

CLIENT UPDATE

CFTC ISSUES MULTIPLE NO-ACTION LETTERS ON REPORTING AND BUSINESS CONDUCT RULES

NEW YORK

Byungkwon Lim
blim@debevoise.com

Emilie T. Hsu
ehsu@debevoise.com

Aaron J. Levy
ajlevy@debevoise.com

Between June 26 and June 28, 2013, the Commodity Futures Trading Commission (the “CFTC”) issued a number of no-action letters extending previously granted relief and granting additional relief in connection with the following requirements under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”):

- Portfolio reconciliation;
- Swap trading relationship documentation;
- Certain external business conduct standards; and
- Ongoing swap data reporting and real-time reporting.

PORTFOLIO RECONCILIATION

Portfolio Reconciliation Delayed Compliance No-Action Letter

On June 27, 2013, the CFTC issued a no-action letter¹ extending the temporary relief previously granted to swap dealers (“SDs”) and major swap participants (“MSPs”) from the portfolio reconciliation requirements under section 23.502 of the CFTC regulations (the “Regulations”) until August 23, 2013.

¹ CFTC No-Action Letter No. 13-40 issued on June 27, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6633-13>

This extends the relief previously granted by the CFTC, which would otherwise have expired on July 1, 2013.²

Portfolio Reconciliation Material Terms No-Action Letter

On June 26, 2013, the CFTC issued a no-action letter³ (the “Portfolio Reconciliation Material Terms Letter”) permitting SDs and MSPs to omit certain data fields (which are not considered “material terms”) from the portfolio reconciliation process required under Regulation 23.502. The Portfolio Reconciliation Material Terms Letter states that the Division of Swap Dealer and Intermediary Oversight (“DSIO”) will not recommend an enforcement action against an SD or MSP that omits the following “Excluded Data Fields” (which are not considered to be “material terms”) from the portfolio reconciliation process required under Regulation 23.502: (i) indication that the swap will be allocated; (ii) if the swap will be allocated, or is a post-allocation swap, the Legal Entity Identifier of the agent; (iii) an indication that the swap is a post-allocation swap; (iv) if the swap is a post-allocation swap, the unique swap identifier; (v) block trade indicator; (vi) execution timestamp; (vii) timestamp for submission to the relevant swap data repository (“SDR”); (viii) clearing indicator; (ix) clearing venue; (x) if the swap will not be cleared, an indication of whether the exception from clearing in section 2(h)(7) of the CEA (the “end-user clearing exception”) has been elected; and (xi) the identity of the counterparty electing the end-user clearing exception.

SWAP TRADING RELATIONSHIP DOCUMENTATION AND EXTERNAL BUSINESS CONDUCT RULES

Intended-To-Be-Cleared Swaps No-Action Letter

On June 27, 2013, the CFTC issued a no-action letter⁴ (the “ITBC Swaps Letter”) providing relief to SDs and MSPs from certain external business conduct standards requirements (the “External BCS Requirements”) and certain swap trading relationship documentation requirements under Regulation 23.504 (the “STRD Requirements”) when executing swaps with the intention to clear contemporaneously with execution. The ITBC Swaps Letter provides that DSIO will not recommend an enforcement action against an SD or MSP for

² See our client update, “CFTC Defers Compliance Dates for Many Business Conduct Rules for Swap Dealers and Major Swap Participants,” <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=7edaff75-c5e6-416d-b804-3305e42ddb6>

³ CFTC No-Action Letter No. 13-31 issued on June 26, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6622-13>

⁴ CFTC No-Action Letter No. 13-33-Corrected issued on June 27, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6632-13>

either (i) failure to comply with a number of enumerated External BCS Requirements⁵ or the STRD Requirements with respect to a swap that is not executed on a SEF or DCM but is intended to be cleared (an “ITBC Swap”) where the SD or MSP does not know the identity of the counterparty prior to execution (“Anonymous ITBC Swap”) or (ii) failure to comply with the STRD Requirements with respect to an ITBC Swap where the SD or MSP does know the identity of the counterparty prior to the execution of the swap, subject to certain specific conditions set forth in the letter.

