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COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter 1

Effective Date for Swap Regulation

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Order.

SUMMARY: On June 17, 2011, the Commodity Futures Trading Commission ("CFTC" or the "Commission") published for public comment in the Federal Register a proposed order that would grant, pursuant to the Commission's exemptive authority pursuant to section 4(c) of the Commodity Exchange Act ("CEA"), certain temporary relief from the provisions of the CEA added or amended by title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") that reference one or more terms regarding entities or instruments that title VII requires be "further defined," such as 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 and do not require a rulemaking. The CFTC also proposed to grant temporary relief from certain provisions of the CEA that will or may apply to certain agreements, contracts, and transactions in exempt or excluded commodities as a result of the repeal of various CEA exemptions and exclusions as of the general effective date set forth in section 754 of the Dodd-Frank Act, July 16, 2011. Upon consideration of the full record, the Commission has determined to issue this final exemptive order ("Final Order") essentially as proposed, with appropriate or necessary modification or clarification.

DATES: Effective **July 14, 2011.**

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SUPPLEMENTARY INFORMATION:

I. Background.

On July 21, 2010, President Obama signed the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act amends the CEA[2] to establish a comprehensive new regulatory framework for 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 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 under the authority of the Securities and Exchange Commission ("SEC").

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

[2] 7 U.S.C. 1 et seq.

Section 754 of the Dodd-Frank Act states that, unless otherwise provided, the provisions of subtitle A of title VII of the Dodd-Frank Act ("Title VII")[3] "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, as of July 8, 2011, the Commission has issued 52 advance notices of proposed rulemaking or notices of proposed rulemaking, two interim final rules, six final rules, and one proposed interpretive order. The regulatory requirements that have been proposed by the Commission present a substantially complete mosaic of the Commission's proposed regulatory framework under Title VII. In light of this substantially complete mosaic, the Commission reopened or extended the comment period of many of its proposed rulemakings in order to provide the public with an additional opportunity to comment on the proposed new regulatory framework for swaps, either in part or as a whole.[4] The extended comment period closed on June 3, 2011. The Commission also has solicited public comments on the phasing of rule implementation (i.e., identifying which requirements can be met sooner and which ones will take more time).[5]

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[3] 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. Subtitle B of Title VII is entitled "Regulation of Security-Based Swap Markets," and consists of sections 761-774. References to "Title VII" in this Release shall include only subtitle A of Title VII.

[4] See Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274, May 4, 2011.

[5] The Commission has noted its ability to phase in implementation of the new requirements based on factors such as: the type of swap, including by asset class; the type of market participants that engage in

Section 712(d)(1) of the Dodd-Frank Act requires the Commission and the SEC to further define certain terms used in Title VII, including the terms "swap," "swap dealer," "major swap participant," and "eligible contract participant."[6] Section 721(c) requires the Commission to adopt a rule to further define the terms "swap," "swap dealer," "major swap participant," and "eligible contract participant" to prevent evasion of statutory and regulatory obligations.[7] The Commission has issued two notices of proposed rulemaking that address these further definitions.[8]

The Commission's final rulemakings further defining the terms in sections 712(d) and 721(c) will not be in place as of July 16, 2011. Consequently, concerns have been raised about effects upon the swaps market and the applicability of various regulatory requirements to certain agreements, contracts, and transactions during the period between

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such trades; the speed with which market infrastructures can meet the new requirements; and whether registered market infrastructures or participants might be required to have policies and procedures in place ahead of compliance with such policies and procedures by non-registrants. See http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/staffconcepts050211.pdf.

[6] Section 712(d)(1) 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 [of the Federal Reserve System], 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))."

[7] Section 721(c) 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'."

[8] 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 ("Entity Definitions") 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.

July 16, 2011 and the date(s) that those rulemakings have been completed. To address these concerns, and to "strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime,"[9] the Commission proposed to exercise its authority under CEA section 4(c) and section 712(f) of the Dodd-Frank Act.

Section 4(c) of the CEA, as amended by the Dodd-Frank Act, provides the Commission with authority to exempt certain agreements, contracts, and transactions (referred to hereafter collectively as "transactions") that may otherwise be subject to the CEA from various provisions of the CEA.[10] Section 712(f) of the Dodd-Frank Act states that "in order to prepare for the effective dates of the provisions of this Act," including the general effective date set forth in section 754, the Commission may "exempt persons, agreements, contracts, or transactions from provisions of this Act, under the terms contained in this Act." Section 754 specifies that unless otherwise provided in Title VII, provisions requiring a rulemaking become effective "not less than 60 days after publication of the final rule" (but not before July 16, 2011).

The provisions of Title VII can be grouped into four major categories: (1) provisions that require a rulemaking (for which relief was not proposed); (2) self-effectuating provisions 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 relief was not proposed.

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[9] See Notice Regarding the Treatment of Petitions Seeking Grandfather Relief for Trading Activity Done in Reliance Upon Section 2(h)(1)-(2) of the Commodity Exchange Act, 75 FR 56512, 56513, Sept. 16, 2010 ("Grandfather Notice").

[10] 7 U.S.C. 6(c).

Category 1 provisions are not self-effectuating because they require a rulemaking. A significant number of the Title VII provisions fall into this category. Examples of Category 1 provisions include new CEA section 4s(a) (governing registration of swap dealers and major swap participants), new CEA section 4s(e) (governing capital and margin requirements for swap dealers and major swap participants), and new CEA section 4s(h) (external business conduct standards for swap dealers and major swap participants).[11] Pursuant to section 754, the rulemakings to implement these provisions of the CEA will not become effective, at a minimum, until 60 days after publication of a final Commission rule (and not before July 16, 2011).

Because the Category 1 provisions are not self-effectuating as of July 16, 2011, it was not necessary for the Commission to propose relief with respect to the same. As noted above, the Category 1 provisions will not go into effect until at least 60 days after publication of a final Commission rule in the Federal Register.[12]

The Category 4 provisions also fell outside the scope of the proposed order. They are self-effectuating and do not require relief because, in the judgment of the Commission, compliance with these requirements upon the effective date will not cause undue disruption to affected transactions, markets, or entities, and a delay of the imposition of these statutory requirements would not be in the public interest.

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[11] To be codified at 7 U.S.C. 6s(a), 6s(e) and 6s(h), respectively.

[12] As stated in footnote 5, supra, the Commission has discretion to phase-in implementation of new requirements in Category 1 rulemakings as well as rulemakings conducted with respect to Category 2 provisions. Accordingly, the Commission anticipates that it may establish compliance dates for the substantive requirements established in a rulemaking implementing Category 1 provisions that differ from the effective date of the rulemaking. The effective date and compliance dates for each rulemaking will be determined in each rulemaking proceeding. Additionally, as stated in footnote 69, infra, the Commission has received and has solicited public comments with respect to the appropriate phase-in of the Dodd-Frank Act rulemaking requirements.

The proposed order, as well as lists of the Category 1 and Category 4 provisions prepared by Commission staff, were published on the Commission's website (www.cftc.gov) on June 14, 2011. A list of the provisions in each of the four categories is provided in the Appendix to this Final Order.

II. The Proposed Order.

On June 14, 2011, the Commission issued a proposed order to provide temporary exemptive relief in two parts, each addressing one of the remaining categories of provisions noted above: (1) Category 2 – provisions that are self-effectuating (i.e., do not require rulemaking) and reference terms that require further definition (i.e., "swap," "swap dealer," "major swap participant," or "eligible contract participant"); and (2) Category 3 – provisions that are self-effectuating (i.e., do not require rulemaking) and repeal provisions of current law, but that do not reference terms that require further definition. The Commission's proposed order was published in the Federal Register on June 17, 2011.[13]

With respect to part one of the proposed order addressing Category 2 provisions, the Commission proposed to temporarily exempt persons and entities from the provisions of the CEA, as added or amended by the Dodd-Frank Act, that reference one or more of the terms regarding entities or instruments subject to further definition under sections 712(d) and 721(c) of the Dodd-Frank Act, including the terms "swap," "swap dealer," "major swap participant," or "eligible contract participant."[14] CEA section 4d(f), as

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[13] See Effective Date for Swap Regulation, 76 FR 35372, June 17, 2011.

[14] 76 FR at 35374. In footnote 15 of the proposed order, the Commission stated: "The Commission's authority to provide exemptive relief under CEA section 4(c), as amended by section 721(d) of the Dodd-Frank Act, may not extend to certain Category 2 provisions of the Dodd-Frank Act and the CEA. These

amended by section 724 of the Dodd-Frank Act, is an example of a Category 2 provision to which the exemption provided in the proposed order would extend.[15]

The Commission made clear that the proposed exemptive relief from such provisions would apply only with respect to those requirements or portions of such provisions that specifically relate to such referenced terms. Further, the Commission stressed that the proposed relief "would not in any way limit 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."[16]

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provisions include: new CEA section 4s(l), 7 U.S.C. 6s(l) (providing for swap dealer segregation requirements with respect to uncleared swaps); amended CEA section 5b(a), 7 U.S.C. 7a-1(a) (prohibiting a DCO from performing the functions of a DCO with respect to swaps unless the DCO is registered with the Commission); and new CEA section 4s(k), 7 U.S.C. 6s(k) (providing for the duties and designation of a chief compliance officer for swap dealers and major swap participants). As such, these provisions will take effect on July 16, 2011, and may not be subject to the exemptive relief noted above granted by the Commission. The Commission staff has informed the Commission that it is separately considering whether to issue a no-action letter in which the staff would state that it would not recommend that the Commission commence an enforcement action against markets or market participants for failure to comply with the above-referenced provisions over a similar time period." Subsequently, a draft staff no-action letter that would provide such relief was posted on the Commission's website. See http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/noaction061411.pdf.

[15] To be codified at 7 U.S.C. 6d(f). Thus, for example, persons who accept money, securities or property (or extend credit in lieu thereof) from, for, or on behalf of a swaps customer to margin, guarantee, or secure a swap cleared by or through a derivatives clearing organization would not be required to register as futures commission merchants as otherwise required by section 4d(f)(1) until the expiration of the exemption in part one of the proposed order.

[16] 76 FR at 35374. In footnote 16 of the proposed order, the Commission stated, "The Dodd-Frank Act amended the CEA's anti-fraud and anti-manipulation provisions to cover 'swaps.'" Examples of such provisions include the amendments to the antifraud provisions in CEA section 4b, 7 U.S.C. 6b, as well as the amendments set forth in section 746 of the Dodd-Frank Act, which enacted certain insider trading prohibitions that apply to, among other things, futures contracts and swaps. The Commission stated: "Although these provisions therefore would, under the proposed relief, not apply to 'swaps' under the Dodd-Frank Act because that term 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

The Commission also placed other limitations on the relief in part one of the proposed order. First, the Commission stated that the relief would not apply to any provisions of Title VII and the CEA that have become effective prior to July 16, 2011 or to Commission regulations already issued.[17] Further, the relief would not affect any effective date set out in any specific Dodd-Frank Act rulemaking by the Commission.[18] In addition, the proposed order would not limit the Commission's authority under section 712(f) of the Dodd-Frank Act to issue rules, orders, or exemptions prior to the effective date of any provision, in order to prepare for the effective date of such provision, provided that such rule, order, or exemption shall not become effective prior to the effective date of the provision.[19] Finally, the Commission stated that the proposed order would not affect the applicability of any provision of the CEA to futures contracts or options on futures contracts.[20]

The Commission proposed that the temporary exemptive relief would expire upon the earlier of: (1) the effective date of the applicable final rule further defining the

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2(c)(2) (7 U.S.C. 2(c)(2)), and transactions subject to exemptive relief pursuant to part two of the proposed order)."

[17] 76 FR at 35374. In footnote 17 of the proposed order, the Commission included the following citation: "See, e.g., section 737(d) of the Dodd-Frank Act (amendments regarding position limits effective on the date of enactment). Similarly, this relief would not affect the effective date of any provision that may become effective after July 16, 2011, such as section 716 of the Dodd-Frank Act."

[18] 76 FR at 35374.

[19] Id.

[20] Id. In footnote 18 of the proposed order, the Commission stated: "Accordingly and by way of non-exclusive example, where a provision references both swaps and futures, this relief does not affect in any way the application of the provision (and any implementing Commission regulations thereunder) insofar as it refers to futures."

relevant term; or (2) December 31, 2011.[21] In proposing to limit the relief to no more than a fixed period (i.e., December 31, 2011), the Commission provided the following reasons:

> First, the Commission believes it appropriate and prudent to periodically review the extent and scope of any relief provided from the CEA, as amended by the Dodd-Frank Act. The Commission anticipates that additional rulemakings to implement the Dodd-Frank Act will be completed during this period of transitional relief. During this period the Commission also will be considering the appropriate phase-in of the various regulatory requirements under the Dodd-Frank rulemakings. Accordingly, the Commission believes it would be appropriate to periodically re-examine the scope and extent of the proposed exemptive relief in order to ensure that the scope of relief is appropriately tailored to the schedule of implementation of the Dodd-Frank Act requirements.
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> Second, the limitation of this exemptive relief to no more than a fixed period of time is consistent with similar limitations on transitional relief provided by the Congress elsewhere in Title VII. Section 723(c) of the Dodd-Frank Act allows persons to submit petitions to the Commission "to remain subject to section 2(h) of the [CEA]." In acting upon such petitions, the Commission may allow persons to "continue operating subject to section 2(h) [of the CEA] for not longer than a 1-year period." Similarly, section 734 authorizes the Commission to grant petitions for persons to remain subject to the provisions of section 5d of the CEA governing the operation of exempt boards of trade ("EBOTs") "for up to 1 year after the effective date of this subtitle." In light of these provisions authorizing the Commission to provide transitional relief for no longer than a fixed period of time, the Commission believes it would be appropriate to provide transitional relief consistent with section 712(f) of the Dodd-Frank Act and CEA section 4(c) under this proposed order for no longer than a fixed time period.[22]

In the proposed order, the Commission reiterated its intent: (1) that existing practices should not be unduly disrupted during any transition period; and (2) to deliberatively and efficiently proceed to complete the rulemakings to implement the

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[21] 76 FR at 35374.

