

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Chapter 1**

**Effective Date for Swap Regulation**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Proposed Order and Request for Comment.

**SUMMARY:** Pursuant to section 754 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), the general effective date for certain provisions of subtitle A of title VII of the Dodd-Frank Act (“Title VII”) that do not require a rulemaking is 360 days after enactment, or July 16, 2011, unless another effective date is specifically provided. Following the general effective date, market participants may be subject to certain Commodity Exchange Act (“CEA” or “Act”) requirements but not others. To provide greater clarity regarding the applicability of various statutory and regulatory requirements, the Commodity Futures Trading Commission (“CFTC” or the “Commission”) is proposing to grant, pursuant to its section 4(c) exemptive authority, temporary relief in two parts with respect to various requirements of the CEA that apply or may apply to certain agreements, contracts, and transactions. In part one, the Commission is proposing to temporarily exempt persons or entities with respect to provisions of the CEA added or amended by the Dodd-Frank Act that reference one or more terms regarding entities or instruments that Title VII requires be “further defined,” such as the terms “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant,” to the extent that requirements or portions of such provisions specifically relate to such referenced terms. In part two, the Commission is

proposing to grant relief from certain provisions of the CEA that will or may apply to certain agreements, contracts, and transactions in exempt or excluded commodities as a result of the repeal of various CEA exemptions and exclusions as of July 16, 2011.

**DATES:** Comments must be received on or before [**insert date 14 days after publication in Federal Register**].

**ADDRESSES:** Comments may be submitted, referenced as “Effective Dates,” by any of the following methods:

- Agency website, via its Comments Online process: <http://comments.cftc.gov>. Follow the instructions for submitting comments through the website.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21<sup>st</sup> Street, NW, Washington, DC 20581.
- Courier: Same as mail above.

Please submit your comments using only one method. “Effective Dates” must be in the subject field of responses submitted via e-mail, and clearly indicated on written submissions. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to [www.cftc.gov](http://www.cftc.gov). You should submit only information that you wish to make available publicly. If you wish the CFTC to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in section 145.9 of the CFTC’s

regulations.<sup>1</sup>

The CFTC reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from [www.cftc.gov](http://www.cftc.gov) that it may deem to be inappropriate for publication, including obscene language. All submissions that have been redacted or removed that contain comments on the merits of this action will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Terry Arbit, Deputy General Counsel, 202-418-5120, [tarbit@cftc.gov](mailto:tarbit@cftc.gov), or Harold Hardman, Deputy General Counsel, 202-418-5120, [hhardman@cftc.gov](mailto:hhardman@cftc.gov), Office of the General Counsel, or Steven Kane, Consultant, 202-418-5911, [skane@cftc.gov](mailto:skane@cftc.gov), Office of the Chief Economist, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21<sup>st</sup> Street, NW, Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction.**

On July 21, 2010, President Obama signed the Dodd-Frank Act.<sup>2</sup> Title VII of the Dodd-Frank Act amends the CEA<sup>3</sup> to establish a comprehensive new regulatory framework for swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of swap dealers and major

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<sup>1</sup> 17 CFR 145.9.

<sup>2</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

<sup>3</sup> 7 U.S.C. 1 et seq.

swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commission with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight. Title VII also includes amendments to the federal securities laws to establish a similar regulatory framework for security-based swaps under the authority of the Securities and Exchange Commission ("SEC").

Section 754 of the Dodd-Frank Act provides that, unless otherwise provided, the provisions of subtitle A of Title VII<sup>4</sup> "shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provisions of this subtitle." The date 360 days after the date of enactment is July 16, 2011.

To implement the Dodd-Frank Act, the Commission has to-date issued 53 advance notices of proposed rulemaking or notices of proposed rulemaking, two interim final rules, one final rule, and one proposed interpretive order. The regulatory requirements that have been proposed by the Commission present a substantially complete mosaic of the Commission's proposed regulatory framework under Title VII. In light of this substantially complete mosaic, the Commission reopened or extended the comment period of many of its proposed rulemakings in order to provide the public with an additional opportunity to comment on the proposed new regulatory framework for

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<sup>4</sup> Subtitle A of Title VII contains two parts. Part I, entitled "Regulatory Authority," consists of sections 711-720; part II, entitled "Regulation of Swap Markets," consists of sections 721-754. Subtitle B of Title VII is entitled "Regulation of Security-Based Swap Markets," and consists of sections 761-774. References to "Title VII" in this Release shall include only subtitle A of Title VII.

swaps, either in part or as a whole.<sup>5</sup> The extended comment period closed on June 3, 2011. The Commission also has solicited public comments on phasing of rule implementation (i.e., identifying which requirements can be met sooner and which ones will take more time).<sup>6</sup>

## II. Background and Discussion.

Section 712(d)(1) of the Dodd-Frank Act requires the Commission and the SEC to further define certain terms used in Title VII, including the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant.”<sup>7</sup> Section 721(c) requires the Commission to adopt a rule to further define the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant” to prevent evasion of statutory and regulatory obligations.<sup>8</sup> The Commission has issued two notices of proposed rulemaking that address these definitions.<sup>9</sup>

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<sup>5</sup> See Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274, May 4, 2011.

