



## U.S. COMMODITY FUTURES TRADING COMMISSION

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CFTC Letter No. 16-72  
No-Action  
September 14, 2016  
Division of Market Oversight  
Division of Swap Dealer and Intermediary Oversight

### **Conditional no-action relief related to CFTC No-Action Letter No. 15-29 with respect to swaps trading on Yieldbroker Pty Limited**

The Commodity Futures Trading Commission's (CFTC's) Divisions of Market Oversight (DMO) and Swap Dealer and Intermediary Oversight (DSIO) (the Divisions) are jointly issuing this letter to provide conditional no-action relief related to CFTC No-Action Letter No. 15-29 (Letter 15-29)<sup>1</sup> for:

- (1) Yieldbroker PTY Limited (Yieldbroker) from the swap execution facility (SEF) registration requirement under section 5h(a)(1) of the Commodity Exchange Act (CEA)<sup>2</sup> and Commission regulation 37.3(a)(1);<sup>3</sup>
- (2) Parties executing swap transactions on Yieldbroker from:
  - (i) the trade execution mandate under CEA section 2(h)(8);<sup>4</sup> and
  - (ii) their obligations to report part 45 creation data and the initial part 43 data associated with such swap transactions once Yieldbroker begins reporting part 45 creation data and the initial part 43 data associated with swap transactions to a

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<sup>1</sup> See Letter 15-29 (May 15, 2015), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/15-29.pdf>.

<sup>2</sup> 7 U.S.C. § 7b-3(a)(1).

<sup>3</sup> See 17 CFR 37.3(a)(1).

<sup>4</sup> 7 U.S.C. § 2(h)(8).

Commission-registered or provisionally-registered swap data repository (SDR), as if Yieldbroker were a SEF;<sup>5</sup> and

(3) Subject to the conditions specified below, swap dealers (SDs) and major swap participants (MSPs) executing swap transactions on Yieldbroker 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);<sup>6</sup>

(ii) the confirmation requirement under Commission regulation 23.501;<sup>7</sup> and

(iii) the swap trading relationship documentation requirements under Commission regulation 23.504.<sup>8</sup>

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 Yieldbroker, pursuant to this letter and Letter 15-29, 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 Yieldbroker from the trade execution mandate of CEA section 2(h)(8) and from certain reporting obligations;<sup>9</sup> and (2) Section II of the letter describes the conditional no-action relief being provided by DSIO, pursuant to this letter and Letter 15-29, to SDs and MSPs executing swap transactions on Yieldbroker from certain specified business conduct, confirmation, and swap trading relationship documentation requirements under part 23 of the Commission's regulations.

All no-action relief provided pursuant to this letter and Letter 15-29 will expire upon the effective date of any framework implementing the Commission's authority, under CEA section 5h(g), to exempt swap execution facilities that are "subject to comparable, comprehensive supervision and regulation on a consolidated basis by . . . the appropriate governmental

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<sup>5</sup> See 17 CFR parts 43 & 45. Yieldbroker'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 Letter 15-29. Without the imposition of such a requirement by Letter 15-29, Yieldbroker would not be obligated to report such data under the Commission's swaps data reporting regime as Yieldbroker swap transactions are considered "off-facility swaps" under Commission regulation 45.1 (*i.e.*, non-SEF/designated contract market transactions).

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

<sup>7</sup> See 17 CFR 23.501.

<sup>8</sup> See 17 CFR 23.504. Nothing in this letter provides relief from the SD and MSP registration requirements.

<sup>9</sup> A prerequisite to a trade execution mandate under CEA section 2(h)(8) is a clearing requirement issued by the Commission under CEA section 2(h)(1) (*see* 7 U.S.C. § 2(h)(1)) and codified in part 50 of the Commission's regulations (*see* 17 CFR part 50).

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).<sup>10</sup>

## **I. Conditional no-action relief provided by DMO**

### **A. Background**

#### **1. Letter 15-29**

On May 15, 2015, DMO and DSIO jointly issued Letter 15-29 to provide conditional no-action relief to:

- Qualifying Australian Licensed Markets (QALMs)<sup>11</sup> from the SEF registration requirement;
- Parties executing swap transactions on QALMs from the trade execution mandate;<sup>12</sup> and
- SDs and MSPs executing swap transactions on QALMs from certain business conduct and documentation requirements.