[22] 76 FR at 35375 (footnotes omitted).

Dodd-Frank Act.[23] As to timing, the Commission proposed that in the event that a further definitions rulemaking is completed prior to December 31, 2011, the Commission will at the time of such rulemaking address the appropriate phase-in and implementation dates of the resulting regulatory requirements. Alternatively, the Commission stated, should the proposed order expire at the end of the fixed time period—December 31, 2011—such expiration will not affect the Commission's ability to provide further relief, as appropriate, to avoid undue disruption or costs to market participants.[24]

With respect to part two of the proposed order addressing Category 3 provisions, the Commission's proposed order identified the existing provisions of the CEA that currently exclude or exempt, in whole or in part, certain transactions from Commission oversight under the CEA.[25] These are as follows:

i. Section 2(d)(1),[26] transactions in excluded commodities[27] between eligible contract participants and not executed or traded on a trading facility;

ii. Section 2(d)(2),[28] principal-to-principal transactions in excluded commodities between certain eligible contract participants and executed or traded on an electronic trading facility;

iii. Section 2(g),[29] transactions subject to individual negotiation between eligible contract participants in commodities other than agricultural commodities and not executed or traded on a trading facility;

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[23] Id.

[24] Id.

[25] Id.

[26] 7 U.S.C. 2(d)(1).

[27] The term "excluded commodity" is defined in CEA section 1a(13), 7 U.S.C. 1a(13), to include, among other things, financial instruments such as a currency, interest rate, or exchange rate, or any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the transaction.

[28] 7 U.S.C. 2(d)(2).

iv. Sections 2(h)(1)-(2),[30] transactions in exempt commodities[31] between eligible contract participants and not entered into on a trading facility;

v. Sections 2(h)(3)-(7),[32] principal-to-principal transactions in exempt commodities between eligible commercial entities[33] and executed or traded on an electronic trading facility (called exempt commercial markets, or "ECMs");

vi. Section 5d,[34] transactions in commodities, among other things, having a nearly inexhaustible deliverable supply or no cash market, between eligible contract participants and traded on an exempt board of trade ("EBOT"); and

vii. Section 2(e),[35] which generally provides that nothing in the CEA governs or is applicable to an electronic trading facility that limits transactions authorized to be conducted on its facilities to those satisfying the requirements of sections 2(d)(2), 2(g) or 2(h)(3).

Under the Dodd-Frank Act, these provisions will be removed from the CEA as of July 16, 2011. However, the Commission noted that part 35 of the Commission's regulations,[36] and part 32 with respect to options,[37] will continue to be available with respect to transactions that meet the conditions therein, until such time as they may be withdrawn, amended, or replaced by the Commission.[38]

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[29] 7 U.S.C. 2(g).

[30] 7 U.S.C. 2(h)(1)-(2).

[31] The term "exempt commodity" is defined in CEA section 1a(14), 7 U.S.C. 1a(14), as a commodity other than an excluded or agricultural commodity, and includes energy and metals commodities.

[32] 7 U.S.C. 2(h)(3)-(7).

[33] The term "eligible commercial entity" is defined in CEA section 1a (11), 7 U.S.C. 1a(11).

[34] 7 U.S.C. 7a-3.

[35] 7 U.S.C. 2(e).

[36] 17 CFR 35.1 et seq.

[37] 17 CFR 32.1 et seq.

[38] 76 FR at 35375 and 35376 n.36.

As the Commission stated in the proposed order, part 35 originally was promulgated in 1993 pursuant to, among others, the Commission's general exemptive authority in CEA section 4(c) and authority under section 4c(b), and provides a broad-based exemption from the CEA for "swap agreements" in any commodity.[39] Specifically, part 35 exempts "swap agreements," as defined therein, from most of the provisions of the CEA if: (1) they are entered into by "eligible swap participants" ("ESPs");[40] (2) they are not part of a fungible class of agreements standardized as to their material economic terms;[41] (3) the creditworthiness of any party having an actual or potential obligation under the swap agreement would be a material consideration in entering into or determining the terms of the swap agreement, including pricing, cost, or credit enhancement terms;[42] and (4) they are not entered into or traded on a multilateral transaction execution facility.[43] The Commission stated that transactions fully meeting the conditions of part 35 are outside the scope of the proposed order.[44]

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[39] The Commission notes, as discussed infra, that part 35 was originally promulgated in part pursuant to the Commission's plenary options authority in CEA section 4c(b), 7 U.S.C. 6c(b).

[40] The parties covered under the ESP definition, while very broad, are not coextensive with those covered by the terms "eligible commercial entity" or "eligible contract participant." Therefore, it is possible that a small segment of persons or entities that are currently relying on one or more of the CEA exclusions or exemptions cited above might not qualify as an ESP and consequently would not be eligible for exemptive relief under part 35.

[41] This condition was designed so that the exemption would not establish "a market in swap agreements, the terms of which are fixed and are not subject to negotiation that functions essentially in the same manner as an exchange but for the bilateral execution of transactions." See Exemption for Certain Swap Agreements, 58 FR 5587, 5590, Jan. 22, 1993.

[42] By this condition, the exemption does not extend to transactions that are subject to a clearing system where the credit risk of individual members of the system to each other in a transaction to which each is a counterparty is effectively eliminated and replaced by a system of mutualized risk of loss that binds members generally, whether or not they are counterparties to the original transaction. Id. at 5591.

[43] In this context, a multilateral transaction execution facility is a physical or electronic facility in which all market makers and other participants that are members simultaneously have the ability to execute

However, because part 35 covers essentially non-standardized, non-cleared, non-exchange traded transactions, certain persons or entities that currently rely on the CEA exclusions or exemptions cited above may not qualify for part 35. Therefore, and in response to requests from market participants for greater clarity regarding the applicability of various statutory and regulatory requirements to certain transactions following the general effective date, the Commission, pursuant to its authority under CEA section 4(c), proposed to grant relief for those transactions that satisfy certain criteria specified below.[45]

Specifically, the Commission proposed to temporarily exempt a transaction in exempt or excluded commodities (and any person or entity offering or entering into such transaction) from the CEA (other than the anti-fraud and anti-manipulation enforcement provisions identified below) following the general effective date if the transaction otherwise would comply with part 35, notwithstanding that: (1) the transaction may be executed on a multilateral transaction execution facility; (2) the transaction may be cleared; (3) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA (prior to July 16, 2011); (4) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (5) no more than one of the parties to the transaction is entering into the

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transactions and bind both parties by accepting offers which are made by one member and open to all members of the facility. Id.

[44] 76 FR at 35376. In footnote 36, the proposed order also stated that "part 32 of the Commission's regulations will continue to be available with respect to commodity option transactions that meet the conditions therein, until such time as part 32 may be withdrawn, amended, or replaced by the Commission." See Commodity Options and Agricultural Swaps, 76 FR 6095, Feb. 3, 2011.

[45] 76 FR at 35376.

transaction in conjunction with its line of business, but is neither an eligible contract participant nor an ESP, and the transaction was not and is not marketed to the public (the "line of business provision").[46]

As the Commission noted, the proposed temporary exemptive relief would not affect the availability of either parts 35 or 32 with respect to transactions that fully meet the conditions therein.[47] For transactions that fall outside of existing parts 35 or 32, the Commission made clear that the proposed relief would only be available to the extent those transactions (and persons offering or entering into such transactions) fall within the scope of any of the existing CEA sections 2(d), 2(e), 2(g), 2(h), and 5d as in effect prior to July 16, 2011 or the line of business provision.[48]

With respect to any transaction within the scope of part two of the proposed order, the Commission stated that the proposed exemptive relief "would not in any way limit 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

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[46] Id. In footnote 37, the proposed order stated that commenters responding to the Commission's proposed Entity Definitions have suggested that the Commission should exercise its authority to further define the term "eligible contract participant" to encompass the "line of business" provision that was a part of the Commission's Policy Statement Concerning Swap Transactions, 54 FR 30694, 30696-30697, July 21, 1989. The staff is evaluating these comments in the context of the Commission's rulemaking to further define the term "eligible contract participant."

[47] 76 FR at 35376. In addition, in September 2010, the Commission published an order in the Federal Register providing that it would extend grandfather relief, as provided in sections 723(c) and 734(c) of the Dodd-Frank Act, to ECMs and EBOTs provided that certain conditions are met. See Order Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade, 75 FR 56513, Sept. 16, 2010 ("grandfather relief orders"). The Commission stated that nothing in the proposed order was intended to impact the availability of the independent grandfather relief provided in the grandfather relief orders. Id. at n.38.

[48] 76 FR at 35376. The Commission stated in footnote 39 of the proposed order that the exemptive relief would not be available to an electronic trading facility that, as of July 15, 2011, is not already operating as an ECM pursuant to CEA sections 2(h)(3)-(7), or to an EBOT that, as of July 15, 2011, is not already operating pursuant to CEA section 5d, or not compliant with the conditions set forth in such provisions.

the Commission promulgated pursuant to such authorities, including regulations pursuant to CEA section 4c(b) proscribing fraud."[49] Additionally, the Commission stated that the proposed relief would not affect any Dodd-Frank Act implementing regulations (and any implementation period contained therein) that the Commission promulgates and applies to the subject transactions, market participants, or markets.[50] With respect to timing, the Commission proposed that this temporary exemptive relief would expire upon the earlier of: (1) December 31, 2011; or (2) the repeal or replacement of parts 35 or 32, as applicable.[51] The Commission also specified that the exemptive relief in part two of the proposed order would operate for no longer than a fixed period of time for the same reasons as described above with respect to part one of the proposed order.[52]

III. Comments on the Proposed Relief and Commission Determinations.

A. Comments Generally.

The Commission requested comment on all aspects of the proposed order, including whether the proposed temporary exemptions are consistent with the public interest and other requirements of CEA section 4(c).[53] The Commission received 19

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[49] 76 FR at 35376. In so doing, the Commission noted that "the addition of the term 'swap' to some of these provisions would not in any way affect the applicability of these anti-fraud and anti-manipulation enforcement provisions to transactions subject to relief pursuant to part two of the proposed order." Id. at n.40.

[50] 76 FR at 35376. The Commission noted that the proposed order would not affect any Commission rulemaking authority over agreements, contracts, or transactions that may not depend on the terms subject to further definition under sections 712(d) or 721(c) of the Dodd-Frank Act. This relief also would not affect any provisions of the Dodd-Frank Act or the CEA that have become effective prior to July 16, 2011 or regulations already issued. Id. at n.41.

[51] 76 FR at 35376.

[52] Id.

[53] 76 FR at 35377.

comment letters from a variety of interested parties, including market participants and trade associations, trading platforms and clearing organizations, futures and derivatives committees of bar associations, a law firm, and a non-governmental public interest organization.[54]

The majority of commenters generally supported the Commission taking action to provide clarity and exemptive relief with respect to the July 16 effective date. For example, the American Feed Industry Association ("AFIA") described the proposed order as "a prudent move" to "ensure current practices for bona fide hedgers and end-users of agricultural commodities are not unduly disrupted during the transition."[55] Better Markets, Inc. ("Better Markets") described the proposed relief as "appropriate and reasonable," and said that a limited delay is "consistent with the Dodd Frank Act, informed rulemaking and the goal of financial reform."[56] The Alternative Investment Management Association ("AIMA") commented that the proposed order was "clear and provide[s] sufficient guidance for persons and entities to know which rules fall within the order and which do not."[57] The National Grain and Feed Association ("NGFA")

[54] Comments unrelated to the proposed order will not be evaluated here, but will inform the Commission as it proceeds with its Dodd-Frank Act rulemakings.

[55] See letter dated June 28, 2011, from Joel G. Newman, President and Chief Executive Officer, AFIA, at p. 1.

[56] See letter dated July 1, 2011, from Dennis M. Kelleher, President and Chief Executive Officer and Wallace C. Turbeville, Derivatives Specialist, Better Markets, at pp. 1, 2.

[57] See letter dated July 1, 2011, from Jiri Krol, Director of Government & Regulatory Affairs, AIMA, at page 2.

commended the agency "for taking steps to ensure the continued availability of important risk management tools used by hedgers in the grain, feed and processing industry."[58]

Commenters also suggested various modifications or clarifications of the proposed order to address specific issues related to the scope or basis for the proposed exemptive relief. These issues, which are discussed in the remainder of this section below, include: (1) the scope of temporary relief; (2) the expiration date; (3) coverage of commodity options and agricultural swaps; (4) coverage of eligible contract participants; (5) private rights of action; (6) preemption; (7) market issues; (8) core principles; (9) intermediary issues; and (10) the scope of "appropriate persons" under CEA section 4(c). After considering the complete record in this matter, the Commission has determined that the requirements of CEA section 4(c) have been met. For the reasons discussed below, the Commission deems it in the public interest to issue this Final Order substantially as proposed, except for certain clarifications set forth in the discussion in this section below, which the Commission deems appropriate or necessary upon due consideration of the comments received.

B. Scope of Temporary Relief.

1. Comments.

Several commenters expressed general support for the Commission's effort to provide exemptive relief but urged the Commission to use what they stated to be the Commission's broad authority to grant a more comprehensive relief. For example, the Committee on Futures and Derivatives Regulation of the New York City Bar Association ("NYCBA") stated that the Commission has "ample" authority, either based solely on

[58] See letter dated July 1, 2011, from Matt Bruns, Chair, Risk Management Committee, NGFA, at p. 1.

CEA Section 4(c) or as supplemented by section 754 and section 712(f) of the Dodd-Frank Act, to delay the effective date of the Dodd-Frank Act provisions until the effective date of the related implementing regulations.[59] Similarly, the Derivatives and Futures Law Committee of the Business Law Section of the American Bar Association ("ABA Derivatives Committee") stated that sections 754 and 712(f), as well as CEA section 4(c), authorize the Commission to temporarily grant relief from the Dodd-Frank Act until all necessary final rulemakings, including rulemakings as to definitions, are in place.[60] Finally, BG Americas & Global LNG ("BGA") contends that section 721(f) of the Dodd-Frank Act authorizes the Commission to extend exemptive relief with respect to CEA sections 4s(l) (collateral segregation requirements for uncleared swaps) and 4s(k) (duties and designation of a chief compliance officer).[61]

The Commission also received comments requesting modification or clarification regarding the categorization of certain provisions of the Dodd-Frank Act.[62] Specifically,

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[59] See letter dated June 30, 2011, from Timothy P. Selby, Chair, NYCBA, at p. 3. NYCBA asserted that the requirement in section 712(f)(4) that exemptions be made "under the terms of the Act" is intended to require that they be made under the provisions establishing or limiting regulatory authority under the Dodd-Frank Act as a whole, rather than referring to the substance of the exemptive authority available under provisions of the CEA. Id. at p. 4.