<sup>6</sup> The Commission has noted its ability to phase in implementation of the new requirements based on factors such as: the type of swap, including by asset class; the type of market participants that engage in such trades; the speed with which market infrastructures can meet the new requirements; and whether registered market infrastructures or participants might be required to have policies and procedures in place ahead of compliance with such policies and procedures by non-registrants.  
<http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/staffconcepts050211.pdf>.

<sup>7</sup> Section 712(d) provides: “Notwithstanding any other provision of this title and subsections (b) and (c), the Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors [of the Federal Reserve System], shall further 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’ in section 1a(47)(A)(v) of the Commodity Exchange Act (7 U.S.C. 1a(47)(A)(v)) and section 3(a)(78) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(78)).”

<sup>8</sup> Section 721(c) provides: “To include transactions and entities that have been structured to evade this subtitle (or an amendment made by this subtitle), the Commodity Futures Trading Commission shall adopt a rule to further define the terms ‘swap’, ‘swap dealer’, ‘major swap participant’, and ‘eligible contract participant’.”

<sup>9</sup> See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 75 FR 80174, Dec. 21, 2010 (“Entity Definitions”) and Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based

The Commission's final rulemakings further defining the terms in sections 712(d) and 721(c) will not be in place as of July 16, 2011. Consequently, concerns have been raised about effects upon the swaps market during the period between July 16, 2011 and prior to the date(s) that those rulemakings have been completed. The Commission is proposing this relief to address these concerns and provide clarity to market participants upon the general effective date of the Dodd-Frank Act. The Commission reiterates its intent to "strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime."<sup>10</sup>

Section 712(f) of the Dodd-Frank Act authorizes the Commission to "promulgate rules, regulations, or orders permitted by this [Dodd-Frank] Act," conduct studies and prepare reports, register persons, and "exempt persons, agreements, contracts, or transactions from the provisions of the Act, under the terms contained in this Act," in order to prepare for the effective dates of the provisions of Title VII. Section 4(c) of the CEA, as amended by the Dodd-Frank Act, provides the Commission with authority to exempt certain agreements, contracts, and transactions that may otherwise be subject to the CEA from various provisions of the CEA.<sup>11</sup>

The provisions of Title VII can be grouped into 4 major categories: (1) provisions that require a rulemaking (for which relief is not being proposed); (2) self-effectuating provisions that reference terms that require further definition; (3) self-effectuating provisions that do not reference terms that require further definition and that repeal

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Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818, May 23, 2011.

<sup>10</sup> See Notice Regarding the Treatment of Petitions Seeking Grandfather Relief for Trading Activity Done in Reliance Upon Section 2(h)(1)-(2) of the Commodity Exchange Act, 75 FR 56512, 56513, Sept. 16, 2010 ("Grandfather Notice").

<sup>11</sup> 7 U.S.C. 6(c).

provisions of current law; and (4) self-effectuating provisions for which relief is not being proposed.

Section 754 specifies that unless otherwise provided in Title VII, provisions requiring a rulemaking become effective “not less than 60 days after publication of the final rule” (but not before July 16, 2011). Category 1 provisions, therefore, are not self-effectuating. A significant number of the Title VII provisions fall into this category. Examples of such provisions in Category 1 include new CEA section 4s(a) (governing registration of swap dealers and major swap participants), new CEA section 4s(e) (governing capital and margin requirements for swap dealers and major swap participants), and new CEA section 4s(h) (external business conduct standards for swap dealers and major swap participants).<sup>12</sup> The requirements in these provisions of the CEA will not become effective, at a minimum, until 60 days after publication of a final Commission rule (and not before July 16, 2011).

Because these provisions are not self-effectuating as of July 16, 2011, it is not necessary to provide relief with respect to Category 1 provisions as of July 16, and they are outside the scope of the proposed order. Similarly, Category 4 provisions also are outside the scope of the proposed order, and will go into effect on July 16, 2011.<sup>13</sup> Lists

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<sup>12</sup> 7 U.S.C. 6s(a), 6s(e) and 6s(h), respectively.

<sup>13</sup> Examples of Category 4 provisions include new CEA section 5b(c)(2), 7 U.S.C. 7a-1(c)(2) (core principles for derivatives clearing organizations (“DCOs”)); new CEA section 5(d), 7 U.S.C. 7(d) (core principles for designated contract markets); and new CEA sections 4c(a)(5)-(6), 7 U.S.C. 6c(a)(5)-(6) (certain anti-disruptive practices authority). To the extent that the Commission has issued proposed rulemakings to implement any Category 4 provisions, any requirements or guidance in such rulemakings will not become effective until the effective date of a final rulemaking.

