



February 15, 2013

Ms. Melissa Jurgens, Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Adaptation of Regulations to Incorporate Swaps, 77 Fed. Reg. 66,288 (Nov. 2, 2012)
RIN 3038-AD63

Dear Ms. Jurgens:

The Wholesale Market Brokers' Association, Americas ("WMBAA" or "Association")¹ seeks to alert the Commodity Futures Trading Commission ("CFTC" or "Commission") of concerns raised as a result of recently issued final rules that make a number of revisions to Commission regulations to conform them to provisions promulgated pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") (the "conforming rules").

The Association believes that an interpretation of the revised definition of the term "member," which may be interpreted to include employees of a SEF and provides no guidance on "trading privileges," may have unintended negative consequences that impact the still-pending final regulations for swap execution facilities ("SEFs").

We urge the Commission to address these issues in the final SEF rules or provide interpretive guidance to market participants.²

Background

Under Section 1.3 of the conforming rules, the Commission replaced the definition of "member of a contract market" with a new definition of the term "member" to accommodate newly established SEFs.³ In particular, the conforming rules define the term "member" as follows:

¹ The WMBAA is an independent industry body representing the largest inter-dealer brokers operating in the North American wholesale markets across a broad range of financial products. The five founding members of the group are: BGC Partners; GFI Group; ICAP; Tradition; and Tullett Prebon. For more information, please see www.wmbaa.org.

² The WMBAA submitted a request for no-action relief with respect to introducing broker registration for employees of entities that intend to register as SEFs upon promulgation of final rules. See Letter from Mr. Chris Giancarlo, WMBAA, to Mr. Gary Barnett, CFTC (Dec. 21, 2012). If the Commission addresses introducing broker issues in the final SEF rules, the Commission should also make clear that introducing brokers may introduce trades executed on an affiliated registered SEF.

³ Adaptation of Regulations to Incorporate Swaps, 77 Fed. Reg. 66,288, 66,291 (Nov. 2, 2012).

(1) [a]n individual, association, partnership, corporation, or trust—(i) [o]wning or holding membership in, or admitted to membership representation on, a registered entity; or (ii) *[h]aving trading privileges on a registered entity.*⁴

In the preamble to the conforming rules, the Commission explained that the Commodity Exchange Act (“CEA”) “considers participants on a SEF ‘members’ by virtue of their having trading privileges on the SEF.”⁵ Since promulgation of the conforming rules, Commission staff (Division of Swap Dealer and Intermediary Oversight) has indicated that the term “member” will include SEF employees whose function is to aid in liquidity formation by disseminating bids and offers to multiple market participants.

Over-the-Counter Market Structure Distinct from Exchange-Traded Futures Model

As an initial matter, it is important that the Commission understand that WMBA member firms’ employees act solely as neutral intermediaries. These employees provide the valuable service to their customers of disseminating bids and offers, helping to understand market conditions, and executing transactions between counterparties “through any means of interstate commerce,” consistent with the definition in the Dodd-Frank Act. They only act on behalf of others. They do not trade for their own account, do not take positions, and do not hold or manage customer funds. Rather, their customers are those with “trading privileges” on a SEF, as they are the market participants offering and accepting bids and offers.

By contrast, in futures markets, designated contract markets (“DCMs”) do not have employed traders, but rather commodity brokers, including futures commission merchants and floor brokers and traders. These futures market participants are considered to be distinct members of DCMs that are subject to their oversight and business conduct rules.

Given the clear difference in function between these two market structures, particularly how interdealer intermediaries of OTC swaps do not have a vested interest in the products they intermediate, it is vital that the Commission make clear that employees of registered SEFs are not deemed to have “trading privileges.”

Example of Potential Negative Unintended Consequences: Ownership/Governance Restrictions

If this important distinction is not established, presumptive SEFs will find themselves subject to significant regulatory burden not previously contemplated because of the conforming rules’ definition of “member.”

⁴ *Id.* at 66,316 (emphasis added).

⁵ *Id.* at 66,292.

If the Commission were to deem neutral SEF employees, in their role as intermediary, as having trading privileges under the definition of “member,” negative unintended consequences may arise, including the unnecessary imposition of certain ownership limitations on SEFs.

For example, under Section 37.19(d) of the Commission’s proposed requirements for SEFs regarding the mitigation of conflicts of interest, registered SEFs may not permit any member, in addition to any “related persons” of a member, to own more than 20 percent of the voting equity in the SEF.⁶ As WMBAA member firm GFI noted in its letter to the Commission,⁷ the conflicts of interest rulemaking is designed to address conflicts that arise from persons who execute transactions directly on a SEF having a controlling ownership or governance presence. However, by using the term “member,” as opposed to “participant” or other term, it remains possible that SEF employees might find themselves subject to this proposed rule – clearly not one of the intended results from this regulatory construct. If applied in such a fashion, many of the companies currently operating trade execution platforms would cease to exist, as the extension of the “member” definition would make it impossible for them to comply with such a requirement.

Trade execution service providers would be limited to entities with highly dispersed ownership (*i.e.*, public companies) or companies without intermediaries that foster liquidity (*i.e.*, electronic-only platforms). The WMBAA does not believe such a result would be consistent with Congressional intent, the statutory definition of a SEF, or what legislators or regulators envision for a competitive market structure.

Conclusion

As the Commission has not analyzed the full range of potential unintended consequences resulting from the designation of SEF intermediaries as “members,” the WMBAA respectfully requests that the Commission make clear that such employees are not considered to have trading privileges.

The WMBAA is concerned that subjecting SEFs to such ownership restrictions may regulate these new entities out of existence as the result of a change to one defined term. Alternatively, though prospective SEF registrants may not have finalized their plans with respect to the corporate structure of the SEFs, the application of such ownership restrictions may require prospective SEFs to substantially reorganize their ownership and governance structures prior to registration, thereby further delaying the implementation process.

The WMBAA reiterates its support of final Commission SEF rules that are consistent with the Dodd-Frank Act, promote competition, and make clear that trade execution may take place “through any means of interstate commerce.” The WMBAA understands that the Commissioners are currently considering a draft set of final SEF rules. We look forward to reviewing the final rules upon completion, as they will allow U.S. swaps markets and their customers to finally proceed with business under a clear regulatory framework that has been unknown for over two years.

⁶ Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63,732, 63,748 (Oct. 18, 2010).

⁷ Letter from Mr. Scott Pintoff, GFI, to Mr. David A. Stawick, CFTC (Nov. 17, 2010), *available at* <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26433&SearchText=>.

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Thank you for the opportunity to express our concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Julian Harding', with a stylized flourish at the end.

Julian Harding
Chairman, WMBAA

cc: The Honorable Gary Gensler, Chairman
The Honorable Jill Sommers, Commissioner
The Honorable Bart Chilton, Commissioner
The Honorable Scott O'Malia, Commissioner
The Honorable Mark Wetjen, Commissioner