The relief provided under Letter 15-29 is not self-effectuating. Rather, Letter 15-29 is an enabling no-action letter that requires the Australian Licensed Market to affirmatively undertake to DMO that it will comply with the conditions set out in Letter 15-29. Relief pursuant to Letter 15-29 would be provided to an Australian Licensed Market upon issuance of a letter by DMO and DSIO acknowledging receipt of an Australian Licensed Market’s relief request that includes a certification that the Australian Licensed Market:

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<sup>10</sup> See 7 U.S.C. § 7b-3(g).

<sup>11</sup> For purposes of Letter 15-29, DMO and DSIO defined 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 Licensed Markets), that satisfy the conditions for SEF/designated contract market (DCM) registration relief set out in Letter 15-29. The Australian Securities and Investments Commission (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://asic.gov.au/regulatory-resources/markets/licensed-markets/licensed-domestic-financial-markets-operating-in-australia/>.

<sup>12</sup> To qualify for relief from the SEF registration requirement, an Australian Licensed Market that plans to execute only permitted transactions need not certify that it complies with the trading methodology requirements in Letter 15-29 pertaining to the method of execution for Required Transactions and block trades. However, parties that execute swap transactions on an Australian Licensed Market will not have relief from the CEA section 2(h)(8) trade execution mandate with respect to trades executed on an Australian Licensed Market unless the Australian Licensed Market certifies that it is in compliance with the trading methodology requirements that are specified in Letter 15-29.

(1) is subject to and compliant with regulatory requirements established by the appropriate Australian governmental authorities that are in accordance with certain SEF regulatory requirements concerning trading methodology;

(2) is subject to and compliant with regulatory requirements established by the appropriate Australian governmental authorities 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;<sup>13</sup>

(4) does not allow trading by U.S. persons<sup>14</sup> who are not eligible contract participants (ECPs);<sup>15</sup> and

(5) is overseen by a regulatory authority that is 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). Notably, ASIC is a signatory to the IOSCO MMOU.

Relief would not be triggered until DMO reviews the applicant's certification and issues a responsive relief letter jointly with DSIO. Such relief would expire upon the effective date of any Commission exempt SEF framework adopted pursuant to CEA section 5h(g).

## **2. Yieldbroker**

Yieldbroker, an Australian licensed swap-trading platform that offers direct access to U.S. persons, has operated pursuant to several no-action letters issued by DMO since 2013.<sup>16</sup> Yieldbroker's current no-action letter is scheduled to expire on September 15, 2016.<sup>17</sup>

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<sup>13</sup> Pursuant to Letter 15-29, an Australian Licensed Market is required to certify that (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 entered into by a person subject to CEA section 2(h)(1), are cleared by a registered DCO, an exempt DCO, or a central counterparty that has received no-action relief; and (b) the Australian Licensed Market routes transactions that are required to be cleared to a DCO, an exempt DCO, or a central counterparty with relief (as appropriate), in a manner that is acceptable to such clearinghouse and the Australian Licensed Market coordinates with each DCO, exempt DCO, or central counterparty 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).

<sup>14</sup> For purposes of this letter and Letter 15-29, 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).

<sup>15</sup> Pursuant to CEA section 2(e), it is unlawful for any person, other than an ECP, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under CEA section 5.

<sup>16</sup> DMO has issued a series of short-term no-action letters providing conditional, time-limited relief for Yieldbroker. See CFTC No-Action Letter No. 13-76 (December 20, 2013), CFTC No-Action Letter No. 14-70 (May 14, 2014),

## **B. Yieldbroker's request for no-action relief pursuant to Letter 15-29**

On July 18, 2016, Yieldbroker submitted a request to DMO, consistent with the requirements of Commission regulation 140.99, for no-action relief pursuant to Letter 15-29, for itself and on behalf of its participants. In support of its relief request, Yieldbroker certified that it will comply with the conditions set out in Letter 15-29.

