

CORPORATE & FINANCIAL

WEEKLY DIGEST

October 4, 2013

BROKER DEALER

FINRA Proposes Rule to Require Alternative Trading Systems to Report Volume Information and Use Unique Market Participant Identifiers

The Financial Industry Regulatory Authority filed a rule proposal with the Securities and Exchange Commission to require alternative trading systems (ATS) to report to FINRA volume information in securities (both equity and debt) subject to FINRA trade reporting obligations (e.g., any National Market System (NMS) stock, over-the-counter (OTC) equity security or any debt security subject to FINRA's Trade Reporting and Compliance Engine rules). Specifically, each ATS will be required to report weekly to FINRA the volume and number of trades handled by the ATS. The proposed rule would require that this information be reported to FINRA on a security-by-security basis within seven business days after the end of each calendar week. FINRA proposes to publish the reported information on its website regarding NMS stocks in the S&P 500 Index or the Russell 1000 Index and certain exchange traded products on a two-week delayed basis. All other NMS stocks and OTC equity securities subject to FINRA trade reporting requirements would be published on a four-week delayed basis. Although the proposed rule would impose new weekly reporting obligations, each ATS must already maintain this information pursuant to Regulation ATS. In addition, the proposal would require that each ATS use a single, unique market participant identifier when reporting the information to FINRA.

Click [here](#) to read the Rule Proposal.

SEC Issues Frequently Asked Questions Regarding Liability of Broker-Dealer Compliance and Legal Personnel

The Securities and Exchange Commission Division of Trading and Markets has issued Frequently Asked Questions (FAQs) that provide guidance regarding potential supervisory liability of compliance and legal personnel at broker-dealers under Sections 15(b)(4) and 15(b)(6) of the Securities Exchange Act of 1934, as amended (the Exchange Act).

The FAQs clarify that compliance or legal personnel, including a chief compliance officer, are not deemed supervisors of broker-dealer employees for purposes of Sections 15(b)(4) and 15(b)(6) of the Exchange Act solely by virtue of their compliance or legal position. The FAQs further clarify that compliance and legal personnel do not become supervisors solely because they (i) have provided advice or counsel concerning compliance or legal issues to business line personnel, or assisted in the remediation of an issue; (ii) participate in, provide advice to, or consult with a management or other committee; or (iii) provide advice to, or consult with, senior management. The FAQs provide that the determination of whether a particular person is a supervisor depends on the facts and circumstances of a particular case and whether that person has the requisite degree of responsibility, ability or authority to affect the conduct of the broker-dealer employee whose behavior is at issue. The FAQs provide guidance on factors to consider when making this determination, including, among other things, whether a person has been given or assumed clear supervisory authority (through the broker-dealer's policies and procedures or otherwise) and whether a person has the ability to hire, reward or punish the employee or otherwise has the authority to prevent the violation from continuing (e.g., firing or demoting the employee).

Click [here](#) to read the Frequently Asked Questions.

CFTC

CFTC Staff Issues No-Action Letters Relating to Swap Execution Facilities

Commodity Futures Trading Commission staff released several no-action letters impacting swap execution facilities (SEFs) and their participants. These no-action letters are related to swap data reporting requirements, SEF enforcement responsibilities, transaction confirmations, requirements for listing new products and risk management requirements. In addition, one of the no-action letters provides a foreign swap execution facility that has filed an application for temporary SEF registration with the CFTC with a one-month extension of the October 2 registration deadline.

- **Swap Creation Data Reporting Requirements.** CFTC No-Action Letter No. 13-55 provides that the Division of Market Oversight (DMO) will not recommend enforcement action against a SEF that does not report swap creation data pursuant to Parts 43 and 45 of the CFTC Regulations through October 29 for foreign exchange asset classes and through December 1 for equity and other commodity asset classes. This relief does not apply to the interest rate or credit asset classes. In order to rely upon the relief provided by Letter No. 13-55, a SEF must: (i) provide a backloaded swap creation data report for the relevant period to a swap data repository or require the reporting counterparty to report all swap creation data in the time and manner set forth in Parts 43 and 45 of the CFTC Regulations; (ii) retain records related to all transactions covered by the relief and make such records available to the CFTC; (iii) submit a notice to DMO no later than October 10 that reflects the SEF's intention to rely upon Letter 13-55 and contains a detailed description of the system architecture and software issues that preclude the SEF from complying with the CFTC's reporting rules; (iv) possess and utilize a valid CFTC Interim Compliant Identifier for all reporting and recordkeeping requirements; and (v) backload and report all Part 45-required creation data by the deadlines specified in Letter 13-55.

CFTC Letter No. 13-55 is available [here](#).

- **Continuation Data Reporting.** In CFTC Letter No. 13-56, DMO issued no-action relief for reporting counterparties that fail to report swap continuation data or make errors or omissions in swap continuation data reports for uncleared swaps executed on or pursuant to the Rules of a SEF in the equity, foreign exchange and other commodity asset classes. This relief applies when the reporting counterparty fails to report required swap continuation data for any of the following reasons: (i) a SEF fails to provide the reporting counterparty with the identity of the special drawing right to which the swap creation data was reported, the unique swap identifier or any other creation data; (ii) a SEF is providing backloaded swap creation data reports in reliance upon CFTC Letter No. 13-55; or (iii) when swap continuation data reports contain errors or omissions that result from errors or omissions in swap creation data or result from the circumstances described in (i) above. This no-action relief is valid until the earlier of (x) the time that the reporting counterparty can fulfill its swap continuation data reporting obligations and (y) October 29 for the foreign exchange asset class and December 1 for the equity and other commodity asset classes. In order to utilize this relief, a reporting counterparty must inform the SEF of the reason that precludes it from reporting continuation data and must also retain records related to all transactions covered by the relief.