In two cases, a Category 4 provision that amends the CEA references a term that requires further definition, but nevertheless, the Commission does not believe that it is appropriate to include the provision in the proposed order. These provisions are new CEA section 5b(g), 7 U.S.C. 7a-1(g) (depository institutions and SEC-registered clearing agencies clearing swaps prior to enactment are “deemed to be registered” as DCOs); and amended CEA section 22(a), 7 U.S.C. 25(a) (private right of action with respect to swaps).

of Category 1 and Category 4 provisions prepared by Commission staff will be published on the Commission's website.

The proposed relief discussed herein is considered in two parts, each addressing one of the remaining Categories noted above: (1) Category 2 – provisions that are self-effectuating (i.e., do not require rulemaking) and reference terms that require further definition (i.e., “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant”); and (2) Category 3 – provisions that are self-effectuating (i.e., do not require rulemaking) and repeal provisions of current law, but that do not reference terms that require further definition. These parts are discussed, in turn, in the sections that follow.

A. Part one: Category 2 – self-effectuating provisions referencing terms that require further definition.

Some provisions of Title VII that do not require a rulemaking and thus, under section 754, become effective on July 16, 2011, specifically reference the terms “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant” (or other entities or instruments) which themselves are the subject of rulemakings for further definition under sections 712(d) and 721(c) of the Dodd-Frank Act. As discussed above, the final rulemakings on these further definitions will not be in place by July 16, 2011.

In response to requests from market participants for greater clarity regarding the applicability of various regulatory requirements to certain agreements, contracts, and transactions (referred to hereafter collectively as “transactions”) following the general

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There also are provisions in Category 4 that reference a term that requires further definition, but that do not amend the CEA and thus are outside the scope of the Commission's exemptive authority under CEA Section 4(c). Such provisions in Title VII include, for example: (1) section 711 and much of section 712 (provisions regarding certain definitions and regulatory authority of CFTC and SEC); and (2) sections 724(b) and 725(g) (amending the Bankruptcy Code and the Legal Certainty for Bank Products Act of 2000, respectively).

effective date,<sup>14</sup> the Commission is proposing this temporary exemptive order pursuant to section 4(c) of the CEA. Specifically, for the Category 2 provisions described above, the Commission proposes to exempt persons and entities from the provisions of the CEA, as added or amended by the Dodd-Frank Act, that reference one or more of the terms regarding entities or instruments subject to further definition under sections 712(d) and 721(c) of the Dodd-Frank Act, including the terms “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant.”<sup>15</sup> The proposed exemptive relief from such provisions would apply only with respect to those requirements or portions of such provisions that specifically relate to such referenced terms.

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<sup>14</sup> See, e.g., Futures Industry Association, Petition for Exemption Pursuant to Section 4(c) of the Commodity Exchange Act (June 1, 2011) (requesting that the Commission “adopt an order pursuant to section 4(c) of the [CEA] exempting such Clearing Members from the requirements of section 4d(f) of the CEA, as added by section 724 of [the Dodd-Frank Act], for a period of not less than 30 calendar days, beginning July 16, 2011, the effective date of many provisions of the Dodd-Frank Act, and ending not before August 15, 2011”) (footnote omitted). New CEA section 4d(f), 7 U.S.C. 7d(f), falls within Category 2 discussed above.

See also (1) Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, Securities Industry and Financial Markets Association, and U.S. Chamber of Commerce, Request for Clarification and Relief Under Sections 754 and 739 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; Petition for Exemption Pursuant to Section 4(c) of the Commodity Exchange Act, (June 10, 2011); (2) The Financial Services Roundtable, Letter re. Automatically Effective Provisions under Title VII of the Dodd-Frank Act, Application for Exemption Pursuant to Section 4(c) of the Commodity Exchange Act and Section 712(f) Pending Effectiveness of Final Rulemaking (June 10, 2011); (3) National Grain and Feed Association, Letter re. Status of Options on Agricultural Commodities Entered Into After July 16, 2011 (June 7, 2011); and (4) Paul Pantano on behalf of Commodity Options and Agricultural Swaps Working Group, Letter re. Transition Exemption for Options on Agricultural Commodities Entered Into After July 15, 2011 (June 6, 2011).

<sup>15</sup> The Commission’s authority to provide exemptive relief under CEA section 4(c), as amended by section 721(d) of the Dodd-Frank Act, may not extend to certain Category 2 provisions of the Dodd-Frank Act and the CEA. These provisions include: new CEA section 4s(l), 7 U.S.C. 6s(l) (providing for swap dealer segregation requirements with respect to uncleared swaps); amended CEA section 5b(a), 7 U.S.C. 7a-1(a) (prohibiting a DCO from performing the functions of a DCO with respect to swaps unless the DCO is registered with the Commission); and new CEA section 4s(k), 7 U.S.C. 6s(k) (providing for the duties and designation of a chief compliance officer for swap dealers and major swap participants). As such, these provisions will take effect on July 16, 2011, and may not be subject to the exemptive relief noted above granted by the Commission. The Commission staff has informed the Commission that it is separately considering whether to issue a no-action letter in which the staff would state that it would not recommend that the Commission commence an enforcement action against markets or market participants for failure to comply with the above-referenced provisions over a similar time period.

