



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Letter No. 12-33 Amended  
No-Action  
November 29, 2012  
Division of Swap Dealer and Intermediary Oversight

**Re: Requests for No-Action Relief from Commission Regulation 23.451 in Connection with Dealings with Certain Governmental Plans and for Clarification Concerning the “Look-Back” Provision of Commission Regulation 23.451**

Ladies and Gentlemen:

This letter responds to submissions addressed to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) requesting no-action relief from Commission Regulation (“Regulation”) 23.451<sup>1</sup> in connection with swap dealers’ (“SDs”) and their covered associates’ dealings with certain “governmental plans” as defined in the Employee Retirement Income Security Act of 1974 (“ERISA”).<sup>2</sup> Additionally, this letter addresses questions raised about the application of the “look-back” provision in Regulation 23.451.

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<sup>1</sup> Regulation 23.451 is the Commission’s “pay-to-play” rulemaking. For the relevant text of the Regulation in part 23 of Title 17, *see* Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012).

<sup>2</sup> ERISA’s definition of a “governmental” plan is:

A plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Any plan to which the Railroad Retirement Act of 1935, or 1937 [45 U.S.C. 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C. 288 et seq.].

A plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of title 26), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of title 26), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

The Commission promulgated Regulation 23.451<sup>3</sup> pursuant to its discretionary authority under section 4s(h) of the Commodity Exchange Act (“the Act”), 7 U.S.C. § 6s(h), as amended by section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

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 and guidance provided by this letter do not excuse or relieve an SD from its obligation to comply immediately upon registration with its duties as an SD, in particular: the Special Entity rules (Regulations 23.440-23.450); fair dealing (Regulation 23.433); and the prohibition against engaging in any act, practice, or course of business that is fraudulent, deceptive or manipulative (Regulation 23.410). In addition, pursuant to Regulation 23.402(a), each SD is required to implement policies and procedures reasonably designed to ensure compliance with—and prevent evasion of—the requirements of the Commodity Exchange Act and its implementing regulations, and to monitor its compliance with such policies and procedures.

No-Action Relief for SDs and Covered Associates in Connection with Dealings with “Governmental Plans” as defined in Section 3 of ERISA

Regulation 23.451 seeks to prevent fraud.<sup>4</sup> To accomplish this goal, Regulation 23.451 restricts the ability of SDs and “covered associates” of SDs<sup>5</sup> to make or solicit political contributions to officials of a “governmental Special Entity” – a term that includes certain state and local government entities as well as “governmental plans” as defined in Section 3 of ERISA.<sup>6</sup> As noted by several interested parties, most SDs are subject to the current “pay-to-

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*See* 29 U.S.C. § 1002(32).

<sup>3</sup> Regulation 23.451, 17 C.F.R. § 23.451; 77 Fed. Reg. at 9827-28.

<sup>4</sup> 77 Fed. Reg. at 9827. In the Notice of Proposed Rulemaking, the Commission stated that the rule, in addition to deterring fraud, was intended to deter undue influence that harms the public and to promote consistency in the business conduct standards that apply to financial market professionals dealing with municipal entities. *See* 75 Fed. Reg. 80638, 80654 (Dec. 22, 2010).

<sup>5</sup> Regulation 23.451(a)(2) defines “covered associate” to mean:

- (i) Any general partner, managing member, or executive officer, or other person with a similar status or function;
- (ii) Any employee who solicits a governmental Special Entity for the swap dealer and any person who supervises, directly or indirectly, such employee; and
- (iii) Any political action committee controlled by the swap dealer or by any person described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section.

