions, that are not block trades, must be traded: (1) on an order book, or (2) on an order book operating in conjunction with an RFQ system, as defined in Commission regulation 37.9(a)(3). Commission regulation 37.9(a)(3) provides that under such an RFQ system, market participants must transmit an RFQ to buy or sell a specific instrument to no less than three market participants in the trading system or platform. Staff notes that the Commission provided a phase-in compliance period from August 5, 2013 until October 2, 2014, during which market participants may transmit RFQs to two market participants. See SEF Final Rulemaking at 33497. Australian Licensed Markets that operate order book plus RFQ systems to meet this condition for relief may utilize the same phase-in compliance period and approach as applies to SEFs executing Required Transactions.

⁵² 17 CFR 43.6. Appendix F to part 43 lists the initial appropriate minimum block sizes by asset class for block trades and large notional off-facility swaps.

⁵³ 17 CFR 37.202. On November 14, 2013, DMO and DSIO, along with the Commission's Division of Clearing and Risk, provided guidance addressing the impartial access requirements in Commission regulation 37.202(a). *Division of Clearing and Risk, Division of Market Oversight and Division of Swap Dealer and Intermediary Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities*, November 14, 2013, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf>.

(a) Rule enforcement

- Commission regulation 37.200 (Compliance with rules);⁵⁴
- Commission regulation 37.201 (Operation of swap execution facility and compliance with rules);⁵⁵
- Commission regulation 37.202(b) (Consent to Jurisdiction);⁵⁶
- Commission regulation 37.203 (Rule enforcement program);⁵⁷
- Commission regulation 37.205 (Audit trail);⁵⁸
- Commission regulation 37.206 (Disciplinary procedures and sanctions);⁵⁹

(b) Monitoring

- Commission regulation 37.400 (Monitoring of trading and trade processing);⁶⁰
- Commission regulation 37.401 (General requirements);⁶¹
- Commission regulation 37.402 (Additional requirements for physical-delivery swaps);⁶²
- Commission regulation 37.403 (Additional requirements for cash-settled swaps);⁶³
- Commission regulation 37.404 (Ability to obtain information);⁶⁴
- Commission regulation 37.405 (Risk controls for trading);⁶⁵

⁵⁴ 17 CFR 37.200.

⁵⁵ 17 CFR 37.201.

⁵⁶ 17 CFR 37.202(b). Under Commission regulation 37.202(b), prior to granting any ECP access to its facilities, a SEF must require that the ECP consent to its jurisdiction. Since only ECPs, as that term is defined in Commission regulation 1.3(m), may execute a swap on a SEF, § 37.202(b) essentially requires that all SEF participants consent to their SEF's jurisdiction. Staff notes that this jurisdictional requirement enables a SEF to effectively investigate and sanction persons that violate SEF rules, thereby allowing the SEF to enforce its rules. *See Core Principles and Other Requirements for Swap Execution Facilities, Final Rule*, 78 Fed. Reg. 33476, 33509, (June 4, 2013) ("SEF Final Rulemaking"). Likewise, an Australian Licensed Market would be required as a condition for qualifying for relief under this letter, to certify that it is subject to and compliant with regulations that require all Australian Licensed Market participants to consent to the Australian Licensed Market's jurisdiction.

⁵⁷ 17 CFR 37.203.

⁵⁸ 17 CFR 37.205.

⁵⁹ 17 CFR 37.206.

⁶⁰ 17 CFR 37.400.

⁶¹ 17 CFR 37.401.

⁶² 17 CFR 37.402.

⁶³ 17 CFR 37.403.

⁶⁴ 17 CFR 37.404.

