

MEMO# 27419

July 30, 2013

CFTC Staff Provides No-Action Relief for Certain Commodity Trading Advisors and Investment Advisers from Prohibition of Aggregation of Orders for Large Notional Off-Facility Swaps

[27419]

July 30, 2013

TO:

CLOSED-END INVESTMENT COMPANY MEMBERS No. 66-13
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 59-13
INVESTMENT ADVISER MEMBERS No. 55-13
SEC RULES MEMBERS No. 73-13 RE: CFTC STAFF PROVIDES NO-ACTION RELIEF FOR CERTAIN COMMODITY TRADING ADVISORS AND INVESTMENT ADVISERS FROM PROHIBITION OF AGGREGATION OF ORDERS FOR LARGE NOTIONAL OFF-FACILITY SWAPS

On July 30, 2013, the Division of Market Oversight of the Commodity Futures Trading Commission ("CFTC") issued a letter providing no-action relief from the aggregation prohibition in Regulation 43.6(h)(6) under the Commodity Exchange Act ("CEA") for certain commodity trading advisors ("CTAs") and investment advisers ("IAs") with respect to large notional off-facility swaps. [\[1\]](#) Regulation 43.6(h)(6) under the CEA prohibits the aggregation of orders for different accounts to satisfy the minimum block size or cap size requirements but permits aggregation under limited circumstances if done on a designated contract market ("DCM") or a swap execution facility ("SEF"). [\[2\]](#) As we previously informed you, the CFTC clarified in the release adopting Regulation 43.6(h)(6) that the aggregation prohibition is intended to apply to large notional off-facility swaps. The exception to the aggregation prohibition, however, applies only to aggregation that is "done on a SEF or DCM." The compliance date for the aggregation prohibition is July 30, 2013.

Time-Limited Relief for Large Notional Off-Facility

Swaps

Currently, no DCM lists swaps for trading and the compliance date for SEF rules is October 2, 2013. Consequently, with no DCM or SEF listing swaps, CTAs and IAs would be prohibited under Regulation 43.6(h)(6) from aggregating orders for the purpose of satisfying the appropriate minimum block size or cap thresholds. The CFTC staff, however, states that it will not recommend that the CFTC take enforcement action, until 11:59 p.m. on October 1, 2013, against any person who aggregates orders to execute large notional off-facility swaps and who satisfies the following conditions. These conditions include:

(i) The aggregation of orders is done by a person who:

(1)(A) is a CTA registered pursuant to Section 4n of the CEA or exempt from such registration under the CEA, or a principal thereof, and who has discretionary trading authority or directs client accounts;

(B) is an investment adviser who has discretionary trading authority or directs client accounts and satisfies the criteria of § 4.7(a)(2)(v) of the CFTC's regulations; or

(C) is a foreign person who performs a similar role or function as the persons described in subparagraphs (A) or (B) and is subject as such to foreign regulation; and

(2) has more than \$25,000,000 in total assets under management;

(ii) The aggregated transaction is appropriately reported pursuant to Parts 43 and Part 45 of the CFTC's regulations as a "large notional off-facility swap," subject to the cap size thresholds; and

(iii) The aggregated orders are executed as one swap transaction.

Relief for Swaps that are Not Listed or Offered for Trading on a SEF and DCM

Because the aggregation of orders is only permitted for block trades on a DCM or SEF, the CFTC staff recognizes the concern that the aggregation of orders will not be possible if a SEF or DCM does not list the swap for trading. Therefore, the CFTC staff will not recommend that the CFTC take enforcement action, until further notice, against any person who aggregates orders for large notional off-facility swaps and cap size requirements and who satisfies the following conditions. These conditions are:

(i) The orders being aggregated are orders for swaps that: (1) are not listed or offered for trading on a SEF; and (2) are not listed or offered for trading on a DCM;

(ii) The aggregation of orders is done by a person who:

(1)(A) is a CTA registered pursuant to Section 4n of the CEA or exempt from such registration under the CEA, or a principal thereof, and who

has discretionary trading authority or directs client accounts;

(B) is an investment adviser who has discretionary trading authority or directs client accounts and satisfies the criteria of § 4.7(a)(2)(v) of the CFTC's regulations; or

(C) is a foreign person who performs a similar role or function as the persons described in subparagraphs (A) or (B) and is subject as such to foreign regulation; and

(2) has more than \$25,000,000 in total assets under management;

(iii) The aggregated transaction is appropriately reported pursuant to Parts 43 and Part 45 of the CFTC's regulations as a "large notional off-facility swap," subject to the cap size thresholds; and

(iv) The aggregated orders are executed as one swap transaction.

Jennifer S. Choi
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endnotes

[1] CFTC Letter No. 13-48, CFTC's Division of Market Oversight Issues Time-Limited No-Action Relief from the Prohibition of Aggregation Under § 43.6(h)(6) for Large Notional Off-Facility Swaps (July 30, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-48.pdf>.

[2] For a summary of the aggregation prohibition and the block trades rules, see ICI Memorandum No. 27283 (June 6, 2013), available at http://www.ici.org/my_ici/memorandum/memo27283.