



U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5120
Facsimile: (202) 418-5524
www.cftc.gov

Office of General Counsel

January 11, 2013

Mr. Boris Bershteyn
Acting Administrator
Office of Information and Regulatory Affairs Office of Management and Budget Executive
Office of the President
725 17th Street, NW
Washington, DC 20503

Re: Fourth Status Report on "Phase One" of the Commodity Futures Trading
Commission's Plan for Retrospective Review of Agency Regulations under Executive
Order 13563

Dear Administrator Bershteyn:

Attached please find the fourth status report on "Phase One" of the Commodity Futures Trading Commission's ("CFTC" or "Commission") Plan for Retrospective Review of Agency Regulations in accordance with Executive Order 13563 ("CFTC Plan" or "Plan"). The CFTC, an independent regulatory agency, voluntarily developed the Plan and published it in the Federal Register on June 30, 2011 (76 FR 38328, June 30, 2011) (entitled "Reducing Regulatory Burden: Retrospective Review under E.O. 13563").

As part of its ongoing efforts to implement the Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), the CFTC has modernized a significant portion of its regulatory scheme. The attached fourth status report describes both the new regulations and the modifications to existing regulations the Commission issued recently to implement the Dodd-Frank Act.

Please contact me or Assistant General Counsel Maria Godel if you have any questions or for further information.

Sincerely,

Dan M. Berkovitz
General Counsel

Fourth Status Report on CFTC Retrospective Review of Agency Regulations¹

The CFTC Plan

The CFTC's Plan consists of two phases. In its Federal Register release², the CFTC observed that "[i]n determining the extent to which [the CFTC's] existing regulations have needed to be modified to conform to the Dodd-Frank Act's new requirements, the Commission already has subjected many of its rules to scrutiny." Accordingly, the CFTC stated, "'Phase One' of the Commission's retrospective review of its existing regulations is (and has been) well underway as a significant effort prior to the issuance of Executive Order 13563 and the [February 2, 2011] OIRA Memorandum."

CFTC Status Report Update (since October 16, 2012 Status Report)

Since the initial issuance of its Plan, the CFTC has examined and revised a number of its existing regulations as part of its implementation of the Dodd-Frank Act. The CFTC also has issued a number of new regulations that reflect new regulatory requirements. In adopting these new regulations, where relevant and appropriate the Commission has examined industry best practices and existing Commission regulatory requirements and practices.

In this Update, we are providing a summary of all of the Commission final rules issued since the third status report was issued in October 2012, in order to provide full regulatory context for the retrospective reviews that were undertaken during this period.

--Final Rules Regarding the Adaptation of Regulations to Incorporate Swaps—Records of Transactions, 17 CFR Part 1³

This final rulemaking makes certain conforming amendments to recordkeeping provisions of regulations 1.31 and 1.35(a) to integrate these regulations more fully with the new framework created by the Dodd-Frank Act. More specifically, this final rulemaking requires futures commission merchants ("FCMs"), certain introducing brokers ("IBs"), retail foreign exchange dealers ("RFEDs") and certain other registrants that are members of designated contract markets ("DCMs") or swap execution facilities ("SEFs") to record all oral communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a transaction in a commodity interest, whether communicated by telephone, voicemail, mobile device, or other digital or electronic media, and to keep those records for one year. This final rulemaking also requires FCMs, IBs, RFEDs, and all members of a DCM or SEF to record and keep all written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a transaction in a commodity interest or related cash or forward transactions, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media, and to keep those written records for five years.

¹ The CFTC submitted its first status report on Phase One of the CFTC Plan on November 7, 2011. On June 7, 2012 the CFTC submitted its second status report and on October 16, 2012 submitted its third status report.

² 76 FR 38328, June 30, 2011.

³ 77 FR 75523, Dec. 21, 2012.

The final rulemaking largely conforms the recordkeeping requirements for FCMs, IBs, RFEDs and various other registrants that are DCM and SEF members to similar recordkeeping requirements for swap dealers and major swap participants promulgated by the Commission pursuant to the Dodd-Frank Act.⁴

--Final Rule Regarding the Clearing Requirement Determination Under Section 2(h) of the CEA, 17 CFR Parts 39 and 50⁵

The CFTC promulgated final regulations that implement the clearing requirement established under Section 2(h)(1)(A) of the CEA, as amended by the Dodd-Frank Act, for certain credit default swaps (CDS) and interest rate swaps. The final regulations establish the first clearing determination by the CFTC under the Dodd-Frank Act. The final regulations require market participants to submit a swap that is identified in the rule for clearing by a registered derivatives clearing organization (DCO). The clearing requirement does not apply to entities that are eligible to elect an exception from clearing, such as non-financial entities hedging commercial risk.

The final regulations in 17 CFR § 50.4 require clearing of swaps in four interest rate swap classes and two CDS classes. These swaps are currently cleared by four DCOs. The final regulations identify these classes of swaps by using basic specifications. Therefore, counterparties contemplating entering into a swap will be able to determine quickly whether or not the particular swap is subject to the clearing requirement.

The final regulations clarify the phased implementation of the clearing requirement. Swap dealers and private funds active in the swaps market will be required to comply for swaps they enter into on or after March 11, 2013. Accounts managed by third party investment managers, as well as ERISA pension plans, will have until September 9, 2013, to begin clearing swaps entered into on or after that date. All other financial entities will be required to clear swaps entered into on or after June 10, 2013.

The final regulations also codify in 17 CFR § 50.5 statutory provisions that make clear that any swaps entered into prior to the enactment of the Dodd-Frank Act or prior to the application of the clearing requirement are not required to be cleared.