Consistent with the terms of Letter 15-29, Yieldbroker has certified that it:

(1) is subject to pre-trade price transparency requirements in connection with executing Required Transactions<sup>18</sup> that are in accordance with the requirements for executing Required Transactions on SEFs (as specified in Letter 15-29);

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CFTC No-Action Letter No. 14-105 (August 11, 2014), CFTC No-Action Letter No. 14-139 (November 13, 2014), CFTC No-Action Letter No. 15-04 (February 12, 2015), CFTC No-Action Letter No. 15-30 (May 15, 2015), CFTC No-Action Letter No. 15-56 (October 15, 2015), and CFTC No-Action Letter No. 16-52 (May 12, 2016). Short-term no-action relief for Yieldbroker under each of these letters has been predicated on Yieldbroker's satisfaction of the following conditions that were first specified in the December 2013 letter, and modified to include New Zealand dollar-denominated interest rate swaps in the May 2016 letter:

1. Yieldbroker will not offer trading on its platform in any product that is subject to the trade execution mandate, pursuant to CEA section 2(h)(8), during the relief period.
2. Yieldbroker will only offer trading in Australian dollar-denominated and New Zealand dollar-denominated interest rate swaps on its platform during the relief period.
3. Yieldbroker will maintain its Australian Market License and will remain an exchange in good standing with ASIC and other applicable regulators.
4. Yieldbroker must provide impartial access to its platform consistent with the requirements of Commission regulation 37.202(a) and with any Commission- or Commission staff-issued guidance and interpretations thereto.
5. Yieldbroker must at all times maintain an "order book" that complies with Commission regulation 37.3(a)(3).
6. Yieldbroker must provide notice to its participants that each swap transaction executed on or pursuant to the rules of its platform during the period of relief provided herein is not occurring on a registered SEF and that the counterparties to such off-facility swaps may have swap data reporting obligations pursuant to parts 43 and 45 of the Commission's regulations. Additionally, Yieldbroker will undertake to monitor that any trade that is reportable under part 45 that is executed on its platform has been assigned a unique swap identifier (USI) and has therefore been reported to a provisionally-registered or registered SDR.

<sup>17</sup> See Letter 16-52, available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/16-52.pdf>.

<sup>18</sup> The term "Required Transaction" is defined in Commission regulation 37.9(a)(1) to mean any transaction involving a swap that is subject to the trade execution requirement in CEA section 2(h)(8). A prerequisite for any trade execution requirement is the issuance of a Commission clearing requirement determination under CEA section 2(h)(1).

(2) maintains an order book, pursuant to its operating rules, that is 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 Yieldbroker;<sup>19</sup>

(3) is subject to and compliant with regulatory requirements and supervision in Australia that are comparable to the SEF regulatory requirements concerning non-discriminatory access by market participants and an appropriate level of oversight as specified in Letter 15-29;<sup>20</sup>

(4) will comply with the reporting and clearing-related requirements specified in Letter 15-29;

(5) does not allow trading by U.S. persons who are not ECPs on its platform; and

(6) will use all reasonable endeavors to obtain affirmative certification letters, on an annual basis, from all members, persons and firms subject to its recordkeeping requirements confirming that such members, persons and firms have complied with such recordkeeping requirements.

### **1. Yieldbroker's comparative regulatory analysis, operating rules and Australian Market License**

In support of its request for relief pursuant to Letter 15-29, Yieldbroker submitted an analysis to DMO comparing the requirements for SEFs as specified in Letter 15-29 with the relevant statutory and regulatory requirements that Yieldbroker is subject to in Australia as an Australian Licensed Market. Yieldbroker also provided copies of its current operating rules and current Australian Market License (AML) to DMO, which Yieldbroker has implemented in consultation with its home country regulator, ASIC.

Notably, in order to comply fully with the requirements of Letter 15-29, Yieldbroker, in consultation with ASIC, has taken two important steps. First, Yieldbroker has added operating rules that align with the SEF requirements that are listed in Letter 15-29.<sup>21</sup>

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<sup>19</sup> Yieldbroker included within its application a detailed description of its order book and a list of those operating rules pertaining to its order book.

<sup>20</sup> Yieldbroker's relief request was accompanied by supporting explanations as to why the regulations and supervision that it is subject to in Australia are comparable to those CFTC regulatory requirements applicable to SEFs that are specified in Letter 15-29.

<sup>21</sup> Yieldbroker added a suite of operating rules that applies to its derivatives trading platform to the extent that Yieldbroker relies on the relief provided by Letter 15-29. Those revised operating rules became effective on June 28, 2016.

Second, ASIC has established as part of Yieldbroker's AML a new condition that affirmatively requires Yieldbroker to comply with the terms of Letter 15-29 in order for it to maintain good regulatory standing as a Licensed Market in Australia.