This proposed relief would not in any way limit the Commission's authority with respect to any person, entity, or transaction pursuant to CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2), or 13, or the regulations of the Commission promulgated pursuant to such authorities, including CEA section 4c(b) proscribing fraud.<sup>16</sup> This relief would not apply to any provisions of Title VII and the CEA that have become effective prior to July 16, 2011<sup>17</sup> or Commission regulations already issued. Further, this relief would not affect any effective date set out in any specific Dodd-Frank Act rulemaking by the Commission. In addition, the proposed order would not limit the Commission's authority under section 712(f) of the Dodd-Frank Act to issue rules, orders, or exemptions prior to the effective date of any provision, in order to prepare for the effective date of such provision, provided that such rule, order, or exemption shall not become effective prior to the effective date of the provision. Finally, this proposed order would not affect the applicability of any provision of the CEA to futures contracts or options on futures contracts.<sup>18</sup>

The proposed temporary exemptive relief would expire upon the earlier of: (1) the effective date of the applicable final rule further defining the relevant term; or (2)

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<sup>16</sup> The Dodd-Frank Act amended the CEA's anti-fraud and anti-manipulation provisions, including CEA section 4b, to cover "swaps." Although these provisions therefore would, under the proposed relief, not apply to "swaps" under the Dodd-Frank Act because that term is subject to further definition, nevertheless, they will apply to all transactions other than "swaps" (including, but not limited to, futures contracts, options on futures contracts, transactions with retail customers in foreign currency or other commodities pursuant to CEA section 2(c)(2) (7 U.S.C. 2(c)(2)), and transactions subject to exemptive relief pursuant to part two of the proposed order).

<sup>17</sup> See, e.g., section 737(d) of the Dodd-Frank Act (amendments regarding position limits effective on the date of enactment). Similarly, this relief would not affect the effective date of any provision that may become effective after July 16, 2011, such as section 716 of the Dodd-Frank Act.

<sup>18</sup> Accordingly and by way of non-exclusive example, where a provision references both swaps and futures, this relief does not affect in any way the application of the provision (and any implementing Commission regulations thereunder) insofar as it refers to futures.

December 31, 2011. The Commission is proposing to limit this proposed relief to no more than a fixed period—i.e. December 31, 2011—for several reasons.

First, the Commission believes it appropriate and prudent to periodically review the extent and scope of any relief provided from the CEA, as amended by the Dodd-Frank Act. The Commission anticipates that additional rulemakings to implement the Dodd-Frank Act will be completed during this period of transitional relief. During this period the Commission also will be considering the appropriate phase-in of the various regulatory requirements under the Dodd-Frank rulemakings. Accordingly, the Commission believes it would be appropriate to periodically re-examine the scope and extent of the proposed exemptive relief in order to ensure that the scope of relief is appropriately tailored to the schedule of implementation of the Dodd-Frank Act requirements.<sup>19</sup>

Second, the limitation of this exemptive relief to no more than a fixed period of time is consistent with similar limitations on transitional relief provided by the Congress elsewhere in Title VII. Section 723(c) of the Dodd-Frank Act allows persons to submit petitions to the Commission “to remain subject to section 2(h) of the [CEA].”<sup>20</sup> In acting upon such petitions, the Commission may allow persons to “continue operating subject to section 2(h) [of the CEA] for not longer than a 1-year period.” Similarly, section 734 authorizes the Commission to grant petitions for persons to remain subject to the provisions of section 5d of the CEA governing the operation of exempt boards of trade

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<sup>19</sup> The Commission adopted a similar approach in not granting “grandfather” relief with respect to transactions being conducted under CEA sections 2(h)(1) and (2), 7 U.S.C. 2(h)(1) and (2): “Until the contents and timing of the Commission’s regulations affecting bilateral swaps are better known, however, the Commission has determined not to grant grandfather relief as it is impossible to know at this time whether such relief will be necessary.” See Grandfather Notice, 75 FR at 56513.

<sup>20</sup> 7 U.S.C. 2(h).

(“EBOTs”) “for up to 1 year after the effective date of this subtitle.”<sup>21</sup> In light of these provisions authorizing the Commission to provide transitional relief for no longer than a fixed period of time, the Commission believes it would be appropriate to provide transitional relief consistent with section 712(f) of the Dodd-Frank Act and CEA section 4(c) under this proposed order for no longer than a fixed time period.

The Commission nonetheless reiterates its intent that existing practices should not be unduly disrupted during any transition period. Moreover, the Commission reiterates its intent to deliberately and efficiently proceed to complete the rulemakings to implement the Dodd-Frank Act. In the event that a further definitions rulemaking is completed prior to December 31, 2011, the Commission will at that time address the appropriate phase-in and implementation dates of the resulting regulatory requirements. Alternatively, should the proposed order expire at the end of the fixed time period—December 31, 2011—such expiration will not affect the Commission’s ability to provide further relief, as appropriate, to avoid undue disruption or costs to market participants.