- Commission regulation 37.406 (Trade reconstruction);⁶⁶

(c) System safeguards

- Commission regulation 37.1400 (System safeguards);⁶⁷
- Commission regulation 37.1401(Requirements);⁶⁸

(d) Emergency authority

- Commission regulation 37.800 (Emergency authority).⁶⁹

2. Reporting and clearing-related requirements

(i) Reporting requirements

- (a) An Australian Licensed Market must certify that it will report all swap transactions to a Commission-registered or provisionally-registered SDR as if it were a SEF, in compliance with parts 43 and 45 of the Commission’s regulations, as a condition subsequent to qualifying for relief under this letter. An Australian Licensed Market must further certify that it will commence such reporting within sixty days of DMO’s issuance of a no-action relief letter acknowledging receipt of the Australian Licensed Market’s relief request to DMO.
- (b) In order to avoid duplicative reporting of Australian Licensed Market transactions, an Australian Licensed Market must certify that once it begins reporting all swap transactions to a Commission-registered or provisionally-registered SDR, as if it were a SEF, it will have rules that affirmatively prohibit reporting of part 45 creation data and initial part 43 data by the counterparties to such transactions (whether directly or through use of a third party service provider), and will provide notice to its market participants that it has commenced such reporting.⁷⁰
- (c) An Australian Licensed Market must certify that once it begins reporting all swap transactions to a Commission-registered or provisionally-registered SDR, as if it were a SEF, it will use the Acknowledgment ID (“AID”) that will be included in

⁶⁵ 17 CFR 37.405.

⁶⁶ 17 CFR 37.406.

⁶⁷ 17 CFR 37.1400.

⁶⁸ 17 CFR 37.1401.

⁶⁹ 17 CFR 37.800.

⁷⁰ This requirement is not intended to preclude compliance with any reporting requirements pursuant to Australian law for parties executing swap transactions on Australian Licensed Markets.

the DMO-issued letter acknowledging receipt of an Australian Licensed Market's relief request pursuant to this letter, in lieu of a CFTC-assigned name space⁷¹ for creation of unique swap identifiers ("USIs")—as if it were a SEF in accordance with Commission regulation 45.5—for all swap transactions. A Qualifying Australian Licensed Market must inform each registered SDR to which it will report of its AID prior to the commencement of reporting to such SDR.

- (d) In order for the Commission to monitor the levels of participation and volume on the Qualifying Australian Licensed Market attributable to U.S. persons,⁷² a Qualifying Australian Licensed Market must submit monthly reports to CFTC staff concerning those levels of participation and volume on or pursuant to the rules of the Qualifying Australian Licensed Market until such time that CFTC staff are reasonably able to derive such information directly from SDR data and so inform Qualifying Australian Licensed Markets. CFTC staff will continue to take steps to implement necessary changes to acquire such information directly from SDR data. Such monthly reports shall include the following items, specified by asset class:⁷³
- The percentage of the total notional value (expressed in USD) of completed swap transactions executed on or pursuant to the rules of the Australian Licensed Market that are attributable to orders entered by U.S. persons;
 - The percentage of the total number of completed swap transactions executed on or pursuant to the rules of the Australian Licensed Market that are attributable to orders entered by U.S. persons.

(ii) Clearing-related requirements

Section 2(h)(1) of the Act requires certain persons to submit a swap for clearing to either a Commission-registered DCO, or to a DCO that is exempt from registration, if the swap is required to be cleared.⁷⁴ The implementing Commission regulations for this statutory requirement are contained in part 50 of the Commission's regulations.⁷⁵ Specifically, Commission regulation 50.2 describes the obligations of those persons who are subject to

⁷¹ 17 CFR 45.5(a)(1)(i) ("The unique alphanumeric code assigned to the swap execution facility or designated contract market by the Commission for the purpose of identifying the swap execution facility or designated contract market with respect to unique swap identifier creation").

⁷² See *supra* discussion of the term "U.S. person" at note 9 and accompanying text.

⁷³ Monthly volume reports must be presented for each of the following asset classes: interest rate swaps, credit swaps, foreign exchange swaps, equity swaps, and commodity swaps.

⁷⁴ 7 U.S.C. § 2(h)(1).