[60] See ABA Derivatives Committee at pp. 2-3. The ABA Derivatives Committee stated that the Commission's exemptive authority under the Dodd-Frank Act is broader than the exemptive authority specifically conferred by the CEA, especially in light of the different language of section 712(e) as compared to section 712(f). Id. at p. 5.

[61] See letter dated July 1, 2011, from Lisa Yoho, Director, Regulatory Affairs and Matt Schatzman, Senior Vice President, Energy Marketing, BGA, at pp. 9-10. As discussed in footnote 14, supra, the Commission believes that its authority to provide exemptive relief under section 4(c), as amended by section 721(d) of the Dodd-Frank Act, may not extend to certain Category 2 provisions, such as CEA sections 4s(l) and 4s(k), though the Commission is informed that staff is separately considering a no-action letter with respect to these provisions.

[62] See generally letter dated July 1, 2011, from David M. Perlman, Bracewell & Giuliani LLP, on behalf of the Coalition of Physical Energy Companies, at p. 3 (requesting statement that the Commission intends to preserve the legal status quo for the swaps market unless and until it affirmatively and systematically makes changes).

seven trade associations (collectively, the "Associations") filed a joint comment letter contending that many provisions in Categories 1 and 2 are interdependent with related rulemakings (including those relating to definitions) and, thus, should be extended exemptive relief until all of the mutually-interdependent rulemakings have been completed.[63] The ABA Derivatives Committee believes that Category 2 provisions also are Category 1 provisions because they require the definitional rulemakings to be completed.[64]

Commenters addressing the proposed relief for Category 3 provisions urged that the Commission use its broad authority under CEA section 4(c) and section 712(f) of the Dodd-Frank Act to amend part 35 of the Commission's regulations to provide blanket exemptive relief.[65] The NYCBA recommended that the Commission preserve the current "safe harbors" in CEA sections 2(d), 2(e), 2(g), 2(h) and 5d until the effective date of the applicable final rules with certain clarifications, and that such "safe harbors" should be available even if the subject transaction is cleared.[66]

2. Commission Determination.

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[63] See letter dated July 1, 2011, from American Bankers Association, ABA Securities Association, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, and Securities Industry and Financial Markets Association, at p. 4.

[64] See ABA Derivatives Committee at p. 3.

[65] See, e.g., letter dated July 1, 2011, from R. Michael Sweeney, Jr., Hunton & Williams, on behalf of the Working Group of Commercial Energy Firms ("CEF"), at pp. 3-4. In the alternative, CEF recommends that at a minimum, the Commission use its authority under sections 723(c)(l)-(2) to provide grandfather relief to all persons who transact, operate, or otherwise rely on current CEA section 2(h) as well as all transactions subject to this provision, for a six-month period commencing on July 16, 2011. CEF states that the Commission may rely on section 712(f) as well as sections 723(c)(l)-(2) to exempt persons relying on current CEA sections 2(h)(l)-(2) in carrying out their bilateral exempt commodity transactions, for up to a one year period, following the effective date. CEF at p. 4.

[66] NYCBA at pp. 6-8.

As stated in the proposed order, a significant number of Dodd-Frank Act provisions are not self-effectuating and, thus, it is not necessary to provide relief with respect to such provisions (i.e., Category 1). With respect to the provisions of the Dodd-Frank Act in Categories 2 or 3, the Commission has determined to use its authority to issue this exemptive relief under section 712(f) of the Dodd-Frank Act co-extensively with its exemptive authority under the CEA.[67] The exemptive relief will allow markets and market participants to continue to operate under the regulatory regime as in effect prior to July 16, 2011, but subject to various implementing regulations that the Commission promulgates and applies to the subject transactions, market participants, or markets.

This temporary relief, in the Commission's judgment, is appropriately tailored to enable the Commission to continue to implement the Dodd-Frank Act in an expeditious manner, while minimizing undue disruption and uncertainty for the markets and market participants during the transition period. In this regard, the Commission reiterates that, in considering the appropriate phase-in of its various Dodd-Frank Act implementing regulations, it intends to continue to "strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime."[68] While the sequencing of the final rules is beyond the scope of this Final Order, the

[67] See CEA sections 4(c) and 4c(b).

[68] See Grandfather Notice, supra, n.9.

interdependencies of the various rulemakings will be a consideration in determining the implementation date for each final rule.[69]

C. Expiration Date.

1. Comments.

The proposed order included an outermost, fixed expiration date for parts one and two of the exemptive relief. Part one would expire on the earlier of: (1) the effective date of the applicable final rule further defining the relevant term; or (2) December 31, 2011. Part two of the proposed order would expire on the earlier of: (1) December 31, 2011; or (2) the repeal or replacement of part 35 of the Commission's regulations. In the proposed order, the Commission explained that setting an expiration date was "appropriate to periodically re-examine the scope and extent of the proposed exemptive relief" and that "the limitation of this exemptive relief to no more than a fixed period of time is consistent with similar limitations on transitional relief provided by the Congress" in section 723(c) and section 734 of the Dodd-Frank Act.[70]

Better Markets generally supported the expiration date because it believes that it is extremely important for the Commission to have the ability to assess conditions related to implementation as they evolve over the next six months.[71] Conversely, the ABA

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[69] During the Dodd-Frank Act rulemaking process the Commission has received a number of comments recommending that the Commission appropriately sequence the effective dates and compliance dates under the various Dodd-Frank Act rulemakings. As noted in footnote 5, supra, the Commission already has held a roundtable and solicited public comments with respect to the appropriate phase-in of the Dodd-Frank Act rulemaking requirements. Prior to the roundtable, on April 29, 2011, CFTC staff released a document that set forth concepts that the Commission may consider with regard to the effective dates of final rules for swaps under the Dodd-Frank Act. The Commission therefore anticipates that the determinations regarding the phase-in of compliance dates for and within the various rulemakings will continue to be informed by the Commission's further consideration of this issue, including public comments.

[70] 76 FR at 35375.

[71] See Better Markets at p. 2.

Derivatives Committee, AIMA, the Associations, CME Group Inc. ("CME"), and MarketAxess Holdings Inc. ("MarketAxess") argued that a predetermined global expiration date was not necessary and the Commission should provide that the temporary relief will expire for a given rule only upon the effective date (or compliance date, if later) of the applicable final rule.[72]

In the event the Commission decides to include an expiration date, the NYCBA and ABA Derivatives Committee believe that the Commission should revise the proposed order to trigger the effectiveness of the relevant provision only when both the definitional rulemaking and the substantive rulemaking for the relevant provision become effective.[73] Similarly, the Associations and CME urged the Commission, at a minimum, to extend the expiration date to July 2012, consistent with the transitional period specified in sections 723(c) and 734 of the Dodd-Frank Act.[74] Finally, to address a perceived "potential gap period," the NYCBA and ABA Derivatives Committee believe that the order should contain language specifically addressing situations where final rules are adopted within 60 days before December 31, 2011, or where a final rule otherwise has a prescribed effective date after December 31, 2011.[75]

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[72] See ABA Derivatives Committee at p. 6; AIMA at p. 2; Associations at p. 6; letter dated July 1, 2011, from Craig S. Donohue, Chief Executive Officer, CME, at p. 2; letter dated June 29, 2011, from Richard McVey, Chairman and Chief Executive Officer, MarketAxess, at p. 2.

[73] See NYCBA at p. 4; ABA Derivatives Committee at p. 7.

[74] See Associations at p. 6, n.11; CME at p. 2.

[75] See NYCBA at p. 5; ABA Derivatives Committee at pp. 7-8. NYCBA and the ABA Derivatives Committee proposed the following language: "This order shall expire on (1) December 31, 2011, with respect to any provision for which final rules (including final definitional rules) were not adopted on or before December 31, 2011, or (2) with respect to any provision for which final rules (including final definitional rules) were adopted on or before December 31, 2011, on the later of the effective date of all final definitional rules used in the provision and the effective date of the provision as set forth in the final rules adopting such provision."

2. Commission Determination.

The Commission has determined, for the reasons discussed in the proposed order, not to alter the expiration date(s) contained in the proposed order. An automatic expiration date of no later than December 31, 2011, will allow the Commission to review the extent and scope of relief provided from the CEA on a measured basis. Should the Commission deem it appropriate to extend any exemptive relief, the Commission will be in a better position to tailor any exemption at that time. Further, as noted in the proposed order, limiting exemptive relief to a fixed period is consistent with the approach to transitional relief provided in sections 723(c) and 734 of the Dodd-Frank Act. With regard to any concerns over a potential "gap period" before or after the expiration date of December 31, 2011, the Commission notes that it can address compliance date concerns within the context of each individual rulemaking. Once again, the Commission will be able to act in a measured manner tailored to the particular statutory and regulatory provisions.

D. Commodity Options and Agricultural Swaps.

1. Comments.

Several commenters requested that the Commission clarify that the relief based on part 35 in part two of the proposed order, which applies to certain transactions in exempt and excluded commodities, covers commodity options.[76] The ABA Derivatives Committee also requested that the Commission expand the relief based on part 35 in part

[76] See CEF at p. 5; ABA Derivatives Committee at p. 12; BGA at p. 8.

two of the proposed order to include swaps and options in agricultural commodities.[77] Finally, commenters including various energy companies urged the Commission to rely, in part, upon CEA section 4c(b) as authority to issue the elements of the relief related to options, stating that the Commission retains its plenary authority to regulate commodity options under CEA section 4c(b)[78] and that section 4c(b) was unaltered by the Dodd-Frank Act.[79] The NGFA, though, noted that the proposed order addressed concerns it had regarding the availability of certain option-based transactions until final rules authorizing their continued use are published.[80]

2. Commission Determination.

With respect to options, the Commission is clarifying that the relief in part two of the Final Order that is based on part 35 applies to commodity options on excluded and exempt commodities to the extent they were permitted by the applicable statutory exemptions and exclusions in effect prior to July 16, 2011. As reflected in the commenters' citations to § 35.1 of the Commission's regulations, the text of paragraph (b)(1) of the "swap agreement" definition in the rule lists several types of options, including, but not limited to, currency options, interest rate options, and rate caps and

[77] See ABA Derivatives Committee at pp. 9, 11-13; letter dated June 29, 2011, from Paul J. Pantano, Jr., and Athena Eastwood, Cadwalader, Wickersham & Taft LLP, on behalf of the Commodity Options and Agricultural Swaps Working Group, at p. 2.

[78] See CEF at p. 5, n.12.

[79] See ABA Derivatives Committee at pp. 10-11; BGA at p. 8, n.22.

[80] See NGFA at p. 1.

collars, and includes the following text: "any other similar agreement (including any option to enter into any of the foregoing)."[81]

Under part two of the Final Order, transactions in exempt or excluded commodities (and persons offering, entering into, or rendering advice or rendering other services with respect to such transactions) will be temporarily exempt from the CEA if such transactions comply with part 35 notwithstanding that: (1) the transaction may be executed on a multilateral transaction execution facility; (2) the transaction may be cleared; (3) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA (prior to the enactment of the Dodd-Frank Act); (4) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (5) no more than one of the parties to the transaction is entering into the transaction in conjunction with its line of business, but is neither an eligible contract participant nor an ESP, and the transaction was not and is not marketed to the public. The options identified in the swap agreement definition and any options captured by the concluding catch-all language, as well as any options described in paragraphs (b)(1)(ii)[82] and/or (iii)[83] of § 35.1 of the Commission's regulations, involving excluded or exempt commodities are, therefore, within the scope of the Final Order.[84]

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[81] 17 CFR 35.1(b)(1)(i). In addition to the options specifically identified in the swap agreement definition, in the part 35 adopting release, the Commission stated that "[t]he words 'any similar agreement' in the definition includes any agreement with a similar structure to those transactions expressly included in the definition (e.g., a cap, collar, or floor) without regard to the nature of the underlying commodity interest involved." Exemption for Certain Swap Agreements, 58 FR 5587, 5589 n.16, Jan. 22, 1993. The Commission also said that "[i]n enacting this exemptive rule, the Commission is also acting under its plenary authority under section 4c(b) of the Act with respect to swap agreements that may be regarded as commodity options." Id. at 5589.

[82] Paragraph (b)(1)(ii) of § 35.1 defines "any combination of the foregoing [list of identified swap agreements]" as a swap agreement.

With respect to agricultural commodities, part 35 is not currently available for option transactions on the agricultural commodities enumerated in either CEA section 1a(4)[85] or § 32.2 of the Commission's regulations[86] (the "Enumerated Agricultural Commodities"). Such option transactions may occur only pursuant to the agricultural trade option exemption in § 32.13 of the Commission's regulations.[87] As the Commission noted when it adopted § 32.13 as an interim final rule, which it later adopted as a final rule:

> [o]ne commenter representing swaps dealers requested that the Commission clarify that the part 35 exemption applies to off-exchange agricultural options rather than this exemption [17 CFR § 32.13(g)]. The Commission disagrees. Any off-exchange option on an enumerated agricultural commodity must comply with Commission rule 32.13(g) for exemption from the Act and Commission rules, and no other exemptive provision is available."[88]

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[83] Paragraph (b)(1)(iii) of § 35.1 defines "[a] master agreement for any of the foregoing [list of identified swap agreements] together with all supplements thereto" as a swap agreement.

