

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Chapter 1**

**Effective Date for Swap Regulation**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final order.

**SUMMARY:** On October 25, 2011, the Commodity Futures Trading Commission (“CFTC” or the “Commission”) published in the Federal Register a Notice of Proposed Amendment (“Notice”) to extend the temporary exemptive relief the Commission granted on July 14, 2011 (“July 14 Order”) from certain provisions of the Commodity Exchange Act (“CEA”) that otherwise would have taken effect on the general effective date of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Dodd-Frank Act”) – July 16, 2011. This final order extends the July 14 Order with certain modifications. Specifically, it extends the potential latest expiration date of the July 14 Order from December 31, 2011 to July 16, 2012; and adds provisions to account for the repeal and replacement (as of December 31, 2011) of part 35 of the Commission’s regulations.

**DATES:** This final order will be effective upon issuance by the Commission.

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.<sup>1</sup> Title VII of the Dodd-Frank Act amends the CEA<sup>2</sup> 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.<sup>3</sup>

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<sup>4</sup> "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." Thus, the general effective date for provisions of title VII that do not require a rulemaking was July 16, 2011. This includes the provisions that repealed several

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<sup>1</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> 7 U.S.C. 1 et seq.

<sup>3</sup> 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").

<sup>4</sup> All of the amendments to the CEA in title VII are contained in subtitle A. Accordingly, for convenience, references to "title VII" in this Notice shall refer only to subtitle A of title VII.

provisions of the CEA as in effect prior to the Dodd-Frank Act that excluded or exempted, in whole or in part, certain transactions from Commission oversight.<sup>5</sup>

Section 712(d)(1) of the Dodd-Frank Act requires the Commission and the SEC to undertake a joint rulemaking to “further define” certain terms used in title VII, including the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant.”<sup>6</sup> 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.<sup>7</sup> The Commission and the SEC have jointly issued two notices of proposed rulemaking that address these further definitions.<sup>8</sup>

The Commission’s final rulemakings further defining the terms in sections 712(d) and 721(c) were not expected to be in effect as of July 16, 2011 (i.e., the general effective date set forth in section 754 of the Dodd-Frank Act). Accordingly, on July 14, 2011 the Commission exercised its exemptive authority under CEA section 4(c)<sup>9</sup> and its authority under section 712(f)

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<sup>5</sup> These exclusions and exemptions were contained in former CEA sections 2(d), 2(e), 2(g), 2(h), and 5d, 7 U.S.C. 2(d), 2(e), 2(g), 2(h), and 7a-3.

<sup>6</sup> 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)).”

<sup>7</sup> 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’.”

<sup>8</sup> 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 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.

<sup>9</sup> 7 U.S.C. 6(c).

of the Dodd-Frank Act by issuing the July 14 Order.<sup>10</sup> In so doing, the Commission sought to address concerns that had been raised about the applicability of various regulatory requirements to certain agreements, contracts, and transactions after July 16, 2011, and thereby ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime.<sup>11</sup>

## **II. Description of Relief Provided in July 14 Order**

The July 14 Order groups the relevant provisions of the Dodd-Frank Act into four categories and provides temporary exemptive relief, set to expire no later than December 31, 2011, with respect to Categories 2 and 3. A summary of the four categories of provisions follows.

Category 1 covers statutory provisions which by their express terms require a rulemaking. Because, under section 754 of the Dodd-Frank Act, these provisions do not become effective until at least 60 days after the final rule is published, no exemptive relief from the general effective date is necessary. Category 1 provisions include, among others, the further definitions of terms regarding swap entities or instruments as required by the Dodd-Frank Act

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<sup>10</sup> Effective Date for Swap Regulation, 76 FR 42508 (issued and made effective by the Commission on July 14, 2011; published in the Federal Register on July 19, 2011). 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).

<sup>11</sup> Concurrent with the July 14 Order, the Commission’s Division of Clearing and Intermediary Oversight and the Division of Market Oversight (together “the Divisions”) identified certain provisions of the Dodd-Frank Act and CEA as amended that would take effect on July 16, 2011, but that may not be eligible for the exemptive relief provided by the Commission in its July 14 Order – specifically, the amendments made to the CEA by Dodd-Frank Act sections 724(c), 725(a), and 731. On July 14, 2011, the Divisions issued Staff No-Action Relief addressing the application of these provisions after July 16, 2011. 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 period of time co-extensive with that set forth in this final order.