⁷⁵ 17 CFR part 50.

the clearing requirement in CEA Section 2(h)(1),⁷⁶ and Commission regulation 50.4 specifies the classes of swaps that must be cleared.⁷⁷

An Australian Licensed Market must certify that it meets the following clearing-related requirements:

(a) Transactions executed on or through the Australian Licensed Market that are required to be cleared pursuant to Commission regulations 50.2 and 50.4, and which are entered into by a person subject to CEA section 2(h)(1), are cleared by: (1) a Commission-registered DCO; (2) a DCO that is exempt from registration; or (3) a central counterparty that has received no-action relief (“CCP with relief”) from the Commission’s Division of Clearing & Risk; and

(b) For transactions that are required to be cleared as described above, the Australian Licensed Market routes such transactions to a DCO, exempt DCO, or CCP with relief (as appropriate) in a manner that is acceptable to such clearing house and coordinates with each such DCO, exempt DCO, or CCP with relief to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing in accordance with the requirements of Commission regulation 39.12(b)(7).⁷⁸

F. Conclusion

The no-action relief provided by DMO in section I of this letter is limited to the application of CEA sections 5h(a)(1) and 2(h)(8), Commission regulation 37.3(a)(1), part 43 and part 45, and to the entities and transactions described herein.

Section I of this letter, and the no-action position taken herein, reflects the views of DMO only, and not necessarily the position or views of the Commission or of any other division or office of the Commission’s staff. The no-action position taken herein does not excuse affected persons from compliance with any other applicable requirements of the CEA or the regulations thereunder. As with all no-action letters, DMO retains the authority, in its discretion, to further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein.⁷⁹

⁷⁶ 17 CFR 50.2; 7 U.S.C. 2(h)(1).

⁷⁷ 17 CFR 50.4.

⁷⁸ Consistent with the Cross Border Guidance related to swaps executed anonymously between a non-U.S. person and a U.S. person on a registered SEF and cleared, when a swap is similarly executed anonymously on a Qualifying Australian Licensed Market, neither the non-U.S. person nor the U.S. person counterparty will be required to take any further steps with regard to Section 2(h)(1)(A) of the CEA or Commission regulation 50.2. *See* Cross Border Guidance at 45351.

⁷⁹ Commission guidance or action taken during the pendency of this no-action relief, could supersede the relief granted herein.

II. Conditional no-action relief provided by DSIO

A. Background

In addition to the foregoing, DSIO is providing no-action relief for SDs and MSPs from (i) certain External BCS; (ii) the confirmation requirement under Commission regulation 23.501; and (iii) the swap trading relationship documentation requirements under Commission regulation 23.504. Such no-action relief is intended to provide broadly equivalent relief for swaps executed by SDs and MSPs on or pursuant to the rules of a Qualifying Australian Licensed Market as is available to SDs and MSPs when executing swaps on or pursuant to the rules of a SEF.

As background, DSIO notes that the Commission's rules under the External BCS prohibit SDs and MSPs from engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.⁸⁰ In addition, the External BCS require SDs and MSPs to provide or obtain specific information from their counterparties, to obtain specific representations in writing from their counterparties, and to perform certain due diligence inquiries with respect to their counterparties prior to entering into (or in some cases, offering to enter into) a swap with such counterparties.⁸¹ Certain safe harbors under the External BCS permit SDs and MSPs to rely on written representations from their counterparties and standardized disclosures, each of which may require amendments or supplements to an SD's or MSP's relationship documentation with such counterparties prior to entering into a swap with such counterparties.⁸²

However, many of the External BCS do not apply either (i) when the SD or MSP does not know the identity of the counterparty to a swap prior to the execution of the swap, or (ii) when the

⁸⁰ See Commission regulation 23.410(a)(3). Nothing in this letter provides relief from compliance with the prohibition on fraud, manipulation, and other abusive practices under Commission regulation 23.410.

⁸¹ See Commission regulation 23.402(b) (requiring SDs to obtain essential facts about their counterparty prior to execution of a transaction); § 23.430(a) (requiring SDs and MSPs to verify that a counterparty meets the eligibility standards for an ECP before offering to enter into or entering into a swap with such counterparty); § 23.431(a) (requiring SDs and MSPs to provide material information concerning a swap to its counterparty at a reasonably sufficient time prior to entering into the swap); § 23.431(b) (requiring SDs and MSPs to provide notice to counterparties that they can request and consult on the design of a scenario analysis; § 23.431(d) (requiring SDs and MSPs to provide notice to counterparties of the right to receive the daily mark from a DCO for cleared swaps); § 23.432 (requiring SDs and MSPs to provide notice to counterparties of the right to select clearing and the DCO on which a swap is to be cleared); § 23.434 (requiring SDs and MSPs that recommend a swap to have a reasonable basis to believe that the swap is suitable for the counterparty); § 23.440 (requiring SDs and MSPs that act as an advisor to a Special Entity to act in such entity's best interest); § 23.450 (requiring SDs and MSPs to inquire into the knowledge and status of a representative of a counterparty that is a Special Entity); and § 23.451 (prohibiting SDs from entering into swaps with certain governmental entities if it has made political contributions to an official of such entity).

