



U.S. COMMODITY FUTURES TRADING COMMISSION

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**Office of the
General Counsel**

January 13, 2014

Mr. Dominic Mancini
Deputy and Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Sixth 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 Mancini:

Attached please find the sixth 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 sixth 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 questions or for further information.

Sincerely,

Jonathan L. Marcus
General Counsel

Sixth Status Report on CFTC Retrospective Review of Agency Regulations¹

The CFTC Plan

The CFTC's Plan consists of two phases. In its Federal Register Release (76 FR 38328, June 30, 2011), 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." 76 FR 38328-38329.

The Commission explained that "after 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 "Phase Two" of its Plan. 76 FR at 38329. The Commission stated that in Phase Two, the CFTC "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)." *Id.*

CFTC Status Report Update (since July 8, 2013 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 status report update, we are providing a summary of all of the Commission final rules issued since the fourth status report was issued in January 2013, in order to provide full regulatory context for the retrospective reviews undertaken during this period.

¹ The CFTC submitted its first status report on Phase One of the CFTC Plan on November 7, 2011. Subsequently, the CFTC submitted its second (June 7, 2012), third (October 16, 2012), fourth (January 11, 2013), and fifth (July 8, 2013) status reports.

--Final Rule Regarding Derivatives Clearing Organizations and International Standards, 17 CFR Parts 39, 140, and 190 (78 FR 72476)

These final rules amend Part 39 of the CFTC's regulations to establish additional standards for systemically important derivatives clearing organizations (SIDCOs) and those derivatives clearing organizations that elect to adhere to the heightened regulatory requirements. New Subpart C of Part 39 aligns rules for SIDCOs with international standards set forth in "Principles for Financial Market Infrastructures" (PFMIs) published by the Bank of International Settlements Committee on Payment and Settlement Systems and the Board of the International Organization of Securities Commissions.

The rulemaking was promulgated under Titles VII and VIII of the Dodd-Frank Act. Pursuant to the requirement in Section 805(a)(2)(A) of the Dodd-Frank Act, the CFTC consulted with the Financial Stability Oversight Council and the Federal Reserve Board with respect to this rulemaking.

These rules, together with existing derivatives clearing organizations rules, including the Final Rule Regarding Enhanced Risk Management Standards for Systemically Important Derivatives Clearing Organizations, described herein, establish CFTC regulations that are consistent with the PFMIs and allow SIDCOs to continue to be Qualifying Central Counterparties for purposes of international bank capital standards as set forth in "Capital Requirements for Bank Exposures to Central Counterparties" published by the Basel Committee on Banking Supervision. The final rules include substantive requirements relating to governance, financial resources, system safeguards, special default rules and procedures for uncovered losses or shortfalls, risk management, additional disclosure requirements, efficiency, and recovery and wind-down procedures.

In addition, the final rules include procedures by which derivatives clearing organizations other than SIDCOs may elect to become subject to the additional standards in Subpart C.

Thus, these final rules enable, together with the previously adopted standards for SIDCOs, reduce systemic risk and aid the competitive position of registered derivative clearing organizations by enabling them to be Qualifying Central Counterparties and offer customers more favorable capital treatment.

--Final Rule Regarding Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy, 17 CFR Parts 23 and 190 (78 FR 66621)

These final rules, which impose requirements on swap dealers (“SDs”) and major swap participants (“MSPs”) with respect to the treatment of collateral posted by their counterparties to margin, guarantee, or secure uncleared swaps, were adopted by the Commission to implement new requirements promulgated by the Dodd-Frank Act. Section 724(c) of the Dodd-Frank Act amended the CEA to add section 4s(l), which includes provisions concerning the rights of counterparties to SDs and MSPs with respect to the treatment of such counterparty’s margin for uncleared swaps. In addition, the final rule includes revisions to ensure that, for purposes of subchapter IV of chapter 7 of the Bankruptcy Code, securities held in a portfolio margining account that is a futures account or a Cleared Swaps Customer Account constitute “customer property”; and owners of such account constitute “customers.”

The CFTC received 22 written comments from members of the public on the proposed rulemaking, hosted a public roundtable, and participated in several meetings with market participants. As a result of the written comments received and dialogue with market participants, the Commission in this final rule has revised certain regulations that were proposed in the notice.

