

CFTC PROPOSES EXTENSION AND MODIFICATION TO PREVIOUSLY ISSUED EXEMPTIVE RELIEF FROM SWAP REGULATIONS

May 14, 2012

To Our Clients and Friends:

On May 10, 2012, the Commodity Futures Trading Commission (the “CFTC”) issued a notice of proposed amendments (the “Proposed Amendment”) that would modify and extend previously granted exemptive relief with respect to certain provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Title VII”).¹ Comments are due on or before the 14th day after the publication of the Proposed Amendment in the Federal Register.

OVERVIEW

The Proposed Amendment would provide a six-month extension to the exemptive relief previously granted by the CFTC in a final order dated July 14, 2011² (the “July Order”), which was already amended and extended in December 2011.³ Without the Proposed Amendment, the previously granted exemption relief would expire on July 16, 2012. In the July Order, the CFTC exercised its exemptive authority under section 4(c) of the Commodity Exchange Act (the “CEA”) and section 712(f) of Title VII to address the concern that final, joint rulemakings from the CFTC and Securities and Exchange Commission (“SEC”) to define the terms “swap,” “security-based swap,” “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant” and “security-based swap agreement” (the “Entities and Products Definitions”) would not be completed by July 16, 2011, Title VII’s general effective date. According to the CFTC, the July Order was intended to mitigate potential market disruptions that could have resulted if various regulatory requirements mandated under Title VII were to be applied to agreements, contracts and transactions after July 16, 2011 in the absence of final rules for the Entities and Products Definitions.

¹ CFTC, *Second Amendment to July 14, 2011 Order for Swap Regulation* (May 10, 2012).

² *Effective Date for Swap Regulation*, 76 Fed. Reg. 42,508 (July 19, 2011).

³ *Amendment to July 14, 2011 Order for Swap Regulation*, 76 Fed. Reg. 80,233 (Dec. 23, 2011), which had extended the original exemption relief expiration date of the July Order from December 31, 2011 to July 16, 2012.

The Proposed Amendment would amend the July Order in four significant respects, each of which is discussed below.

FURTHER EXTENSION OF EXEMPTIVE RELIEF

First, and most importantly, the Proposed Amendment would further extend the expiration date of the July Order from July 16, 2012 to December 31, 2012, or such other compliance date as would be determined by the CFTC. Consistent with the July Order, this extension intends to “ensure that market practices will not be unduly disrupted during the transition to the new [swaps regulatory] regime.”

REMOVAL OF REFERENCES TO ENTITIES DEFINITIONS

Second, the Proposed Amendment clarifies that the exemptive relief provided in the July Order to various Title VII provisions pending the finalization of the definitions of “swap dealer,” “major swap participant,” and “eligible contract participant” is no longer applicable as the CFTC and SEC have since adopted final rules with respect to these terms.⁴

CLEARING OF AGRICULTURAL SWAPS

Third, the Proposed Amendment would amend the July Order to clarify that agricultural swaps, whether entered into bilaterally, on a designated contract market (“DCM”) or on a swap execution facility (“SEF”), may be cleared to the same extent that any other swap would be cleared without the need for further exemptive relief from the CFTC under section 4(c) of the CEA. According to the CFTC, this amendment would harmonize the July Order with the CFTC’s already-promulgated final rule ending the pre-Title VII prohibition against the clearing of agricultural swaps.⁵ Therefore, the Proposed Amendment confirms the CFTC’s intention that agricultural swaps may only be entered into or executed bilaterally, on a DCM, or on a SEF.

⁴ CFTC-SEC, *Further Definition of “Swap Dealer”, “Security-Based Swap Dealer”, “Major Swap Participant”, “Major Security-Based Swap Participant”, and “Eligible Contract Participant”* (issued Apr. 18, 2012) (to be codified at 17 CFR pt. 1), available at: <http://www.cftc.gov/ucml/groups/public/@newsroom/documents/file/federalregister041812b.pdf>.

⁵ *Agricultural Swaps*, 76 Fed. Reg. 49,291 (Aug. 10, 2011).

REMOVAL OF REFERENCES TO PREVIOUS RELIEF
GRANTED TO EXEMPT COMMERCIAL MARKETS
AND EXEMPT BOARDS OF TRADE

Finally, the Proposed Amendment would amend the July Order to remove any reference to a previous CFTC order (the “ECM/EBOT Grandfather Order”) that grandfathered relief from compliance with the general effective date of Title VII for exempt commercial markets (“ECMs”) and exempt boards of trade (“EBOTs”).⁶ After July 16, 2012, ECMs, EBOTS, and markets that relied on section 2(d)(2) of the CEA prior to the passage of the Dodd-Frank Act (“2(d)(2) Market Entities”) will no longer be able to rely on the ECM/EBOT Grandfather Order. Instead, these entities must rely on relief provided in the Proposed Amendment, which will itself expire upon the effective date of final rules relating to DCMs or SEFs, whichever is later, unless the ECM, EBOT or 2(d)(2) Market Entity files a DCM or SEF application on or prior to the effective date of such final rules (in which case relief would remain in place during the pendency of the application).

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Please feel free to contact us with any questions.

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⁶ *Orders Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade*, 75 Fed. Reg. 56,513 (Sept. 16, 2010).