



## **Swap Dealer and Major Swap Participant—Registration**

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### **Introduction**

Beginning July 28, 2010, staff has engaged in discussions with CFTC and SEC staff members concerning the registration of Swap Dealers (SDs), Major Swap Participants (MSPs) and persons associated with them. NFA has preliminarily expressed our belief that, to the extent possible, the registration process for SDs, MSPs and their APs be the same as it is for all other categories.

### **Swap Dealers and Major Swap Participants**

SDs and MSPs should file a Form 7-R firm application modified to accommodate the two new categories of registration. The Form 7-R information includes full legal name and form of organization, business address, business records location, branch office locations, entity principals, various contact information, disciplinary history and the firm certification. Additionally, the SD or MSP should file Form 8-Rs and fingerprint cards for its individual principals, and these individual principals would subsequently verify the accuracy of the information in the Form 8-R.

SDs and MSPs and their principals should be subject to the fitness review process that NFA conducts for other applicants and registrants. Based on the disciplinary information provided in the applications or uncovered as a result of NFA's fitness examination of an applicant or principal, NFA could institute and conclude a registration action using the same procedures applicable to firms in existing registration categories.

### **Individuals Associated with Swap Dealers and Major Swap Participants**

Dodd-Frank prohibits, unless the Commission provides otherwise, SDs and MSPs from having any person who solicits or accepts swaps or supervises such persons, other than a person functioning solely in a clerical or ministerial capacity, from being associated with it if the person is subject to a statutory disqualification.<sup>1</sup> While

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<sup>1</sup> The "disqualification" provision uses the term, "person associated with", which is not a defined term. However, Dodd-Frank defines "Associated Person of a Swap Dealer or Major Swap Participant" as a person who is associated with the SD or MSP in any capacity that involves the solicitation or acceptance of swaps or who supervises such a person, but excludes persons whose functions are solely clerical or ministerial. We assume the terms "person associated with" and "associated person of" to be equivalent in this context.

Dodd-Frank does not explicitly require these individuals to register as APs,<sup>2</sup> CFTC staff has advised us that the Commission may nonetheless have the authority to require these individuals to register based on the legislative history of Dodd-Frank. If these individuals are required to be registered, the SDs and MSPs with whom these persons are associated would file Form 8-Rs on their behalf, which the individual would subsequently verify as accurate, and fingerprint cards. The AP applicants would be subject to the fitness review process that NFA conducts for other AP applicants and registrants. Based on the disciplinary information provided in the applications or uncovered as a result of NFA's fitness examination of an applicant, NFA could institute and conclude a registration action using the same procedures applicable to existing APs.

If the Commission determines that it cannot require registration of these individuals, the Commission could require SDs and MSPs to notify NFA of any person who will be associated with them, possibly through the filing of a Form 8-R and fingerprint card.<sup>3</sup> NFA would then conduct a fitness review and apply the same fitness standards to these individuals as it would perform if the person was applying to be an AP. When appropriate, NFA would institute a registration action against the SD or MSP under Section 8a(3)(M) for having a person associated with it who is subject to a statutory disqualification. The Commission may wish to consider issuing an Interpretive Notice specifying that Section 8a(3)(M) applies in this circumstance.

Alternatively, CFTC staff could require SDs and MSPs to notify NFA only if the person associated with it is subject to a disqualification. NFA would institute a registration action against the SD or MSP under Section 8a(3)(M) for having a Disqualified Swap Individual associated with it. We do not favor this approach because without a fingerprint card for the particular individual, we could not be certain that the individual is in fact subject to the disclosed disqualification and only that disqualification. We would also not be aware of any other persons who the SD or MSP does not know to be disqualified.

If the Commission determines to allow each SD and MSP to request that it be permitted to have a Disqualified Swap Individual, NFA suggests that the procedures and law generally applicable to Commission registrants and applicants apply to these cases. Assuming the individuals are required to register as APs, NFA could deny or grant the AP a conditioned registration imposing appropriate conditions. If individuals are not registered as APs, NFA could condition the registration of the SD or MSP and impose requirements related to the Disqualified Swap Individual's activities. If NFA determines that the Disqualified Swap Individual should not be associated with the SD

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<sup>2</sup> If the SD is also registered in some other capacity, such as an FCM, these individuals might be required to register as APs of the FCM.

<sup>3</sup> There is some ambiguity concerning the Commission's authority to require persons who are not applying for registration to submit fingerprint cards. However, the Commission currently requires principals to submit fingerprint card, so presumably it could impose a similar requirement for swaps solicitors.

or MSP, it could issue a Final Order so stating or imposing a conditional registration on the SD or MSP, the condition being that the SD or MSP may not permit, other than in a clerical or ministerial capacity, the Disqualified Swap Individual to engage in swap activities on its behalf.

Any Final Orders issued in connection with a registration proceeding involving SDs, MSPs or APs would be subject to Commission review like any other Final Order issued by NFA in its registration cases.

### **Ongoing Filings by SDs and MSPs**

The obligation to correct any deficiency or inaccuracy in the Form 7-R and Form 8-R should apply to SDs, MSPs and their APs and principals as it does to the other categories of registration. Staff suggests that SDs and MSPs should also be required to file annual registration updates. This process has proved to be an effective way to insure that information on file for the existing categories of registration is verified at least annually. It has also been an effective way to withdraw registrations in instances where firms are no longer engaging in activities requiring registration.

The Form 7-W should also be modified to apply to SDs and MSPs requesting withdrawal of their registrations. SDs and MSPs would file a Form 8-T to notify NFA of the withdrawal of principals and APs or, depending on whether a Form 8-R has been filed, Disqualified Swap Individuals. The Form 8-T would have to be modified to include swap individuals as a category to be withdrawn if it applies to them.

### **Proficiency Requirements for APs and Designated Chief Compliance Officers**

CFTC staff has advised us that it is contemplating requiring that individuals satisfy a proficiency requirement. CFTC staff also advised us that it is considering requiring SDs, MSPs and FCMs to list their designated chief compliance officers (DCCOs) on the Form 7-R either separately or by including this position in the definition of principal and imposing a proficiency requirement for DCCOs. NFA can create and administer appropriate tests if the Commission requires them<sup>4</sup>. However, the Commission must establish the applicable regulatory requirements before NFA could create and implement tests covering those requirements. It is possible, depending on when the Commission finalizes those requirements, that the tests would not yet be available when registration is required. Consequently, we recommend that the proficiency requirement be made effective at such time that a test is available. One alternative to the creation of a new test for DCCOs, however, might be to allow the DCCO to take and pass an existing exam.

August 25, 2010

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<sup>4</sup> We understand that Chairman Gensler has indicated that SDs may also have to be registered as FCMs because they will hold margin funds. That raises the issue of whether an individual required to register as an AP of the SD/FCM because of activity involving swaps would also need to pass the Series 3 or whether a specialized exam would be sufficient for APs who limit their activities to swaps.