

COMMODITY FUTURES TRADING COMMISSION

**ORDER OF THE COMMODITY FUTURES TRADING COMMISSION
RELATING TO THE CONTINUATION, SHUTDOWN, AND RESUMPTION OF
CERTAIN COMMISSION OPERATIONS IN THE EVENT OF A LAPSE IN
APPROPRIATIONS**

AGENCY: Commodity Futures Trading Commission

ACTION: Notice of order; final order.

SUMMARY: This order is being issued to provide for the continuation, shutdown, and resumption of certain operations of the Commodity Futures Trading Commission in the event of a lapse in appropriations, and to alert all persons regulated by or engaged in proceedings at the Commodity Futures Trading Commission of these provisions.

DATES: This notice and order is effective on **April 8, 2011**

FOR FURTHER INFORMATION CONTACT: For market oversight matters contact Richard A. Shilts, Acting Director, Division of Market Oversight, 202-418-5275, rshilts@cftc.gov. For clearing and intermediary matters, contact John Lawton, Deputy Director, jlawton@cftc.gov, 202-418-5480; Thomas Smith, Deputy Director, tsmith@cftc.gov, 202-418-5495; or Robert Wasserman, Associate Director, rwasserman@cftc.gov, 202-418-5092 in the Division of Clearing and Intermediary Oversight.

SUPPLEMENTARY INFORMATION:

I. Background.

As of 12:01 a.m. on April 9, 2011, the continuing resolution that funds many federal government activities is set to expire. Unless additional appropriations are enacted, federal departments and agencies whose continued operations are dependent

upon such funding—including the Commodity Futures Trading Commission (the “Commission”)—will be required to execute contingency plans for this lapse in appropriations (commonly referred to as a “shutdown”). Under 31 U.S.C. 1341 (the “Anti-Deficiency Act”), the Commission is prohibited from expending or obligating any funds in the absence of appropriations, subject to a narrow set of exceptions.¹ One exception that applies to the Commission is “emergencies involving the safety of human life or the protection of property.”² It has been recognized that certain commodity market functions may continue during a lapse in appropriations.³ Thus, the Commission has designated certain essential personnel to fulfill its obligation to protect property.

The Commission’s regulations place a number of filing obligations on registered entities, intermediaries, market participants and the public within specified time frames and also include provisions relating to requests for Commission approval and issuance of exemption and interpretative relief and guidance with specific time frames for

¹ The Anti-Deficiency Act provides that an officer or employee of the United States may not:

- (A) make or authorize an expenditure or obligation exceeding an amount in an appropriation or fund for the expenditure or obligation;
- (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
- (C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or
- (D) involve [the] government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

² 31 U.S.C. 1342 provides:

An officer or employee of the United States Government . . . may not accept voluntary services for [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . . As used in this section, the term “emergencies involving the safety of human life or the protection of property” does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

³ Memorandum from Walter Dellinger, Assistant Attorney General, Department of Justice, Office of Legal Counsel, to Alice Rivlin, Director, Office of Management and Budget, Aug. 16, 1995, at 2-3.

Commission action. The Commission has reviewed its rules in light of its obligation to protect property to determine which obligations will continue to apply during a lapse in appropriation.

A. Tolling and Extension of Certain Procedural Time Limits.

In the event of a lapse in appropriations, the Commission will not be officially receiving, processing, or reviewing filings for Commission approval or action that are not directly related to the protection of property. Matters not directly related to the protection of property include rule, rule amendment, and contract certifications, except for emergency rules certified pursuant to regulation 40.6(a)(2); rules, rule amendments and contracts voluntarily submitted for Commission approval; requests for contract market designation and derivatives clearing organization and derivatives trade execution facilities registration; and other requests for Commission approval or relief. The above-mentioned matters do not include any emergency notifications that may be required by Commission regulations of registered entities and intermediaries, or that are required by any rule of a registered entity that has been approved by or self-certified to the Commission.