(such as the terms “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant”). Category 1 also includes, among others: (1) registration, capital and margin requirements, and business conduct standards for swap dealers and major swap participants; (2) provisions prohibiting agricultural swaps except pursuant to CFTC rules; (3) rules regarding swap execution facilities; and (4) various swap data recordkeeping and reporting requirements. A complete list of the Category 1 provisions is included in the appendix to the July 14 Order.

The first part of the relief provided for in the July 14 Order reaches those Dodd-Frank Act provisions (“Category 2 provisions”) that are self-effectuating (*i.e.*, do not require a rulemaking) and that reference one or more of the terms for which the Commission and SEC are required to provide further definition, including “swap,” “swap dealer,” “major swap participant,” “eligible contract participant,” and “security-based swap agreement” (collectively, the “referenced terms”). These Category 2 provisions include, for example, the trade execution requirement of CEA section 2(h)(8), as amended by Dodd-Frank Act section 723. A complete list of the Category 2 provisions is included in the appendix to the July 14 Order. Because the Category 2 provisions would have taken effect on July 16, 2011 pursuant to section 754, the Commission granted temporary relief from those provisions, but only to the extent that the requirements in such provisions specifically relate to a referenced term that is not yet further defined. Thus, if a Category 2 provision also applies to futures or options on futures, the provision took effect on July 16 with respect to futures or options on futures. The exemption for Category 2 provisions expires on the earlier of: (1) the effective date of the applicable final rule further defining the relevant term; or (2) December 31, 2011.

In part two of the July 14 Order, the Commission provides temporary exemptive relief from the provisions of the CEA that may apply to certain agreements, contracts, and transactions

in exempt or excluded commodities (generally, financial, energy and metals commodities) as a result of the repeal of the CEA exemptions and exclusions in former CEA sections 2(d), 2(e), 2(g), 2(h), and 5d as of July 16, 2011 pursuant to sections 723(a)(1) and 734(a) of the Dodd-Frank Act (the “Category 3 provisions”). As explained in the July 14 Order, this relief is based on the Commission’s existing “part 35” exemptive rules.<sup>12</sup>

Part 35 originally was promulgated in 1993 pursuant to, among others, the Commission’s general exemptive authority in CEA section 4(c) and its plenary options authority under section 4c(b),<sup>13</sup> and provides a broad-based exemption from the CEA for “swap agreements” in any commodity. 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”);<sup>14</sup> (2) they are not part of a fungible class of agreements standardized as to their material economic terms; (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; and (4) they are not entered into or traded on a multilateral transaction execution facility.

Under part two of the relief provided for in the July 14 Order, the Commission stated that transactions in exempt or excluded commodities (and persons offering, entering into, or rendering advice or rendering other services with respect to such transactions) are temporarily

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<sup>12</sup> 76 FR at 42514. The July 14 Order did not extend to agreements, contracts, or transactions that fully met the conditions of part 35, since in such circumstances further relief was unnecessary.

<sup>13</sup> 7 U.S.C. 6c(b).

<sup>14</sup> As noted in the July 14 Order, 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 part 35. 76 FR at 42511, n. 40.

exempt from provisions of the CEA that may apply to such transactions 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.<sup>15</sup>

Thus, for certain transactions, the July 14 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 that are not eligible contract participants, etc.). The Commission stated in the July 14 Order that this relief is limited to transactions in exempt and excluded commodities, and does not extend to transactions in agricultural commodities, because transactions in agricultural commodities were not covered by the applicable statutory exclusions and exemptions in effect prior to July 16, 2011.<sup>16</sup> The exemption

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<sup>15</sup> 76 FR at 42514. With respect to commodity options, the Commission clarified that options identified in the swap agreement definition in paragraph (b)(1)(i) of § 35.1 of the Commission's regulations and any options captured by the concluding catch-all language in that paragraph, as well as any options described in paragraphs (b)(1)(ii) and/or (iii) of § 35.1, involving excluded or exempt commodities are within the scope of the July 14 Order. 76 FR at 42514-15.