⁸² See Commission regulations 23.402(d), (e), and (f).

swap is initiated on a DCM or SEF and the SD or MSP does not know the identity of the counterparty to a swap prior to the execution of the swap.⁸³

SDs and MSPs executing a swap on or pursuant to the rules of a Qualifying Australian Licensed Market are also deemed to meet the requirement under Commission regulation 23.501 to ensure that each swap transaction is confirmed in writing whenever a swap transaction is executed on a SEF, provided that the rules of the SEF require that confirmation of the transaction take place at the same time as execution.⁸⁴

Similarly, Commission regulation 23.504 contains an exception to the requirement that an SD or MSP execute swap trading relationship documentation with a counterparty prior to or contemporaneously with entering into a swap transaction with such counterparty. Commission regulation 23.504(a)(1) states that such documentation is not required with respect to swaps executed on a DCM or anonymously on a SEF if such swaps are cleared by a DCO and all terms of the swaps conform to the rules of the DCO and Commission regulation 39.12(b)(6).⁸⁵

Recognizing the exceptions to the documentation requirements and the External BCS outlined above, and encouraged by the pre-clearing risk mitigation provided by compliance with the Commission's regulations for straight-through-processing of swaps intended to be cleared in parts 1, 23, 39, and 50 of the Commission's regulations, DSIO published No-Action Letter No. 13-70 on November 15, 2013 (the "November No-Action Letter").

⁸³ See Commission regulations 23.402(b) and (c) (requiring SDs and MSPs to obtain and retain certain information only about each counterparty "whose identity is known to the SD or MSP prior to the execution of the transaction"), § 23.430(e) (not requiring SDs and MSPs to verify counterparty eligibility when a transaction is entered on a DCM or SEF and the SD or MSP does not know the identity of the counterparty prior to execution), § 23.431(c) (not requiring disclosure of material information about a swap if initiated on a DCM or SEF and the SD or MSP does not know the identity of the counterparty prior to execution (but see general prohibition of fraudulent, deceptive, or manipulative practices under § 23.410)), § 23.450(h) (not requiring SDs and MSPs to have a reasonable basis to believe that a Special Entity has a qualified, independent representative if the transaction with the Special Entity is initiated on a DCM or SEF and the SD or MSP does not know the identity of the Special Entity prior to execution), and § 23.451(b)(2)(iii) (disapplying the prohibition on entering into swaps with a governmental Special Entity within two years after any contribution to an official of such governmental Special Entity if the swap is initiated on a DCM or SEF and the SD or MSP does not know the identity of the Special Entity prior to execution).

⁸⁴ See Commission regulation 23.501(a)(4)(i).

⁸⁵ Commission regulation 39.12(b)(6):

(6) A derivatives clearing organization that clears swaps shall have rules providing that, upon acceptance of a swap by the derivatives clearing organization for clearing:

- (i) The original swap is extinguished;
- (ii) The original swap is replaced by an equal and opposite swap between the derivatives clearing organization and each clearing member acting as principal for a house trade or acting as agent for a customer trade;
- (iii) All terms of a cleared swap must conform to product specifications established under derivatives clearing organization rules; and
- (iv) If a swap is cleared by a clearing member on behalf of a customer, all terms of the swap, as carried in the customer account on the books of the clearing member, must conform to the terms of the cleared swap established under the derivatives clearing organization's rules.

The November No-Action Letter provided no-action relief to SDs and MSPs when entering into swaps that are (i) of a type accepted for clearing by a DCO, and (ii) intended to be submitted for clearing contemporaneously with execution (such swaps, “Intended-To-Be-Cleared Swaps” or “ITBC Swaps”). The November No-Action Letter provides relief for these swaps from certain disclosure and notice requirements and other duties imposed on SDs and MSPs pursuant to the External BCS, as well as certain documentation requirements imposed on SDs and MSPs pursuant to Commission regulation 23.504.

