

CALM BEFORE THE STORM? CFTC PROPOSES TEMPORARY EXEMPTIVE RELIEF

June 17, 2011

To Our Clients and Friends:

Earlier this week, the Commodity Futures Trading Commission (the “CFTC”) released a proposed order to grant temporary relief with respect to a number of swap regulatory requirements that were enacted and would otherwise become effective on July 16, 2011. The CFTC grouped the provisions of Title VII of the Dodd-Frank Act into four major categories:

- Category 1: provisions that require a rulemaking;
- Category 2: self-effectuating provisions that reference terms that require further definition;
- Category 3: self-effectuating provisions that do not reference terms that require further definition and that repeal provisions of current law; and
- Category 4: self-effectuating provisions for which relief is not being proposed.

As the CFTC has not yet completed the rulemaking process, it has proposed to grant temporary relief with respect to Categories 2 and 3 of those self-effectuating provisions to “promote market efficiency [...] and provide clarity to participants in the swaps market that is in the interest of the markets and the public.” The CFTC explained that Category 1 provisions do not require temporary relief and that Category 4 provisions (such as the private right of action) which refer to certain terms requiring a rulemaking can become effective on July 16, 2011.

TWO TYPES OF EXEMPTIONS

There are two types of exemptions in the proposed order:

- part one addresses the provisions of the Commodity Exchange Act (“CEA”) that reference terms such as “swap,” “swap dealer,” “major swap participant” or “eligible contract participant” that are subject to further rulemakings and definitions. The CFTC proposed to grant a temporary relief from compliance with those provisions to the extent that it is specifically related to those referenced terms until the earlier of December 31, 2011 or the effective date of their definitional rulemaking.

- part two addresses certain provisions that are being repealed by the Dodd-Frank Act. Those are provisions that, prior to the Dodd-Frank Act, excluded or exempted certain transactions in excluded or exempt commodities (i.e., primarily financial and energy commodities) from the CFTC's regulatory oversight. The CFTC proposed to temporarily exempt transactions in excluded or exempt commodities from the CEA if such transactions otherwise would comply with Part 35¹ until the earlier of December 31, 2011 or the effectiveness of the repeal or replacement of the relevant CFTC regulations.

However, this exemptive relief is not intended to limit in any way the CFTC's additional enforcement authority granted by the Dodd-Frank Act with respect to anti-fraud or anti-manipulation provisions against any person, entity or transaction.

PROVISIONS NOT COVERED BY THE PROPOSED RELIEF

Those provisions that require an implementing rulemaking that will not become effective on July 16 are not covered by this proposed relief as they are not self-effectuating. Further, the CFTC has also proposed to exclude certain self-effectuating provisions from the proposed relief; a proposed list of those provisions, as published by the CFTC, is attached to this memorandum.

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Please feel free to contact us with any questions.

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¹ Part 35 exempts "swap agreements" if (1) they are entered into by "eligible swap participants"; (2) they are not part of a fungible class of agreements standardized as to their material economic terms; (3) the creditworthiness of any party having an actual or potential obligation under the swap agreement would be a material consideration in entering into or determining the terms of the swap agreement, including pricing, costs or credit enhancement terms; and (4) they are entered into or traded on a multilateral transaction execution facility.

**CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE
NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE**

Dodd-Frank Section No.	CEA Section No. ¹	Provision, Obligation or Prohibition Applicable To:	Summary Description
			<u>SUBTITLE A, PART I: SECTIONS 701-720 – REGULATORY AUTHORITY</u>
701	None	None	<u>Short Title</u>
711	None	None	<u>Definitions</u> Various terms have the meanings given in Commodity Exchange Act (“CEA”) Section 1a.
712(a) (1)-(7), 712(b)-(c)	None	None	<u>Review of Regulatory Authority</u> General provisions regarding rulemakings.
712(e)-(f)	None	None	<u>Rulemaking Timeframe and Rules/Registration before Final Effective Dates</u> Provides global rulemaking deadline of 360 days from enactment (unless otherwise provided). Permits issuance of rules, studies, reports and exemptions, and registration of persons, prior to effective date. ²
713(b) ³	4d	Futures Commission Merchants (“FCMs”)	<u>Portfolio Margining</u> Pursuant to exemption or rule, dually-registered FCM-Broker Dealer may, pursuant to a portfolio margining program approved by Securities and Exchange Commission (“SEC”), hold futures and options on futures, and margin thereon, in a portfolio margining account carried as a securities account.
714	None	None	<u>Abusive Swaps</u> CFTC may collect information concerning markets for swaps and issue report re. types of swaps that are detrimental to stability of a financial market or participants therein.
715	None	None	<u>Authority to Prohibit Participation in Swap Activities</u> If CFTC determines that regulation of swap markets in a foreign country undermines stability of U.S. financial system, it may, in consultation with Secretary of Treasury, prohibit an entity domiciled in the foreign country from participating in the U.S. in any swap activities.
716	None	Swap Dealers (“SDs”)/Major Swap Participants (“MSPs”)	<u>Prohibition on Federal Assistance</u> Prohibits Federal assistance to certain registered SDs/MSPs; requires insured depository institutions to comply with “Volcker Rule.”
717(a) and (d) ⁴	2(a)(1)(C) and 5c(c)(1)	None	<u>New Product Approval CFTC-SEC Process</u> Provides CFTC jurisdiction over options exempted by SEC; provides for stay of certification of product pending jurisdictional determination.
718	None	None	<u>Novel Derivative Products</u> Provides a process for CFTC and SEC to resolve jurisdictional issues relating to novel derivative products.
719	None	None	<u>Studies</u> Requires 4 Studies re: (a) effects of position limits on trading on exchanges in U.S.; (b) feasibility of requiring use of standardized algorithmic description for financial derivatives; (c) international swap regulation; and (d) stable value contracts.
720	None	None	<u>Memoranda of Understanding</u> Requires CFTC and the Federal Energy Regulatory Commission (“FERC”) to negotiate Memoranda of Understanding (“MOUs”) to: (a) establish procedures for addressing jurisdictional issues;

