



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Letter No. 14-34  
No-Action  
March 21, 2014  
Division of Swap Dealer and Intermediary Oversight

### **Re: Staff No-Action Relief: Revised Relief from the De Minimis Threshold for Certain Swaps with Utility Special Entities**

Ladies and Gentlemen:

Section 1.3(ggg) of the regulations of the Commodity Futures Trading Commission (the “Commission”) further defines certain terms, including the term “swap dealer.”<sup>1</sup> Section 1.3(ggg) includes an exception for a person that has entered into swap positions connected with its swap dealing activities that, in the aggregate, do not exceed either of two gross notional amount thresholds.<sup>2</sup> The two gross notional amount thresholds are (i) \$3 billion, subject to a phase in level of \$8 billion (referred to herein as the “general de minimis threshold”), and (ii) \$25 million with regard to swaps in which the counterparty is a “special entity”<sup>3</sup> (referred to herein as the “special entity de minimis threshold”).

On October 12, 2012, the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commission published CFTC Letter No. 12-18 (the “2012 No-Action Letter”).<sup>4</sup> The 2012 No-Action Letter provided no-action relief, subject to certain conditions, from the swap dealer (“SD”) registration requirement if the “utility commodity swaps” connected with a person’s swap dealing activities into which the person – or any other entity controlling, controlled by or under common control with the person – enters with “utility special entities” over the course of the immediately preceding 12 months have an aggregate gross notional amount of no more than \$800 million.

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<sup>1</sup> See 17 CFR 1.3(ggg) and 77 Fed. Reg. 30596 (May 23, 2012) (the “Swap Dealer Definitions Adopting Release”).

<sup>2</sup> 17 CFR 1.3(ggg)(4)(i).

<sup>3</sup> *Id.* The term “special entity” is defined in Section 4s(h)(2)(C) of the Commodity Exchange Act (“CEA”), 7 USC 6s(h)(2)(C), and 17 CFR 23.401(c).

<sup>4</sup> Staff no-action letters are available on the Commission’s website:  
<http://www.cftc.gov/LawRegulation/CFTCStaffLetters/No-ActionLetters/index.htm>.

Subsequent to issuance of the 2012 No-Action Letter, a number of electric power industry representative groups<sup>5</sup> have identified key conditions in the 2012 No-Action Letter that they believe have inhibited counterparties' willingness to enter into swap transactions with utility special entities, and thereby significantly reduced the number of counterparties available to utility special entities. They have represented that these conditions either require counterparties to adopt additional procedures in order to do business with a utility special entity or cause uncertainty as to whether a counterparty can take advantage of the no-action relief contained in the 2012 No-Action Letter.

The Division understands from its discussions with market participants that revising the no-action relief provided by the 2012 No-Action Letter will allow utility special entities to significantly increase the number of swap counterparties available to the utility special entities and assist in lessening potential harm to the public interest in view of the importance of the energy services provided by the utility special entities. The Division also understands from its discussions with market participants that a larger volume of swaps with persons that are not registered SDs is not likely to raise the types of risks that the Commission's SD registration requirements are intended to prevent, and it is appropriate to provide expanded no-action relief as described below.

In view of the foregoing, the Division will not recommend that the Commission commence an enforcement action against a person for failure to apply to be registered as an SD if the person – or any other entity controlling, controlled by or under common control with the person – fails to include utility operations-related swaps (as defined below) when determining whether it has entered into swaps as a result of its swap dealing activities in excess of the special entity de minimis threshold; *provided* that it has not entered into swaps (counting utility operations-related swaps) as a result of its swap dealing activities in excess of the general de minimis threshold or (not counting utility operations-related swaps) the special entity de minimis threshold.<sup>6</sup>

For purposes of this letter, a “utility special entity” is a special entity<sup>7</sup> that owns or operates electric or natural gas facilities or electric or natural gas operations (or anticipated facilities or operations), supplies natural gas and/or electric energy to other utility special entities, has public service obligations (or anticipated public service obligations) under Federal, State or local law or regulation to deliver electric energy and/or natural gas service to utility

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<sup>5</sup> The American Public Power Association, Large Public Power Council, Bonneville Power Administration, and Transmission Access Policy Study Group.

<sup>6</sup> The Division emphasizes that a person's utility operations-related swaps connected with the person's swap dealing activities are not in addition to the person's swaps subject to the general de minimis threshold. Rather, such swaps effectively reduce the general de minimis threshold for that person. For example, if a person enters into utility operations-related swaps connected with the person's swap dealing activities with an aggregate gross notional amount of \$200 million, then in order to remain below the general de minimis threshold the person could enter into other swaps with an aggregate gross notional amount of only \$7.8 billion (i.e., \$8 billion minus \$200 million).

<sup>7</sup> *Id.* The term “special entity” is defined in Section 4s(h)(2)(C) of the Commodity Exchange Act (“CEA”), 7 USC 6s(h)(2)(C), and 17 CFR 23.401(c).

customers, or is a Federal power marketing agency as defined in Section 3 of the Federal Power Act (16 U.S.C. § 796(19)).

For purposes of this letter, the term “utility operations-related swap” means any swap that meets all of the following conditions:

- (1) A party to the swap is a utility special entity;
- (2) The utility special entity has represented to the other party that it is using the swap in the manner described in 17 C.F.R. 50.50(c); and
- (3) The swap is either (i) an electric energy or natural gas swap; or (ii) The utility special entity has represented to the other party that the swap is associated with:
  - (a) The generation, production, purchase or sale of natural gas or electric energy, the supply of natural gas or electric energy to a utility, or the delivery of natural gas or electric energy service to utility customers;
  - (b) Fuel supply for the facilities or operations of a utility;
  - (c) Compliance with an electric system reliability obligation; or
  - (d) Compliance with an energy, energy efficiency, conservation, or renewable energy or environmental statute, regulation, or government order applicable to a utility.

The relief provided in this letter will remain effective until the effective date of any final Commission action with respect to the petition received by the Commission on July 12, 2012, seeking an amendment of Commission regulation 1.3(ggg)(4) (the “Petition”),<sup>8</sup> including without limitation a rulemaking, an order, or a determination not to take action with respect to the Petition.

As with all no-action letters, the Division retains the authority, in its discretion, to further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein.<sup>9</sup>

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<sup>8</sup> Petition for rulemaking dated July 12, 2012 from the American Public Power Association, the Large Public Power Council, the American Public Gas Association, the Transmission Access Policy Study Group and the Bonneville Power Administration (collectively, the “Petitioners”), available at <http://sirt.cftc.gov/sirt/sirt.aspx?Topic=PendingFilingsandActionsAD&Key=23845>. The Petition requested that the regulation be amended to exclude from the special entity de minimis threshold swaps to which the Petitioners are counterparties and that relate to the Petitioners’ utility operations.

<sup>9</sup> Commission guidance or action taken during the pendency of this no-action relief, could supersede the relief granted herein.

This letter, and the positions taken herein, represent the view of this Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse 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. Specifically, the relief issued by this letter does not relieve any person from an obligation to report a swap or information concerning a swap under part 43 or part 45 of the Commission's regulations. Further, this letter, and the relief contained herein, is based upon the representations made to the Division. Any different, changed or omitted material facts or circumstances might render this no-action relief void.

This letter supersedes the 2012 No-Action Letter (CFTC Letter No. 12-18). No person may rely upon the relief provided in such letter after the date hereof.

If you have any questions, please do not hesitate to contact me at 202-418-5977, Frank Fisanich, Chief Counsel, at 202-418-5949, or Ward Griffin, Associate Chief Counsel, at 202-418-5425.

Very truly yours

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