<sup>16</sup> The Commission also stated, though, that because part 35 remained in effect at the time of the July 14 Order, market participants could continue to rely on part 35 with respect to swaps (other than commodity options) on enumerated agricultural commodities as defined in CEA section 1a(4) or § 32.2 of the Commission's regulations, as well as swaps and commodity options on non-enumerated agricultural commodities, to the extent these transactions fully comply with part 35. Under the July 14 Order, 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. Rule 32.13(g) permits off-exchange options offered to producers, processors, commercial users or merchants of the commodity or its products or by-products that have a net worth of at least \$10 million, provided the offeree also has a net worth of at least \$10 million.

in part two of the July 14 Order expires on the earlier of: (1) the repeal, withdrawal or replacement of part 35; or (2) December 31, 2011.

Category 4 contains those Dodd-Frank Act provisions for which the Commission determined not to issue relief, and which therefore went into effect on July 16, 2011. A complete list of the Category 4 provisions is included in the appendix to the July 14 Order.

The temporary exemptions issued in the July 14 Order are subject to several conditions. These conditions provide that the July 14 Order shall not: (1) limit in any way the Commission's anti-fraud or anti-manipulation authority under the CEA; (2) apply to any provision of the Dodd-Frank Act or the CEA that became effective prior to July 16, 2011; (3) affect any effective date or compliance date set forth in any rulemaking issued by the Commission to implement provisions of the Dodd-Frank Act; (4) limit the Commission's authority under Dodd-Frank Act section 712(f) 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 such effective date; and (5) affect the applicability of any provision of the CEA to futures contracts or options on futures contracts, or to cash markets.<sup>17</sup>

### **III. Discussion of the Proposed Amendments to the July 14 Order**

On October 25, 2011, the Commission published in the Federal Register a Notice to amend the July 14 Order in two ways.<sup>18</sup> First, the Commission proposed to amend the July 14 Order to extend the potential latest expiry dates. With respect to provisions covered in the first part of the relief in the July 14 Order, the Commission proposed that the temporary exemptive relief expire upon the earlier of: (1) the effective date of the applicable final rule further defining

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<sup>17</sup> 76 FR at 42522.

<sup>18</sup> Effective Date for Swap Regulation, 76 FR 65999, Oct. 25, 2011.



the relevant referenced term; or (2) July 16, 2012.<sup>19</sup> This proposed amendment addressed the potential that, as of December 31, 2011, the CFTC-SEC joint rulemakings “further defining” the referenced terms will not yet be effective. The Commission also proposed to amend the July 14 Order to extend the expiry date of the second part of the relief in the July 14 Order until the earlier of: (1) July 16, 2012; or (2) such other compliance date as may be determined by the Commission. For the same reason stated by the Commission in issuing the second part of the relief provided in the July 14 Order, the Commission proposed extending this exemptive relief to “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.”<sup>20</sup>

Second, the Commission proposed to include within the second part of the relief any agreement, contract or transaction that fully meets the conditions in part 35 as in effect prior to December 31, 2011. This proposed amendment addressed the fact that such transactions, which were not included within the scope of the July 14 Order because the exemptive rules in part 35 covered them at that time, now require temporary relief because part 35 will no longer be available as of December 31, 2011.<sup>21</sup> Accordingly, to ensure that the exemptive relief currently

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<sup>19</sup> The date of July 16, 2012, is consistent with the potential transitional period provided in section 723(c) of the Dodd-Frank Act regarding former CEA section 2(h) and section 734(c) of the Dodd-Frank Act regarding former CEA section 5d (i.e., for “not longer than a 1-year period” following the general effective date of title VII).

<sup>20</sup> 76 FR at 42513.