--Final Rule Regarding Swap Dealers and Major Swap Participants; Clerical or Ministerial Employees, 17 CFR Part 23 (78 FR 64173)

The Commission amended its Regulation 23.22 to make clear that swap dealers and major swap participants (MSPs) are not subject to the prohibition in Section 4s(b)(6) of the Commodity Exchange Act (CEA) on associating with a person who is subject to statutory disqualification (i.e., a disqualification from registration under Section 8a(2) or 8a(3) of the CEA), where the person is a clerical or ministerial employee.

Section 4s(b)(6) of the Act provides that except to the extent otherwise specifically provided by the Commission, a swap dealer or MSP may not permit a person associated with it who is subject to a statutory disqualification to be involved in effecting swaps on its behalf, if it knew or reasonably should have known of the statutory disqualification. Regulation 23.22 makes this prohibition generally applicable to associated persons of swap dealers and MSPs. However, Regulation 1.3(aa)(6) excludes a person associated with a swap dealer or MSP in a clerical or ministerial capacity from the “associated person” definition. To resolve any possible confusion between these two provisions, the Commission amended Regulation 23.22 to except clerical and ministerial employees from the statutory disqualification prohibition. The amendment is consistent with the treatment under the CEA and Commission regulations of clerical and ministerial employees of other registrants.

--Final Rule Regarding Clearing Exemption for Certain Swaps Entered Into By Cooperatives, 17 CFR Part 50 (78 FR 52286)

This rule exempts swaps entered into by qualified cooperatives from the clearing requirement under section 2(h)(1)(A) of the Commodity Exchange Act (CEA) and part 50 of the Commission's regulations, subject to certain conditions. The Dodd-Frank Act amended the CEA to require clearing of swaps that the Commission determines must be cleared. The Commission has issued one clearing requirement determination, requiring that swaps meeting the specifications outlined in four classes of interest rate swaps and two classes of credit default swaps be cleared. Clearing is mandatory unless one of the counterparties can elect an exception, exemption, or other relief from the clearing requirement.

Generally, no relief from the clearing requirement is available for institutions that are within the definition of "financial entity" in section 2(h)(7)(C) of the CEA and have total assets in excess of \$10 billion. However, certain cooperatives that meet the definition of "financial entity" and have total assets in excess of \$10 billion consist exclusively of member-owners that could elect the exception from the clearing requirement pursuant to section 2(h)(7) of the CEA, known as the end-user exception. These member-owners receive important financial services from such cooperatives, but absent an exemption, cooperative members would lose the ability to use their cooperative for financial services and at the same time, realize the full benefits of the end-user exception. Without an exemption, when a cooperative engages in financial activity that could benefit from the end-user exception and that activity is in the interest of the cooperative's members, the members would not realize the full benefits of the end-user exception because the cooperative cannot elect the exception.

In light of this, the Commission determined in August 2013 to exercise its authority under section 4(c) of the CEA, which grants the Commission general exemptive authority, to adopt Regulation 50.51, which permits a qualifying cooperative to elect not to clear a swap subject to the clearing requirement provided that the cooperative's members are either non-financial entities or other cooperatives whose members are non-financial entities. In addition, the swap must be entered into in connection with originating loans to cooperative members or for the purpose of hedging or mitigating commercial risk related to loans to, or swaps with, members.

--Final Rule Regarding Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 17 CFR Part 4 (78 FR 52308)

These final rules set forth the compliance obligations for registered commodity pool operators (CPOs) of investment companies that are registered with the Securities and Exchange Commission (SEC) under the Investment Company Act of 1940. The rule harmonizes the CFTC's recordkeeping, reporting and disclosure requirements (Part 4 rules) with similar SEC

requirements. In conjunction with recent amendments to CFTC Regulation 4.5, the final rule was designed to enable the CFTC to protect customers of commodity pools affiliated with a registered investment company (RIC) through market oversight and enforcement, and appropriate disclosure of risks. At the same time, the CFTC sought to eliminate potentially inconsistent or conflicting compliance obligations between the two agencies.