B. Part two: Category 3 – provisions that are self-effectuating and repeal provisions of current law but that do not reference terms that require further definition.

Currently, the CEA includes provisions that exclude or exempt, in whole or in part, certain transactions from Commission oversight under the CEA. These are as follows:

- i. Section 2(d)(1),<sup>22</sup> transactions in excluded commodities<sup>23</sup> between eligible contract participants and not executed or traded on a trading facility;

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<sup>21</sup> 7 U.S.C. 7a-3.

<sup>22</sup> 7 U.S.C. 2(d)(1).

<sup>23</sup> The term “excluded commodity” is defined in CEA section 1a(13), 7 U.S.C. 1a(13), to include, among other things, financial instruments such as a currency, interest rate, or exchange rate, or any economic or

- ii. Section 2(d)(2),<sup>24</sup> principal-to-principal transactions in excluded commodities between certain eligible contract participants and executed or traded on an electronic trading facility;
- iii. Section 2(g),<sup>25</sup> transactions subject to individual negotiation between eligible contract participants in commodities other than agricultural commodities and not executed or traded on a trading facility;
- iv. Sections 2(h)(1)-(2),<sup>26</sup> transactions in exempt commodities<sup>27</sup> between eligible contract participants and not entered into on a trading facility;
- v. Sections 2(h)(3)-(7),<sup>28</sup> principal-to-principal transactions in exempt commodities between eligible commercial entities (“ECEs”)<sup>29</sup> and executed or traded on an electronic trading facility (called exempt commercial markets, or “ECMs”);
- vi. Section 5d,<sup>30</sup> transactions in commodities, among other things, having a nearly inexhaustible deliverable supply or no cash market, between eligible contract participants and traded on an EBOT; and
- vii. Section 2(e),<sup>31</sup> which generally provides that nothing in the CEA governs or is applicable to an electronic trading facility that limits transactions authorized to be conducted on its facilities to those satisfying the requirements of sections 2(d)(2), 2(g) or 2(h)(3).

Under the Dodd-Frank Act, these provisions all will be removed from the CEA as of July 16, 2011. However, part 35 of the Commission’s regulations will continue to be available with respect to transactions that meet the conditions therein, until such time as it may be withdrawn, amended, or replaced by the Commission.

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commercial index based on prices, rates, values, or levels that are not within the control of any party to the transaction.

<sup>24</sup> 7 U.S.C. 2(d)(2).

<sup>25</sup> 7 U.S.C. 2(g).

<sup>26</sup> 7 U.S.C. 2(h)(1)-(2).

<sup>27</sup> The term “exempt commodity” is defined in CEA section 1a(14), 7 U.S.C. 1a(14), as a commodity other than an excluded or agricultural commodity, and includes energy and metals commodities.

<sup>28</sup> 7 U.S.C. 2(h)(3)-(7).

<sup>29</sup> The term “eligible commercial entity” is defined in CEA section 1a (11), 7 U.S.C. 1a(11).

<sup>30</sup> 7 U.S.C. 7a-3.

<sup>31</sup> 7 U.S.C. 2(e).

Part 35 originally was promulgated in 1993 pursuant to the Commission's general exemptive authority in CEA section 4(c), and provides a broad-based exemption from the CEA for "swap agreements" in any commodity. Specifically, part 35 exempts "swap agreements," as defined therein, from most of the provisions of the CEA if: (1) they are entered into by "eligible swap participants" ("ESPs");<sup>32</sup> (2) they are not part of a fungible class of agreements standardized as to their material economic terms;<sup>33</sup> (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, cost, or credit enhancement terms;<sup>34</sup> and (4) they are not entered into or traded on a multilateral transaction execution facility.<sup>35</sup> Accordingly, transactions that fully meet the conditions of part 35 are outside the scope of the proposed order.<sup>36</sup>

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<sup>32</sup> The parties covered under the ESP definition, while very broad, are not coextensive with those covered by the terms "ECE" or "eligible contract participant." Therefore, it is possible that a small segment of persons or entities that are currently relying on one or more of the CEA exclusions or exemptions cited above might not qualify as an ESP and consequently would not be eligible for exemptive relief under part 35.

<sup>33</sup> This condition was designed so that the exemption would not establish "a market in swap agreements, the terms of which are fixed and are not subject to negotiation that functions essentially in the same manner as an exchange but for the bilateral execution of transactions." See Exemption for Certain Swap Agreements, 58 FR 5587, at 5590, Jan. 22, 1993.

<sup>34</sup> By this condition, the exemption does not extend to transactions that are subject to a clearing system where the credit risk of individual members of the system to each other in a transaction to which each is a counterparty is effectively eliminated and replaced by a system of mutualized risk of loss that binds members generally whether or not they are counterparties to the original transaction. Id. at 5591.