FX Swap Documentation Delayed Compliance Letter

On June 27, 2013, the CFTC issued a no-action letter⁶ (the “FX Swap Documentation Delayed Compliance Letter”) granting relief to SDs and MSPs from certain of the STRD Requirements with respect to (i) foreign exchange transactions that are swaps (“Swaps on FX”) and (ii) physically-settled foreign exchange forwards and swap agreements that have been exempted from the definition of “swap” by the Secretary of the Treasury (“Exempt FX Transactions” and, together with Swaps on FX, the “Covered FX Transactions”).

The FX Swap Documentation Delayed Compliance Letter provides that DSIO will not recommend an enforcement action against an SD or MSP for failure to execute swap trading relationship documentation with a counterparty in compliance with Regulation 23.504 until (i) September 1, 2013, with respect to a counterparty that is an “active fund”⁷ or (ii) December 31, 2013, with respect to any other counterparty except a registered SD or MSP, subject to certain specific conditions set forth in the letter.

External BCS Delayed Compliance No-Action Letter

On June 27, 2013, the CFTC issued a no-action letter⁸ (the “External BCS Delayed Compliance Letter”) granting temporary relief for SDs from certain External BCS

⁵ The excluded External BCS Requirements are: 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 SDs acting as advisors to special entities; 23.450: requirements for SDs and MSPs acting as counterparties to special entities; and 23.451: political contributions by certain SDs.

⁶ CFTC No-Action Letter No. 13-38 issued on June 27, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6630-13>

⁷ For purposes of this no-action relief, an “active fund” is any private fund (as defined in section 202(a) of the Investment Advisers Act of 1940) that is not a third-party subaccount and that executes 200 or more Covered Transactions per month based on a monthly average over the 12 months preceding June 27, 2013. A “third-party subaccount” is an account that is managed by an investment manager that is independent of and unaffiliated with the account’s beneficial owner or sponsor, and is responsible for the documentation necessary for the account’s beneficial owner to document swaps as required under section 4s(i) of the CEA.

⁸ CFTC No-Action Letter No. 13-39 issued on June 27, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6631-13>

Requirements in the context of “intermediated” prime brokerage arrangements relating to certain foreign exchange transactions. Specifically, the External BCS Delayed Compliance Letter provides that, subject to certain specific conditions listed in the letter, DSIO will not recommend an enforcement action against an SD (acting as a prime broker) for failure to comply with its obligations under a number of External BCS Requirements with respect to a Covered FX Transaction with a counterparty executed under an intermediated prime brokerage arrangement to the extent those obligations with respect to such External BCS Requirements have been allocated to a registered introducing broker (“IB”) or futures commission merchant (“FCM”) and such IB or FCM has accepted such allocation of obligations.

REPORTING REQUIREMENTS

Valuation Data Reporting No-Action Letter

On June 26, 2013, the CFTC issued a no-action letter⁹ (the “Valuation Data Reporting Letter”) extending the temporary relief previously granted to SDs and MSPs from the obligation to report valuation data for cleared swaps as required by Regulation 45.4(b)(2)(ii)¹⁰ until June 30, 2014. The Valuation Data Reporting Letter provides that, until June 30, 2014,¹¹ the Division of Market Oversight (“DMO”) will not recommend an enforcement action against an SD or MSP that is a reporting counterparty under Regulation 45.8 for failure to comply with the valuation data reporting requirement under Regulation 45.4(b)(2)(ii) with respect to a cleared swap.

Bespoke or Complex Swap Reporting No-Action Letter

On June 27, 2013, the CFTC issued a no-action letter¹² (the “Bespoke or Complex Swap Reporting Letter”) granting relief, for bespoke or complex swaps,¹³ from certain reporting obligations under Part 43 and Part 45 of the Regulations.¹⁴ The relief effectively extends a number of elements of relief previously granted by the CFTC and will expire on

⁹ CFTC No-Action Letter No. 13-34 issued on June 26, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6625-13>

¹⁰ Regulation 45.4(b)(2)(ii) requires swap valuation data to be reported to an SDR by the reporting counterparty to the cleared swap if the reporting counterparty is an SD or MSP.