More specifically, matters not directly related to the protection of property include filings under regulation 1.47 and regulation 1.48 (bona fide hedge requests), part 36 (notification filings and information on trading), part 37 (derivatives trading execution facility applications, certifications of continued compliance in situations of merger or sale, and demonstrations of compliance with the core principles), part 38 (designated contract market applications, certifications of continued compliance in situations of merger or sale, and demonstrations of compliance with the core principles), part 39

(derivatives clearing organization applications, requests for orders regarding competition, and demonstrations of compliance with the core principles), part 40 (rule and contract filings (both certifications and approvals and requests for confidential treatment of submissions)), part 41 (filing of notice-designated contract markets trading security futures products), regulations 145.7 and 145.9 requests (requests for Commission records, petitions for confidential treatment of information submitted to the Commission, and appeals of FOIA decisions), regulation 140.99 filings (requests for exemptive, no-action and interpretive letters), and petitions for grandfather relief under section 734 of the Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) pursuant to the Commission’s order that became effective on September 10, 2010.⁴ For matters that are currently pending before the Commission pursuant to any of these provisions, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations.

Matters not directly related to the protection of property also include certain procedural rules associated with Commission adjudicatory actions, in particular certain rules under part 3 (procedure to deny, condition, or suspend, revoke, or place restrictions on registration), part 9 (related to review of exchange disciplinary, access denial or other adverse actions), part 10 (the Commission’s rules of practice for adjudicatory proceedings before the Commission), part 12 (rules related to reparations proceedings), and part 171 (review of National Futures Association decisions). For these matters that are currently pending before the Commission pursuant to any of these provisions, all applicable time deadlines for Commission action will be tolled until the Commission is

⁴ See Orders Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade, 75 FR 56513, Sep. 16, 2010.

able to resume full operations. Moreover, all applicable time deadlines for parties to an adjudicative proceeding that arise during a lapse in appropriations will be extended until one business day after the Commission resumes its full operations.

B. Continued Operation of Certain Agency Regulations.

The Commission's regulations also impose filing obligations on registered entities, intermediaries, market participants and the public. The Commission has determined that certain filing requirements will remain in effect in order for the Commission to fulfill its obligation to protect property even during a lapse of appropriations. Accordingly, such filing requirements will continue to be in effect during ~~the lapse in appropriations and such filings will continue to be received and processed.~~

This category includes regulation 1.10 filings (financial reports of futures commission merchants (FCMs) and introducing brokers (IBs)), regulation 1.12 filings (notice provisions required of FCMs and IBs), regulation 1.17 filings (capital requirements (business days would include those days the Commission is shutdown for purposes of requirements relating to margin calls and the computation of margin) and any notice provision requirements)),⁵ regulation 1.32 filings (segregation calculation (business days would include those days the Commission is shutdown for purposes of requirements related to segregation)), regulation 1.65 filings (notice of bulk transfers (a business day would include those days the Commission is shutdown)), and regulation 30.7 filings (formal secured amount requirements (a business day would include those days the Commission is shutdown)). For these regulations, the business day requirements will not be affected by a lapse in appropriations. Also in this category are part 15 filings (general

⁵ Generally, the Commission's regulations define business day to exclude only Saturday, Sunday, and federal holidays. Thus, the shutdown would not affect the operation of these rules.

reporting requirements), part 16 filings (clearing member reports), part 17 filings (FCM reports), part 18 filings (reports by traders), part 19 filings (bona fide hedge position reports), part 21 filings (special call provisions), and regulation 40.6 filings (emergency rules of a registered entity).

The Commission's regulations require and industry practice provides for notification to the Commission and its staff of certain emergency situations. Thus registered entities and intermediaries should continue to provide the Commission notice of emergency situations such as system malfunctions, cyber security incidents or financial emergencies throughout a lapse in appropriations.