<sup>35</sup> In this context, a multilateral transaction execution facility is a physical or electronic facility in which all market makers and other participants that are members simultaneously have the ability to execute transactions and bind both parties by accepting offers which are made by one member and open to all members of the facility. Id.

<sup>36</sup> Similarly, part 32 of the Commission's regulations will continue to be available with respect to commodity option transactions that meet the conditions therein, until such time as part 32 may be withdrawn, amended, or replaced by the Commission. See Commodity Options and Agricultural Swaps, 76 FR 6095, Feb 3, 2011.

However, because part 35 covers essentially non-standardized, non-cleared, non-exchange traded transactions, certain persons or entities that currently rely on the CEA exclusions or exemptions cited above may not qualify for part 35. In response to requests from market participants for greater clarity regarding the applicability of various statutory and regulatory requirements to certain transactions following the general effective date, the Commission, pursuant to its authority under section 4(c) of the CEA, is proposing to grant relief for those transactions that satisfy the conditions specified below.

Specifically, the Commission is proposing to temporarily exempt a transaction in exempt or excluded commodities (and any person or entity offering or entering into such transaction) from the CEA (other than the anti-fraud and anti-manipulation enforcement provisions identified below) following the general effective date if the transaction otherwise would comply with part 35, notwithstanding that: (1) the transaction may be executed on a multilateral transaction execution facility; (2) the transaction may be cleared; (3) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA (prior to July 16, 2011); (4) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (5) no more than one of the parties to the transaction is entering into the transaction in conjunction with its line of business, but is neither an eligible contract participant nor an ESP, and the transaction was not and is not marketed to the public (the “line of business provision”).<sup>37</sup>

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<sup>37</sup> Commenters responding to the Commission’s proposed Entity Definitions have suggested that the Commission should exercise its authority to further define the term “eligible contract participant” to encompass the “line of business” provision that was a part of the Commission’s Policy Statement Concerning Swap Transactions, 54 FR 30694, 30696-30697, July 21, 1989. The staff is evaluating these comments in the context of the Commission’s rulemaking to further define the term “eligible contract participant.”

As noted above, this proposed temporary exemptive relief would not affect the availability of either part 35 or part 32 with respect to transactions that fully meet the conditions therein.<sup>38</sup> For transactions that fall outside of existing part 35 or part 32, this relief would only be available to the extent those transactions (and persons offering or entering into such transactions) fall within the scope of any of the existing CEA sections 2(d), 2(e), 2(g), 2(h), and 5d as in effect prior to July 16, 2011<sup>39</sup> or the line of business provision.

With respect to any transaction within the scope of the proposed order, the proposed exemptive relief would not in any way limit the Commission's authority with respect to any person, entity, or transaction pursuant to CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2) or 13, or the regulations of the Commission promulgated pursuant to such authorities, including CEA section 4c(b) proscribing fraud.<sup>40</sup> Additionally, this proposed relief would not affect any Dodd-Frank Act implementing regulations (and any implementation period contained therein) that the Commission promulgates and applies to the subject transactions, market participants, or markets.<sup>41</sup>

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<sup>38</sup> In September 2010, the Commission published an order in the Federal Register providing that it would extend grandfather relief to ECMs and EBOTs provided that certain conditions are met. See Order Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade, 75 FR 56513, Sept. 16, 2010. Nothing in this proposed order is intended to impact the availability of this grandfather relief.

<sup>39</sup> This exemptive relief would not be available to an electronic trading facility that, as of July 15, 2011, is not already operating as an ECM pursuant to CEA sections 2h(3)-(7), or to an EBOT that, as of July 15, 2011, is not already operating pursuant to CEA section 5d, or not compliant with the conditions set forth in such provisions.

<sup>40</sup> As discussed above, the addition of the term "swap" to some of these provisions would not in any way affect the applicability of these anti-fraud and anti-manipulation enforcement provisions to transactions subject to relief pursuant to part two of the proposed order.

<sup>41</sup> Further, the proposed order would not affect any Commission rulemaking authority over agreements, contracts, or transactions that may not depend on the terms subject to further definition under sections 712(d) or 721(c) of the Dodd-Frank Act. This relief also would not affect any provisions of the Dodd-Frank Act or the CEA that have become effective prior to July 16, 2011 or regulations already issued.

This proposed temporary exemptive relief would expire upon the earlier of: (1) December 31, 2011; or (2) the repeal or replacement of part 35 or part 32, as applicable. The Commission is proposing to provide this exemptive relief in part two of the proposed order for no longer than a fixed period of time for the same reasons as described above with respect to part one of the proposed order.