[84] In addition to CEA section 4(c) and section 712(f) of the Dodd-Frank Act, CEA section 4c(b), 7 U.S.C. 6c(b) also provides the Commission with authority to issue the temporary exemptive Order with respect to commodity options. Section 4c(b), which was unaltered by the Dodd-Frank Act, provides the Commission plenary authority to regulate commodity options. Parts 32 and 35 were issued, in part, based on the Commission's authority under CEA section 4c(b).

[85] 7 U.S.C. 1a(4).

[86] 17 CFR 32.2.

[87] 17 CFR 32.13. The Commission notes that the NGFA comment letter generally supported the Commission's approach "to preserve the availability of certain option-based transactions such as . . . OTC options until final rules authorizing their continued use are published." See NGFA at p. 1.

[88] See Trade Options on the Enumerated Agricultural Commodities, 63 FR 18821, 18829, Apr. 16, 1998. § 32.13(a) technically also would be available to persons satisfying its terms. However, that would require such persons to register as agricultural trade option merchants ("ATOMs") and comply with the ATOM regulatory regime. Only one firm has ever registered as an ATOM, and it later withdrew its registration. Currently, no firm is registered as an ATOM. The Commission recently proposed to repeal § 32.13. See Commodity Options and Agricultural Swaps, 76 FR 6095, Feb. 3, 2011.

Accordingly, part 35 may not be relied upon for options in the Enumerated Agricultural Commodities. As the Commission noted in the proposed order, though, part 32 of the Commission's regulations will continue to be available with respect to commodity option transactions that meet the conditions therein, until such time as part 32 may be withdrawn, amended, or replaced by the Commission.[89] The Commission further stated in the proposed order that the purpose of the proposed relief is to "strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime."[90] Accordingly, the Commission is clarifying that part two of this Final Order does not apply to options on Enumerated Agricultural Commodities.

Part 35, however, always has covered swap agreements (other than options) on the Enumerated Agricultural Commodities and swap agreements (including options)[91] on non-enumerated agricultural commodities (e.g., coffee, sugar, cocoa). As the Commission noted in the proposed order, part 35 will continue to be available with respect to transactions that meet the conditions therein, until such time as it may be withdrawn, amended, or repealed by the Commission.[92]

For certain transactions, part two of this Final Order provides relief notwithstanding that the transaction may not satisfy certain part 35 requirements (e.g., cleared, executed on a multilateral trade execution facility, entered into by certain persons

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[89] 76 FR at 35376 n.36.

[90] 76 FR at 35373, quoting Grandfather Notice, supra, n.9 (emphasis added).

[91] Options on non-enumerated agricultural commodities may be conducted pursuant to part 35, as the agricultural trade option rules in § 32.13 apply only to options on the Enumerated Agricultural Commodities.

[92] 76 FR at 35375.

that are not eligible contract participants, etc.).[93] This relief is limited to transactions in exempt and excluded commodities, and does not extend to transactions in agricultural commodities (enumerated or non-enumerated). As stated in the proposed order, the purpose of part two of the Final Order is to provide relief with respect to CEA provisions that will be repealed as of July 16, 2011 – specifically, current CEA sections 2(d), 2(e), 2(g), 2(h), and 5d. These provisions apply only to transactions in exempt and excluded commodities, and do not encompass agricultural commodities. Thus, because transactions in agricultural commodities cannot today be executed in reliance on one or more of these provisions to be repealed on July 16, extending part two of the Final Order to transactions in agricultural commodities is not necessary to "strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime."[94]

In sum, the Commission is clarifying that the temporary exemptive relief in part two of the Final Order that is based on part 35 applies to commodity options on excluded and exempt commodities to the extent that these transactions were permitted by the applicable statutory exclusions and exemptions in effect prior to July 16, 2011. It does not apply, however, with respect to swaps and commodity options on agricultural commodities (enumerated or non-enumerated). Market participants may continue to rely on part 35 with respect to swaps and commodity options on non-enumerated agricultural

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[93] Id. at 35376.

[94] See supra, n.9. The Commission has in the past granted exemptive relief pursuant to CEA section 4(c) from the requirements of part 35 to permit the clearing of certain agricultural basis and calendar swaps. See orders granted to ICE Clear US, Inc., 73 FR 77015, Dec. 18, 2008; Chicago Mercantile Exchange, 74 FR 12316, Mar. 24, 2009; and Kansas City Board of Trade, 75 FR 34983, June 21, 2010. Part two of this Final Order does not apply; however, parties may continue to rely on these prior orders to the extent their transactions fully comply with them.

commodities, as well as swaps (other than commodity options) on Enumerated Agricultural Commodities, to the extent these transactions fully comply with part 35. Market participants also may continue to rely on part 32 for options on Enumerated Agricultural Commodities to the extent these transactions are conducted in accordance with § 32.13(g) of the Commission's regulations.

E. Eligible Contract Participants.

1. Comments.

First, with respect to the amendments that the Dodd-Frank Act made to the existing definition of the term "eligible contract participant" in the CEA, the NYCBA asked the Commission to confirm that these changes are subject to exemptive relief under the Final Order.[95] The ABA Derivatives Committee believes that because the term "eligible contract participant" expressly requires rulemaking, the amendments to the existing CEA definition would not take effect even in the absence of exemptive relief; it asked that the Final Order confirm this.[96] Comment letters from various energy companies supported the request of the ABA Derivatives Committee in this regard.[97]

The Associations requested that the Commission confirm that amendments to CEA sections 2(c)(2)(B), 2(c)(2)(C) and 2(c)(2)(E) regarding off-exchange foreign currency ("forex") transactions with retail customers will not become effective until relevant required rulemakings have been completed.[98] The Associations requested that

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[95] See NYCBA at p. 5.

[96] See ABA Derivatives Committee at p. 8.

[97] See CEF at p. 8; BGA at p. 6.

[98] See Associations at p. 3.

the Commission confirm that, notwithstanding its general classification of the Dodd-Frank Act's retail forex amendments as Category 4 provisions, it will regard the specific provisions that relate to the definition of the term "eligible contract participant" as Category 1 provisions.[99] The Associations believe that CEA Section 2(c)(2)(E) also should be treated as a Category 1 provision because it explicitly requires rulemakings by other financial regulatory agencies. Alternatively, the Associations stated, these provisions fall in Category 2 because they depend on the definition of the term "eligible contract participant," and thus should be subject to section 4(c) exemptive relief.[100] The Associations requested, if the Commission declines to adopt either of these categorizations, a non-enforcement position until the rule further defining the term "eligible contract participant" and the federal regulatory agency rules applicable to retail forex transactions have been finalized, along with a corresponding section 4(c) order exempting affected persons from private rights of action.[101]

2. Commission Determination.

With respect to the first issue, the term "eligible contract participant" is currently defined in the CEA.[102] The Dodd-Frank Act amended the existing CEA definition by, among other things, raising the monetary thresholds for certain persons and entities to qualify as eligible contract participants. As noted, the term "eligible contract participant" is one of the terms that Congress, in sections 712(d) and 721(c), required the Commission

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[99] Id. at p. 16.

[100] Id.

[101] See Associations at p. 16, n.38.

[102] See CEA section 1a(12), 7 U.S.C. 1a(12).

(jointly with the SEC, and in consultation with the Board of Governors of the Federal Reserve System) to further define. Sections 712(d) and 721(c) are included in the list of Category 1 provisions in the Appendix. Accordingly, the Commission confirms that pending the effective date of the required rulemaking to further define the term "eligible contract participant," that term shall continue to mean an eligible contract participant as defined by the CEA prior to the enactment of the Dodd-Frank Act.

With respect to the second issue, sections 741 and 742 of the Dodd-Frank Act enacted various amendments to CEA sections 2(c)(2)(B) and (C), which address certain types of forex transactions with retail customers. These amendments do not themselves require a rulemaking, nor do they reference the term "eligible contract participant" or any other term requiring further definition. Therefore, they are appropriately placed in Category 4, outside the scope of the Final Order granting temporary exemptive relief from the July 16 effective date.

To be sure, both of these provisions, in text that was not amended by the Dodd-Frank Act, define the "retail" customers to which they apply as persons that are not eligible contract participants. Yet, the amendments in sections 741 and 742 of the Dodd-Frank Act contain important protections for non-eligible contract participants engaging in off-exchange forex transactions, which represent an area that historically has been fraught with customer fraud and other abusive sales practices. As one example, they clarify that an account or pooled investment vehicle that is offered for the purpose of trading, or that trades, a covered off-exchange forex transaction with a non-eligible contract participant – in addition to the transaction itself – is subject to the Commission's jurisdiction, including its anti-fraud authority.

Unlike new statutory terms required to be further defined (e.g., "swap," "swap dealer," and "major swap participant"), the CEA prior to enactment of the Dodd-Frank Act already contains a definition of the term "eligible contract participant" that has been in place for over a decade.[103] The Commission does not believe that it is necessary or appropriate to delay the effective date of the important customer protections in amended CEA sections 2(c)(2)(B) and (C) until such time as it issues the final joint rulemaking further defining the term "eligible contract participant" for purposes of the new swap regulatory regime.[104] Accordingly, the Commission, as proposed, considers the amendments to CEA sections 2(c)(2)(B) and (C) to be Category 4 provisions in their entirety and is not providing exemptive relief from the July 16 effective date of these provisions. As discussed above, though, pending the effective date of the required rulemaking to further define the term "eligible contract participant," for purposes of CEA sections 2(c)(2)(B) and (C) that term shall continue to mean an eligible contract participant as defined by the CEA prior to the enactment of the Dodd-Frank Act.

With respect to new CEA section 2(c)(2)(E) enacted as part of section 742 of the Dodd-Frank Act,[105] it generally prohibits a financial institution for which there is a Federal regulatory agency[106] from entering into certain off-exchange forex transactions[107]

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[103] The amendments to the definition of the term "eligible contract participant" in the Dodd-Frank Act were motivated largely by concerns regarding the marketing of over-the-counter derivatives that the Dodd-Frank Act defines as "swaps." See generally Department of the Treasury, Financial Regulatory Reform: A New Foundation; Rebuilding Financial Supervision and Regulation, at pp. 45-46, June 17, 2009.

[104] Even if these provisions were placed in Category 2, section 742 of the Dodd-Frank Act is listed in section 721(d), which places limits on the Commission's exemptive authority under CEA section 4(c).

[105] To be codified at 7 U.S.C. 2(c)(2)(E).

[106] Section 2(c)(2)(E) defines a "Federal regulatory agency" to include the Commission, the SEC, the National Credit Union Administration, the Farm Credit Administration, and an "appropriate Federal banking agency." Section 721(a)(2) of the Dodd-Frank Act, in turn, adds a new definition of the term

with retail customers (i.e., non-eligible contract participants) except pursuant to a rule or regulation of the Federal regulatory agency allowing the transaction under such terms and conditions as the Federal regulatory agency shall prescribe. The Commission does not agree that CEA section 2(c)(2)(E) should be treated as a Category 1 provision on the basis that it requires rulemakings by other financial regulatory agencies.[108] Although section 2(c)(2)(E) prohibits a financial institution from entering into certain forex transactions with non-eligible contract participants unless its Federal regulatory agency adopts rules allowing such transactions, it does not require Federal regulatory agencies to adopt such rules.

Granting relief from the July 16 effective date with respect to section 2(c)(2)(E) would treat this provision differently from the Commission's treatment of the similar provisions in sections 2(c)(2)(B) and (C) as Category 4 provisions, as discussed above.[109] In light of the important customer protection interests served by section 2(c)(2)(E), the Commission does not believe that such different treatment is necessary or appropriate. Accordingly, the Commission, as proposed, considers new CEA section 2(c)(2)(E) to be a Category 4 provision and is not providing exemptive relief from the July 16 effective

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"appropriate Federal banking agency" in CEA section 1a(2), to be codified at 7 U.S.C. 1a(2), that includes the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Board of Governors of the Federal Reserve System.

[107] The prohibition applies to forex transactions of the type described in CEA section 2(c)(2)(B), as well as all forex transactions "that are functionally or economically similar" to such transactions.

[108] See Associations at p. 16.

[109] See also supra, n.104.

date of this provision.[110] As discussed above, though, pending the effective date of the required rulemaking to further define the term "eligible contract participant," for purposes of CEA section 2(c)(2)(E) that term shall mean an eligible contract participant as defined by the CEA prior to the enactment of the Dodd-Frank Act.[111]

F. Private Right of Action.

1. Comments.

Section 749 of the Dodd-Frank Act amends CEA section 22(a)(1)(B)[112] to apply the CEA's private right of action to violations involving swaps. The Associations requested that the Commission confirm that it is granting a temporary exemption pursuant to CEA section 4(c) with respect to the Dodd-Frank Act's expansion of the private right of action to violations involving swaps, and to provide a specific section 4(c) exemption with respect to the application of CEA section 22(a)(1)(B) to any provision

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[110] Although none of the comment letters discussed new CEA section 2(c)(2)(D) enacted in section 742 of the Dodd-Frank Act, to be codified at 7 U.S.C. 2(c)(2)(D), it provides protections to retail customers, which it defines as persons that are not eligible contract participants, in transactions in commodities other than foreign currency. Thus, it raises similar issues. Fraud and abusive practices also have been a frequent problem in off-exchange transactions with retail customers in commodities such as precious metals. In light of these important customer protection concerns, and the fact that the CEA prior to enactment of the Dodd-Frank Act already contains a settled definition of the term "eligible contract participant," the Commission is clarifying that new CEA section 2(c)(2)(D) similarly is a Category 4 provision for which no relief from the July 16 effective date is being provided. Pending the effective date of the required rulemaking to further define the term "eligible contract participant," for purposes of CEA section 2(c)(2)(D) that term shall mean an eligible contract participant as defined by the CEA prior to the enactment of the Dodd-Frank Act.

[111] AIMA submitted a comment letter that expressed "support [for] exemptive relief from any rule that relies on the amended definition" of the term "eligible contract participant." See AIMA at p. 2. The exemptive relief being issued by the Commission applies to various provisions of the Dodd-Frank Act and the CEA that otherwise would become effective on July 16, 2011. The Commission will consider the appropriate effective date and compliance date of the rules implementing the Dodd-Frank Act in its final rulemakings adopting such rules.