~~C. Extension of Open Comment Periods on Proposed Regulation and Other Matters that may be Subject to a Request for Comment by the Commission.~~

Finally, the Commission has proposed a number of rules to implement the Dodd-Frank Act for which the comment period may expire while the Commission is shutdown. The Commission will be unable to officially receive and process comment submissions until it resumes full operations. Therefore, the Commission is extending the comment periods for such rules, and for any other matters that may be subject to a request for comment by the Commission, until one business day after the Commission is able to resume full operations. Notice of the lifting of a shutdown will be provided on the Commission's website.

II. ADMINISTRATIVE COMPLIANCE

A. Administrative Procedure Act.

To the extent that some of the provisions of this order may be subject to notice and comment under the Administrative Procedure Act ("APA"),⁶ and may be subject to

⁶ See 5 U.S.C. 553(b).

the provisions of the APA that require publication or service of a substantive rule be made not less than 30 days before its effective date,⁷ the Commission for good cause finds that notice and comment and a delayed effective date are impracticable and contrary to the public interest. The Commission may be obligated to commence orderly shutdown of its operations at the commencement of business on April 11 and has determined that it is in the interest of the public and the markets it regulates to have established and publicized its procedures for limiting its operations to only those that are essential to the protection of property before that time.

Moreover, though the tolling of certain procedural time limits will delay the Commission's review and approval of certain industry filings, the review and approval provisions in the Commission's regulations implement review and approval provisions of the Commodity Exchange Act ("CEA") in order to protect the public interest. It would be contrary to the CEA, and to the public interest, if these review and approval time limits continued to run while the Commission is unable to conduct routine business.

Finally, in order to protect the property interests of the public related to the orderly operation of the futures markets, the Commissioners will be supported by essential personnel in the surveillance of the markets in order to identify any emergency market situations that may require action to protect property during a lapse in appropriations. It therefore is essential that reporting regulations associated with market surveillance and emergency notices continue to operate.

B. Paperwork Reduction Act.

⁷ See 5 U.S.C. 553(d).

The Paperwork Reduction Act provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it has been approved by the Office of Management and Budget (“OMB”) and displays a currently valid control number.⁸ The collections of information referenced in this notice and order have valid control numbers that are currently in effect. Therefore, the Commission is not obligated to seek a control number in connection with this order.

C. Regulatory Flexibility Act.

The Regulatory Flexibility Act (“RFA”) requires the Commission to consider whether a rule it proposes will have a significant economic impact on a substantial number of small entities and either provide a regulatory flexibility analysis respecting the significant impact or certify that the rule will not have such an impact.⁹ The RFA is applicable only to a rule for which the Commission publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b).¹⁰

The Commission is not publishing this order as a general notice of proposed rulemaking. Therefore, neither a regulatory flexibility analysis nor a certification is required for this rulemaking action. Nonetheless, this order will impose no new regulatory obligations on any party. Rather, it simply establishes the limited regulatory framework under which the Commission will operate during a shutdown in order to ensure the protection of property. Accordingly, as permitted by 5 U.S.C. § 605, the Chairman, on behalf of the Commission, hereby certifies that the provisions contained in

⁸ 44 U.S.C. 3501 et seq.

⁹ 5 U.S.C. 601 et seq.

¹⁰ 5 U.S.C. 601(2).

this order will not have a significant economic impact on a substantial number of small entities.

D. Cost Benefit Analysis.

Section 15(a) of the CEA¹¹ requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. Section 15(a) specifies that the costs and benefits shall be considered against 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 give greater weight to one or more of the five enumerated considerations to determine, in its discretion, that a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

This order imposes the cost of delay on parties with petitions for approval, self-certification filings, rights of review, and adjudicative matters before the Commission. As the Commission is limited by law to function most notably with respect to the protection of property, these costs are unavoidable.

In terms of benefits, this order provides for the limited continuation of Commission business. The order also confirms the ongoing regulatory obligations of registered entities and intermediaries notwithstanding a shutdown, in order to ensure that the Commission has available to it all information necessary to identify emergency situations and take action to protect property and, hence, to protect market participants

¹¹ 7 U.S.C. 19(a).

and the public, the efficiency and financial integrity of the futures markets, and price discovery.