### **III. Section 4(c) of the Commodity Exchange Act.**

Section 4(c)(1) of the CEA<sup>42</sup> authorizes the CFTC to exempt any transaction or class of transactions (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the transaction) from any of the provisions of the CEA (subject to certain exceptions). Pursuant to section 4(c)(2), the Commission must determine that: (1) the exemption is appropriate for the transactions and consistent with the public interest; (2) the exemption is consistent with the purposes of the CEA; (3) the transaction will be entered into solely between “appropriate persons;”<sup>43</sup> and (4) the exemption will not have a material adverse effect on the ability of

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<sup>42</sup> Section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 5 of this Act) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (C)(ii) and (D) of section 2(a)(1), except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D)), if the Commission determines that the exemption would be consistent with the public interest.

<sup>43</sup> CEA Section 4(c)(3), 7 U.S.C. 6(c)(3), includes within the term “appropriate persons” a number of specified categories of persons deemed appropriate under the CEA for entering into transactions exempted by the Commission under section 4(c). This includes persons the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.<sup>44</sup> The Commission may grant such an exemption by rule, regulation or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative. Further, the Commission may grant such an exemption either conditionally or unconditionally, or for stated periods within the Commission's discretion. Finally, section 712(f) of the Dodd-Frank Act authorizes the Commission to "exempt persons, agreements, contracts, or transactions from the provisions of the [Dodd-Frank] Act, under the terms contained in" the Dodd-Frank Act, in order to prepare for the effective dates of the provisions of Title VII.

In enacting section 4(c), Congress noted that the goal of the provision "is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner."<sup>45</sup> The proposed relief is intended to provide clarity and stability to the markets and market participants concerning the applicability of the provisions of the CEA, as added or amended by the Dodd-Frank Act (in part one), and the current provisions of the CEA as repealed by the Dodd-Frank Act (in part two), upon

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<sup>44</sup> CEA Section 4(c)(2), 7 U.S.C. 6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that--

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

<sup>45</sup> House Conf. Report No. 102-978, 1992 U.S.C.C.A.N. 3179, 3213.

the general effective date of the Dodd-Frank Act, thereby avoiding or minimizing undue and unwarranted disruptions to the markets.

The Commission notes that the proposed order is temporary in scope and reserves the Commission's anti-fraud and anti-manipulation enforcement authority. As such, the Commission believes that the proposed order would be consistent with the public interest and purposes of the CEA. The Commission also believes the order to be limited to appropriate persons, including persons in current registration categories for which the Dodd-Frank Act expanded the definition to include activities relating to swaps (e.g., introducing brokers, commodity pool operators, commodity trading advisors, and associated persons thereof).<sup>46</sup> The proposed order will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.

The Commission seeks comment on whether the proposed temporary exemptions are consistent with the public interest and other requirements of CEA section 4(c).

#### **IV. Request for Comment.**

The Commission requests comment on all aspects of this proposed temporary exemptive order.

#### **V. Related Matters.**

##### **A. Paperwork Reduction Act.**

The Paperwork Reduction Act ("PRA")<sup>47</sup> imposes certain requirements on federal

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<sup>46</sup> See CEA section 4(c)(3)(K), 7 U.S.C. 6(c)(3)(K) (appropriate persons may include such "other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections").

<sup>47</sup> 44 U.S.C. 3507(d).

agencies (including the Commission) in connection with conducting or sponsoring any collection of information as defined by the PRA. This proposed temporary exemptive order, if approved, would not require a new collection of information from any persons or entities that would be subject to the proposed order.

**B. Cost-Benefit Analysis.**

Section 15(a) of the CEA<sup>48</sup> requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, section 15(a) simply requires the Commission to “consider the costs and benefits” of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

1. Protection of market participants and the public.

As discussed above, the Commission is proposing that the scope of this temporary exemptive relief be limited to persons who are “appropriate persons” as set forth in section 4(c) of the Act. Further, this proposal does not affect the Commission’s existing

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<sup>48</sup> 7 U.S.C. 19(a).

and future anti-fraud and anti-manipulation authorities, including CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2), or 13, or the regulations of the Commission promulgated pursuant to such authorities, including section 4c(b) proscribing fraud. The Commission believes that market participants and the public will benefit from the clarity offered by the proposed temporary exemptive relief, while maintaining the Commission's authorities regarding the prevention and deterrence of fraud and manipulation. With respect to costs, the Commission believes that the exemptive relief imposes no affirmative duties or obligations on market participants and the public. The temporary exemptive relief does not contain any requirement to create, retain, submit, or disclose any information. Furthermore, the exemptive relief imposes no recordkeeping or related data retention or disclosure requirements on any person, including small businesses. Consequently, the Commission finds it unlikely that the exemptive relief will impose any additional costs beyond the existing costs associated with ongoing operations, including those that ensure that behavior and statements are not fraudulent or manipulative.

2. Efficiency, competition, and financial integrity.

Although the Dodd-Frank Act establishes a comprehensive new regulatory framework for swaps, the Commission's work to implement that framework will not be complete as of July 16, 2011. Accordingly, this relief offers the benefit of greater clarity in the swaps market that is in the interest of both the markets and the public.

