
MEMORANDUM

To CFTC

From K&L Gates LLP, on behalf of the Church Alliance

Date October 4, 2011

Re Special Entity Definition – Opt-In for Church Plans

This memorandum is in follow up to the meeting on September 9, 2011 between representatives of the Church Alliance and the Commodity Futures Trading Commission (“CFTC”). Per your request, this memorandum discusses the issue of how to classify “church plans” for purposes of various regulations under Dodd-Frank.

Although Dodd-Frank refers in several places to any employee benefit plan *defined in* Section 3 of ERISA, which would include church plans, you have indicated that staff may recommend to the Commissions that this phrase be limited to any employee benefit plan *subject to* ERISA in adopting relevant final regulations, with a separate reference to “governmental plans” as provided in Dodd-Frank. Thus, governmental plans would be the only employee benefit plans not subject to ERISA that would be specifically referred to in the regulations under Dodd-Frank, leaving church plans, among others, in limbo.

The Church Alliance recommended in several comment letters to the Commissions that this issue be addressed by giving effect to the plain meaning of the statute and thereby treating all employee benefit plans defined in Section 3 of ERISA in the same manner. You indicated that, as an alternative, there may be a willingness to consider an approach in the final business conduct standards regulations that would permit church plans to “opt in” to being treated like employee benefit plans that are subject to ERISA for purposes of regulations adopted under Dodd-Frank.

In its previous comment letters, the Church Alliance recommended an approach that gives plain meaning to the text of Dodd-Frank and treats all employee benefit plans the same for purposes of all regulations adopted under that statute. The Church Alliance is concerned that potential counterparties would be unsure as to the status of church plans when comparing Dodd-Frank and the regulations promulgated thereunder, and that the legal uncertainty created would cause potential counterparties to refuse to deal with church plans in swap transactions. The Church Alliance, however, concurs that an opt in regime for the business conduct standards regulations is a preferable approach. In the attached materials, the Church Alliance puts forth suggestions for regulatory text that would permit church plans to opt in to being treated like employee benefit plans subject to ERISA for purposes of regulations being adopted under Dodd-Frank.

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It is important to note that the opt in regime for the business conduct standards regulations does not alleviate the need to clarify the status of church plans for purposes of other regulations under Dodd-Frank. Consequently, the Church Alliance is also recommending that the text of the definitions of major swap participant and major security-based swap participant be revised so that it will be clear that church plans will be treated in the same manner as employee benefit plans subject to ERISA and governmental plans for purposes of those definitions without the need for an opt in. We recommend the latter regulatory text changes because we believe that all church plans will want to have their swap and security-based swap positions used for hedging and risk mitigation excluded from the computation to determine whether an entity is a major swap participant or a major security-based swap participant without the need to “opt in” for such treatment. We recognize that the thresholds for determining whether an entity is a major swap participant or a major security-based swap participant will be set at levels that church plans would be unlikely to exceed, but we nevertheless believe that the regulatory text should be revised to provide greater legal certainty and to be consistent throughout the regulations.

We have noted in the following pages suggested revised regulatory text with strike outs and underlining to indicate the text that we believe should be deleted and added, respectively, as well as separate regulations for the church plans opt in procedure. As noted, when you make these changes, preamble discussion of these issues should be similarly revised.

We hope that this information is helpful. Please contact us if we can further assist you or if you have any additional questions regarding this matter. Thank you for your time and consideration of the position of the Church Alliance.

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REVISED TEXT FOR CFTC REGULATION 23.401, DEFINITION OF SPECIAL ENTITY

Special Entity. The term Special Entity means:

- (1) A Federal agency;
- (2) A State, State agency, city, county, municipality, or other political subdivision of a State ~~or~~;
- (3) Any employee benefit plan, ~~as defined in Section 3 of~~ subject to regulation under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);
- (4) Any governmental plan, as defined in Section 3(32) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); ~~or~~
- (5) Any church plan, as defined in Section 3(33) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), including an organization described in Section 3(33)(C)(i) of such Act (a “church benefits board”) and the plans it maintains, if the church or convention or association of churches or church benefits board that maintains the church plan or plans makes an election in accordance with the provisions of § 23.403 and such election has not been withdrawn; or
- ~~(5)~~ Any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)).

NEW REGULATION

§ 23.403 Election by church plans.

(a) Any church plan (as defined in paragraph (5) in Section 23.401 of this chapter) that wishes to be treated as a “Special Entity” for purposes of this part and the de minimis exception to the swap dealer definition in Section 1.3(ppp)(4)(i) of this chapter, or as a “Financial Entity” or a “Category 2 Entity” for purposes of Parts 23 and 39 of this chapter, shall file a notice so stating electronically with National Futures Association through its electronic exemption filing system, containing the following information:

- (1) The name and main business address of the church plan making the election;
- (2) The name and telephone number of the person filing the notice, who must be authorized to bind the church plan; and
- (3) The status or statuses elected by the church plan.

(b) The election notice must be filed with National Futures Association prior to the date upon which the church plan intends to claim a particular status, and the notice shall be effective upon filing.

