

CLIENT UPDATE

TEMPORARY RELIEF TO SWAP DEALERS AND MAJOR SWAP PARTICIPANTS FROM CERTAIN RECORDKEEPING REQUIREMENTS

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On October 26, 2012, the Commodity Futures Trading Commission (the “CFTC”) granted temporary no-action relief to swap dealers (“SDs”) and major swap participants (“MSPs”) from certain recordkeeping requirements of subpart F to part 23 of its regulations. This temporary no-action relief is based upon certain representations made by the Securities Industry and Financial Markets Association’s member firms and other SDs and MSPs (the “Firms”) in a letter (the “SIFMA Letter”) to the Division of Swap Dealer and Intermediary Oversight (the “Division”).

The no-action letter provides SDs and MSPs temporary relief from the requirements to:

- maintain telephonic recordings of communications related to pre-execution trade information for swaps and related cash and forwards transactions;
- maintain transaction and daily trading records in a manner identifiable and searchable by transaction and counterparty;
- use Coordinated Universal Time (“UTC”) to timestamp a swap’s trade information prior to and at the time of execution of a swap; and
- retain swap records at their principal place of business or other principal offices.

BACKGROUND AND SUMMARY OF SIFMA LETTER

Telephonic Recording of Pre-Execution Trade Information

Section 23.202(a)(1) of the CFTC regulations¹ requires SDs and MSPs to create and maintain pre-execution trade information, including records of all oral and written (including electronic) communications provided or received concerning quotes, solicitations, bids, instructions, trading and prices, that lead to the execution of a swap. Section 23.202(b)(1) provides for the same requirement as applied to related cash and forwards transactions.

In the SIFMA Letter, the Firms request temporary relief from this requirement, ranging from an additional six months to a year after the compliance date, in order to allow sufficient time to install systems to record relevant landline and mobile telephone conversations of personnel involved in swaps activity.

Identifiable and Searchable by Transaction and Counterparty

Section 23.201(a) requires SDs and MSPs to create and maintain transaction records (including daily trading records) for each swap in a manner that is readily accessible, identifiable and searchable by transaction and by counterparty. Section 23.202(b) provides for the same requirement as applied to related cash and forwards transactions. In the SIFMA Letter, the Firms request no-action relief from, and permission to rely upon existing search capabilities to achieve compliance with, such requirements.

UTC Timestamps

Section 23.202(a)(1)(ii) requires SDs and MSPs to create and maintain a record, using a UTC timestamp, of the date and time of each quotation provided to, or received from, the counterparty prior to execution of a swap. Similarly, Section 23.202(a)(2)(iv) requires SDs and MSPs to use a UTC timestamp to record the date and time of execution of a swap. Sections 23.202(b)(3) and (b)(4) provide for the same requirements as applied to related cash and forwards transactions.

In the SIFMA Letter, the Firms request temporary relief from such requirements in order to allow sufficient time to convert all legacy systems that record quotation or transaction times in local time into UTC. The Firms also represent that during the interim time, they

¹ Unless otherwise specified, section references are to the regulations of the CFTC.

will enable any time data previously recorded in local time to be convertible to UTC within a reasonable time after a regulatory request for such time data.

Retention of Records at the Principal Place of Business

Section 23.203 set forth record retention and inspection requirements for SDs and MSPs. Specifically, Section 23.203(a)(1) requires SDs and MSPs to keep all records required by the Commodity Exchange Act and the regulations of the CFTC at the principal place of business (or other designated principal office) of the SD or MSP.

In the SIFMA Letter, the Firms request no-action relief for any Firm that stores the required data either (1) at its foreign branch or affiliate or (2) on its supporting technology infrastructure, including internal or external data centers and third-party hosted technology systems, as long as, in each case, such data is retrievable from a location designated as a “principal place of business” of the Firm. Moreover, the Firms request no-action relief for any Firm that reasonably relies on legal advice indicating that transferring or providing access to data created or stored in a foreign jurisdiction would violate laws in the relevant non-U.S. jurisdiction where the data is held, counterparties are located or swap activity is conducted.

Temporary No-Action Relief

The no-action letter provides that, based on the Firms’ representations in the SIFMA Letter, prior to **March 31, 2013**, the Division will not recommend that the CFTC take an enforcement action against any Firm for failure to be fully compliant with the requirements that SDs and MSPs:

- make and keep records of all oral communications related to pre-execution swap trade information (and communications that lead to the conclusion of a related cash or forward transaction) pursuant to Sections 23.202(a) and (b);
- maintain all transaction records and daily trading records in a manner identifiable and searchable by transaction and counterparty pursuant to Sections 23.201(a)(1), 23.202(a) and 23.202(b);
- use a UTC timestamp when recording quotations prior to and at the time of execution of a swap pursuant to Sections 23.202(a)(1)(ii), (a)(2)(iv), (b)(3) and (b)(4); and

- retain swap records at their principal place of business or such other principal offices as designated by the SD or MSP.²

The no-action letter provides that the Division will continue to work with industry participants to clarify what is required to comply with the regulations addressed by such letter.

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Please do not hesitate to contact us with any questions.

October 31, 2012

² The no-action letter states that the Division anticipates presenting the CFTC with a proposed rule amendment clarifying the principal place of business requirement.