¹¹ CFTC No-Action Letter No. 12-55 issued on December 17, 2012, <http://www.cftc.gov/PressRoom/PressReleases/pr6466-12>

¹² CFTC No-Action Letter No. 13-35 issued on June 27, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6627-13>

¹³ A “bespoke or complex swap” is a swap that (1) is not listed for trading on a DCM, (2) is not available to be traded on a SEF, (3) is not eligible to be cleared by a DCO, (4) is not eligible to be confirmed through an electronic matching confirmation system and (5) is not represented in Financial products Markup Language (“FpML”).

¹⁴ Unless otherwise stated, all “Part” references are to parts of the Regulations.

September 30, 2013. The Bespoke or Complex Swap Reporting Letter provides that, for bespoke or complex swaps, DMO will not recommend an enforcement action against a reporting party for failure to report the data fields specified in the letter to SDRs until September 30, 2013, subject to certain specific conditions set forth in the letter.

Additionally, the Bespoke or Complex Swap Reporting Letter extends the no-action relief previously granted for uncleared inter-affiliate swaps for which paper confirmations are not generated. For such swaps, DMO will not recommend an enforcement action against the reporting counterparty for failure to report confirmation data required by Regulations 45.3(b)(3), 45.3(c)(1)(iii), 45.3(c)(2)(iii) and 45.3(d)(3) until September 30, 2013.

CDS Clearing-Related Swaps Reporting No-Action Letter

On June 27, 2013, the CFTC issued a no-action letter¹⁵ (the “CDS Clearing-Related Swaps Reporting Letter”) extending the temporary relief previously granted to SDs and MSPs from the obligation to report swap data under Part 45 for cleared credit default swaps (“CDS”) that are entered into by clearing members of a derivatives clearing organization (“DCO”) pursuant to the DCO’s rules regarding its price submission process for determining end-of-day settlement prices for cleared CDS (“CDS Clearing-Related Swaps”), subject to certain conditions.

Each registered DCO that is currently eligible to clear CDS (*i.e.*, CME Clearing, ICE Clear Credit and ICE Clear Europe) has policies and procedures in place to ensure accurate and reliable end-of-day pricing for clearing CDS. Generally, under the DCO rules, clearing members are required to submit price quotes for any cleared CDS in which the clearing member or its customer(s) has an open interest at the end of each day. The DCO relies on these quotes in setting the end-of-day settlement prices for all cleared CDS positions. To ensure that the prices submitted by clearing members as part of this process are accurate, DCOs periodically require their clearing members to enter into “firm or forced trades” that result in cleared CDS positions. The CDS Clearing-Related Swaps Reporting Letter provides that DMO will not recommend an enforcement action against a reporting counterparty for failure to comply with its reporting obligations under Part 45 for CDS Clearing-Related Swaps prior to December 31, 2013, subject to certain specific conditions set forth in the letter.

¹⁵ CFTC No-Action Letter No. 13-36 issued on June 27, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6628-13>

Identifying Information No-Action Letter

On June 28, 2013, the CFTC issued a no-action letter¹⁶ (the “Identifying Information Letter”) extending the temporary relief previously granted to “reporting entities” under Part 20, and to “reporting counterparties” under Parts 45 and 46, of the Regulations from the obligation to report certain identifying information regarding their counterparties in certain specified jurisdictions (the “Enumerated Jurisdictions”).¹⁷ This Identifying Information Letter is an extension of the no-action relief granted previously in CFTC Letter No. 12-46.¹⁸ The relief provided applies to swaps entered into with a “Privacy Law Counterparty,” which is defined as a non-reporting counterparty or a reporting entity’s counterparty that (i) is not a registered SD or MSP; (ii) is a non-U.S. person, (iii) is not guaranteed by, or an affiliate conduit¹⁹ of, a “U.S. person”²⁰ and (iv) is located in an Enumerated Jurisdiction.

The Identifying Information Letter provides that DMO will not recommend an enforcement action against a reporting counterparty for failure to report the “Opposite LEI,”²¹ “Other Enumerated Identifiers”²² and “Other Identifying Terms”²³ for any swap

¹⁶ CFTC No-Action Letter No. 13-41 issued on June 28, 2013, <http://www.cftc.gov/PressRoom/PressReleases/pr6634-13>

¹⁷ The “Enumerated Jurisdictions” are: France, Korea, Luxembourg, People’s Republic of China, Switzerland, Taiwan, Belgium, India, Algeria, Singapore, Bahrain, Argentina, Hungary, Samoa, Austria and Pakistan.

