COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038–AD64

Retail Commodity Transactions Under Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Interpretation.

SUMMARY: On December 14, 2011, the Commodity Futures Trading Commission (“Commission” or “CFTC”) issued an Interpretation (“Interpretation”) regarding the meaning of the term “actual delivery,” as set forth in the Commodity Exchange Act. The Commission also requested public comment on whether the Interpretation accurately construed the statutory language. In response to the comments received, the Commission has determined to clarify its Interpretation.

DATES: Effective August 23, 2013.

FOR FURTHER INFORMATION CONTACT: Rosemary Hollinger, Regional Counsel, Division of Enforcement, 312–596–0538, rhollinger@cftc.gov, or Martin B. White, Assistant General Counsel, Office of the General Counsel, 202–418–5129, mwhite@cftc.gov, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). Title VII of the Dodd-Frank Act amended the Commodity Exchange Act (“CEA”) to establish a comprehensive new regulatory framework for swaps and security-based swaps. 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 Commission’s rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight.

In addition, section 742(a) of the Dodd-Frank Act amends section 2(c)(2) of the CEA to add a new subparagraph, section 2(c)(2)(D)(I) of the CEA, entitled “Retail Commodity Transactions.” New CEA section 2(c)(2)(D) broadly applies to any agreement, contract, or transaction in any commodity that is entered into with, or offered to (even if not entered into with), a non-eligible contract participant or non-eligible commercial entity on a leveraged or margin basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

New CEA section 2(c)(2)(D) further provides that such an agreement, contract, or transaction shall be subject to CEA sections 4(a), 6(a), and 7 as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery.

New CEA section 2(c)(2)(D) excepts certain transactions from its application. In particular, new CEA section 2(c)(2)(D)(II)(III)(aa) excepts a contract of sale that results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved.

On December 14, 2011, the Commission issued an Interpretation inviting public comment on whether its stated interpretation of the term “actual delivery,” as used in new CEA section 2(c)(2)(D)(II)(III)(aa), accurately construes the statutory language.

The Commission received several public comments on the Interpretation. After thoroughly reviewing those comments, the Commission has determined to clarify its Interpretation in response to the comments received.

II. Summary of Comments

A. Comments Generally

The Commission received 13 comments in response to its Interpretation. The comments included 11 comment letters that addressed the Interpretation. These 11 comment letters were submitted by entities representing a broad range of interests, including a self-regulatory organization, precious metals dealers and depository companies, law firms, trade associations comprised of energy producers and suppliers, and electricity and natural gas suppliers.

Of the 11 comment letters addressing the Interpretation, two voiced general support for the Interpretation. For example, NFA stated:

NFA fully supports the Commission’s proposed interpretation of the term [actual delivery] and believes that it is consistent with the statutory language.

The comment letter submitted by DGG expressed its appreciation of the Commission’s efforts to “curtail any fraudulent retail commodity transactions occurring by unscrupulous actors.” DGG further urged the Commission to consider delivery of precious metals to affiliates of the seller, not to the seller itself, as constituting actual delivery under new CEA section 2(c)(2)(D)(II)(III)(aa), stating that “[w]hile we understand the CFTC’s desire to ensure, among other things, that the seller actually has the commodity to deliver, an affiliate of one of the limited types of depositories described in Example 2 of the Interpretation are unlikely to be the...
seller ‘fraudsters’ Senator Lincoln had in mind.’"

Two of the comment letters submitted by law firms generally did not support the Interpretation. GBT stated that neither the Dodd-Frank Act nor its legislative history indicated Congress’s desire to limit the depositories to which actual delivery could be made, and JBG voiced its view that delivery in the context of precious and industrial metals requires only transfer of title to metal, not physical delivery of metal. The third comment letter submitted by a law firm, RJL, was submitted on behalf of precious metals dealers. RJL requested clarification of when the Commission will consider the 28 days in new CEA section 2(c)(2)(D)(ii)(III)(aa) to begin and urged the Commission to allow for delivery of precious metals to additional depositories beyond those described in the Interpretation. RJL also requested clarification, as did MDC, a retail precious metals dealer, of whether the offset of a precious metals purchase prior to transfer of title to the customer and delivery of the precious metals to a depository within 28 days would cause the original purchase to become a prohibited transaction under new CEA section 2(c)(2)(D).