Through operation of its AML, compliance with the terms of Letter 15-29 will be effectively converted to mandatory requirements for Yieldbroker to maintain its Licensed Market status in Australia. Accordingly, ASIC will have regulatory jurisdiction over Yieldbroker with respect to its compliance with Letter 15-29 such that ASIC would partially revoke or suspend Yieldbroker's AML should it fail to comply with the requirements in Letter 15-29.

## **2. Trading methodology requirements in connection with the execution of Required Transactions**

The trade execution mandate set out in CEA section 2(h)(8) requires that a swap that is subject to the clearing requirement must be executed on a DCM, SEF, or SEF that is exempt from registration under CEA section 5h(g) (unless no DCM or SEF makes the swap available to trade).<sup>22</sup> Yieldbroker is not a Commission-registered SEF or DCM, nor is it a SEF that is exempt from registration under CEA section 5h(g).

Yieldbroker has certified that it maintains an order book, pursuant to its operating rules, that is in accordance with the order book definition in Commission regulation 37.3(a)(3)<sup>23</sup> and which is available as an execution method for all swaps traded on Yieldbroker. Yieldbroker has further certified that any Required Transaction, as defined by Commission regulation 37.9(a)(1),<sup>24</sup> will be executed on Yieldbroker's trading platform in a manner that is in accordance with the requirements of Commission regulation 37.9(a)(2)(i).<sup>25</sup>

## **3. Clearing and straight through processing**

Swaps that are required to be cleared pursuant to CEA section 2(h)(1) and Commission regulations 50.2 and 50.4 (swaps required to be cleared), and that are entered into by a person subject to CEA section 2(h)(1), must be cleared by: (1) an eligible Commission-registered derivatives clearing organization (registered DCO); or (2) an eligible derivatives clearing

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<sup>22</sup> 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.

<sup>23</sup> 17 CFR 37.3(a)(3).

<sup>24</sup> 17 CFR 37.9(a)(1).

<sup>25</sup> 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.

organization that the Commission has exempted from registration (exempt DCO).<sup>26</sup> Under regulation 39.5(a), a DCO is “presumed eligible to accept for clearing any swap that is within a group, category, type, or class of swaps that the [DCO] already clears ... subject to review by the Commission.”<sup>27</sup> Commission regulation 50.2 describes the obligations of those persons who are subject to the clearing requirement in CEA section 2(h)(1). Commission regulation 50.4 specifies the classes of swaps that must be cleared.<sup>28</sup>

Pursuant to the process set forth under Letter 15-29, Yieldbroker has represented to Commission staff that it is working to establish a process by which swaps executed on or through Yieldbroker that are required to be cleared pursuant to CEA section 2(h)(1) and Commission regulations 50.2 and 50.4, and that are entered into by a person subject to CEA section 2(h)(1), will be routed to either a Commission-registered DCO or a DCO that is exempt from registration with the Commission. At this time, however, Yieldbroker does not have clearing arrangements in place with any registered DCOs or exempt DCOs.

Nothing in this letter is intended to relieve market participants executing swaps on Yieldbroker’s platform (or subject to Yieldbroker’s rules) of their obligations under CEA section 2(h)(1) and part 50 of the Commission’s regulations. Each executing counterparty subject to the clearing requirement under CEA section 2(h)(1) and part 50 of the Commission’s regulations retains all obligations to submit swaps required to be cleared to a registered DCO or an exempt DCO, pursuant to CEA section 2(h)(1) and Commission regulation 50.2.

For swaps required to be cleared pursuant to CEA section 2(h)(1) and part 50 of the Commission’s regulations, and for transactions that are cleared voluntarily, Yieldbroker has certified that when it begins routing such transactions to a registered DCO, and/or an exempt DCO, Yieldbroker will route such transactions in a manner that is acceptable to such DCOs and will coordinate with each such registered DCO, and/or exempt DCO, 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

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<sup>26</sup> Pursuant to Commission orders, an exempt DCO is permitted to clear for U.S. proprietary accounts but not for U.S. customers. *See, e.g.*, Order of Exemption from Registration to Japan Securities Clearing Corp. (JSCC) (Oct. 26, 2015) and Amended Order of Exemption from Registration to ASX Clear (Futures) Pty Ltd. (ASX) (Jan. 28, 2016).