[112] 7 U.S.C. 25(a)(1)(B).

that is the subject of a Commission or staff no-action position.[113] The Associations noted that "under the Commission's proposed categorization, it is clear that section 749's amendment to CEA Section 22(a)(1)(B) should logically fall under Category 2, and accordingly be the subject of a temporary exemption under CEA Section 4(c)."[114]

2. Commission Determination.

As noted in the proposed order, amended CEA section 22(a) (private right of action with respect to swaps) is a provision that amends the CEA and that references a term that requires further definition, but nevertheless, the Commission does not believe that it is appropriate to include the provision within the scope of the exemptive relief.[115] To the extent that the Final Order provides exemptive relief under CEA section 4(c) with respect to Category 2 and Category 3 provisions, such exemptive relief would, in effect, preclude a person from succeeding in a private right of action under CEA section 22(a) for violation of such provisions. Accordingly, the Commission believes that the requested relief is not necessary to achieve the purposes of the Final Order.[116]

Nevertheless, the staff's Category 4 list that was posted on the CFTC website identified only CEA sections 22(a)(4) and (5)—not section 22(a)(1), which is the provision that provides for a private right of action for violation of the swap provisions.

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[113] See Associations at p.12.

[114] Id. at 11.

[115] 76 FR at 35374, n.13.

[116] The Commission also declines to provide a section 4(c) exemption with respect to the application of CEA section 22(a)(1)(B) to any provision that is the subject of a no-action letter, as such relief would be the functional equivalent of exemptive relief which may be restricted under the limitations on CEA section 4(c) set forth in section 721(d) of the Dodd-Frank Act. In the absence of clear authority to provide such relief in this manner, the Commission does not believe that granting such relief in this Final Order would provide the requested legal clarity.

To address this inadvertent omission, the Category 4 list in the appendix to this Final Order includes CEA section 22(a)(1)(B).[117]

NYCBA requested the Commission to "explicitly provide that section 22(a)(4)(B) of the CEA as amended by the Dodd-Frank Act will become effective July 16, 2011."[118] The Commission notes that the Category 4 list in the Appendix includes amended sections 22(a)(4)-(5) under the Dodd-Frank Act section 739 provisions governing legal certainty for swaps. As such, sections 22(a)(4)-(5) become effective on July 16, 2011.

G. Preemption.

1. Comments.

The Commission also received comments addressing questions of the preemption of state gaming and bucket shop laws. NYCBA requested that the Final Order clarify that any agreement, contract or transaction subject to the Final Order "will benefit from the preemption of any state or local laws provided by Section 12(e)(2) of the CEA because the relief is granted under Section 4(c) of the CEA."[119]

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[117] In addition, the lists of Category 1 and Category 4 provisions set forth in the Appendix include other changes as compared to the staff lists that were posted on the Commission's website on June 14, 2011. Specifically with respect to Category 1: (i) section 711 of the Dodd-Frank Act has been added to the "Required Rulemaking" column for Teams II and XXI; (ii) section 741(b)(10) of the Dodd-Frank Act has been added to the "Required Rulemaking" column for Team II; (iii) the reference to "section 2(h)(7)" of the CEA for Team XI has been modified to read "section 2(h)(7)(A)-(D);" and (iv) the separate rows with respect to swap data recordkeeping and reporting requirements have been combined. And with respect to Category 4: (i) sections 722(a) and (c) of the Dodd-Frank Act have been added; (ii) new CEA section 5b(h), to be codified at 7 U.S.C. 7a-1(h), has been added; (iii) section 741(a) of the Dodd-Frank Act has been added; (iv) the reference to "section 741(b)" of the Dodd-Frank Act has been modified to read "section 741(b)(8)-(9);" (v) wording changes to the "Summary Description" of sections 742(a) and (c) of the Dodd-Frank Act have been made; (vi) new CEA sections 23(g) and (m), to be codified at 7 U.S.C. 26(g) and (m), have been added with respect to section 748 of the Dodd-Frank Act; and (vii) a technical correction in the reference to CEA section 6(b) has been made with respect to section 749 of the Dodd-Frank Act.

[118] See NYCBA at p. 8.

[119] Id.

The Associations noted that because the Dodd-Frank Act repealed the application of CEA section 12(e)(2)(B)[120] to certain previously exempted swap transactions, "market participants are concerned that transactions conducted in accordance with the federal statutory provisions and rules applicable to swaps could potentially be subject to challenges for invalidity under state law prohibitions against gaming and bucket shops that in many cases pre-date even federal regulation of futures contracts."[121] To address these concerns, the Associations suggested the adoption of a permanent exemption under section 4(c) for such transactions. They noted that "[i]f the Commission extends permanent exemptive relief to such transactions, this risk would be eliminated, since CEA section 12(e)(2)(B) explicitly states that the CEA supersedes state gaming and bucket shop laws in the case of 'an agreement, contract or transaction . . . exempted under section 4(c) of [the CEA] . . .'"[122]

2. Commission Determination.

The Commission notes that the Final Order does not affect the applicability of CEA section 12(e)(2)(B) to any exemptive relief under section 4(c) that is provided by the Final Order. CEA section 12(e)(2)(B) as amended by section 749 of the Dodd-Frank

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[120] CEA section 12(e)(2)(B), as amended by section 749 of the Dodd-Frank Act, provides that:

> (2) This Act shall supersede and preempt the application of any State or local law that prohibits or regulates gaming or the operation of bucket shops (other than antifraud provisions of general applicability) in the case of—
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> . . .
>
> (B) an agreement, contract, or transaction that is excluded from this Act under section 2(c) or 2(f) of this Act . . . or exempted under section 4(c) of this Act (regardless of whether any such agreement, contract, or transaction is otherwise subject to this Act.)

[121] See Associations at p. 14.

[122] Id.; see also ABA Derivatives Committee at p. 13.

Act provides that the CEA supersedes state gaming and bucket shop laws in the case of "an agreement, contract or transaction . . . exempted under section 4(c)" of the CEA. To the extent that the Final Order provides temporary exemptive relief under CEA section 4(c), CEA section 12(e)(2)(B) will apply to such transactions that are within the scope of such exemptive relief.

As the Commission explained in its proposed order, the purpose of the relief is to address concerns that were raised about the effects upon the swaps market during the period between July 16, 2011 and the date(s) that the definitional rulemakings have been completed.[123] Indeed, the Commission reaffirmed in its proposed order that it intends to "strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime."[124] Insofar as these comments seek a permanent exemption under section 4(c), the requested relief is outside the scope of the Final Order.

H. Market Issues.

1. Comments.

State Street Corporation ("State Street") expressed concern that "limiting exemptive relief under the Commission's Order and grandfather relief under the [swap execution facility] rules to the small number of firms that are already operating an electronic trading platform or system for the trading of exempt commodities (in the case of ECMs) or the trading of futures contracts on excluded commodities (in the case of EBOTs) would have the effect of making it impossible for new entrants – who would have to wait for the [swap execution facility] rules to be adopted and their applications to

[123] 76 FR at 35373.

[124] See n.9, supra.

be approved" to enter the swaps market and compete.[125] State Street also requested that the Commission clarify that electronic trading facilities that operate, either currently or at any point during the relief period, under CEA sections 2(d)(2) and 2(e), as in effect prior to July 16, 2011, will be permitted to conduct business operations on a temporary basis during the relief period, without regard to whether the electronic trading facility is currently operating or instead commences operations at some point during the relief period.[126]

CME requested that the Commission confirm that exemptive relief is not needed for a designated contract market ("DCM") to list swaps for trading on or after July 16, so long as those products are regulated as futures products and market participants trading those products are regulated as futures market participants. Alternatively, if the Commission views it differently, CME asks the Commission to issue such exemptive relief.[127]

2. Commission Determination.

In response to the comments, the Commission would like to clarify the conditions that apply to the grandfather relief orders for ECMs and EBOTs that were issued by the Commission in September 2010.[128] Both of those orders have three basic conditions. First, the ECM or EBOT must file an appropriate and timely petition with the Commission. In the case of ECMs, the filing deadline was September 20, 2010 and for

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[125] See letter dated June 28, 2011, from David C. Phelan, Executive Vice President and General Counsel, State Street, at p. 3.

[126] Id. at pp. 2-3.

[127] See CME at pp. 4-5.

[128] See supra, n.47.

EBOTs, the deadline is July 15, 2011. Second, the ECM or EBOT must file a DCM or swap execution facility ("SEF") application with the Commission within 60 days of the effective date of final regulations regarding the DCM or SEF provisions. Third, the ECM's or EBOT's DCM or SEF application must remain pending before the Commission.

The Commission is clarifying the second and third conditions, in that the Commission has not yet issued any final DCM or SEF rulemakings since enactment of the Dodd-Frank Act. The Commission notes that the list of conditions for the ECM and EBOT grandfather relief orders are premised on the ECM or EBOT "meet[ing] all of the following applicable conditions."[129] Given that the Commission has not yet adopted either final DCM or final SEF regulations, the ECM and EBOT grandfather relief order conditions premised on DCM or SEF applications are not yet applicable. Accordingly, at this point in time, all that an ECM or EBOT must do to receive relief pursuant to the grandfather relief orders is to have satisfied the orders' petition condition in a timely manner.

The Commission also is clarifying the relationship between the grandfather relief orders and this Final Order. For ECMs that filed their petitions with the Commission by September 20, 2010, the grandfather relief order operates independently and those ECMs may rely on either the grandfather relief order or this Final Order, or both. For those ECMs that did not file a petition for grandfather relief by September 20, 2010, they may qualify for relief under this temporary Final Order if they satisfy the requisite terms and

[129] Id. at 56515.

conditions herein.[130] Similarly, for EBOTs that file or have filed their petitions for grandfather relief by July 15, 2011, that grandfather relief operates independently and those EBOTs may rely on either the grandfather relief order or this Final Order, or both. Likewise, for those EBOTs that have not filed their petitions for grandfather relief by July 15, 2011, they may qualify for relief under this Final Order if they, too, satisfy the requisite terms and conditions herein.

The Commission stated in footnote 39 of the proposed order that the proposed exemptive relief would not be available to an electronic trading facility that, as of July 15, 2011, was not already operating as an ECM pursuant to CEA sections 2(h)(3)-(7), or to an EBOT that, as of July 15, 2011, was not already operating pursuant to CEA section 5d, or not compliant with the conditions set forth in such provisions. The Commission, however, has determined not to limit the Final Order herein to those ECMs and EBOTs that already are operating as of July 15, 2011. Further, the Commission also clarifies that the relief under this Final Order is available to an electronic trading facility that currently operates or commences operations during the pendency of this relief pursuant to CEA sections 2(d)(2) and 2(e), as in effect prior to July 16, 2011.

The Commission also confirms that a DCM may list and trade swaps on or after July 16 under the DCM's rules related to futures contracts, without exemptive relief.[131]

I. Core Principles.

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[130] EBOTs and ECMs that rely on this exemptive relief also must comply with part 36 of the Commission's regulations and, in particular, its various reporting requirements.

[131] The Commission notes that if a DCM intends to trade swaps pursuant to the rules, processes, and procedures currently regulating trading on its DCM, the DCM may need to amend or otherwise update applicable rules, processes, and procedures, in order to address the trading of swaps, depending upon the composition of the DCM's rules.

1. Comments.

The Commission received a number of comments on the application of the Proposed Order to the DCM and derivatives clearing organization ("DCO") core principles. On the one hand, CME agreed that the core principles for DCMs and DCOs are appropriately categorized as Category 4 provisions for which the Commission is not issuing exemptive relief.[132]

On the other hand, some commenters believe that the core principles for DCMs and DCOs in CEA sections 5(d) and 5b(c)(2), respectively,[133] should be treated as either Category 1 or 2 provisions. The Minneapolis Grain Exchange, Inc. ("MGEX") stated that the Commission should grant temporary relief from the new core principles of the Dodd-Frank Act for DCOs and DCMs.[134] The Natural Gas Exchange ("NGX") expressed concern that DCOs will have to make modifications to come into compliance with amended core principles by July 16, 2011, and then may be required to again make modifications when final rules are issued. NGX requested that the Commission or its staff adopt a non-enforcement policy against any DCO or DCO member or participant with respect to compliance with the DCO core principles until the implementation of final Commission rules governing the operation of DCOs or, alternatively, that the Commission provide at least a 60-day period following July 16, 2011, before it takes any enforcement action.[135]

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[132] CME at p. 4.

[133] 7 U.S.C. 7(d) and 7a-1(c)(2).

[134] See letter dated July 1, 2011, from Layne G. Carlson, Corporate Secretary, MGEX, at pp. 1-2.

[135] See letter dated June 30, 2011, from Peter Krenkel, President and Chief Executive Officer, NGX, at pp. 2-3.

Nodal Exchange cautioned that placing the DCM core principles in section 735 of the Dodd-Frank Act into Category 4, while the core principles for SEFs in section 733 are in Category 1, may lead to their respective regulations being issued and finalized at different times.[136] Nodal Exchange recommended that the Commission issue final rules regarding the DCM and SEF core principles simultaneously.[137]

2. Commission Determination.

The Commission has considered these comments and believes that the DCO and DCM core principles are properly treated as Category 4 provisions outside the scope of relief of this Final Order. These amended core principles apply to the trading and clearing of instruments on DCMs and DCOs, regardless of whether the instrument is a futures contract or a swap. The Commission sees no need to delay the application of these amended core principles to DCMs that trade futures contracts or to DCOs that clear futures, a term which does not require further definition under the Dodd-Frank Act. Moreover, the amended core principles provide that, absent a rule or regulation prescribed by the Commission, DCMs and DCOs shall have reasonable discretion in developing their rules and programs to comply with the core principles.[138]

To the extent that the Commission has issued proposed rulemakings with regard to these core principles, any requirements or guidance in such rulemakings will not become effective until the effective or compliance date of a final rulemaking. The

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[136] See letter dated June 30, 2011, from Paul Cusenza, Chief Executive Officer, Nodal Exchange, at pp. 1, 4.

[137] Id. at p. 4.

[138] See, e.g., CEA section 5(d)(1)(B) and section 5b(c)(2)(A)(ii), 7 U.S.C. 7(d)(1)(B) and 7a-1(c)(2)(A)(ii).