Finally, four of the comment letters were submitted by energy suppliers or trade associations comprised of energy producers and suppliers, and they generally requested clarification of whether new CEA section 2(c)(2)(D) and/or its exceptions apply to the sale and delivery of physical energy commodities, such as electricity and natural gas, to industrial, commercial, and/or retail customers on a recurring basis. For example, NEMA requested: [redacted]. The examples are non-exclusive and are included to provide the public with a readily ascertainable date on which the agreement, contract, or transaction is entered into. This approach is consistent with the functional approach the Commission will take in determining whether actual delivery has occurred, and it should provide industry participants and the public with a readily ascertainable date for determining whether actual delivery has occurred within the meaning of new CEA section 2(c)(2)(D)(ii)(III)(aa).

3. Interpretation

The Interpretation included five examples to illustrate how the Commission would determine whether actual delivery has occurred within the meaning of new CEA section 2(c)(2)(D)(ii)(III)(aa). The Commission has determined to clarify the intent behind these examples.

The examples are non-exclusive and are included to provide the public with guidance on how the Commission will apply the relevant factors enumerated in the Interpretation in making its determination of whether actual delivery has occurred within the meaning of new CEA section 2(c)(2)(D)(ii)(III)(aa). Examples 1 and 2 do not encompass all scenarios in which the Commission may determine that actual delivery has occurred, nor do Examples 3, 4, and 5 encompass all scenarios in which the Commission may determine that actual delivery has not occurred. Specifically, with regard to Example 2, the Commission may determine that actual delivery has occurred if a commodity is delivered to an affiliate of the seller or is already physically located at a depository, so long as the commodity is otherwise delivered in accordance with the methods described in Example 2, if a careful consideration of the other relevant factors enumerated in the Interpretation demonstrates that the purported delivery is not simply a sham and that actual delivery has occurred within the meaning of new CEA section 2(c)(2)(D)(ii)(III)(aa).

4. Offsetting of Transactions

Two commenters, in response to Example 5 of the Interpretation, requested clarification of whether the offset of a precious metals purchase prior to transfer of title to the customer and delivery of the precious metals to a depository within 28 days would cause the original purchase to become a prohibited transaction under new CEA section 2(c)(2)(D). After careful consideration of this comment, the Commission has determined that Example 5 accurately illustrates the Commission’s views of whether actual delivery will have occurred under the circumstances described in Example 5. However, the Commission recognizes that a customer may request to cancel a purchase of a commodity prior to actual delivery of the commodity within 28 days due to extraordinary market
circumstances. Accordingly, the Commission will not prosecute a seller for permitting such a cancellation, provided that the seller does so only on limited occasions and at the customer’s request, and further provided that the customer does not enter into a subsequent transaction within three business days of such cancellation.

5. Energy Producers and Suppliers

Four comment letters requested clarification of whether any given transaction results in actual delivery of physical energy commodities to industrial, commercial, and/or retail customers on a recurring basis. Specifically, under the scenario described in these comment letters, energy firms enter into fixed price contracts with customers to supply electricity or natural gas to the customer’s residence or business for a period of one or more years. The customer consumes the electricity or natural gas and subsequently pays for that usage, along with all applicable taxes, on a periodic basis. The Commission is not of the view that new CEA section 2(c)(2)(D)(ii)(aa) applies to this scenario, particularly in light of the fact that the customer regularly receives delivery of and consumes the physical energy commodity over the term of the contract and periodically pays for that usage.

III. Commission Interpretation of “Actual Delivery”

In consideration of the foregoing, the Commission issues the following interpretation to inform the public of the Commission’s views as to the meaning of the term “actual delivery” as used in new CEA section 2(c)(2)(D)(ii)(aa) and to provide the public with guidance on how the Commission intends to assess whether any given transaction results in actual delivery within the meaning of the statute. This interpretation does not address the meaning or scope of new CEA section 2(c)(2)(D)(ii)(bb) or any exception to that section.

Example 2: Actual delivery will have occurred if, within 28 days, the seller has: (1) Physically delivered the entire quantity of the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, into the possession of the buyer; and (2) has transferred title to that quantity of the commodity to the buyer.

Example 3: Actual delivery will not have occurred if, within 28 days, a book entry is made by the seller purporting to show that the delivery of the commodity has been made to the buyer and/or that a sale of the commodity has subsequently been covered or hedged by the seller through a third party contract or account, but the seller has not, in accordance with the methods described in Example 2, physically delivered the entire quantity of the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, and transferred title to that quantity of the commodity to the buyer, regardless of whether the agreement, contract, or transaction between the buyer and seller purports to create an enforceable obligation on the part of the seller, or a parent company, partner, agent, or other affiliate of the seller, to deliver the commodity to the buyer.