Accordingly, the Commission believes that this temporary exemptive relief is an appropriate measure to facilitate a transition to the comprehensive new regulatory

framework for swaps set out in Title VII of the Dodd-Frank Act. Such an orderly transition will promote market efficiency, competition, and financial integrity.

3. Price discovery.

As stated above, the temporary relief proposed here is designed to maintain the functioning of the markets until such time as the comprehensive new regulatory framework for swaps set forth in the Dodd-Frank Act is in place. With the clarity offered by the proposed exemptive relief, markets would function better as venues for price discovery.

4. Sound risk management practices.

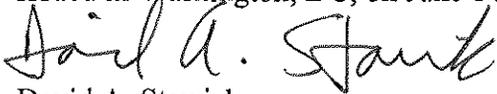
Appropriate persons covered by this proposal would be subject to the Commission's full array of existing anti-fraud and anti-market manipulation provisions and certain new authorities provided under the Dodd-Frank Act. Market participants and the public will benefit substantially from the continuing protection through the prevention and deterrence of fraud and manipulation. Markets protected from fraud and manipulation function better as venues for price discovery and risk management.

5. Other public interest considerations.

The proposed exemptive order is temporary and limited. It would not affect the applicability of any provision of the CEA to futures contracts, options on futures contracts, or transactions with retail customers in foreign currency or other commodities pursuant to CEA section 2(c)(2). Further, it would expire at an appropriate date, as discussed above. The expiration provision would permit the Commission to ensure that the scope and extent of exemptive relief is appropriately tailored to the schedule of implementation of the Dodd-Frank Act requirements.

After considering these factors, the Commission has determined to seek comment on the proposed temporary exemptive order, as discussed above. The Commission seeks comment on all aspects of the foregoing proposed application of the cost-benefit considerations set forth in CEA section 15(a). Commenters also are invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposal with their comment letters.

Issued in Washington, DC, on June 14, 2011 by the Commission.



David A. Stawick  
Secretary of the Commission

Appendices to Effective Date for Swap Regulation—Commission Voting Summary and Statements of Commissioners

NOTE: The following appendices will not appear in the Code of Federal Regulations

Appendix 1- Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O'Malia voted in the affirmative; no Commissioner voted in the negative.

Appendix 2- Statement of Chairman Gary Gensler

I support the proposed order regarding the effective dates of certain Dodd-Frank Act provisions.

The Dodd-Frank Act has a deadline of 360 days after enactment for completion of the bulk of our rulemakings – July 16, 2011. Both the Dodd-Frank Act and the Commodity Exchange Act (CEA) give the CFTC the flexibility and authority to address the issues

relating to the effective dates of Title VII. We have coordinated closely with the SEC on these issues.

Section 754 of the Dodd-Frank Act states that Subtitle A of Title VII – the Subtitle that provides for the regulation of swaps – “shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provisions of this subtitle.”

Thus, those provisions that require rulemakings will not go into effect until the CFTC finalizes the respective rules. This is a substantial portion of the derivatives provisions under Dodd-Frank. Furthermore, they will only go into effect based on the phased implementation dates included in the final rules. Today we are releasing a list of the provisions of the swaps subtitle that require rulemakings.

There are other provisions of Title VII that do not require rulemaking and will take effect on July 16. The proposed order that we are considering today would provide relief until December 31, 2011, or when the definitional rulemakings become effective, whichever is sooner, from certain provisions that would otherwise apply to swaps or swap dealers on July 16. This includes provisions that do not directly rely on a rule to be promulgated, but do refer to terms that must be further defined by the CFTC and SEC, such as “swap” and “swap dealer.”

The proposed order also would provide relief through no later than December 31, 2011, from certain CEA requirements that may result from the repeal, effective on July 16, 2011, of some of sections 2(d), 2(e), 2(g), 2(h) and 5d.

There have been suggestions to delay implementation of the derivatives reforms included in the Dodd-Frank Act. That is not what today's proposed order is. Instead, it provides the time necessary for the Commission to complete the rulemaking process to implement the Dodd-Frank Act.

Some might ask: why six months? Six months will provide the Commission with the opportunity to re-examine the status of final rulemaking in light of the changed regulatory landscape at the time. It would allow us, if appropriate at the time, to tailor relief from certain provisions of the Dodd-Frank Act at the end of the year.

It is important to note, however, that until the CFTC completes its rule-writing process and implements and enforces those new rules, the public remains unprotected.

#### Appendix 3- Statement of Commissioner Bart Chilton

I concur with the Commission's decision today to provide needed relief with regard to provisions of the Wall Street Reform and Consumer Protection Act that go into effect on July 16, 2011. I believe, however, that the precise nature of this relief must be developed utilizing an iterative process with affected parties to ensure that essential legal certainty is provided to the markets and to market participants. I will not support any final rule on

this issue that does not provide clear and unequivocal guidance regarding the legality of transactions and the required responsibilities under the Act. In addition, this relief must be issued promptly, in order to ensure that there is no gap in the effective date of the Act's provisions and the common understanding of the effectiveness of those dates.