CFTC Letter No. 13-56 is available [here](#).

- **SEF Enforcement Responsibilities.** Pursuant to CFTC Letter No. 13-57, DMO granted SEFs that were temporarily registered as of October 2 no-action relief from any enforcement responsibilities under CFTC Regulations 37.200(a), 37.200(b), 37.201(b)(1), 37.201(b)(3), 37.201(b)(5), 37.202(b) and 37.203 with respect to market participants trading on those SEFs. Under this relief, the Division will not recommend that the CFTC take any action against SEFs that provide temporary access to market participants who do not sign onboarding documentation, including user agreements and consent to jurisdiction agreements, until November 1, 2013.

CFTC Letter No. 13-57 is available [here](#).

- **Transaction Confirmations.** CFTC No-Action Letter No. 13-58 provides that CFTC staff will not recommend enforcement action against a SEF that fails to provide a confirmation to the counterparties of a non-cleared swap transaction as required by CFTC Regulation 37.6(b). This relief is available through October 29 for foreign exchange, interest rate and credit asset classes and through December 1 for equity and other commodity asset classes. In order to rely upon this relief, a SEF must notify the counterparties that the swap transaction has not been confirmed by the SEF. The SEF also must have arrangements to ensure that the swap counterparties provide the SEF with transaction confirmations so that the SEF can comply with its reporting and recordkeeping obligations under Parts 43 and 45 of CFTC Regulations.

CFTC Letter No. 13-58 is available [here](#).

- **Foreign Trading Platform.** In CFTC Letter No. 13-59, DMO issued no-action relief to Yieldbroker Pty Limited (Yieldbroker), a multilateral trading platform that operates as a licensed exchange in Australia. The letter indicates that DMO will not recommend enforcement action against Yieldbroker for failure to register as a SEF or against market participants for use of, or other relationships with, Yieldbroker until November 1. Yieldbroker provides US persons with direct access to its swaps trading platform and has submitted a draft of a SEF application to DMO. Yieldbroker, DMO and the Australian Securities and Investment Commission are engaged in discussions regarding an arrangement whereby Yieldbroker would register with the CFTC as a SEF while maintaining its Australian Market License. The no-action letter provides some insight into how the CFTC plans to treat foreign trading platforms that offer direct access to US persons.

CFTC Letter No. 13-59 is available [here](#).

- **Listing New Products.** Pursuant to CFTC Letter No. 13-60, DMO will not recommend enforcement action against temporarily registered SEFs or designated contract markets (DCMs) for violating CFTC Regulation 40.2(a)(2) if the SEF or DCM lists a swap for trading on the same day that it submits to the CFTC a self-certification relating to that listing pursuant to CFTC Regulation 40.2. DMO indicated that this relief will help accommodate newly registered SEFs and DCMs. This relief will expire on the first business day after the conclusion of the federal government shutdown.

CFTC Letter No. 13-60 is available [here](#).

- **Risk Management.** CFTC No-Action Letter No. 13-62 provides that CFTC staff will not recommend enforcement action against clearing futures commission merchants (FCMs) that do not screen orders for compliance with risk-based limits in accordance with CFTC Regulation 1.73 on SEFs that do not facilitate pre-execution screening. The letter also provides that CFTC staff will not recommend enforcement action against SEFs that do not already facilitate pre-execution screening by FCMs on an order-by-order basis. Any SEF that intends to rely upon this relief must submit any rule amendments and a written representation that it is undertaking all steps necessary to achieve compliance with CFTC Regulations 1.73 and 37.702 no later than October 10. The no-action relief provided in Letter No. 13-62 will expire on November 1.

CFTC Letter No. 13-62 is available [here](#).

CFTC Staff Responds to FAQs Regarding Commodity Options

On September 30, CFTC staff issued responses to several frequently asked questions (FAQs) related to commodity options. Pursuant to Section 1a(47) of the Commodity Exchange Act, which defines the term “swap” to include an “option of any kind that is for the purchase or sale, or based on the value, of 1 or more . . . commodities,” commodity options are generally regulated as swaps. The CFTC has provided certain exceptions and exemptions for commodity options that are embedded in a forward contract, including volumetric options, and trade options. The FAQs provide the conditions for qualifying for these limited exceptions and includes specific guidance on the trade option exemption.

To qualify as a trade option, a commodity option must: (i) involve a physical commodity; (ii) be offered by an eligible contract participant or commercial participant; (iii) be offered to a commercial participant; and (iv) be intended to be physically settled. A trade option that meets these conditions is exempt from most of the rules applicable to swaps. The FAQs also provide guidance on the recordkeeping and reporting requirements that apply to trade options.

The FAQs are available [here](#).

CFTC Issues Order Relating to the Continuation, Shutdown and Resumption of Operations Following a Lapse in Appropriations

On September 27, the CFTC issued guidance describing its operations in the event of a lapse in appropriations. The order provides that the CFTC will not process rule, rule amendment or contract certification filings (other than those related to emergency rules), requests for designation or registration as a contract market, swap execution facility, swap data repository, derivatives clearing organization or foreign board of trade. The time to process new filings and matters pending before the CFTC prior to, or submitted during, the shutdown will be tolled until the CFTC resumes full operations. The CFTC will continue to process filings required by registered entities and intermediaries arising under CFTC Regulations 1.10, 1.12, 1.15, 1.16, 1.17, 1.18, 1.65, 5.6, 5.12, 5.23, 39.19, 40.6(a)(6)-(7) and 40.10(h), as well as certain emergency filings.

The CFTC's order is available [here](#).

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