The order also notifies market participants and the public of the matters in which the Commission will be engaged, as well as of the tolling and extensions of time put in place with respect to filings under Commission regulations. Tolling ensures that the Commission will have an opportunity to review routine industry filings and take steps if necessary to protect the interests of the market and the public before those filings are finalized. The extensions of time ensure that all persons with filing obligations in certain adjudicative proceedings that arise during a shutdown or who wish to submit comments during a comment period that will close during a shutdown will not be prejudiced by the inability of the Commission to accept those filings or comments.

III. ORDER

In light of the foregoing, the Commodity Futures Trading Commission (the “Commission”) has determined to issue the following Order, pursuant to its authority under the provisions of the Commodity Exchange Act, 7 U.S.C. 1 et seq., and in compliance with the Anti-Deficiency Act, 31 U.S.C. 1341 and 1342.

IT IS HEREBY ORDERED that, in the event of a lapse in appropriations (also referred to as “shutdown”) commencing at 12:01 a.m. on April 9, 2011, the Commission will commence operating according to the procedures set forth in this Order:

1. Tolling and Extension of Certain Procedural Time Limits. The Commission will not officially receive or process any filings, or review any matters for Commission approval or action to the extent that the matters are not directly related to the protection of property or market surveillance. This applies to rule, rule amendment and contract certifications, except for emergency rules certified pursuant to regulation 40.6(a)(2);

rules, rule amendments and contracts voluntarily submitted for Commission approval or review; requests for contract market designation and derivatives clearing organization and derivatives trade execution facilities registration; and other requests for Commission approval or other action. Specifically, the time limits for Commission action shall be tolled for §§ 1.47 and 1.48 of the Commission's regulations, and parts 36, 37, 38, 39, 40 and 41. Tolling also applies to requests and appeals submitted under §§ 145.7 and 145.9 of the Commission's regulations, and requests submitted under § 140.99.

The time for officially receiving, processing, or reviewing any new matters under these provisions of the Commission's regulations shall be tolled until the Commission is able to resume full operations. For matters that are pending under these provisions when a lapse in appropriations occurs, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations.

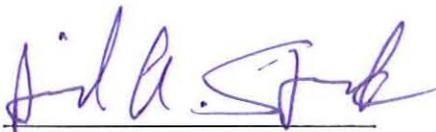
This tolling and extension of time limits also shall apply to certain procedural rules associated with Commission adjudicatory actions, in particular the time-limited procedural rules under parts 3, 9, 10, 12, and 171. For matters that are currently pending before the Commission under any of these parts, all applicable time deadlines for Commission action will be tolled until the shutdown is no longer in effect. Moreover, all time deadlines for filings by a party in an adjudicative proceeding that arise during a shutdown period will be extended until one business day after the Commission resumes its full operations. The filing of replies to any filing delayed by a lapse in appropriations will have its reply period extended for the same number of days.

2. Procedures and Time Limits Not Extended or Tolloed. The Commission will continue to receive and process filings required of a registered entity or intermediary

under certain Commission regulations, specifically under §§ 1.10, 1.12, 1.17, 1.32, 1.65, 30.7, and 40.6(a)(2), or any emergency notification to the Commission that may be required by any rule of a registered entity that has been approved by or self-certified to the Commission. Paragraph 1 also shall not apply to filings under parts 15, 16, 17, 18, 19, and 21 of the Commission's regulations.

3. Extension of Open Comment Periods on Proposed Regulation and Other Matters that may be Subject to a Request for Comment by the Commission. Any comment period for a proposed rulemaking or other matter that may be subject to a request for comment by the Commission that terminates during the shutdown shall be extended until one business day after the Commission resumes its full operations after a shutdown.

Issued in Washington, DC on April 8, 2011, by the Commission.



David A. Stawick
Secretary of the Commission