Commission, in its discretion, will, where appropriate, establish separate compliance dates to address issues arising from the impact of compliance with any new requirements.

J. Intermediary Issues.

1. Comments.

The Commission received a comment on part two of its proposed order relating to whether the exemption provided under part 35 applies to agency transactions. Specifically, State Street requested that the Commission "make clear that eligible swap participants and eligible contract participants may continue to rely on the Part 35 exemption to effect transactions in excluded or exempt commodities, either directly or through brokers and other agents, as currently permitted by Part 35."[139]

The Commission also received a comment on part two of the Proposed Order relating to registration requirements for futures commission merchants ("FCMs"), introducing brokers ("IBs"), and commodity trading advisors ("CTAs"). The law firm of Covington & Burling noted that many participants exclusively in the "OTC" swaps market are not currently registered with the Commission in any capacity, but may have to register with the Commission as FCMs, IBs or CTAs after the Commission's Dodd-Frank Act rules are made effective. The commenter requested that the Commission clarify that these entities will not be required to register in those capacities based solely on their swaps activity until after the last adopted final product definition rules become effective.[140]

2. Commission Determination.

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[139] See State Street at p. 4.

[140] See letter dated July 1, 2011 from Bruce C. Bennett, Covington & Burling LLP, at p. 5.

The purpose of this exemptive relief is to maintain the status quo during the implementation process for the Dodd-Frank Act. As noted in the proposed order, the temporary exemptive relief would not affect the availability of part 35 with respect to transactions that fully meet the requirements of part 35.[141] Thus, the Commission confirms that to the extent that agency transactions are permitted under part 35, that relief is unaffected by the temporary exemptive relief provided herein.[142] However, for transactions that exclusively qualify for the temporary exemptive relief in part two of this Final Order (i.e., do not comply fully with the requirements of part 35), such agency transactions would only be permitted to the extent they were permitted by the applicable statutory exclusions and exemptions in effect prior to July 16, 2011 (i.e., current CEA sections 2(d), 2(e), 2(g), 2(h), and 5d).

The Dodd-Frank Act amended various intermediary definitions to cover swaps activity as well as futures transactions.[143] The Commission confirms that if an entity is exclusively participating in the swaps market, it would not have to register as an FCM, IB or CTA prior to the completion of the rulemaking further defining the term "swap." In sum, the Commission will not require registration in an intermediary capacity in this situation until the further definition of the term "swap" becomes effective.

IV. Section 4(c) of the Commodity Exchange Act.

[141] 76 FR at 35376.

[142] See Exemption for Bilateral Transactions, 65 FR 78030, 78033, Dec. 13, 2000.

[143] See, e.g., 76 FR at 35374 n.16.

Section 4(c)(1) of the CEA[144] authorizes the CFTC to exempt any transaction or class of transactions (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the transaction) from any of the provisions of the CEA (subject to certain exceptions). Pursuant to CEA section 4(c)(2), the Commission must determine that: (1) the exemption is appropriate for the transaction and consistent with the public interest; (2) the exemption is consistent with the purposes of the CEA; (3) the transaction will be entered into solely between "appropriate persons;"[145] and (4) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.[146]

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[144] CEA section 4(c)(1), 7 U.S.C. 6(c)(1), provides in full that:

> In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 5 of this Act) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a), or from any other provision of this Act (except subparagraphs (C)(ii) and (D) of section 2(a)(1), except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D)), if the Commission determines that the exemption would be consistent with the public interest.

[145] CEA section 4(c)(3), 7 U.S.C. 6(c)(3), includes within the term "appropriate person" a number of specified categories of persons deemed appropriate under the CEA for entering into transactions exempted by the Commission under section 4(c). This includes persons the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections. See CEA section 4(c)(3)(K), 7 U.S.C 6(c)(3)(K).

[146] CEA Section 4(c)(2), 7 U.S.C. 6(c)(2), provides in full that:

> The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) unless the Commission determines that--
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> (A) the requirement should not be applied to the agreement, contract, or transaction for which the

The Commission may grant such an exemption by rule, regulation or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative. Further, the Commission may grant such an exemption either conditionally or unconditionally, or for stated periods within the Commission's discretion. Finally, section 712(f) of the Dodd-Frank Act authorizes the Commission to "exempt persons, agreements, contracts, or transactions from provisions of the Act, under the terms contained in" the Act, in order to prepare for the effective dates of the provisions of Title VII.

A. The Proposed Order

In enacting section 4(c), Congress noted that the goal of the provision "is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner."[147] In proposing the temporary relief, the Commission stated its intention to provide clarity and stability to the markets and market participants concerning the applicability of the provisions of the CEA, as added or amended by the Dodd-Frank Act (in part one), and the current provisions of the CEA as repealed by the

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exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

[147] House Conf. Report No. 102-978, 1992 U.S.C.C.A.N. 3179, 3213.

Dodd-Frank Act (in part two), upon the general effective date of Title VII, thereby avoiding or minimizing undue and unwarranted disruptions to the markets.[148]

The Commission also noted the limited duration of the proposed order and that it reserved the Commission's anti-fraud and anti-manipulation enforcement authority.[149] As such, the Commission stated its belief that the proposed order would be consistent with the public interest and purposes of the CEA.[150] The Commission proposed to limit the relief to appropriate persons, including persons in current registration categories for which the Dodd-Frank Act expanded the definition to include activities relating to swaps (e.g., IBs, commodity pool operators ("CPOs"), CTAs, and associated persons thereof).[151] The Commission stated its belief that the proposed order would not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.[152]

B. Comments.

The ABA Derivatives Committee commented that the Commission should exercise its authority under CEA section 4(c)(3)(K) to make it clear that the "appropriate persons" who qualify for relief under its exemptive order include individuals whose total

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[148] 76 FR at 35377.

[149] Id.

[150] Id.

[151] 76 FR at 35377 n.46, citing CEA section 4(c)(3)(K), 7 U.S.C. 6(c)(3)(K) (appropriate persons may include such "other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections").

[152] 76 FR at 35377.

assets exceed $10 million and "persons relying on the 'line of business' exemption to engage in swaps without ECP status."[153]

C. Commission Determination

For the purpose of making the requisite findings under section 4(c) for part two of the Final Order, the Commission confirms that individuals whose total assets exceed $10 million are appropriate persons. Likewise, for purposes of part two of this Final Order, persons relying on the "line of business" exemption as described in the proposed order are appropriate persons. It should be noted that the explicit reference in the proposed order to IBs, CPOs, and CTAs (and associated persons thereof) as appropriate persons was not intended to restrict the scope of appropriate persons to only those persons. The Commission confirms that for the purpose of this temporary Final Order, the Commission has found the various persons and entities subject to this temporary relief to be appropriate persons.

For the reasons provided in the proposed order and mentioned above, the Commission has determined that: (1) the exemption provided by this Final Order is appropriate for the subject transactions and consistent with the public interest; (2) the exemption is consistent with the purposes of the CEA; (3) the transactions will be entered into solely between appropriate persons; and (4) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.

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[153] See ABA Derivatives Committee at p. 9. See also CEF at p. 7 n.21. The "line of business" provision was a part of the Commission's Policy Statement Concerning Swap Transactions, 54 FR 30694, 30696-30697, July 21, 1989.

V. Paperwork Reduction Act.

The Paperwork Reduction Act ("PRA")[154] imposes certain requirements on federal agencies (including the Commission) in connection with conducting or sponsoring any collection of information as defined by the PRA. This Final Order does not require a new collection of information from any persons or entities that would be subject to the Final Order.

VI. Cost-Benefit Considerations.

Section 15(a) of the CEA[155] requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. CEA section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

The Commission has decided to issue, pursuant to its authority under CEA sections 4(c) and 4c(b), certain temporary relief from the provisions of the CEA added or amended by Title VII of the Dodd-Frank Act that reference one or more terms regarding entities or instruments that Title VII requires be "further defined," such as the terms

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[154] 44 U.S.C. 3507(d).

[155] 7 U.S.C. 19(a).

"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 and do not require a rulemaking. The Commission also is granting temporary relief from certain provisions of the CEA that will or may apply to certain agreements, contracts, and transactions as a result of the repeal of various CEA exemptions and exclusions as of the general effective date of Title VII of the Dodd-Frank Act set forth in section 754 -- July 16, 2011.

The Commission received no comments on the cost and benefit considerations section of the proposed order. Nevertheless, the Commission did receive two specific comments requesting additional exemptive relief due to potential costs.

NGX is concerned that DCOs will have to make modifications to come into compliance with amended core principles by July 16, 2011, and then may be required to again make modifications when final rules are issued by the Commission.[156] Similarly, MGEX states that the Commission should grant temporary relief from the new core principles of the Dodd-Frank Act for DCOs and DCMs in sections 725 and 735.[157]

The Commission has decided not to grant more relief to DCOs and DCMs. The Commission recognizes that DCOs and DCMs have discretion in how to comply with the core principles unless and until the CFTC issues rules in this area.

An analysis of the specific areas of concern identified in section 15(a) is set out immediately below:

1. Protection of market participants and the public.

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[156] See NGX at p. 2.
[157] See MGEX at p. 2.

As discussed above, the scope of this temporary exemptive relief is limited to persons who are ''appropriate persons'' as set forth in section 4(c) of the CEA and in this Final Order. Further, this Final Order does not affect the Commission's existing and future anti-fraud and anti-manipulation authorities, including 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. The Commission believes that market participants and the public will benefit from the clarity offered by the temporary exemptive relief, while maintaining the Commission's authorities regarding the prevention and deterrence of fraud and manipulation. With respect to costs, the Commission believes that the exemptive relief imposes no affirmative duties or obligations on market participants and the public. The temporary exemptive relief does not contain any requirement to create, retain, submit, or disclose any information. Furthermore, the exemptive relief imposes no recordkeeping or related data retention or disclosure requirements on any person, including small businesses. Consequently, the Commission finds it unlikely that the exemptive relief will impose any additional costs beyond the existing costs associated with ongoing operations, including those that ensure that behavior and statements are not fraudulent or manipulative.

2. Efficiency, competition, and financial integrity.

Although the Dodd-Frank Act establishes a comprehensive new regulatory framework for swaps, the Commission's work to implement that framework will not be complete as of July 16, 2011. Accordingly, this relief offers the benefit of greater clarity in the swaps market that is in the interest of both the markets and the public. The

Commission believes that this temporary exemptive relief is an appropriate measure to facilitate a transition to the comprehensive new regulatory framework for swaps set out in Title VII of the Dodd-Frank Act. Such an orderly transition will promote market efficiency, competition, and financial integrity.

3. Price discovery.

As stated above, the temporary relief provided here is designed to maintain the functioning of the markets until such time as the comprehensive new regulatory framework for swaps set forth in the Dodd-Frank Act is in place. With the clarity offered by the exemptive relief, markets will function better as venues for price discovery.

4. Sound risk management practices.

Appropriate persons covered by this exemptive relief will be subject to the Commission's full array of existing anti-fraud and anti-manipulation provisions and certain new authorities provided under the Dodd-Frank Act. Market participants and the public will benefit substantially from the continuing protection through the prevention and deterrence of fraud and manipulation. Markets protected from fraud and manipulation function better as venues for price discovery and risk management.

5. Other public interest considerations.

This Final Order is temporary and limited. It will not affect the applicability of any provision of the CEA to futures contracts, options on futures contracts, or transactions with retail customers in foreign currency or other commodities pursuant to CEA section 2(c)(2). Further, it will expire at an appropriate date, as discussed above. The expiration provision will permit the Commission to ensure that the scope and extent

of exemptive relief is appropriately tailored to the schedule of implementation of the Dodd-Frank Act requirements.

After considering the costs and benefits, the Commission has determined to issue this Final Order.

VII. Order

The Commission, to provide for the orderly implementation of the requirements of Title VII of the Dodd-Frank Act, pursuant to sections 4(c) and 4c(b) of the CEA and section 712(f) of the Dodd-Frank Act, hereby issues this Order essentially as proposed, consistent with the determinations set forth above, which are incorporated in this Final Order by reference, and:

(1) Exempts, subject to the conditions set forth in paragraph (3), all agreements, contracts, and transactions, and any person or entity offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction, from the provisions of the CEA, as added or amended by the Dodd-Frank Act, that reference one or more of the terms regarding entities or instruments subject to further definition under sections 712(d) and 721(c) of the Dodd-Frank Act, which provisions are listed in Category 2 of the Appendix to this Order; provided, however, that the foregoing exemption:

a. Applies only with respect to those requirements or portions of such provisions that specifically relate to such referenced terms; and

b. Shall expire upon the earlier of: (i) the effective date of the applicable final rule further defining the relevant term referenced in the provision; or (ii) December 31, 2011;

(2) Exempts, subject to the conditions set forth in paragraph (3), all agreements, contracts, and transactions in exempt and excluded (but not agricultural) commodities, and any person or entity offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction, from the provisions of the CEA, if the agreement, contract, or transaction complies with part 35 of the Commission's regulations, notwithstanding that:

a. The agreement, contract, or transaction may be executed on a multilateral transaction execution facility;

b. The agreement, contract, or transaction may be cleared;

c. Persons offering or entering into the agreement, contract or transaction may not be eligible swap participants, provided that all parties are eligible contract participants as defined in the CEA prior to the date of enactment of the Dodd-Frank Act;

d. The agreement, contract, or transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or

e. No more than one of the parties to the agreement, contract, or transaction is entering into the agreement, contract, or transaction in conjunction with its line of business, but is neither an eligible contract participant nor an eligible swap participant, and the agreement, contract, or transaction was not and is not marketed to the public;

Provided, however, that: (i) such agreements, contracts, and transactions (and persons offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction) fall within the scope of any of the existing CEA sections 2(d), 2(e), 2(g), 2(h), and 5d provisions or the line of business provision as in effect prior to July 16, 2011; and (ii) the foregoing exemption shall expire upon the earlier of: (I) the repeal, withdrawal or replacement of part 35 of the Commission's regulations; or (II) December 31, 2011;

(3) Provides that the foregoing exemptions in paragraphs (1) and (2) above shall not:

a. Limit in any way 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;

b. Apply to any provision of the Dodd-Frank Act or the CEA that has become effective prior to July 16, 2011;

c. Affect any effective or compliance date set forth in any rulemaking issued by the Commission to implement provisions of the Dodd-Frank Act;

d. Limit in any way the Commission's authority under section 712(f) of the Dodd-Frank Act to issue rules, orders, or exemptions prior to the effective date of any provision of the Dodd-Frank Act and the CEA, in order to prepare for the effective date of such provision, provided that such rule, order, or exemption shall not become effective prior to the effective date of the provision; and

e. Affect the applicability of any provision of the CEA to futures contracts or options on futures contracts, or to cash markets.