Given the similarities between Qualifying Australian Licensed Markets and SEFs, DSIO believes that no-action relief for SDs and MSPs is warranted in the context of a swap executed by SDs and MSPs on or pursuant to the rules of a Qualifying Australian Licensed Market where such relief would be available to SDs and MSPs if executing the swap on or pursuant to the rules of a SEF. DSIO believes that such relief should be subject to the same conditions that would be applicable if the swap were executed on or pursuant to the rules of a SEF, including, for ITBC Swaps, whether or not the swap is currently cleared by a DCO or subject to a mandatory clearing determination by the Commission.

B. Scope of no-action relief provided by DSIO

Accordingly, DSIO will not recommend that the Commission commence an enforcement action against an SD or MSP for:

1. Failure to comply with the requirements of the External BCS specified in Table 1 of Appendix B attached hereto with respect to any swap where:

(a) The SD or MSP does not know the identity of the counterparty prior to execution of the swap; and

(b) The swap is executed on or subject to the rules of a Qualifying Australian Licensed Market; or

2. Failure to comply with the requirements of the External BCS specified in Table 2 of Appendix B attached hereto, or the requirements of Commission regulation 23.504 (Swap trading relationship documentation) with respect to an ITBC Swap where:

(a) The ITBC Swap is executed on or subject to the rules of a Qualifying Australian Licensed Market; and either

(b) The ITBC Swap is of a type that was accepted for clearing by a DCO as of November 15, 2013; or

(c) The ITBC Swap is of a type that is, as of the date of execution, required to be cleared pursuant to section 2(h)(1) of the CEA and part 50 of the Commission’s regulations; or

3. Failure to comply with the requirements of the External BCS specified in Table 3 of Appendix B attached hereto, or the requirements of Commission regulation 23.504 (Swap trading relationship documentation) with respect to an ITBC Swap where:

(a) The ITBC Swap is executed on or subject to the rules of a Qualifying Australian Licensed Market;

(b) The ITBC Swap is of a type that was not being accepted for clearing by a DCO as of November 15, 2013; and

(c) The ITBC Swap is not of a type that is, as of the date of execution, required to be cleared pursuant to section 2(h)(1) of the CEA and part 50 of the Commission's regulations.

4. Failure to comply with the confirmation requirements of Commission regulation 23.501 with respect to any swap transaction executed on a Qualifying Australian Licensed Market, provided that the rules of the Qualifying Australian Licensed Market establish that confirmation of all terms of the transaction shall take place at the same time as execution.⁸⁶

The relief specified in (2) and (3) above is, in each case, subject to the following conditions:

(i) The SD or MSP is either a clearing member of the DCO to which the ITBC Swap will be submitted, or has entered into an agreement with a clearing member of such DCO for clearing of swaps of the same type as the ITBC Swap; and

(ii) The SD or MSP does not require the counterparty or its clearing FCM to enter into a breakage agreement or similar agreement as a condition to executing the ITBC Swap.

C. Conclusion

The foregoing DSIO no-action relief, and the positions taken therein, represent the views of DSIO 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 persons relying on it from compliance with any other applicable requirements contained in the Act or in the Regulations issued thereunder, including all antifraud provisions of the Act. Further, this letter, and the relief contained herein, is based upon the representations made to DSIO. Any different, changed or omitted material facts or circumstances might render this no-action relief void.

⁸⁶ For purposes of this letter, "confirmation" has the same meaning as provided in Commission regulation 23.500(c).

III. Contact Information

If you have any questions concerning this correspondence, please contact David P. Van Wagner, Chief Counsel, DMO, at (202) 418-5481 or dvanwagner@cftc.gov; David N. Pepper, Attorney Advisor, DMO, at (202) 418-5565 or dpepper@cftc.gov; or Frank Fisanich, Chief Counsel, DSIO, at (202) 418-5949 or ffisanich@cftc.gov.