¹⁸ For more information on CFTC Letter No. 12-46, please see our client update, “Three No-Action Letters on Swap Reporting Obligations” <http://www.debevoise.com/newsevents/pubs/publications/detail.aspx?id=e79a470b-08c0-45f0-ae12-9056a181e923>

¹⁹ An “affiliate conduit” encompasses those entities that function as a conduit or vehicle for U.S. persons conducting swaps transactions with third-party counterparties. The following factors, among others, are relevant to determining whether a non-U.S. is an affiliate conduit: (1) the non-U.S. person is a majority-owned affiliate (as defined in Regulation 1.3(ggg)(6)(i)) of a U.S. person; (2) the non-U.S. person is controlling, controlled by or under common control with the U.S. person; (3) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and (4) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third parties for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third parties to its U.S. affiliates.

²⁰ For purposes of this no-action relief, the term “U.S. person” has the meaning set forth in the Final Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 FR 858 (Jan. 7, 2013) until the effective date of the CFTC’s Final Interpretive Guidance and Policy Statement regarding the cross-border application of the swaps provisions of the CEA, at which point the term will have the meaning set forth in such final guidance. See our client memorandum, “Further Guidance and Order with Respect to Cross-Border Application of CFTC Swap Regulation,” <http://www.debevoise.com/newsevents/pubs/publications/detail.aspx?id=00a2b8f5-fb53-40da-a078-2803de8e39d1>

²¹ “Opposite LEI” means the “legal entity identifier” (“LEI”), as defined in Regulation 45.6 of a Privacy Law Counterparty to a swap.

²² “Other Enumerated Identifiers” are: (1) the identity of the counterparty electing the end-user clearing exception for all asset classes; (2) an indication of the counterparty purchasing protection or of the counterparty selling protection (but not both) in the credit and equity asset classes; (3) the buyer or seller (but not both) in the commodity asset class; and (4) for all asset classes, the internal identifier used by an SDR for a non-reporting counterparty, exclusively where such internal identifier directly identifies the non-reporting counterparty.

with a Privacy Law Counterparty subject to certain specific conditions set forth in the letter, which includes submitting certain information to the CFTC by email by no later than August 27, 2013. This relief will expire upon the earlier of (i) such time that the reporting counterparty no longer holds a reasonable belief that the regulatory or statutory prohibition precludes it from reporting the Parts 45 and 46 Identifying Information to an SDR and ii) 11:59 p.m. Eastern Time on June 30, 2014.

In addition, the Identifying Information Letter provides no-action relief with respect to Part 20 Identifying Information, which means (i) the Privacy Law Counterparty name field in submissions under Regulation 20.4 and (ii) the following counterparty information included in a 102S filing under Regulation 20.5: name, contact name, contact job title, contact phone, contact email and address (other than the country of the counterparty). Specifically, the Identifying Information Letter provides that DMO will not recommend an enforcement action against a reporting entity for failure to report Part 20 Identifying Information for any submission under Regulations 20.4 and 20.5 with respect to a swap with a Privacy Law Counterparty, subject to certain specific conditions set forth in the letter, including a requirement to submit certain information to the CFTC by email by no later than August 27, 2013. This relief will expire upon the earlier of (i) such time that the reporting entity no longer holds a reasonable belief that the regulatory or statutory prohibition precludes it from reporting the Part 20 Identifying Information and (ii) 11:59 p.m. Eastern Time on June 30, 2014.

* * *

Please do not hesitate to contact us with any questions.

July 3, 2013

²³ "Other Identifying Term" means a term of a swap that a reporting counterparty reasonably believes would identify a Privacy Law Counterparty if disclosed and, for foreign exchange swaps (other than cross-currency swaps), interest rate swaps (including cross-currency swaps) and other commodity swaps, the relevant "any other term(s)" data field required by Appendix 1 to Part 45, Exhibits B, C and D.