In its discretion, the Commission may condition, suspend, terminate, or otherwise modify this Order, as appropriate, on its own motion. This Final Order shall be effective immediately.

Issued in Washington, DC, on July 14, 2011by the Commission.

David A. Stawick
Secretary of the Commission

NOTE: The following Commissioner's statement will not publish in the Code of Federal Regulations

Concurrence of Commissioner Scott D. O'Malia
On the Order Regarding the Effective Date for Swap Regulation

I concur with the Commission's decision to use its exemptive authority under section 4(c) of the Commodity Exchange Act (CEA) to provide temporary relief from certain provisions of the Dodd-Frank Act. This order will provide much needed legal certainty to the market, at least until December 31, 2011, while the Commission continues its efforts to adopt final rules under the Dodd-Frank Act. Whereas I support the Commission in providing legal certainty, albeit limited, I am disappointed in the lack of harmonization between our order and the exemptive relief that the Securities and Exchange Commission (S.E.C.) provided. I am also disappointed that the final order ignored a number of comments from market participants, those that have most at stake in

each of the Commission's decisions. I hope that this order does not foreshadow the direction of final rulemakings to come.

Lack of Harmonization

In general, the S.E.C.'s order provides exemptive relief until the relevant final rulemaking is implemented. The Commission's order provides such relief only until December 31, 2011. I proposed an amendment that would have conformed the two orders that the Commission rejected. The S.E.C. is a full partner in many of our rulemakings; it only makes sense to develop identical relief policies. The C.F.T.C.'s sunset provision is based on an arbitrary date and cuts short the very legal certainty that this order purports to provide. Moreover, participants from every aspect of our market – including investor advocates, a designated contract market and derivatives clearing organization, a potential swap execution facility, and multiple trade associations representing intermediaries – commented that the December 31, 2011, expiration date is unnecessary. In contrast, only one commenter supported the expiration date.

Comments from Market Participants

In addition to not heeding market participants with respect to the expiration date, the Commission has also not addressed the public's requests for an implementation plan. I have repeatedly asked the Commission to set forth an implementation plan for public notice and comment. S.E.C. Chairman Shapiro indicated, in her prepared remarks before

the House Financial Services Committee, that the S.E.C. is working on an implementation plan that will include opportunity for public comment. This Commission has already begun voting on final rules, but we have yet to see a proposed implementation plan.

Market participants bear the burden of implementing the multitude of reforms that the Commission is proposing. We cannot pretend that Dodd-Frank has any chance of meeting its goals if we do not work with the public to implement the regulatory requirements.

The Commission is currently planning to meet on August 4th to consider several final rules. I strongly urge the Commission to put forward an implementation plan for public comment during the month of August. This provides a perfect opportunity to receive comment on rule order and implementation, without delaying the Commission schedule this fall. If we wait until September, we will only have ourselves to blame.

APPENDIX

CATEGORY 1: REQUIRED RULEMAKINGS

Team	Rule Name	Required Rulemaking	CEA Section No.
I	Registration of Swap Dealers ("SDs") and Major Swap Participants ("MSPs")	731	4s(a)-(c)
II	Further definition of swap entity terms - Joint with Securities Exchange Commission ("SEC")	711, 712(d), 721(a), 721(c), 741(b)(10)	1a(18), (32), (33), (42), (43), (47) and (49)
III	Business Conduct Standards ("BCS")-SDs and MSPs with Counterparties	731	4s(h)
IV	BCS-Firewall Policies by Futures Commission Merchants ("FCMs") and Introducing Brokers ("IBs"); Chief Compliance Officer	732	4d(c)-(d)
IV	BCS-Duties of SDs and MSPs; Firewall Policies by SDs and MSPs; SD and MSP Reporting, Recordkeeping, and Daily Trading Records Requirements; Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements; Swap Trading Relationship Documentation; Documentation for SDs and MSPs relating to Title II (210(c)(8)); Annual Report Requirement for SDs or MSPs	731	CEA 4s(f) – Reporting and Recordkeeping CEA 4s(g) – Daily Trading Records CEA 4s(i) – Documentation Standards CEA 4s(j) – Duties CEA 4s(j)(5) – Conflicts of Interest for SDs & MSPs CEA - 4s(k)(3) - Annual Report Requirement
V	Capital	731	4s(e)
V	Margin	731	4s(e)
VI	Treatment of Securities in a Portfolio Margining Account	713(c)	20(c)
VII	Designation of Chief Compliance Officer	725(b)	5b(i)
VII	Process for Review of Swaps for Mandatory Clearing	723(a)(3)	2(h)(2)-(3)
IX	Conflict of Interest (180 days) - DCOs, DCMs, SEFs	725(d), 726	none
XI	End-User Exception to Mandatory Clearing	723(a)(3)	2(h)(7)(A)-(D)
XIII	SEFs	733	5h
XVI	Swap Data Repositories	728	21
XVII	Swap data recordkeeping and reporting requirements, including interim final rules	723, 727, 728, 729	2(a)(13)(G), 2(h)(5), 2(h)(6), 4r, 21(b)

CATEGORY 1: REQUIRED RULEMAKINGS

Team	Rule Name	Required Rulemaking	CEA Section No.
XVIII	Real-Time Reporting	727	2(a)(13)(A)-(E)
XIX	Agricultural Commodity Definition	723(c)(3)	none
XIX	Agricultural Swaps and Commodity Options	723(c)(3)	none
XXI	Further definition of swap product terms - Joint with SEC	711, 712(a)(8), 712(d), 721(c)	1a(42), 1a(47)
XXIII	Antimanipulation	753(a)	6(c)
XXV	Whistleblower Provisions	748	23
XXVI	Large Trader Reporting	730	4t

CATEGORY 2: TITLE VII PROVISIONS REFERENCING TERMS THAT REQUIRE FURTHER DEFINITION BY CFTC

Dodd-Frank Section No.	CEA Section No.[158]	Provision, Obligation or Prohibition Applicable To:	Summary Description
			SUBTITLE A, PART I: SECTIONS 701-720 – REGULATORY AUTHORITY
712(a)(1)-(7), 712(b)-(c)	None	None	Review of Regulatory Authority General provisions regarding rulemakings.
			SUBTITLE A, PART II: SECTIONS 721-754 – REGULATION OF SWAP MARKETS
			SECTION 721 -- DEFINITIONS
721(a)	1a	Various registrants and registered entities	Definitions[159] New or amended definitions of terms "associated person of a swap dealer or major swap participant," "cleared swap," "commodity pool," "commodity pool operator," "commodity trading advisor," "floor broker," "floor trader," "foreign exchange forward," "foreign exchange swap," "futures commission merchant," "introducing broker," "registered entity," "significant price discovery contract," "swap data repository," and "swap execution facility."
722(b)	12(h)	None	Regulation of Swaps as Insurance under State Law Provides that a swap shall not be considered to be insurance; and may not be regulated as an insurance contract under the law of any State.
722(d)	2(i)	Any person engaged in swap activities outside United States	Extra-territoriality CFTC-related provisions of Title VII shall not apply to swap activities outside the U.S. unless those activities have a direct and significant connection with activities in, or effect on, commerce of the U.S., or contravene CFTC rules to prevent evasion.
			SECTION 723 - CLEARING
723(a)(2)	2(d)-(e)	Swap counterparties	Application of CEA to Swaps and Market Participant Limitation Identifies CEA provisions applicable to swaps. Also, makes it unlawful for any person, other than an ECP, to enter into a swap unless the swap is entered into on or subject to the rules of a DCM.
723(a)(3)	2(h)(1)(A)	Any person	Standard for Clearing Prohibits any person from engaging in a swap unless that person submits the swap to a registered DCO or a DCO that is exempt from registration if the swap if required to be cleared.
723(a)(3)	2(h)(1)(B)	DCOs	DCO Rule Requirements Requires a DCO to include certain provisions prescribing that all swaps submitted to the DCO with the same terms and conditions are economically equivalent within the DCO and may be offset with each other within the DCO and providing for non-discriminatory clearing of swaps executed bilaterally or on or through the rules of an unaffiliated DCM or SEF.
723(a)(3)	2(h)(4)	None	Prevention of Evasion of Mandatory Clearing of Swaps Requires CFTC to investigate, issue a public report, and take action if it finds that a particular swap or group, category, type or class thereof would be subject to mandatory clearing, but no DCO has listed it. Provides authority to CFTC to adopt rules as determined to be necessary to prevent evasion

[158] Unless otherwise indicated, the CEA references in this column refer to the provisions of the CEA after its amendment by the Dodd-Frank Act.
[159] If a provision references the term "swap," but also applies to futures contracts and/or options on futures contracts, the Category 2 label applies solely to the extent the provision references the term "swap." No relief from the application of the provision to futures and options on futures would be appropriate on July 16, 2011.

CATEGORY 2: TITLE VII PROVISIONS REFERENCING TERMS THAT REQUIRE FURTHER DEFINITION BY CFTC

Dodd-Frank Section No.	CEA Section No.[158]	Provision, Obligation or Prohibition Applicable To:	Summary Description
			of mandatory clearing requirement.
723(a)(3)	2(h)(7) (E)-(F)	Swap counterparties	Counterparty Election of DCO; Prevention of Use of End-User Exception to Evade Mandatory Clearing If swap is not subject to the mandatory clearing requirement, and is entered into by an SD/MSP with a counterparty that is not an SD/MSP, the counterparty: (a) may elect to require that the swap be cleared; and (b) to select the DCO. Provides authority to CFTC to adopt rules as determined to be necessary to prevent evasion of end-user clearing exception.
723(a) (3)	2(h)(8)	Swap counterparties	Trade Execution Requirements for Swaps Subject to Mandatory Clearing If a swap is subject to the mandatory clearing requirement, the counterparties must execute it on a DCM, a registered SEF, or an exempt SEF. The requirement does not apply if no DCM or SEF makes the swap available to trade or if the swap is subject to the end-user clearing exception, but, pursuant to Section 723(c)(4), counterparties must comply with any reporting and recordkeeping requirements prescribed by the CFTC.
723(b)	2(j)	Swap counterparties	Approval of Swaps by Committee of Board End-user exception to clearing and trade execution requirements are available to registered issuer of securities and issuers required to file reports with SEC, but only if appropriate committee of the Board approves entering into the swap subject to such exceptions.
724(a)	4d(f)	Various	Segregation Requirements for Cleared Swaps Makes it unlawful for a person to accept money, securities or property (or to extend credit) from, for, or on behalf of a swap customer to margin, guarantee, or secure a swap cleared by or through a DCO unless the person is registered as an FCM. Requires segregation for cleared swaps. Provides that a swap cleared by or through a DCO will be considered a commodity contract under the Bankruptcy Code.[160]
724(c)	4s(l)	SDs/MSPs	Segregation Requirements for Uncleared Swaps SDs/MSPs are required to notify their counterparties at the beginning of a swap transaction that the counterparty has the right to require segregation of funds or other property supplied to margin, guarantee or secure the obligations of the counterparty. At the request of a counterparty to a swap, an SD/MSP shall segregate the funds or other property for the benefit of the counterparty in an account carried by an independent custodian. If counterparty does not choose segregation, SD/MSP shall report quarterly that its back office procedures regarding margin comply with the agreement of the counterparties.[161]
725(a)	5b(a)	DCOs	Registration Requirement Requires that a DCO clearing swaps be registered.[162]
725(e)	5b(k)	DCOs	DCO Reporting Requirements Reporting and recordkeeping requirements for DCOs that clear swaps and security-based swap agreements.
725(g)	None	Banks	Identified Banking Products Amends Legal Certainty for Bank Products Act of 2000 with respect to swaps.
			SECTION 727 – REAL-TIME REPORTING
727	2(a)(14)	None	Real-Time Reporting

[160] This has been addressed via an existing interpretation.

[161] Exemptive relief may not be available.

[162] Exemptive relief may not be available.

CATEGORY 2: TITLE VII PROVISIONS REFERENCING TERMS THAT REQUIRE FURTHER DEFINITION BY CFTC

Dodd-Frank Section No.	CEA Section No.[158]	Provision, Obligation or Prohibition Applicable To:	Summary Description
			Requires CFTC to issue semiannual and annual reports regarding trading and clearing in major swap categories.
			SECTION 731 – REGISTRATION AND REGULATION OF SDs/MSPs
731	4s(k)	SDs/MSPs	SD/MSP Chief Compliance Officer Must designate a Chief Compliance Officer, who reports directly to the Board or to the senior officer of the SD/MSP, to perform specified duties.[163]
			SECTION 740 – MCOs UNDER FDICIA
740	None	Foreign MCOs	Repeals Sections 408 and 409 of the Federal Deposit and Insurance Corporation Improvement Act (FDICIA) Repeals FDICIA provisions that, among other things, permitted a foreign multilateral clearing organization (MCO) to clear OTC derivatives if it is supervised by a foreign financial regulator that a U.S. agency determines satisfies appropriate standards.
			SECTIONS 741–744 AND 746-748 – ENFORCEMENT PROVISIONS
741(b)(1)-(2), (4)-(7), (11)	Various	Various	General Enforcement Provisions Provides CFTC with anti-fraud and insider trading authority with respect to futures, options on futures, and swaps on a security index. Makes conforming amendments to anti-fraud, anti-manipulation, and procedural enforcement provisions to apply them to swaps. Increases penalties for DCOs and SDs/MSPs that knowingly or recklessly evade the mandatory swap clearing requirement.
746	4c(a)(3)-(4)	Employees and agents of the federal government; persons who knowingly receive or misappropriate non-public government information	Insider Trading The so-called "Eddie Murphy" provision makes it unlawful for any employee or agent of the federal government to trade based on non-public information and to impart such information to others for purposes of trading. Also prohibits knowing use of non-public government information to trade and misappropriation of non-public government information by any person.
747	4c(a)(7)	Any person	Anti-Disruptive Practices Authority – Use of Swaps to Defraud Prohibits any person from entering into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap or part of a device, scheme, or artifice to defraud any third party.
745(b)	5c(c)(5)(C)	Registered entities	Special Review for Event Contracts and Swaps Prohibits a contract, including a swap, that has been determined by the CFTC to be contrary to the public interest, to be listed of made available for clearing or trading. In connection with the listing of a swap for clearing by a DCO, CFTC must determine the initial eligibility, or the continuing qualification of a DCO, to clear the swap under those criteria, conditions, or rules the CFTC determines. The criteria must include the financial integrity of the DCO and other factors the CFTC may determine.
749	Multiple	Various	Conforming Amendments Conforming amendments to CEA Sections 4m(3) (CTA/CPO Registration Requirements).