Sincerely,

Vincent McGonagle
Director
Division of Market Oversight

Gary Barnett
Director
Division of Swap Dealer and Intermediary Oversight

APPENDIX A

Certification

Instructions: The relief provided in this letter is only available to Australian Licensed Markets overseen by the Australian Securities & Investments Commission (ASIC) and is conditioned on DMO's issuance of a no-action relief letter acknowledging receipt of an Australian Licensed Market's relief request to DMO. An Australian Licensed Market's no-action relief request must be consistent with the requirements of Commission regulation 140.99 and must include, in the form and manner described in the letter, a certification that the Australian Licensed Market: (1) is subject to and compliant with regulatory requirements in Australia that are in accordance with the SEF regulatory requirements concerning trading methodology as specified in section I.E.1.(i) of the letter; (2) is subject to and compliant with regulatory requirements in Australia that are comparable to, and as comprehensive as, the SEF regulatory requirements concerning non-discriminatory access by market participants and an appropriate level of oversight as specified in section I.E.1.(ii)–(iii) of the letter; (3) meets the reporting and clearing-related requirements specified in section I.E.2. of the letter; and (4) does not allow trading by U.S. persons who are not ECPs on its platform.

The list below is being provided to aid Australian Licensed Markets in making appropriate and complete certifications to DMO as part of their no-action relief requests. Please provide your responses in an attached document addressing those regulatory requirements by ASIC that the Australian Licensed Market is subject to, and compliant with, which are:

(1) in accordance with each CFTC regulatory requirement applicable to SEFs that is listed in section I.E.1.(i) of the letter; and (2) comparable to, and as comprehensive as, each CFTC regulatory requirement applicable to SEFs that is listed in section I.E.1.(ii)–(iii) of the letter. Your responses must be accompanied by supporting explanations as to why such home country requirements are (1) in accordance with each CFTC regulatory requirement applicable to SEFs that is listed in section I.E.1.(i) of the letter; and (2) comparable to, and as comprehensive as, each CFTC regulatory requirement applicable to SEFs that is listed in section I.E.1.(ii)–(iii) of the letter.

In evaluating whether it satisfies the requirements specified in section I.E.1.(ii)–(iii) of the letter, an Australian Licensed Market may follow an outcomes-based approach. Under this approach, an Australian Licensed Market may certify that it is subject to and compliant with regulatory requirements in Australia that are comparable to, and as comprehensive as, the CFTC regulatory requirements applicable to SEFs if the particular requirements achieve the same regulatory objectives as the counterpart SEF regulatory requirement. In this context, “outcomes-based” refers not to what the regulations state, but instead to the actual consequences that they cause. Notably, an Australian Licensed Market would not have to maintain identical requirements in these areas as those for SEFs in order to be subject to a comparable, comprehensive set of requirements to SEFs.

This certification also includes a set of reporting and clearing-related requirements that an Australian Licensed Market must certify that it meets (or for conditions subsequent to qualification, will meet).

Please sign and date the bottom of the certification, confirming that all of the information provided in the certification is correct, and include such certification in any no-action relief request.

Name of Australian Licensed Market: _____

Address: _____

Contact Person, Position: _____

Phone #: _____

Email Address: _____

Is the Australian Licensed Market currently in good standing with ASIC?

Yes __ No __

A. Relevant CFTC Regulatory Provisions Applicable to SEFs

(1) A multilateral trading scheme and sufficient level of pre-trade price transparency

(a) The Australian Licensed Market maintains an order book that is subject to, and in compliance with, regulatory requirements in Australia that are in accordance with the order book definition in Commission regulation 37.3(a)(3), and which is available as an execution method for all swaps traded on the Australian Licensed Market.

(b) Any Required Transaction, as defined by Commission regulation 37.9(a)(1), that is not a block trade, as defined by Commission regulation 43.2, is executed on the Australian Licensed Market in a manner that complies with regulatory requirements in Australia that are in accordance with the requirements of Commission regulation 37.9(a)(2)(i).

(c) The Australian Licensed Market maintains appropriate minimum block sizes and requirements related to block trades in a manner that complies with regulatory requirements in Australia that are in accordance with the requirements of Commission regulation 43.6.

(2) Non-discriminatory access by market participants

The Australian Licensed Market is subject to and compliant with regulatory requirements that ensure non-discriminatory access by market participants that are comparable to, and as comprehensive as, Commission regulation 37.202 (Access requirements).