(c) In the event that any of the information contained in the notice becomes inaccurate or incomplete, the church plan shall, within fifteen (15) business days of its knowledge of such inaccurate or incomplete information, amend the notice electronically through National Futures Association’s electronic exemption filing system as may be necessary to render the notice accurate and complete.

(d) *Annual Notice.* Each church plan that has filed a notice under this section must, within 30 days of the end of the calendar year through National Futures Association’s electronic exemption filing system, affirm, amend or withdraw the notice. Failure to do so within that 30-day period shall be deemed to be a request for immediate withdrawal. Any such amendment or withdrawal of the notice shall have no effect on any agreement, contract or transaction previously entered into.

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*REVISED TEXT FOR CFTC REGULATION 1.3(ppp)(4)(i), DEFINITION OF SWAP DEALER,
DE MINIMIS EXCEPTION*

(ppp) *****

(4) ***

(i) The swap positions connected with those activities into which the person enters over the course of the immediately preceding 12 months have an aggregate gross notional amount of no more than \$100 million, and have an aggregate gross notional amount of no more than \$25 million with regard to swaps in which the counterparty is a “special entity” (as that term is defined in Section ~~4s(h)(2)(C) of the Commodity Exchange Act~~[23.401 of this chapter](#)). For purposes of this paragraph, if the stated notional amount of a swap is leveraged or enhanced by the structure of the swap, the calculation shall be based on the effective notional amount of the swap rather than on the stated notional amount.

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REVISED TEXT FOR CFTC REGULATION 1.3(qqq)(1)(ii)(A), DEFINITION OF MAJOR SWAP PARTICIPANT

(qqq) ***

(1) ***

(i) ***

(ii)(A) That maintains a substantial position in swaps for any of the major swap categories, excluding both positions held for hedging or mitigating commercial risk, and positions maintained by any employee benefit plan (or any contract held by such a plan) subject to regulation under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) as defined in paragraphs ~~(3) and~~ (32) and (33) (including an organization described in paragraph (33)(C)(i)) of Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

REVISED TEXT FOR CFTC REGULATION 39.6, END-USER EXCEPTION TO CLEARING

§ 39.6 Electing to use the end-user exception to mandatory swap clearing.

(a) A counterparty to a swap (an “electing counterparty”) may elect to use the exception to mandatory clearing under section 2(h)(7)(A)(iii) of the Act if the electing counterparty is not a “financial entity” as defined in section 2(h)(7)(C)(i) of the Act or is not the type of “Special Entity” that makes the election described in paragraph (5) in Section 23.401 of this chapter, is using the swap to hedge or mitigate commercial risk as defined in § 39.6(c), and provides or causes to be provided to a registered swap data repository or, if no registered swap data repository is available, the Commission, the information specified in § 39.6(b). More than one counterparty to a swap may be an electing counterparty. If there is more than one electing counterparty to a swap, the information specified in § 39.6(b) shall be provided with respect to each of the electing counterparties.

(b) ***

(1) ***

(2) Whether the electing counterparty is a “financial entity” as defined in section 2(h)(7)(C)(i) of the Act or is the type of “Special Entity” that makes the election described in paragraph (5) in Section 23.401 of this chapter;

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*REVISED TEXT FOR CFTC REGULATION 23.505, END USER EXCEPTION
DOCUMENTATION*

(a) ***

(3) That the counterparty is a non-financial entity, as defined in section 2(h)(7)(C) of the Act and is not the type of “Special Entity” that makes the election described in paragraph (5) in Section 23.401 of this chapter;

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REVISED TEXT FOR CFTC REGULATION 23.150, MARGIN REQUIREMENTS FOR UNCLEARED SWAPS – PARAGRAPH (3) OF THE DEFINITION OF FINANCIAL ENTITY THEREUNDER SHOULD BE REVISED TO READ AS FOLLOWS:

(3) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income ~~and~~ Security Act of 1974 or the type of “Special Entity” that makes the election described in paragraph (5) in Section 23.401 of this chapter,

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REVISED TEXT FOR CFTC REGULATION 39.5, REVIEW OF SWAPS FOR CFTC DETERMINATION REGARDING MANDATORY CLEARING

(e) ***

(1) ***

Category 2 Entity means (1) a commodity pool; (2) a private fund as defined in section 202(a) of the Investment Advisors Act of 1940 other than an active fund; (3) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income ~~and~~ Security Act of 1974 or the type of “Special Entity” that makes the election described in paragraph (5) in Section 23.401 of this chapter; or (4) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956, *provided that*, in each case, the entity is not a third-party subaccount.

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REVISED TEXT FOR CFTC REGULATIONS 23.175 AND 23.575, IMPLEMENTATION OF TRADING DOCUMENTATION AND MARGINING REQUIREMENTS [MAKE THE SAME REVISIONS IN BOTH REGULATIONS]

(a) ***

Category 2 Entity means (1) A commodity pool; (2) a private fund as defined in section 202(a) of the Investment Advisors Act of 1940 other than an active fund; (3) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income ~~and~~ Security Act of 1974 or the type of “Special Entity” that makes the election described in paragraph (5) in Section 23.401 of this chapter; or (4) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956, *provided that*, in each case, the entity is not a third-party subaccount.