In February 2012, the CFTC adopted modifications to the exclusions from the definition of commodity pool operator (CPO) that are delineated in Regulation 4.5. Specifically, subject to a de minimis exception, the CFTC amended Regulation 4.5 to eliminate the exclusion from the definition of CPO of those entities that are investment companies registered as such with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940. Accordingly, any CPO of a RIC that transacts in derivatives markets, including swaps markets, above a de minimis threshold, must register with the CFTC and comply with Part 4 of the CFTC's Regulations.

The final rules address concerns expressed by commenters in the Regulation 4.5 rulemaking that the amendments to Regulation 4.5 would cause sponsors of RICs to be subject to duplicative, inconsistent, and possibly conflicting disclosure and reporting obligations. The final rules implement a "substituted compliance" regime whereby a dually registered entity will be deemed compliant with most of the CPO requirements in Part 4 of the CFTC's rules, including Regulations 4.21, 4.22, 4.24, 4.25, and 4.26, so long as the RIC complies with the comparable SEC-administered disclosure, reporting and recordkeeping regime established by the Investment Company Act of 1940, Securities Act of 1933, Securities Exchange Act of 1934, and the rules and guidance promulgated thereunder. Thus, for entities that are registered with both the CFTC and SEC, the CFTC will accept the SEC's disclosure, reporting, and recordkeeping regime as substituted compliance for substantially all of Part 4 of the CFTC's regulations, so long as they comply with comparable requirements under the SEC's statutory and regulatory compliance regime.

In addition, the final rules also amend certain provisions of Part 4 of the CFTC's regulations that are applicable to all CPOs. Notably, all CPOs will be permitted to use third-party service providers to maintain their books and records, and the signed acknowledgement requirement is being rescinded.

Thus, by harmonizing the requirements applicable to dually registered RIC-CPO entities, the final rules streamline regulation, improve market oversight, and substantially reduce the compliance costs that such entities would otherwise bear.

--Final Rule Regarding Enhanced Risk Management Standards for Systemically Important Derivatives Clearing Organizations, 17 CFR Part 39 (78 FR 49663)

These final rules implemented enhanced risk management standards for systemically important derivatives clearing organizations (SIDCOs) that had been previously proposed and are consistent with international standards set forth in “Principles for Financial Market Infrastructures” (PFMIs) published by the Committee on Payment and Settlement Systems and the Board of the International Organization of Securities Commissions. Pursuant to the requirement in Section 805(a)(2)(A) of the Dodd-Frank Act, the CFTC consulted with the Financial Stability Oversight Council (FSOC) and the Federal Reserve Board with respect to this rulemaking.

The rulemaking was promulgated under Titles VII and VIII of the Dodd-Frank Act. In Title VII, Section 725(c) of the Dodd-Frank Act amended section 5b(c)(2) of the Commodity Exchange Act (CEA), which sets forth core principles with which a derivatives clearing organization (DCO) must comply in order to be registered and to maintain registration as a DCO. That section revised existing DCO core principles and added several new ones. In addition, the Dodd-Frank Act amended section 5b(c)(2) to provide that the CFTC may adopt rules and regulations implementing the core principles pursuant to its rulemaking authority under section 8a(5) of the CEA.

Title VIII of the Dodd-Frank Act, entitled “Payment, Clearing, and Settlement Supervision Act of 2010,” was enacted to mitigate systemic risk in the financial system and promote financial stability. Title VIII includes provisions empowering FSOC to designate those financial market utilities that the Council determines are, or are likely to become, systemically important. On July 18, 2012, the FSOC designated several financial market utilities as being systemically important, two of which are SIDCOs. With respect to SIDCOs, Section 805 of the Dodd-Frank Act directs the CFTC to consider relevant international standards and existing prudential requirements when prescribing risk management standards governing operations related to payment, clearing, and settlement activities.