¹ Unless otherwise indicated, the CEA references in this column refer to the provisions of the CEA after its amendment by the Dodd-Frank Act.

² Section 712(f) became effective upon enactment of the Dodd-Frank Act.

³ Section 713(a) amends the Securities Exchange Act of 1934.

⁴ Sections 717(b) and (c) amend the Securities Exchange Act of 1934.

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			and (b) share information in investigations into potential manipulation, fraud or market power abuse.
			SUBTITLE A, PART II: SECTIONS 721-754 – REGULATION OF SWAP MARKETS
			SECTION 721 -- DEFINITIONS
721(a) and 721(f)	1a	Various	Definitions New or amended definitions of terms “appropriate Federal banking agency,” “Board,” “eligible commercial entity,” “interstate commerce,” “prudential regulator,” and “trading facility.” ⁵
721(b), (d) and (e)	Various	None	Authority to define terms; exemptions; and conforming amendments Provides CFTC authority to adopt rule defining any term in CFTC-related portions of Title VII; limits CFTC exemptive authority with respect to Title VII; sets forth conforming amendments required due to re-numbering of definitions in CEA Section 1a.
			SECTION 722 – JURISDICTION
722(e), (f), and (g)	2(a)(1) and 4(c)	None	FERC General provisions re. impact on jurisdiction of FERC and provision granting CFTC authority to issue public interest waivers re. transactions entered into pursuant to tariff or rate schedule approved or permitted to take effect by FERC or regulatory authority of State or municipality with jurisdiction to regulate rates and charges for sale of electric energy.
722(h)	1b	None	Foreign Exchange Swaps and Foreign Exchange Forwards Provides process for Secretary of Treasury in considering whether to exempt foreign exchange swaps or foreign exchange forwards from the swap definition.
			SECTION 723 - CLEARING
723(c) (1)-(2)	None	Persons subject to pre-Dodd-Frank Act CEA Section 2(h)	Grandfather Provision Permits petition with the CFTC within 60 days of enactment to allow petitioners to remain subject to existing Section 2(h) of the CEA for 1 year.
724(b)	None	FCMs and Derivatives Clearing Organizations (“DCOs”)	Bankruptcy Treatment of Cleared Swaps Makes amendments to the Bankruptcy Code relating to cleared swaps.
725(a)	5b(b)	DCOs	Voluntary Registration A person clearing transactions that are not required to be cleared may voluntarily register as a DCO.
725(b)	5b(g)	Depository institutions and clearing agencies	Existing Depository Institutions and SEC-Registered Clearing Agencies If required to be registered as a DCO: (a) depository institutions are deemed to be registered to the extent that, before enactment, they cleared swaps as a multilateral clearing organization; and (b) SEC-registered clearing agencies are deemed to be registered to the extent that, prior to enactment, they cleared swaps.
725(b)	5b(i)	DCOs	DCO – Chief Compliance Officer (“CCO”) Must designate a CCO who reports directly to the board or to the senior officer of the DCO, to perform specified duties.
725(c)	5b(c)(2)	DCOs	DCO Core Principles Registered DCOs must comply with the new Core Principles and any other requirements imposed by rule or regulation.
725(f)	8(e)	Foreign central banks	Information Sharing Permits CFTC to share information with foreign central banks and ministries under certain circumstances.

⁵ The amended definition of the term “commodity” became effective on June 1, 2010.