[163] Exemptive relief may not be available.

CATEGORY 3: SELF-EFFECTUATING PROVISIONS THAT REPEAL PROVISIONS OF CURRENT LAW BUT DO NOT REFERENCE TERMS THAT REQUIRE FURTHER DEFINITION

Dodd-Frank Section No.	CEA Section No.	Provision, Obligation or Prohibition Applicable To:	Summary Description
723(a)(1)	2(d), 2(e), 2(g), and 2(h) (under pre-Dodd-Frank Act CEA)	Persons engaged in swap activities in excluded or exempt commodities	Excluded and Exempt Commodities Repeals CFMA provisions that provided exclusions and exemptions from pre-Dodd-Frank Act CEA provisions for OTC derivatives in excluded and exempt commodities.
734(a)	5d (under pre-Dodd-Frank Act CEA)	Persons trading on EBOTs	Repeals CFMA provisions that permit Exempt Boards of Trade

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
			SUBTITLE A, PART I: SECTIONS 701-720 – REGULATORY AUTHORITY
701	None	None	Short Title
711	None	None	Definitions Various terms have the meanings given in Commodity Exchange Act ("CEA") Section 1a.
712(a)(1)-(7), 712(b)-(c)	None	None	Review of Regulatory Authority General provisions regarding rulemakings.
712(e)-(f)	None	None	Rulemaking Timeframe and Rules/Registration before Final Effective Dates Provides global rulemaking deadline of 360 days from enactment (unless otherwise provided). Permits issuance of rules, studies, reports and exemptions, and registration of persons, prior to effective date.[165]
713(b)[166]	4d	Futures Commission Merchants ("FCMs")	Portfolio Margining Pursuant to exemption or rule, dually-registered FCM-Broker Dealer may, pursuant to a portfolio margining program approved by Securities and Exchange Commission ("SEC"), hold futures and options on futures, and margin thereon, in a portfolio margining account carried as a securities account.
714	None	None	Abusive Swaps CFTC may collect information concerning markets for swaps and issue report re. types of swaps that are detrimental to stability of a financial market or participants therein.
715	None	None	Authority to Prohibit Participation in Swap Activities If CFTC determines that regulation of swap markets in a foreign country undermines stability of U.S. financial system, it may, in consultation with Secretary of Treasury, prohibit an entity domiciled in the foreign country from participating in the U.S. in any swap activities.
716	None	Swap Dealers ("SDs")/Major Swap Participants ("MSPs")	Prohibition on Federal Assistance Prohibits Federal assistance to certain registered SDs/MSPs; requires insured depository institutions to comply with "Volcker Rule."
717(a) and (d)[167]	2(a)(1)(C) and 5c(c)(1)	None	New Product Approval CFTC-SEC Process Provides CFTC jurisdiction over options exempted by SEC; provides for stay of certification of product pending jurisdictional determination.
718	None	None	Novel Derivative Products Provides a process for CFTC and SEC to resolve jurisdictional issues relating to novel derivative products.

[164] Unless otherwise indicated, the CEA references in this column refer to the provisions of the CEA after its amendment by the Dodd-Frank Act.
[165] Section 712(f) became effective upon enactment of the Dodd-Frank Act.
[166] Section 713(a) amends the Securities Exchange Act of 1934.
[167] Sections 717(b) and (c) amend the Securities Exchange Act of 1934.

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
719	None	None	Studies Requires 4 Studies re: (a) effects of position limits on trading on exchanges in U.S.; (b) feasibility of requiring use of standardized algorithmic description for financial derivatives; (c) international swap regulation; and (d) stable value contracts.
720	None	None	Memoranda of Understanding Requires CFTC and the Federal Energy Regulatory Commission ("FERC") to negotiate Memoranda of Understanding ("MOUs") to: (a) establish procedures for addressing jurisdictional issues; and (b) share information in investigations into potential manipulation, fraud or market power abuse.
			SUBTITLE A, PART II: SECTIONS 721-754 – REGULATION OF SWAP MARKETS
			SECTION 721 -- DEFINITIONS
721(a) and 721(f)	1a	Various	Definitions New or amended definitions of terms "appropriate Federal banking agency," "Board," "eligible commercial entity," "interstate commerce," "prudential regulator," and "trading facility."[168]
721(b), (d) and (e)	Various	None	Authority to define terms; exemptions; and conforming amendments Provides CFTC authority to adopt rule defining any term in CFTC-related portions of Title VII; limits CFTC exemptive authority with respect to Title VII; sets forth conforming amendments required due to re-numbering of definitions in CEA Section 1a.
			SECTION 722 – JURISDICTION
722(a), and (c)	2(a)(1), 2(c)(2)(A)		Regulation of swaps General provisions re. jurisdiction of CFTC with respect to swaps.
722(e), (f), and (g)	2(a)(1) and 4(c)	None	FERC General provisions re. impact on jurisdiction of FERC and provision granting CFTC authority to issue public interest waivers re. transactions entered into pursuant to tariff or rate schedule approved or permitted to take effect by FERC or regulatory authority of State or municipality with jurisdiction to regulate rates and charges for sale of electric energy.
722(h)	1b	None	Foreign Exchange Swaps and Foreign Exchange Forwards Provides process for Secretary of Treasury in considering whether to exempt foreign exchange swaps or foreign exchange forwards from the swap definition.
			SECTION 723 - CLEARING
723(c) (1)-(2)	None	Persons subject to pre-Dodd-Frank Act CEA Section 2(h)	Grandfather Provision Permits petition with the CFTC within 60 days of enactment to allow petitioners to remain subject to existing Section 2(h) of the CEA for 1 year.
724(b)	None	FCMs and Derivatives Clearing Organizations	Bankruptcy Treatment of Cleared Swaps Makes amendments to the Bankruptcy Code relating to cleared swaps.

[168] The amended definition of the term "commodity" became effective on June 1, 2010.

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
		("DCOs")	
725(a)	5b(b)	DCOs	Voluntary Registration A person clearing transactions that are not required to be cleared may voluntarily register as a DCO.
725(b)	5b(g)-(h)	SEC-registered Depository institutions, SEC-registered clearing agencies, foreign clearinghouses	Depository Institutions/Clearing Agencies/Foreign Clearinghouses If required to be registered as a DCO: (a) depository institutions are deemed to be registered to the extent that, before enactment, they cleared swaps as a multilateral clearing organization; and (b) SEC-registered clearing agencies are deemed to be registered to the extent that, prior to enactment, they cleared swaps. Provides CFTC with authority to exempt SEC-registered clearing agencies and foreign clearinghouses from DCO registration requirements for clearing swaps if subject to comparable, comprehensive supervision and regulation.
725(b)	5b(i)	DCOs	DCO – Chief Compliance Officer ("CCO") Must designate a CCO who reports directly to the board or to the senior officer of the DCO, to perform specified duties.
725(c)	5b(c)(2)	DCOs	DCO Core Principles Registered DCOs must comply with the new Core Principles and any other requirements imposed by rule or regulation.
725(f)	8(e)	Foreign central banks	Information Sharing Permits CFTC to share information with foreign central banks and ministries under certain circumstances.
725(h)	5b(f)(1)	DCOs	Reducing Clearing Systemic Risk Provides that DCO may not be compelled to accept counterparty credit risk of another clearing organization.
			SECTION 734 – DERIVATIVES TRANSACTION EXECUTION FACILITIES ("DTEFs") AND EXEMPT BOARDS OF TRADE
734	5a of pre-Dodd-Frank Act CEA	DTEFs	DTEFs Repeal provisions enacted in Commodity Futures Modernization Act of 2000 that authorized DTEFs.
			SECTION 735 – Designated Contract Markets ("DCMs")
735(a)	5(b)	DCMs	Contract Market Designation Repeals provisions setting forth criteria for designation as a DCM.
735(b)	5(d)	DCMs	DCM Core Principles Registered DCMs must comply with the new Core Principles and any other requirements imposed by rule or regulation.
			SECTION 736 – MARGIN WITH RESPECT TO REGISTERED ENTITIES
736	8a(7)	Registered entities	Margin with respect to registered entities Permits CFTC to alter or supplement rules of a registered entity with respect to the setting of margin levels upon certain specified conditions.
			SECTION 738 – FOREIGN BOARDS OF TRADE ("FBOTs")
738	4(b)	FBOTs	FBOT Requirements. Permits CFTC to write rules for the registration of FBOTs that provide direct access to U.S. customers. Imposes requirements on FBOT contracts provided to U.S. customers by direct access that are linked to the settlement price of a contract traded on a registered entity in the U.S. Provides protections for CFTC registrants trading futures contracts on an FBOT in certain circumstances, and legal certainty for such transactions even if the FBOT fails to comply with the CEA.
			SECTIONS 739 and 749 – LEGAL CERTAINTY FOR SWAPS

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
739	22(a)(1), (4)-(5)	Swap counterparties	Legal Certainty for Swaps No transaction between Eligible Contract Participants ("ECPs") (or persons reasonably believed to be ECPs) shall be void, voidable, or unenforceable, and no party shall be entitled to rescind or recover any payment made with respect thereto, based solely on the failure of the agreement, contract, or transaction to meet the definition of a swap or otherwise be cleared as required by the CEA. Unless specifically reserved in a swap, neither the enactment of the Dodd-Frank Act nor any requirement under that Act shall qualify as a termination event, force majeure, illegality, regulatory change or similar event under the swap that would permit termination, renegotiation, modification or amendment of the swap.
749	22(a)(1)	Swap counterparties	Private Rights of Action Applies CEA private right of action provisions to violations involving swaps.
			SECTIONS 741–744 AND 746-748 – ENFORCEMENT PROVISIONS
741(a)	4b-1	Various	General Enforcement Provision Sets boundaries of enforcement authority over swaps and SDs/MSPs between CFTC and prudential regulators.
741(b)(8)-(9)	2(c)(2)(B)-(C)	Persons engaged in off-exchange forex transactions with retail customers	Forex Enforcement Authority Amends CFTC enforcement authority with respect to off-exchange forex transactions with retail customers.
741(c)	None	Entities regulated by Federal banking agencies	Prudential Regulators Savings clause for appropriate Federal banking agencies with respect to prudential standards imposed outside of Title VII.
742(a) and (c)[169]	2(c)(2)(D)-(E)	Persons engaged in off-exchange transactions with retail customers	Retail Commodity Transactions Provides CFTC with enforcement authority for non-forex retail commodity transactions. Prohibits entities regulated by certain Federal regulatory agencies from engaging in retail forex transactions except pursuant to rules by the applicable regulatory agency allowing such transactions on such terms and conditions as the regulatory agency shall prescribe.
743	None	None	Other Authority Unless otherwise provided, CFTC-related provisions in Title VII do not divest banking agencies, the CFTC, the SEC, or other Federal or state agencies of any authority derived from any other applicable law.
744	6c(d)	None	Restitution Remedies Provides CFTC with the authority to seek restitution for violations of the CEA in the amount of losses proximately caused by such violations.
747	4c(a)(5)-(6)	Traders on registered entities	Anti-Disruptive Practices Authority Prohibits any person from engaging in specifically enumerated bad acts: (a) violating bids or offers; (b) intentional or reckless disregard for the orderly execution of transactions during the closing period; or (c) spoofing. Provides CFTC with authority to prohibit other deceptive trading practices.

[169] Section 742(b) makes a technical correction to the Gramm-Leach-Bliley Act.

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
748	23(g), (h), (m) and (n)	Employers of whistleblowers	Commodity Whistleblower Incentives and Protection Protects whistleblowers from retaliation. Provides that such right may not be waived, and whistleblowers may not be required to agree to arbitration of retaliation disputes.
745(a), (b) and (c)	5c(a)(2), 5c(c) and pre-Dodd-Frank Act Section 5c(d)	Registered entities	Interpretations; Certifications and Prior Approvals Provides that CFTC interpretations of Core Principles may provide the exclusive means for complying with those Core Principles. Establishes a self-certification procedure with respect to rules and products under a 10/90 day CFTC review process for new rules or rule amendments. Provides that a registered entity may seek CFTC prior approval with respect to rules or products. Repeals requirements imposed by CEA Section 5c(d) of pre-Dodd-Frank Act on filing enforcement action when CFTC determines that a registered entity is violating a Core Principle.
749	Multiple	Various	Conforming Amendments Conforming amendments to CEA Sections 4d (FCM Registration Requirements); 5c (Common Provisions Applicable to Registered Entities); 5e (Suspension or Revocation of Designation as a Registered Entity); 6(b) (Court Review of CFTC Orders); 12(e)(2)(B) (Cooperation with Other Agencies); and 17(r)(1) (Registered Futures Associations; Duplicative Regulation of Dual Registrants).
750	None	None	Study on Oversight of Carbon Markets
751	2(a)(15)	None	Energy and Environmental Markets Advisory Committee
752	None	None	International Harmonization
754	None	None	Effective Date