<sup>27</sup> *See* 17 CFR 39.5(a). There are two eligible registered DCOs that currently clear AUD-denominated interest rate swaps: CME Clearing Inc. and LCH.Clearnet Ltd. There are two eligible exempt DCOs that currently clear or offer to clear AUD-denominated interest rate swaps: ASX and JSCC.

<sup>28</sup> Under regulation 50.4(a), currently four classes of interest rate swaps, denominated in particular currencies and having certain other specifications, are required to be cleared: (1) fixed-to-floating interest rate swaps; (2) basis swaps; (3) forward rate agreements; and (4) overnight index swaps. The Commission’s first clearing requirement determination applied to the following currencies: U.S. dollar (USD), euro (EUR), sterling (GBP), and Japanese yen (JPY). *See Clearing Requirement Determination Under Section 2(h) of the CEA*, 77 Fed. Reg. 74284 (Dec. 13, 2012). Note that the Commission has proposed regulations that would expand the clearing requirement under regulation 50.4 to include AUD-denominated interest rate swaps. *See Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps, Notice of Proposed Rulemaking*, 81 Fed. Reg. 39506 (June 16, 2016).



39.12(b)(7).<sup>29</sup> Commission staff will review all such rules and procedures, along with any other clearing arrangement documentation, once Yieldbroker has executed and implemented its arrangements with one or more registered or exempt DCOs.

#### **4. Mandatory SDR reporting**

Consistent with the terms of Letter 15-29, Yieldbroker has certified that it will begin reporting part 45 creation data and the initial part 43 data<sup>30</sup> to a Commission-registered SDR of its choice, as if it were a SEF,<sup>31</sup> in connection with all swap transactions executed on or pursuant to Yieldbroker's rules that are subject to the clearing requirement or involve a counterparty that is a U.S. Person. Yieldbroker has further certified that it will commence such reporting within sixty days of the issuance of this no-action letter.

Upon Yieldbroker's initiation of SDR reporting:

- 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. Yieldbroker has certified that it will notify its participants in a

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<sup>29</sup> 17 CFR 39.12(b)(7). Yieldbroker has included within its relief request a description of its clearing workflows that it represents would ensure prompt and efficient transaction processing, consistent with CFTC No-Action Letter No. 15-67 (Straight Through Processing and Affirmation of SEF Cleared Swaps) (Dec. 21, 2015), given that delays in transaction processing may occur due to an applicable registered DCO, or exempt DCO, being closed during Australian trading hours. Commission staff will review these workflows again upon execution and implementation of specific clearing arrangements between Yieldbroker and any registered DCOs or exempt DCOs.

It is expected that Yieldbroker's clearing arrangements will not be limited to exempt DCOs because, as noted above, Commission orders prohibit exempt DCOs from clearing for U.S. customers. According to the Commission's adopting release for the SEF Core Principles final rule, which was published prior to the first issuance of an order exempting a DCO from registration, "if exempt DCOs are limited to clearing for only certain types of market participants, then the Commission will take action to ensure that SEF market participants have impartial access to swap clearing through registered DCOs." *Core Principles and Other Requirements for SEFs, Final Rule*, 78 Fed. Reg. 33,476, 33,534 (n. 700) (June 4, 2013) (discussing regulation 37.701 (Required clearing)). Moreover, the Commission has indicated the importance of swap counterparties having a choice of which DCO will clear the swaps they execute. Under Commission regulation 23.432(a) (Clearing disclosures for swaps required to be cleared), an SD or MSP is required to "notify any counterparty (other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based swap participant) with which it entered into a swap ... that the counterparty has the sole right to select the [DCO] at which the swap will be cleared." An analogous provision codified in Commission regulation 23.432(b) pertains to swaps not required to be cleared. *See also Business Conduct Standards for SDs and MSPs with Counterparties, Final Rule*, 77 Fed. Reg. at 9,768-69 (Feb. 17, 2012) (discussing regulation 23.432).

<sup>30</sup> *See* 17 CFR parts 43 and 45. The specific reporting requirements for QALMs are listed in Letter 15-29 at pp. 17-18.

<sup>31</sup> Yieldbroker'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 Letter 15-29. Without the imposition of such a requirement by Letter 15-29, Yieldbroker would not be obligated to report such data under the Commission's swaps data reporting regime as Yieldbroker swap transactions are considered "off-facility swaps" under Commission regulation 45.1 (*i.e.*, non-SEF/DCM transactions).

timely fashion when it has commenced reporting part 45 creation data and the initial part 43 data associated with such swap transactions.

