

**CFTC RELEASES FINAL RULE  
ON AGRICULTURAL SWAPS**

August 9, 2011

To Our Clients and Friends:

On August 5, 2011, the U.S. Commodity Futures Trading Commission (the “CFTC”) adopted new Part 35 of its regulations on swaps in an agricultural commodity (“agricultural swaps”) other than options on an agricultural commodity.

Section 723(c)(3) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) provides that agricultural swaps are prohibited unless entered into pursuant to a rule, regulation or order of the CFTC pursuant to section 4(c) of the Commodity Exchange Act (the “CEA”), and section 5h(b)(2) of the CEA, added by section 733 of the Dodd-Frank Act, provides that a swap execution facility (“SEF”) may not list for trading or confirm the execution of any agricultural swap except pursuant to a rule or regulation of the CFTC.

The Commodity Futures Modernization Act of 2000 (“CFMA”) generally exempted from the CFTC’s jurisdiction bilateral swaps between certain sophisticated parties, other than an “agreement, contract, or transaction in an agricultural commodity.” Prior to the Dodd-Frank Act, swaps in excluded and exempt commodities (i.e., commodities other than agricultural commodities) were transacted generally outside the CFTC’s jurisdiction, but agricultural swaps were transacted in reliance on pre-Dodd Frank part 35 (“Existing Part 35”) of the CFTC’s regulations that had been adopted prior to the enactment of the CFMA. Existing Part 35 permitted all swaps to be transacted outside the CFTC’s oversight if they met certain conditions set forth in Existing Part 35. After the CFMA, Existing Part 35 became relevant only for agricultural swaps.

In light of broad amendments made to the CEA by the Dodd-Frank Act, the CFTC is repealing Existing Part 35 to avoid any uncertainty as to whether bilateral swaps on exempt or excluded commodities might be transacted in reliance on Existing Part 35.

The CFTC is adopting new Part 35 (“New Part 35”), under which agricultural swaps (other than options on an agricultural commodity) may be transacted subject to all provisions of the CEA, and any CFTC rule, regulation or order applicable to all swaps. Also, New Part 35 clarifies that agricultural swaps (other than options on an agricultural commodity) may be

transacted on SEFs and designated contract markets to the same extent all other swaps may be so transacted.

In early July of this year, the CFTC amended section 1.3(zz) of its regulations to provide for the definition of agricultural commodity. Under this section, an agricultural commodity includes (1) wheat, cotton and other commodities enumerated in section 1a of the CEA, (2) all other commodities that are, or once were, or are derived from living organisms (including plant and animal) which are generally fungible, within their respective classes and are used primarily for human food, shelter, animal feed or natural fiber, (3) tobacco, products of horticulture, and such other commodities used or consumed by animals or humans as the CFTC may designate and (4) commodity-based indexes based wholly or principally on underlying agricultural commodities.

At this time, the CFTC is not addressing proposed rules on commodity options, including proposed amendments to part 32 and other existing regulations, including the treatment of options on agricultural commodities.

Existing Part 35 will be repealed, and New Part 35 will become effective, as of December 31, 2011.

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Please feel free to contact us with any questions.

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