Example 4: Actual delivery will not have occurred if, within 28 days, the seller has purported to physically deliver the entire quantity of the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, in accordance with the method described in Example 2, and transfer title to that quantity of the commodity to the buyer, but the title document fails to identify the specific financial institution, depository, or storage facility with possession of the commodity, the quality specifications of the commodity, the identity of the party transferring title to the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, into the possession of the buyer; and (2) has transferred title to that quantity of the commodity to the buyer.
the commodity to the buyer, and the segregation or allocation status of the commodity.

Example 5: Actual delivery will not have occurred if, within 28 days, an agreement, contract, or transaction for the purchase or sale of a commodity is rolled, offset, or otherwise netted with another transaction or settled in cash between the buyer and the seller, but the seller has not, in accordance with the methods described in Example 1 or 2, physically delivered the entire quantity of the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, and transferred title to that quantity of the commodity to the buyer, regardless of whether the agreement, contract, or transaction between the buyer and seller purports to create an enforceable obligation on the part of the seller, or a parent company, partner, agent, or other affiliate of the seller, to deliver the commodity to the buyer.

Issued in Washington, DC, on August 20, 2013, by the Commission.

Christopher J. Kirkpatrick, 
Deputy Secretary of the Commission.

Appendix to Retail Commodity Transactions Under Commodity Exchange Act—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton, O’Malia, and Wetjen voted in the affirmative. No Commissioners voted in the negative.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 175

Indirect Food Additives: Adhesives and Components of Coatings

CFR Correction

In Title 21 of the Code of Federal Regulations, Parts 170 to 199, revised as of April 1, 2013, on page 196, in § 175.320, in paragraph (c), in the first sentence, revise “tables 1 and 2 of § 176.17(c)” to read “tables 1 and 2 of § 176.17(c).”

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510, 520, and 558

[Docket No. FDA–2013–N–0839]

New Animal Drugs; Withdrawal of Approval of New Animal Drug Applications; Diethylcarbamazine; Nicarbazin; Penicillin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect the withdrawal of approval of three new animal drug applications (NADAs) at the sponsors’ request because the products are no longer manufactured or marketed.

DATES: This rule is effective September 3, 2013.

FOR FURTHER INFORMATION CONTACT:
David Alterman, Center for Veterinary Medicine (HFV–212), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–453–6843, email: david.alterman@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Phibro Animal Health Corp., 65 Challenger Rd., 3d Floor, Ridgefield Park, NJ 07660 has requested that FDA withdraw approval of NADA 098–371 for use of nicarbazin, penicillin, and roxarsone in 3-way, combination drug Type C medicated feeds for broiler chickens and NADA 098–374 for use of nicarbazin and penicillin in 2-way, combination drug Type C medicated feeds for broiler chickens because the products are no longer manufactured or marketed. Accordingly, 21 CFR 558.366 and 558.460 are being amended to reflect the withdrawal of approval.

R. P. Scherer North America, P.O. Box 5600, Clearwater, FL 33318 has requested that FDA withdraw approval of NADA 123–116 for Diethylcarbamazine Citrate Capsules used in dogs for the prevention of heartworm disease because the product is no longer manufactured or marketed. Accordingly, 21 CFR 520.622d is being amended to reflect the withdrawal of approval.

Following this withdrawal of approval, R. P. Scherer North America is no longer the sponsor of an approved application. Accordingly, 21 CFR 510.600(c) is being amended to remove the entries for these firms.

Elsewhere in this issue of the Federal Register, FDA gave notice that approval of NADA 098–371, NADA 098–374, and NADA 123–116, and all supplements and amendments thereto, is withdrawn. As provided in the regulatory text of this document, the animal drug regulations are amended to reflect these voluntary withdrawals of approval.

This rule does not meet the definition of “rule” in 5 U.S.C. 804(3)(A) because it is a rule of “particular applicability.” Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 510

Animal practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 520

Animal drugs.

21 CFR Part 558

Animal drugs, Animal feeds. Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510, 520, and 558 are amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 510 continues to read as follows:


§ 510.600 [Amended]

2. In § 510.600, in the table in paragraph (c)(1), remove the entry for “R. P. Scherer North America”; and in the table in paragraph (c)(2), remove the entry for “011014”.

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

3. The authority citation for 21 CFR part 520 continues to read as follows:


§ 520.622d [Removed]

4. Remove § 520.622d.

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

5. The authority citation for 21 CFR part 558 continues to read as follows:


§ 558.366 [Amended]

6. In § 558.366, in the table in paragraph (d), in the entry for “90.8 to 181.6 (0.01 to 0.02 pct)”, remove the