(3) An appropriate level of oversight

The Australian Licensed Market is subject to and compliant with oversight requirements that are comparable to, and as comprehensive as, the oversight rules applicable to SEFs as listed below.

(a) Rule enforcement

- (i) § 37.200 (Compliance with rules)
- (ii) § 37.201 (Operation of swap execution facility and compliance with rules)
- (iii) § 37.202(b) (Consent to Jurisdiction)
- (iv) § 37.203 (Rule enforcement program)
- (v) § 37.205 (Audit trail)
- (vi) § 37.206 (Disciplinary procedures and sanctions)

(b) Monitoring

- (i) § 37.400 (Monitoring of trading and trade processing)
- (ii) § 37.401 (General requirements)
- (iii) § 37.402 (Additional requirements for physical-delivery swaps)
- (iv) § 37.403 (Additional requirements for cash-settled swaps)
- (v) § 37.404 (Ability to obtain information)
- (vi) § 37.405 (Risk controls for trading)
- (vii) § 37.406 (Trade reconstruction)

(c) System safeguards

- (i) § 37.1400 (System safeguards)
- (ii) § 37.1401 (Requirements)

(d) Emergency authority

- (i) Commission Regulation 37.800 (Emergency authority)

B. Reporting and clearing-related requirements

The Australian Licensed Market meets the following reporting and clearing-related requirements:

(1) Reporting requirements

- (a) The Australian Licensed Market will report all swap transactions to a Commission-registered or provisionally-registered SDR as if it were a SEF, in compliance with parts 43 and 45 of the Commission's regulations, as a condition subsequent to qualifying for relief under this letter. The Australian Licensed Market will commence such reporting within sixty days of DMO's issuance of a no-action relief letter acknowledging receipt of the Australian Licensed Market's relief request to DMO pursuant to this letter.
- (b) In order to avoid duplicative reporting of Australian Licensed Market transactions once the Australian Licensed Market begins reporting all swap transactions to a Commission-registered or provisionally-registered SDR, as if it were a SEF, the

Australian Licensed Market will have rules that affirmatively prohibit reporting of part 45 creation data and initial part 43 data by the counterparties to such transactions (whether directly or through use of a third party service provider), and will provide notice to its market participants that it has commenced such reporting.

- (c) The Australian Licensed Market will use the Acknowledgment ID (“AID”) that will be included in the DMO-issued letter acknowledging receipt of an Australian Licensed Market’s relief request pursuant to this letter, in lieu of a CFTC-assigned name space⁸⁷ for creation of unique swap identifiers (“USIs”)—as if it were a SEF in accordance with Commission regulation 45.5—for all swap transactions once the Australian Licensed Market begins reporting all swap transactions to a Commission-registered or provisionally-registered SDR, as if it were a SEF. The Australian Licensed Market will inform each registered SDR to which it will report of its AID prior to the commencement of reporting to such SDR.
- (d) In order for the Commission to monitor the levels of participation and volume on the Australian Licensed Market attributable to U.S. persons,⁸⁸ the Australian Licensed Market will submit monthly reports to CFTC staff concerning those levels of participation and volume on or pursuant to the rules of the Australian Licensed Market until such time that CFTC staff are reasonably able to derive such information directly from SDR data and so inform Qualifying Australian Licensed Markets. CFTC staff will continue to take steps to implement necessary changes to acquire such information directly from SDR data. Such monthly reports shall include the following items, specified by asset class:⁸⁹
- The percentage of the total notional value (expressed in USD) of completed swap transactions executed on or pursuant to the rules of the Australian Licensed Market that are attributable to orders entered by U.S. persons;
 - The percentage of the total number of completed swap transactions executed on or pursuant to the rules of the Australian Licensed Market that are attributable to orders entered by U.S. persons.

(2) Clearing-related requirements

- (a) Transactions executed on or through the Australian Licensed Market that are required to be cleared pursuant to Commission regulations 50.2 and 50.4, and which are entered into by a party that is required to submit such transactions for clearing under CEA section

⁸⁷ 17 CFR 45.5(a)(1)(i) (“The unique alphanumeric code assigned to the swap execution facility or designated contract market by the Commission for the purpose of identifying the swap execution facility or designated contract market with respect to unique swap identifier creation”).