77 Fed. Reg. at 9799-9801.

<sup>6</sup> *See supra* note 2. In addition to “governmental plans” as defined in Section 3 of ERISA, the term “governmental Special Entity” also includes a “State, State agency, city, county, municipality, other political subdivision of a State,

play” rules of the Securities and Exchange Commission (“SEC”) and/or Municipal Securities Rulemaking Board (“MSRB”). Those rules restrict political contributions to state and local government agencies, instrumentalities, and plans. However, unlike Regulation 23.451, neither the SEC’s nor MSRB’s “pay-to-play” rules apply to officials of federal or other non-state or non-local government agencies, instrumentalities, or plans. Because the scope of Regulation 23.451 is broader than the SEC’s and MSRB’s existing “pay-to-play” rules, interested parties assert that a failure to grant the requested no-action relief would cause the SDs to expend significant resources to update their current policies and procedures to ensure compliance with Regulation 23.451’s prohibition with respect to “governmental plans” as defined in Section 3 of ERISA.<sup>7</sup> Moreover, interested parties note that Regulation 23.451’s prohibition with respect to such “governmental plans” appears inconsistent with the Commission’s stated intent to harmonize its final rule with the SEC’s and MSRB’s existing “pay-to-play” rules.<sup>8</sup>

Based upon the representations made, the Division believes that granting SDs and the covered associates of SDs no-action relief from Regulation 23.451’s prohibition with respect to “governmental plans” as defined in Section 3 of ERISA is warranted to address the issues presented. Accordingly, the Division will not recommend that the Commission take an enforcement action against any SD or covered associate of any SD for failure to be fully compliant with Regulation 23.451 with respect to “governmental plans” as defined in Section 3 of ERISA, to the extent that such plans are not otherwise covered by SEC and/or MSRB rules.<sup>9</sup> The other provisions of the term “governmental Special Entity,” as defined in Regulation 23.451(a)(3), are unaffected by this letter.<sup>10</sup>

In granting SDs and covered associates of SDs this relief, the Division seeks to further harmonize requirements under the statutory directives of section 731 of the Dodd-Frank Act with those under the securities laws related to “pay-to-play.” The requested relief is consistent with the Commission’s objectives in promulgating the rule.

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or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State.” 17 C.F.R. § 23.401(c)(2); *see* 17 C.F.R. § 23.451(a)(3).

<sup>7</sup> *See supra* note 2.

<sup>8</sup> “The Commission has determined to adopt proposed § 23.451 with changes to reflect certain of the comments and to harmonize its rule with the SEC’s proposed pay-to-play prohibition.” 77 Fed. Reg. at 9800. “Moreover, the Commission’s approach to final § 23.451 is also consistent with MSRB Rules G-37 and G-38. Through such harmonization, the Commission achieves its goals of preventing quid pro quo arrangements while avoiding unnecessary burdens associated with disparities between the SEC’s proposed rule and the Commission’s final rule and guidance. In this way, the incremental cost of complying with the Commission’s prohibition is expected to be minimal as many of the entities that will be subject to its restrictions should already have in place policies and procedures on political contributions by way of their compliance with existing requirements under SEC Advisers Act Rule 206(4)-5 and MSRB Rules G-37 and G-38.” *Id.*

<sup>9</sup> *See supra* note 2. The relief granted herein does not change the definition of “Special Entity” as defined in Regulation 23.401, nor does it change the requirements for swap dealers acting as counterparties to such special entities. *See* 77 Fed. Reg. at 9826-27.

<sup>10</sup> *See supra* note 6.

Clarification of the “Look-Back” Provision

Regulation 23.451 prohibits an SD from offering to enter into—or entering into—a swap or a trading strategy involving a swap with a governmental Special Entity within two years after any contribution to an official of such governmental Special Entity was made by the SD or by any covered associate of the SD, with certain limited exceptions. Staff has received questions about whether, in determining if a contribution triggers the two-year prohibition under that provision, an SD must “look back” beyond the date on which the SD is required to register as such.

The Division believes that the “look-back” period does not include any time period that precedes the date on which an SD is required to register as such.

For example, for an entity that is required to register as an SD on December 31, 2012 (the earliest date on which an entity will be required to register as an SD), any contributions made by it or its covered associates prior to December 31, 2012, are not included in the “look-back.” Similarly, for an entity that is required to register as an SD on January 31, 2013, any contributions made by it or its covered associates prior to January 31, 2013, are not included in the “look-back.”

Should you have any questions, please do not hesitate to contact me at (202) 418-5977; Frank Fisanich, Chief Counsel, at (202) 418-5949; Ward Griffin, Associate Chief Counsel, at (202) 418-5425; or Jason Shafer, Attorney-Advisor, at (202) 418-5097.

Very truly yours,

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cc: Regina Thoele, Compliance  
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