[NOTE: ANY PREAMBLE DISCUSSION OF THE FOREGOING ISSUES SHOULD BE SIMILARLY REVISED]

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REVISED TEXT FOR SEC REGULATION 240.15Fh-1 and 240.15Fh-2, DEFINITION OF SPECIAL ENTITY

Sections 240.15Fh-1 through 240.15Fh-~~67~~ and 240.15Fk-1 are also issued under sec. 943, Pub. L. 111-203, 124 Stat. 1376.

* * * * *

2. Add §§ 240.15Fh-1 through 240.15Fh-~~67~~ to read as follows:

Sec.

240.15Fh-1 Scope.

240.15Fh-2 Definitions.

240.15Fh-3 Business conduct requirements.

240.15Fh-4 Special requirements for security-based swap dealers acting as advisors to special entities.

240.15Fh-5 Special requirements for security-based swap dealers and major security-based swap participants acting as counterparties to special entities.

240.15Fh-6 Political contributions by certain security-based swap dealers.

[240.15Fh-7 Election by church plans.](#)

§ 240.15Fh-1 Scope.

Sections 240.15Fh-1 through 240.15Fh-~~67~~, and 240.15Fk-1 are not intended to limit, or restrict, the applicability of other provisions of the federal securities laws, including but not limited to Section 17(a) of the Securities Act of 1933 and Sections 9 and 10(b) of the Act, and rules and regulations thereunder, or other applicable laws and rules and regulations. Sections 240.15Fh-1 through 240.15Fh-~~67~~, and 240.15Fk-1 apply, as relevant, in connection with entering into security-based swaps and continue to apply, as appropriate, over the term of executed security-based swaps.

§ 240.15Fh-2 Definitions.

As used in §§ 240.15Fh-1 through 240.15Fh-~~67~~:

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(e) *Special entity* means:

- (1) A Federal agency;
- (2) A State, State agency, city, county, municipality, or other political subdivision of a State;
- (3) Any employee benefit plan, ~~as defined in Section 3 of~~ subject to regulation under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);
- (4) Any governmental plan, as defined in section 3(32) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(32)); ~~or~~
- (5) Any church plan, as defined in Section 3(33) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), including an organization described in Section 3(33)(C)(i) of such Act (a “church benefits board”) and the plans it maintains, if the church or convention or association of churches or church benefits board that maintains the church plan or plans makes an election in accordance with the provisions of § 240.15Fh-7 and such election has not been withdrawn; or
- (~~5~~6) Any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986.

NEW REGULATION

§ 240.15Fh-7 Election by church plans.

(a) Any church plan (as defined in § 240.15Fh-2(e)(5)) that wishes to be treated as a “Special Entity” for purposes of §§ 240.15Fh-4 and 240.15Fh-5, or as a “Financial Entity” for purposes of § 240.3Cg-1, shall file a notice so stating in the form and manner specified by the Commission, containing the following information:

- (1) The name and main business address of the church plan making the election;
- (2) The name and telephone number of the person filing the notice, who must be authorized to bind the church plan; and
- (3) The status or statuses elected by the church plan.

(b) The election notice must be filed prior to the date upon which the church plan intends to claim a particular status, and the notice shall be effective upon filing.

(c) In the event that any of the information contained in the notice becomes inaccurate or incomplete, the church plan shall, within fifteen (15) business days of its knowledge of such inaccurate or incomplete information, amend the notice as may be necessary to render the notice accurate and complete.

(d) *Annual Notice.* Each church plan that has filed a notice under this section must, within 30 days of the end of the calendar year, affirm, amend or withdraw the notice. Failure to do so within that 30-day period shall be deemed to be a request for immediate withdrawal. Any such amendment or withdrawal of the notice shall have no effect on any agreement, contract or transaction previously entered into.

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REVISED TEXT FOR SEC REGULATION 240.3a67-1(a)(2)(i), DEFINITION OF MAJOR SECURITY-BASED SWAP PARTICIPANT

(a) ***

(2) ***

(i) That maintains a substantial position in security-based swaps for any of the major security-based swap categories, excluding both positions held for hedging or mitigating commercial risk, and positions maintained by any employee benefit plan (or any contract held by such a plan) subject to regulation under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) as or defined in paragraphs ~~(3) and~~(32) and (33) (including an organization described in paragraph (33)(C)(i)) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

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REVISED TEXT FOR SEC REGULATION 240.3Cg-1(a)(2), END-USER EXCEPTION TO CLEARING

(a) ***

(2) Whether the counterparty invoking the clearing exception is a “financial entity” as defined in Section 3C(g)(3) of the Act (15 U.S.C. 78c-3(g)(3)) or is the type of “Special Entity” that makes the election described in § 240.15Fh-2(e)(5);