The CFTC also promulgated a final regulation in 17 CFR § 50.10 to prevent evasion of the clearing requirement and related provisions.

⁴ See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012) ("SD and MSP Recordkeeping Final Rule") (adopting for SDs and MSPs reporting and recordkeeping standards now found in 17 CFR 23.201-23.203).

⁵ 77 FR 74284, Dec. 13, 2012.

--Final Rules Regarding the Adaptation of Regulations to Incorporate Swaps, 17 CFR Parts 1, 4, 5, 7, 8, 15, 16, 18, 21, 22, 36, 38, 41, 145, 155, and 166⁶

To apply its regulatory regime to the swap activity of intermediaries, the Commission has made a number of changes to its regulations to conform them to the Dodd-Frank Act. The amendments adopted by this rulemaking primarily affect part 1 of the Commission's regulations, but also affect parts 4, 5, 7, 8, 15, 16, 18, 21, 22, 36, 41, 140, 145, 155, and 166. This rulemaking contains amendments of three different types: ministerial; accommodating; and substantive.

Many of the amendments are purely ministerial—for instance, several changes update definitions to conform them to the CEA as amended by the Dodd-Frank Act; add to the Commission's regulations new terms created by the Dodd-Frank Act; remove all regulations and references pertaining to derivatives transaction execution facilities ("DTEFs"), a category of trading facility added to the CEA by Section 111 of the Commodity Futures Modernization Act of 2000 ("CFMA")⁷, which the Dodd-Frank Act eliminated; correct various statutory cross-references to the CEA in the regulations; and remove regulations in whole or in part that were rendered moot by the CFMA.

The accommodating amendments are essential to the implementation of the Dodd-Frank Act in that they add swaps, swap markets, and swap entities to numerous definitions and regulations, but are not simply ministerial additions. Accommodating amendments include, among other things: amending numerous definitions in regulation 1.3 to reference or include swaps; creating new definitions as necessary in regulation 1.3; amending recordkeeping requirements to include information on swap transactions; adding references to swaps and swap execution facilities in various part 1 regulations; and amending parts 15, 18, 21, and 36 to implement the Dodd-Frank Act's grandfathering and phase-out of exempt boards of trade and exempt commercial markets.

The substantive amendments are changes that align requirements or procedures across futures and swap markets. They consist of amendments to regulation 1.31 that harmonize some of the current part 1 recordkeeping requirements with some of those applicable to swap dealers and major swap participants under part 23 regulations and amend procedures pertaining to the post-execution allocation of bunched orders (regulation 1.35(a)). Under the amendments to the bunched orders provisions, "eligible account managers" can allocate such orders post-execution similarly to how they currently do so with futures.

To aid the public in understanding the numerous changes to different parts of the CFTC's regulations adopted by this release, the Commission published on its Web site a "redline" of the affected regulations clearly reflecting the additions and deletions.

⁶ 77 FR 66288, Nov. 2, 2012.

⁷ Public Law 106-554, 114 Stat. 2763 (2000).

--Final Rule Regarding the Adjustment of Civil Monetary Penalties for Inflation, 17 CFR Part 143⁸

The Commission is required by statute to adjust its civil monetary penalties ("CMP") for inflation at least once every four years. Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 ("FCPIAA"). The Commission last adjusted its CMP amounts for inflation in 2008 by amending Rule 143.8. Moreover, the Dodd-Frank Act (Section 753) recently set the CMP amounts for CEA Sections 6(c) and 6(d), but did not set the CMP amounts for CEA Sections 6b and 6c.

Under the FCPIAA methodology, no adjustments were required for the Sections 6(c) and 6(d) CMP amounts. The CMP amounts remain \$1,000,000 (or triple the monetary gain) for manipulation and attempted manipulation violations and \$140,000 (or triple the monetary gain) for all other violations.

Under the FCPIAA methodology, certain adjustments were required, however, for the Sections 6b and 6c CMP amounts. The CMP amounts for manipulation and attempted manipulation assessed pursuant to Sections 6b and 6c were increased \$25,000 to \$1,025,000 (or triple the monetary gain). The CMP amount for other violations assessed pursuant to Section 6b as increased \$25,000 to \$700,000 (or triple the monetary gain). The CMP amount for other violations assessed pursuant to Section 6c remains unchanged, \$140,000.

To keep the Commission's inflation adjustment as simple as possible, this final rulemaking applies the FCPIAA to Sections 6b, 6c, 6(c), and 6(b). Under this consolidated approach, the Commission will not readjust the CEA penalties again until 2016.

Going Forward

In the near future, the Commission will continue to consider proposed and final rules to implement the Dodd-Frank Act. During this period, Phase One of the Commission's retrospective review plan will continue, and the Commission will review existing regulations as part of its implementation of the Dodd-Frank Act. The CFTC will continue to review the comments it receives with respect to specific Dodd-Frank Act implementing proposals as well as the conforming amendments that it has proposed.

As the CFTC stated in the Federal Register release publishing its Plan, "[a]fter the substantial completion of the promulgation of final rules under the Dodd-Frank rulemaking process, including the revision of various existing Commission regulations to conform to the requirements of the Dodd-Frank legislation, the Commission intends to begin the process of the periodic, retrospective review of the remainder of its regulations (i.e., those regulations that were not reviewed as part of the Dodd-Frank effort)." This latter process will constitute "Phase Two" of the Commission's retrospective review.

⁸ 77 FR 65100, October 25, 2012.