Accordingly, these final rules were designed to be an important first step to ensuring that SIDCOs can be Qualifying Central Counterparties (QCCP) for purposes of international bank capital standards as set forth in “Capital Requirements for Bank Exposures to Central Counterparties” published by the Basel Committee on Banking Supervision. Attaining QCCP status results in substantially lower capital charges for a SIDCO’s bank clearing members and bank customers. Specifically, the final rules (1) increase financial resources requirements for SIDCOs that are involved in activities with a more complex risk profile or that are systemically important in multiple jurisdictions as set forth in CFTC Regulation 39.29(a); (2) prohibit the inclusion by SIDCOs, in calculating their available default resources, of assessments, as set forth in CFTC Regulation 39.29(b); and (3) enhance system safeguards for SIDCOs for business continuity and disaster recovery as set forth in CFTC Regulation 39.30. The final rule also

implements special enforcement authority over SIDCOs granted to the CFTC under section 807(c) of the Dodd-Frank Act.

Thus, these final rules, together with subsequently adopted amendments to Part 39 of the CFTC's regulations, reduce systemic risk, improve regulatory oversight, and aid the competitive position of registered SIDCOs by enabling them to be QCCPs and offer customers more favorable capital treatment.

--Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 17 CFR Chapter 1 (78 FR 45292)

The Commission, coordinating closely with other domestic and global regulators, completed guidance on the cross-border application of Title VII of the Dodd-Frank Act in July 2013. The guidance interprets section 722(d) of the Dodd-Frank Act and sets out the manner in which the CFTC generally intends that Title VII's swap provisions apply in the cross-border context. Section 722(d) of the Dodd-Frank Act provides that the law's swap provisions shall not apply to swaps activities outside the U.S. unless those activities have a direct and significant connection with activities in, or effect on, commerce in the United States or the swaps activities outside the United States contravene Commission rules or regulations as are necessary or appropriate to prevent evasion of the swaps provisions of the Dodd-Frank Act.

The guidance addresses, among other things, the CFTC's cross-border policies regarding the interpretation of the term "U.S. person," when a non-U.S. person may be required to register as a swap dealer or major swap participant (MSP), the scope of the term "foreign branch" of a U.S. bank, when a swap should be considered to be with the foreign branch of a U.S. bank, a description of the entity-level requirements and transaction-level requirements under Title VII and the Commission's related regulations, substituted compliance principles, and application of the Title VII requirements to swap dealers and MSPs and where both parties to a swap are neither swap dealers nor MSPs.

The guidance is a statement of the Commission's general policy regarding cross-border swap activities and allows for flexibility in application to various situations, including consideration of all relevant facts and circumstances that are not explicitly discussed in the guidance. In drafting the guidance, the Commission benefitted from written comments received on proposed guidance issued in 2012 and dialogue and meetings with the public and foreign regulators. The guidance is intended to inform the public of the Commission's views on how it ordinarily expects to apply existing law and regulations in the cross-border context. In determining the application of the Title VII swap provisions and Commission regulations to particular entities and transactions in cross-border contexts, the Commission will apply the relevant statutory provisions, including section 722(d) of the Dodd-Frank Act, and regulations to the particular facts and circumstances.

--Exemptive Order Regarding Compliance With Certain Swap Regulations, 17 CFR Chapter 1 (78 FR 43785)

The Commission approved an Exemptive Order in July 2013 to provide temporary conditional relief to market participants from certain provisions of the Commodity Exchange Act (CEA), as amended by Title VII of the Dodd-Frank Act, and Commission regulations thereunder, in the context of cross-border swaps activities. The Exemptive Order was effective July 13, 2013, and expired on December 21, 2013 (and certain earlier dates specified in the Exemptive Order). Under the Exemptive Order, market participants could continue to apply (until December 21, 2013 at the latest) certain provisions of an earlier exemptive order regarding cross-border issues that the Commission issued in January 2013. The Exemptive Order provided targeted, time-limited transitional relief to avoid unnecessary market disruptions and to facilitate market participants' transitions to the new Dodd-Frank swaps regime. For example, the Exemptive Order provided additional time to adjust operational and compliance systems in order to incorporate the revised scope of the Commission's interpretation of the term "U.S. person," and to implement the Commission's substituted compliance program.

The Commission issued the Exemptive Order because it understood that, in the absence of temporary relief, market participants would be faced with significant legal uncertainty and the risk of adverse consequences to their global business, especially in light of the ongoing discussions with foreign regulatory entities and their evolving regulatory regimes.

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 the Dodd-Frank 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)." (76 FR 38328 at 38329 (June 30, 2011)). This latter process will constitute "Phase Two" of the Commission's retrospective review.