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725(h)	5b(f)(1)	DCOs	<u>Reducing Clearing Systemic Risk</u> Provides that DCO may not be compelled to accept counterparty credit risk of another clearing organization.
			<u>SECTION 734 – DERIVATIVES TRANSACTION EXECUTION FACILITIES (“DTEFs”) AND EXEMPT BOARDS OF TRADE</u>
734	5a of pre-Dodd-Frank Act CEA	DTEFs	<u>DTEFs</u> Repeal provisions enacted in Commodity Futures Modernization Act of 2000 that authorized DTEFs.
			<u>SECTION 735 – Designated Contract Markets (“DCMs”)</u>
735(a)	5(b)	DCMs	<u>Contract Market Designation</u> Repeals provisions setting forth criteria for designation as a DCM.
735(b)	5(d)	DCMs	<u>DCM Core Principles</u> Registered DCMs must comply with the new Core Principles and any other requirements imposed by rule or regulation.
			<u>SECTION 736 – MARGIN WITH RESPECT TO REGISTERED ENTITIES</u>
736	8a(7)	Registered entities	<u>Margin with respect to registered entities</u> Permits CFTC to alter or supplement rules of a registered entity with respect to the setting of margin levels upon certain specified conditions.
			<u>SECTION 738 – FOREIGN BOARDS OF TRADE (“FBOTs”)</u>
738	4(b)	FBOTs	<u>FBOT Requirements.</u> Permits CFTC to write rules for the registration of FBOTs that provide direct access to U.S. customers. Imposes requirements on FBOT contracts provided to U.S. customers by direct access that are linked to the settlement price of a contract traded on a registered entity in the U.S. Provides protections for CFTC registrants trading futures contracts on an FBOT in certain circumstances, and legal certainty for such transactions even if the FBOT fails to comply with the CEA.
			<u>SECTION 739 – LEGAL CERTAINTY FOR SWAPS</u>
739	22(a)(4)-(5)	Swap counterparties	<u>Legal Certainty for Swaps</u> No transaction between Eligible Contract Participants (“ECPs”) (or persons reasonably believed to be ECPs) shall be void, voidable, or unenforceable, and no party shall be entitled to rescind or recover any payment made with respect thereto, based solely on the failure of the agreement, contract, or transaction to meet the definition of a swap or otherwise be cleared as required by the CEA. Unless specifically reserved in a swap, neither the enactment of the Dodd-Frank Act nor any requirement under that Act shall qualify as a termination event, force majeure, illegality, regulatory change or similar event under the swap that would permit termination, renegotiation, modification or amendment of the swap.
			<u>SECTIONS 741-744 AND 746-748 – ENFORCEMENT PROVISIONS</u>
741(b)	2(c)(2)(B)-(C)	Persons engaged in off-exchange forex transactions with retail customers	<u>Forex Enforcement Authority</u> Amends CFTC enforcement authority with respect to off-exchange forex transactions with retail customers.
741(c)	None	Entities regulated by Federal banking agencies	<u>Prudential Regulators</u> Savings clause for appropriate Federal banking agencies with respect to prudential standards imposed outside of Title VII.
742(a) and	2(c)(2)(D)-(E)	Persons engaged in off-exchange	<u>Retail Commodity Transactions</u> Provides CFTC with enforcement authority for non-forex retail

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(c) ⁶		transactions with retail customers	commodity transactions. Requires rulemakings for entities regulated by prudential regulators to do retail forex transactions.
743	None	None	<u>Other Authority</u> Unless otherwise provided, CFTC-related provisions in Title VII do not divest banking agencies, the CFTC, the SEC, or other Federal or state agencies of any authority derived from any other applicable law.
744	6c(d)	None	<u>Restitution Remedies</u> Provides CFTC with the authority to seek restitution for violations of the CEA in the amount of losses proximately caused by such violations.
747	4c(a)(5)-(6)	Traders on registered entities	<u>Anti-Disruptive Practices Authority</u> Prohibits any person from engaging in specifically enumerated bad acts: (a) violating bids or offers; (b) intentional or reckless disregard for the orderly execution of transactions during the closing period; or (c) spoofing. Provides CFTC with authority to prohibit other deceptive trading practices.
748	23(h) and (n)	Employers of whistleblowers	<u>Commodity Whistleblower Incentives and Protection</u> Protects whistleblowers from retaliation. Provides that such right may not be waived, and whistleblowers may not be required to agree to arbitration of retaliation disputes.
745(a), (b) and (c)	5c(a)(2), 5c(c) and pre-Dodd-Frank Act Section 5c(d)	Registered entities	<u>Interpretations; Certifications and Prior Approvals</u> Provides that CFTC interpretations of Core Principles may provide the exclusive means for complying with those Core Principles. Establishes a self-certification procedure with respect to rules and products under a 10/90 day CFTC review process for new rules or rule amendments. Provides that a registered entity may seek CFTC prior approval with respect to rules or products. Repeals requirements imposed by CEA Section 5c(d) of pre-Dodd-Frank Act on filing enforcement action when CFTC determines that a registered entity is violating a Core Principle.
749	Multiple	Various	<u>Conforming Amendments</u> Conforming amendments to CEA Sections 4d (FCM Registration Requirements); 5c (Common Provisions Applicable to Registered Entities); 5e (Suspension or Revocation of Designation as a Registered Entity); 6(B) (Court Review of CFTC Orders); 12(e)(2)(B) (Cooperation with Other Agencies); and 17(r)(1) (Registered Futures Associations: Duplicative Regulation of Dual Registrants).
750	None	None	<u>Study on Oversight of Carbon Markets</u>
751	2(a)(15)	None	<u>Energy and Environmental Markets Advisory Committee</u>
752	None	None	<u>International Harmonization</u>
754	None	None	<u>Effective Date</u>

⁶ Section 742(b) makes a technical correction to the Gramm-Leach-Bliley Act.