

Staff No-Action Relief: Application of certain CEA provisions after July 16, 2011 – the general effective date of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).¹ Title VII of the Dodd-Frank Act amends the Commodity Exchange Act (“CEA”)² to establish a comprehensive regulatory framework for swaps.³ Section 754 of the Dodd-Frank Act states that, unless otherwise provided, the provisions of subtitle A of title VII⁴ “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 provision 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 thus far issued 52 advance notices of proposed rulemaking or notices of proposed rulemaking, two interim final rules, six final rules, and one proposed interpretive order.

Sections 712(d)(1)⁵ and 721(c)⁶ of the Dodd-Frank Act require the Commission and the Securities and Exchange Commission (“SEC”) to further define certain terms used in title VII, including the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant.” The Commission and the SEC have issued two notices of proposed rulemaking that

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

² 7 U.S.C. 1 et seq.

³ 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 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.

⁴ 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.

⁵ Section 712(d) of the Dodd-Frank Act 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, 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)).”

⁶ Section 721(c) of the Dodd-Frank Act 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’.”

address these definitions.⁷ As explained in an Order dated July 14, 2011, issued pursuant to sections 4(c) and 4c(b) of the CEA⁸ and section 712(f) of the Dodd-Frank Act (the “4(c) Order”), final rulemakings further defining the terms in sections 712(d) and 721(c) will not be in place as of July 16, 2011. Recognizing this, the Commission granted temporary exemptive relief to address concerns regarding implications for the swaps market during the period between July 16, 2011 and the date(s) that those rulemakings have been completed, and to provide greater clarity regarding the applicability of various statutory and regulatory requirements.

In tailoring the scope of its relief, the Commission grouped the provisions of title VII of the Dodd-Frank Act into four major categories: (1) provisions that require a rulemaking; (2) self-effectuating provisions (i.e., do not require a rulemaking) that reference terms that require further definition; (3) self-effectuating provisions that do not reference terms that require further definition and that repeal provisions of current law; and (4) self-effectuating provisions for which the Commission did not grant exemptive relief.⁹ The Commission explained that the temporary 4(c) Order did not cover category 1 provisions because under section 754 of the Dodd-Frank Act, provisions requiring a rulemaking become effective “not less than 60 days after publication of the final rule” (but not before July 16, 2011). As such, category 1 provisions are not self-effectuating on July 16 and, therefore, it was unnecessary to provide exemptive relief. Category 4 provisions also were outside the scope of the 4(c) Order, and the Commission explained that these provisions will go into effect on July 16, 2011.

With regard to category 2 provisions, the Commission’s 4(c) Order provided temporary exemptive relief from the provisions of the Dodd-Frank Act that reference one or more of the terms set forth in sections 712(d) and 721(c), including 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. This exemptive relief will expire on the earlier of the effective date of the applicable final rule that further defines the relevant term or December 31, 2011. The treatment of category 2 provisions in the Commission’s 4(c) Order will not affect any effective date set out in a final rulemaking issued by the Commission pursuant to the Dodd-Frank Act.

For category 3 provisions, the Commission’s 4(c) Order provided temporary relief, based on part 35 of the Commission’s regulations,¹⁰ from certain provisions of the CEA that will or may apply to certain agreements, contracts, and transactions in exempt or excluded commodities (and any person offering or entering into such agreements, contracts, and transactions) as a result of the repeal of various CEA exemptions and exclusions as of July 16, 2011. The relief will expire on the earlier of December 31, 2011 or the repeal or replacement of part 35. The

⁷ 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 and Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818, May 23, 2011.

⁸ 7 U.S.C. 6(c), 6c(b).

⁹ The provisions in each category are set forth in the Appendix to the 4(c) Order.

¹⁰ See 17 CFR 35.1 et seq.

treatment of category 3 provisions also will not affect any effective date set out in a final rulemaking issued by the Commission pursuant to the Dodd-Frank Act.

Although the Commission's 4(c) Order provides temporary relief from many of the self-effectuating provisions of the Dodd-Frank Act and the CEA, as the Commission noted in the 4(c) Order, the Commission's authority to provide exemptive relief under CEA section 4(c), as amended by the Dodd-Frank Act,¹¹ may not extend to certain self-effectuating provisions of the Dodd-Frank Act and the CEA as amended. The Division of Clearing and Intermediary Oversight ("DCIO") and the Division of Market Oversight ("DMO") (together "Divisions") have identified certain category 2 provisions of the Dodd-Frank Act and CEA as amended that will take effect on July 16, 2011, but that may not be eligible for the exemptive relief provided by the Commission in its 4(c) Order. These provisions are:

- Section 724(c) of the Dodd-Frank Act, which enacted new CEA section 4s(l),¹² and imposes upon swap dealers and major swap participants certain segregation requirements with respect to collateral for uncleared swaps;
- Section 725(a) of the Dodd-Frank Act, to the extent that it amended CEA section 5b(a)¹³ to prohibit a derivatives clearing organization ("DCO") from performing the functions of a DCO with respect to swaps unless the DCO is registered with the Commission; and
- Section 731 of the Dodd-Frank Act, which enacted new CEA section 4s(k),¹⁴ and provides for the duties and designation of a chief compliance officer for swap dealers and major swap participants.

In order to provide greater clarity during the transition to the new regulatory framework for swaps, and in response to inquiries expressed by market participants regarding the applicability of Dodd-Frank Act provisions during the period between July 16, 2011 and the date(s) that the final definitional rulemakings have been completed, the Divisions will not recommend that the Commission commence an enforcement action against any person for failure to comply with the above referenced provisions during such period. This no-action relief will automatically expire upon the earlier of the effective date of the applicable final rule defining the relevant term or December 31, 2011. Further, this relief does not affect any Dodd-Frank Act implementing regulations that the Commission promulgates, including any implementation dates therein. Nor does this relief affect the applicability of any provision of the CEA to futures contracts or options on futures contracts, or to cash markets.

¹¹ See section 721(d) of the Dodd-Frank Act.

¹² To be codified at 7 U.S.C. 6s(l).

¹³ 7 U.S.C. 7a-1(a)(1)(B).

¹⁴ To be codified at 7 U.S.C. 6s(k).

Nothing in this staff no-action letter in any way limits 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 regulations pursuant to CEA section 4c(b) proscribing fraud.¹⁵ Further, the no-action position taken herein is taken by the Divisions only and does not bind the Commission or any other Division or Office of the Commission's staff. As with all no-action letters, the Divisions retain the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in their discretion.

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Director, DCIO

Richard Shilts
Acting Director, DMO

Date

Date

¹⁵ As described in the Commission's 4(c) Order, the Dodd-Frank Act amended the CEA's anti-fraud and anti-manipulation provisions, including CEA section 4b, to cover "swaps." Although, under the 4(c) Order, these provisions will not apply to "swaps" under the Dodd-Frank Act because the term "swap" 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 4(c) Order).