

## CFTC Issues No-Action Letters

Article By:

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The **Commodity Futures Trading Commission (CFTC)** released a series of staff letters relating to various issues arising under rules implementing the **Dodd-Frank Wall Street Reform and Consumer Protection Act**, including chief compliance officer (CCO) reports, statutory disqualification prohibitions, commodity pool operator (CPO) registration, certain commodity swaps and certain requirements for non-US persons.

- **No-Action Relief for FCM Chief Compliance Officers.** Pursuant to CFTC Letter No. 12-47, the CFTC's Division of Swap Dealer and Intermediary Oversight (SDIO) granted no-action relief that will allow the CCO of a futures commission merchant (FCM) that was registered with the CFTC on June 4, 2012, and currently regulated by a US prudential regulator or registered with the Securities and Exchange Commission, to file an abbreviated annual report for the FCM's fiscal year ending on or before March 31, 2013. The annual report must be filed within ninety days of the FCM's fiscal year-end and must cover the full fiscal year. The abbreviated annual report must include the following information:
  - (i) An introduction and an executive summary that contains a description of the FCM's business, identifies the FCM's Chief Executive Officer (CEO) and CCO and the time period of the annual report;
  - (ii) A review of policies and procedures reasonably designed to ensure compliance with a list of enumerated customer protection rules, including a description of customer protection policies and procedures, an assessment of the effectiveness of the policies and procedures as of the end of the FCM's fiscal year and a discussion of areas for improvement;
  - (iii) A description of material noncompliance issues and corresponding actions taken, including corrective actions related to customer protection rules; and
  - (iv) CEO and/or CCO certification(s) stating, "To the best of my knowledge and reasonable belief and under penalty of law, the information contained in the attached annual reporting pertaining to the period from October 1, 2012 through [fiscal year end] is accurate and complete." CFTC Letter No. 12-47 is available [here](#).

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- **Further CPO Interpretation and No-Action Relief for Securitization Vehicles and mREITs.** In two separate no-action letters, CFTC staff provided additional guidance and relief for operators of securitization vehicles and mortgage real estate investment trusts (mREITs) seeking to determine their obligations to register as CPOs.

In CFTC Letter No. 12-44, SDIO staff granted relief from CPO registration to operators of qualifying mREITs, provided that the mREIT limits its exposure to commodity interests to the thresholds specified in the letter, is not marketed as a vehicle for trading commodity interests, and has or will identify itself as an mREIT in its US income tax returns on Form 1120-REIT. The relief granted in the letter is not self-effectuating—for mREITs in operation as of December 1, a no-action request must be submitted to SDIO prior to December 31, and for mREITs commencing operations after December 1, a no-action request must be submitted within 30 days after commencing operations. CFTC Letter No. 12-44 is available [here](#).

In CFTC Letter No. 12-45, SDIO staff have provided further interpretation of the no-action relief granted to operators of securitization vehicles in CFTC Letter No. 12-14, and have also provided broad no-action relief for securitization vehicles that have not and do not issue new securities after October 12, 2012, as well as time-limited no-action relief to other operators of securitization vehicles. Under the expanded guidance, certain types of securitization vehicles that do not satisfy all of the strict requirements of the original letter may nonetheless be excluded from the definition of “commodity pool” where (among other things) their use of swaps is limited to the extent permitted under Regulation AB and Rule 3a-7 under the Investment Company Act of 1940 and such swaps are not used to create an investment exposure. The letter provides several examples of securitization vehicles that may be excluded under the new guidance, as well as examples of structures that would not be excluded from the commodity pool definition.

CFTC Letter No. 12-45 also includes two broad grants of no-action relief. First, SDIO has granted relief from CPO registration to operators of securitization vehicles that have not and will not issue new securities on or after October 12, provided that the operator will provide certain specified information if requested by the CFTC. Second, SDIO granted time-limited no-action relief to operators of securitization vehicles that are unable to rely upon the relief granted by either CFTC Letter No. 12-14 or 12-45, stating that, in light of ongoing discussions with the securitization industry, SDIO will not recommend enforcement action against such operators for failure to register as a CPO until March 31, 2013. CFTC Letter No. 12-45 is available [here](#).

- **No-Action Relief for Certain SDs and MSPs Relating to Statutory Qualification Prohibitions.** Pursuant to CFTC Letter No. 12-43, SDIO issued limited no-action relief for swap dealers (SDs) and major swap participants (MSPs) from compliance with CFTC Regulation 23.22(b), which prohibits persons subject to a statutory disqualification from effecting or being involved in effecting swaps on behalf of the SD or MSP. This relief is only available for non-domestic associated persons of SDs or MSPs who deal solely with non-domestic swap counterparties, and persons employed in a clerical or ministerial capacity by SDs and MSPs. CFTC Letter No. 12-43 is available [here](#).
- **Preservation of Regulatory Status Quo.** In CFTC Letter No. 12-48, the CFTC’s Division of Market Oversight (DMO) further extended the temporary exemptive relief originally granted in a CFTC order dated July 14, 2011. Pursuant to the letter, DMO staff will maintain and preserve the regulatory status quo regarding the regulation of certain agricultural swaps and exempt and excluded commodity swaps. Such relief will expire on the earlier of June 30, 2013, or the effective date of the swap execution facility (SEF) final rules. However, an entity

may no longer rely on such no-action relief if the entity's application for registration as a designated contract market or SEF has been approved, temporarily approved, withdrawn or denied by the CFTC. CFTC Letter No. 12-48 is available [here](#).

- **No-Action Relief Affecting Non-US Persons.** CFTC staff issued two letters relating to non-US persons. In CFTC Letter No. 12-49, SDIO staff granted no-action relief to any CFTC registrant that does not submit fingerprint cards for its non-US principals. In order to obtain such relief, a registrant must submit, in lieu of a fingerprint card, a signed certification that a reasonable criminal history background check was conducted and no matters were revealed constituting a disqualification under Sections 8a(2) or 8a(3) of the Commodity Exchange Act. CFTC Letter No. 12-49 is available [here](#).

In CFTC Letter No. 12-46, DMO staff provided temporary no-action relief from certain counterparty reporting obligations under Parts 20, 45 and 46 of the CFTC's regulations for transactions involving non-US counterparties. Because such no-action relief is predicated upon potential non-US privacy law concerns, the relief is extended until the reporting counterparty has obtained consent from either the non-US counterparty or its non-US regulator, or the reporting party no longer holds a reasonable belief that non-US privacy laws would be violated. In any event, such relief expires no later than June 30, 2013. CFTC Letter No. 12-46 is available [here](#).

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