⁸⁸ For purposes of this certification, the term “U.S. person” has the meaning used in the Commission’s Cross-Border Guidance, 78 Fed. Reg. 45292, 45316–17 (July 26, 2013).

⁸⁹ Monthly volume reports must be presented for each of the following asset classes: interest rate swaps, credit swaps, foreign exchange swaps, equity swaps, and commodity swaps.

2(h)(1), are cleared by: (1) a Commission-registered DCO, (2) a DCO that is exempt from registration, or (3) a central counterparty that has received no-action relief (“CCP with relief”) from the Commission’s Division of Clearing & Risk; and

(b) For transactions that are required to be cleared as described above, the Australian Licensed Market routes such transactions to the DCO, Exempt DCO, or CCP with relief (as appropriate) in a manner that is acceptable to such clearing house and coordinates with each such DCO, exempt DCO, or CCP with relief to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing in accordance with the requirements of Commission regulation 39.12(b)(7).

C. Eligible Contract Participants (“ECPs”)

The Australian Licensed Market does not allow trading by U.S. persons who are not ECPs on its platform.

I certify that _____ [Australian Licensed Market Name] is an Australian Licensed Market in good standing with ASIC, is subject to and compliant with regulatory requirements in Australia that are in accordance with the SEF regulatory requirements concerning trading methodology, and meets the reporting and clearing-related requirements specified above. Additionally, _____ [Australian Licensed Market Name] is subject to and compliant with regulatory requirements in Australia that are comparable to, and as comprehensive as, the SEF regulatory requirements specified above concerning non-discriminatory access by market participants and an appropriate level of oversight. Furthermore, the Australian Licensed Market meets the reporting and clearing-related requirements listed above and does not allow trading by U.S. persons who are not ECPs on its platform. All of the information contained in this certification is true and correct. I, or another member of my organization, will promptly inform the Director of the CFTC’s Division of Market Oversight of any material change, or failure to comply with the requirements listed above, that would render this certification false or misleading.

Signature _____

Position _____

Date _____

APPENDIX B

Specified External BCS Requirements

TABLE 1	
<u>Commission Regulation</u>	<u>Subject Matter</u>
§ 23.430	Verification of counterparty eligibility
§ 23.431(a)	Material risks, characteristics, incentives, mid-market mark
§ 23.431(b)	Scenario analysis
§ 23.431(d)(1)	Notice of right to receive daily mark from DCO for cleared swaps
§ 23.450	Requirements for swap dealers and major swap participants acting as counterparties to Special Entities
§ 23.451	Political contributions by certain swap dealers

TABLE 2	
<u>Commission Regulation</u>	<u>Subject Matter</u>
§ 23.402(b)-(f)	Know your counterparty, True name and owner, Reasonable reliance on representations, Manner of disclosure, and Disclosures in a standard format
§ 23.430	Verification of counterparty eligibility
§ 23.431(a)	Material risks, characteristics, incentives, mid-market mark
§ 23.431(b)	Scenario analysis
§ 23.431(d)(1)	Notice of right to receive daily mark from DCO for cleared swaps
§ 23.432(a)	Notice of right to select DCO
§ 23.432(b)	Notice of right to clearing
§ 23.434	Recommendations to counterparties--institutional suitability
§ 23.440	Requirements for swap dealers acting as advisors to Special Entities
§ 23.450	Requirements for swap dealers and major swap participants acting as counterparties to Special Entities
§ 23.451	Political contributions by certain swap dealers

<u>TABLE 3</u>	
<u>Commission Regulation</u>	<u>Subject Matter</u>
§ 23.402(b)-(f)	Know your counterparty, True name and owner, Reasonable reliance on representations, Manner of disclosure, and Disclosures in a standard format
§ 23.430	Verification of counterparty eligibility
§ 23.431(b)	Scenario analysis
§ 23.431(d)(1)	Notice of right to receive daily mark from DCO for cleared swaps
§ 23.432(a)	Notice of right to select DCO
§ 23.432(b)	Notice of right to clearing
§ 23.451	Political contributions by certain swap dealers