- Counterparties to such swap transactions must continue to comply with any applicable subsequent reporting requirements under parts 43 and 45 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 such swap transactions.<sup>32</sup>

Until such time as Yieldbroker begins reporting all swap transactions executed on its platform or pursuant to its rules, which are subject to the clearing requirement or involve a counterparty that is a U.S. Person, to an SDR, as if it were a SEF, counterparties will continue to retain all applicable reporting responsibilities for off-facility swaps pursuant to parts 43 and 45 for such swap transactions.<sup>33</sup>

In order to avoid duplicative reporting once Yieldbroker begins reporting all swap transactions executed on its platform or pursuant to its rules, which are subject to the clearing requirement or involve a counterparty that is a U.S. Person, to an SDR, as if it were a SEF, Yieldbroker will 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. Additionally, once Yieldbroker begins reporting transactions to an SDR, it will use the Acknowledgment ID (AID) that it has been provided by DMO in lieu of a CFTC assigned name space for creation of unique swap identifiers (USIs)—as if it were a SEF in accordance with Commission regulation 45.5—for all relevant swap transactions. Yieldbroker has represented that it will inform the SDR to which it will report of its AID prior to the commencement of reporting to such SDR.

### **C. Conditional no-action relief**

After consulting with Yieldbroker representatives and ASIC staff, DMO believes that the SEF-related requirements listed in Letter 15-29 concerning market access and oversight, rule enforcement, limitation on participation, system safeguards, and pre-trade price transparency for executing Required Transactions, appear to be satisfied by a combination of Australian statutes, Australian regulations, Yieldbroker's AML, and Yieldbroker's operating rules.

DMO recognizes that regulations in Australia do not currently specify mandatory trading procedures to be used in entering and executing orders traded or posted on an Australian

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<sup>32</sup> DMO notes that counterparties to swap transactions executed on or pursuant to the rules of Yieldbroker will not be subject to any new continuation data reporting obligations under the terms of this no-action letter.

<sup>33</sup> DMO notes that it has issued no-action relief to certain swap dealers and major swap participants established under the laws of Australia, Canada, the European Union, Japan and Switzerland from the requirements of part 45 of the Commission's regulations. See CFTC No-Action Letter No. 15-61 (November 9, 2015), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/15-61.pdf>.

Licensed Market, including block trades.<sup>34</sup> However, DMO believes that Yieldbroker's operating rules, working in conjunction with Yieldbroker's AML would provide transactions that are executed on Yieldbroker's trading platform with a level of pre-trade price transparency in connection with the execution of Required Transactions that would be comparable to that for SEFs. Based on the above-described arrangement and certification, DMO has deemed Yieldbroker's execution methods for Required Transactions as satisfying the requirements of Letter 15-29 with respect to the execution of Required Transactions.

Based on the foregoing, DMO is providing conditional no-action relief in accordance with Letter 15-29 to:

1. Yieldbroker from the SEF registration requirement under CEA section 5h(a)(1) and Commission regulation 37.3(a)(1);
2. Parties executing swap transactions on Yieldbroker from the trade execution mandate under CEA section 2(h)(8); and
3. Parties executing swap transactions on, or pursuant to the rules of, Yieldbroker from their obligations to report part 45 creation data and the initial part 43 data associated with such swap transactions once Yieldbroker begins reporting part 45 creation data and the initial part 43 data associated with swap transactions to a Commission-registered or provisionally-registered SDR, as if Yieldbroker were a SEF.

## **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 Yieldbroker 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.<sup>35</sup> 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

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<sup>34</sup> Note that Yieldbroker has represented that no block trades are executed on or pursuant to its platform.

<sup>35</sup> 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.

counterparties.<sup>36</sup> 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.<sup>37</sup>

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 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.<sup>38</sup>

SDs and MSPs 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.<sup>39</sup>

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

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<sup>36</sup> 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).

<sup>37</sup> See Commission regulations 23.402(d), (e), and (f).

<sup>38</sup> 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).

<sup>39</sup> See Commission regulation 23.501(a)(4)(i).

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).<sup>40</sup>

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).

