



Commodity Futures Trading Commission

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Proposed Rulemaking Regarding Commodity Options and Agricultural Swaps

The Commodity Futures Trading Commission (CFTC or Commission) will consider for publication in the Federal Register proposed rules which will generally authorize (1) agricultural swaps and (2) commodity options to transact subject the same laws and rules applicable to all other swaps. The proposed rule is authorized by provisions of the Commodity Exchange Act (CEA or Act), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Among other things, the Dodd-Frank Act amended the CEA as follows:

- To permit the CFTC to issue rules regarding transacting swaps in an “agricultural commodity,” as that term is defined by the Commission (NOTE: an Advance Notice of Proposed Rulemaking, or ANPRM, seeking comment on the appropriate conditions, restrictions or protections to be included in any rules governing agricultural swaps transactions was published for public comment on September 28, 2010; and a proposed definition of the term “agricultural commodity” was published for public comment on October 26, 2010).
- To include “options,” other than a few exceptions (e.g., options on a futures contract) under the definition of “swap.”

The proposal would repeal and replace Part 35 of the Commission’s regulations with rules generally permitting the transaction of swaps in an agricultural commodity subject to all rules and regulations applicable to any other swap.

Part 35 was originally adopted in 1993 and served as the exemptive authority for bilateral swaps activity prior to the Commodity Futures Modernization Act of 2000 (CFMA). After the enactment of the CFMA, which included several statutorily based exemptions for transacting bilateral swaps, Part 35 was only relevant for agricultural swaps – which were statutorily excluded from the CFMA’s general exemptions for bilateral swaps.

The Dodd-Frank Act removes or revises the bilateral swap exemptions added by the CFMA and also includes a general prohibition on any swap in an agricultural commodity unless permitted under the Commission’s 4(c) exemptive authority (see CEA Section 4(c)). As proposed, new Part 35 would be adopted pursuant to CEA section 4(c) and will be explicitly limited to swaps in an agricultural commodity. New Part 35 would permit the transaction of swaps in an agricultural commodity, or agricultural swaps, subject to all provisions of the CEA, and any rule, regulation, or order thereunder applicable to all other swaps.

The intention of proposed new Part 35 is to remove any need for distinguishing between an agricultural commodity and a non-agricultural commodity for the purpose of identifying the law applicable to a swap transaction.

In addition, the proposal would substantially revise and rewrite Part 32 of the Commission's regulations to include rules generally permitting the transaction of commodity options (other than options on a future, which will remain subject to Part 33) subject to all rules and regulation applicable to any other swap.

Part 32 was originally adopted in 1976 and has been the location for the Commission's evolving commodity options regulations.

The definition of "swap" in the Dodd-Frank Act explicitly includes options of any kind, other than a few exceptions (e.g., options on a futures contract). Accordingly, the Commission is proposing to eliminate the need for distinguishing between a "swap" and an "option" for the purpose of identifying the law applicable to a particular transaction.

As substantially amended by this proposal, new Part 32 would permit the transaction of commodity options (other than options on a futures contract, which would remain subject to Part 33 of the Commission's regulations) subject to all provisions of the CEA, and any rule, regulation, or order thereunder applicable to all other swaps.

As similarly proposed in new Part 35, proposed new Part 32 would no longer require market participants to distinguish between a trade option (existing § 32.4) and an agricultural trade option (existing § 32.13) for the purpose of identifying the law applicable to a particular transaction. Rather, all commodity option transactions (except for options on a future) will be subject to the same laws and rules as any other swap.