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,<sup>41</sup> 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 Yieldbroker 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 Yieldbroker 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 exempt DCO, or subject to a mandatory clearing determination by the Commission.

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<sup>40</sup> 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.

<sup>41</sup> The November No-Action Letter referred only to registered DCOs. The Commission first exempted a DCO from registration in 2015, subsequent to the issuance of the November No-Action Letter. In light of the fact that the Commission has now exempted certain DCOs from registration, DSIO deems the November No-Action Letter to apply equally to both registered DCOs and exempt DCOs.

## **B. Conditional no-action relief**

Based on the foregoing, 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 A 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 Yieldbroker; or
2. Failure to comply with the requirements of the External BCS specified in Table 2 of Appendix A 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 Yieldbroker; and either
  - (b) The ITBC Swap is of a type that was accepted for clearing by a registered DCO or exempt DCO on or after the date that Yieldbroker establishes a clearing arrangement with one or more registered DCOs and/or exempt DCOs; or
  - (c) The ITBC Swap is of a type that is, as of the date of execution of the swap, 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 A 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 Yieldbroker;
  - (b) The ITBC Swap is of a type that was not being accepted for clearing by a registered DCO or exempt DCO as of the date of this letter; 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 Yieldbroker, provided that

Yieldbroker's rules establish that confirmation of all terms of the transaction shall take place at the same time as execution.<sup>42</sup>

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 registered DCO or exempt DCO to which the ITBC Swap will be submitted, or has entered into an agreement with a clearing member of such DCO or exempt 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 futures commission merchant to enter into a breakage agreement or similar agreement as a condition to executing the ITBC Swap.

### **III. Conclusion**

The no-action relief provided by this letter is limited to the application of CEA sections 5h(a)(1), and 2(h)(8), Commission regulation 37.3(a)(1), and parts 23, 43 and 45,<sup>43</sup> and to the entities and transactions described herein. This letter, and the positions taken therein, represent the views of DMO and 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 CEA or in the Regulations issued thereunder, including all antifraud provisions of the CEA. In particular, 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, the clearing requirement, pre-execution credit check requirements, and straight-through processing requirements.<sup>44</sup>

Further, this letter, and the relief contained herein, is based upon the representations made to the Divisions. Any different, changed or omitted material facts or circumstances might render this no-action relief void. As with all no-action letters, the Divisions retain the authority, in their

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<sup>42</sup> For purposes of this letter, "confirmation" has the same meaning as provided in Commission regulation 23.500(c).

<sup>43</sup> In the event that a comparability determination is issued by the Commission with respect to the SDR Reporting Rules for Australia, Yieldbroker will be deemed to be in compliance with the part 45 reporting requirements in Letter 15-29 if a transaction for which substituted compliance is available is executed on or pursuant to the rules of Yieldbroker and is reported to a foreign trade repository in compliance with laws and regulations applicable in Australia, in reliance on the Commission's comparability determination.

<sup>44</sup> The clearing requirement is set forth under part 50 of the Commission's regulations, as discussed above. The applicable pre-execution credit check requirements are set forth under § 1.73 and § 23.609 of the Commission's regulations. Applicable straight-through processing requirements include those set forth under § 1.74, § 23.610, and § 39.12(b)(7) of the Commission's regulations.

discretion, to further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein.<sup>45</sup>

All no-action relief pursuant to this letter will expire upon the effective date of any framework implementing the Commission's authority, under CEA section 5h(g), 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).

#### **IV. Contact Information**

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

Sincerely,

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Vincent McGonagle  
Director  
Division of Market Oversight

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Eileen Flaherty  
Director  
Division of Swap Dealer and Intermediary Oversight

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<sup>45</sup> Commission guidance or action taken during the pendency of this no-action relief, could supersede the relief granted herein. The Divisions 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 or DSIO that Yieldbroker's certification is inaccurate.



**APPENDIX A**  
**Specified External BCS Requirements**

<b><u>TABLE 1</u></b>	
<b><u>Commission Regulation</u></b>	<b><u>Subject Matter</u></b>
§ 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

<b><u>TABLE 2</u></b>	
<b><u>Commission Regulation</u></b>	<b><u>Subject Matter</u></b>
§ 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

<b><u>TABLE 3</u></b>	
<b><u>Commission Regulation</u></b>	<b><u>Subject Matter</u></b>
§ 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