<sup>21</sup> The Commission recently promulgated a rule pursuant to section 723(c)(3) of the Dodd-Frank Act, and CEA sections 4(c) and 4c(b), that, effective December 31, 2011, will repeal the existing part 35 relief and replace it with new § 35.1 of the Commission’s regulations. See Agricultural Swaps, 76 FR 49291, Aug. 10, 2011. Rule 35.1 provides, in pertinent part, that “agricultural swaps may be transacted subject to all provisions of the CEA, and any Commission rule, regulation or order thereunder, that is otherwise applicable to swaps. [It] also clarifies that by issuing a rule allowing agricultural swaps to transact subject to the laws and rules applicable to all other swaps, the Commission is allowing agricultural swaps to transact on [designated contract markets (“DCMs”), swap execution

available for these transactions continues to be available after December 31, 2011, the Commission proposed to amend the July 14 Order to incorporate by reference the part 35 relief available prior to December 31, 2011. Whereas the relief provided in part two of the July 14 Order was (and would remain) limited to transactions in excluded or exempt commodities, the proposed amendment also would include, beginning on January 1, 2012, transactions in agricultural commodities that fully meet the conditions in part 35 as in effect prior to December 31, 2011.<sup>22</sup> The Commission proposed that this further amendment to the July 14 Order is necessary to ensure that the same scope of the exemptive relief available before December 31, 2011 is available to all swaps and extends through July 16, 2012, at the latest.

In proposing these amendments, the Commission sought to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime. As stated above, the proposed July 16, 2012 date coincides with the potential transitional period provided in sections 723(c) and 734(c) of the Dodd-Frank Act.<sup>23</sup> Further, the Commission stated that, should the Commission deem it appropriate to terminate or extend any exemptive relief under part two of the July 14 Order, it would be in a better position to comprehensively evaluate and consider any tailored exemption at that time.

#### **IV. Discussion of the Final Order**

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facilities (“SEFs”)), or otherwise to the same extent that all other swaps are allowed to trade on DCMs, SEFs, or otherwise.” *Id.* at 49296.

<sup>22</sup>The Commission also clarified that, by operation of new § 35.1 of the Commission’s regulations, the Commission’s statement in adopting the July 14 Order that a DCM may list and trade swaps “under the DCM’s rules related to futures contracts, without exemptive relief,” 76 FR at 42518, would apply, as of December 31, 2011, to swaps in agricultural commodities.

<sup>23</sup>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.

The Commission received five comments in response to the Notice proposing to amend the July 14 Order.<sup>24</sup> The comments generally focused upon three issues: (1) the general expiration date of the relief to be provided by the proposed amendment; (2) the application of the proposed amendment to agricultural swaps; and, (3) the expiry date applicable to exempt commercial markets (“ECMs”) operating pursuant to grandfather relief authorized by section 723(c)(1)-(2) of the Dodd-Frank Act and their market participants and clearing organizations. The comments and Commission determinations regarding each of these issues is discussed in the sections that follow. In addition, the final order includes other technical, non-substantive changes to the wording of the proposed amended order.

#### **A. Expiry Date of July 16, 2012**

##### **1. Comments**

Commenters were divided on whether the Commission should include an expiry or “sunset” date of July 16, 2012. For example, Better Markets stated that continuing to set outside dates for the exemptive relief, rather than granting open-ended exemptive relief, establishes important deadlines so that work can be prioritized and completed as quickly as prudently possible.<sup>25</sup> In contrast, CME Group and SIFMA recommended the Commission avoid setting a sunset provision date for the expiration of the temporary exemptive relief.<sup>26</sup> SIFMA stated that the Commission should instead provide exemptive relief that lasts on a provision-by-provision

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<sup>24</sup> The Commission received comments from Better Markets, CME Group (CME); LCH.Clearnet Limited (LCH); Nodal Exchange LLC (Nodal Exchange or Nodal); and the Securities Industry and Financial Market Association (SIFMA). The comment file is available on the Commission’s website at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1102> (last visited Dec. 2, 2011).

<sup>25</sup> Better Markets at 2.

<sup>26</sup> CME at 2; SIFMA at 2.

basis until related substantive requirements of the Dodd-Frank Act are implemented, as the SEC provided for in its parallel relief under subtitle B of title VII.<sup>27</sup> SIFMA said that avoiding the imposition of a sunset date would allow the Commission to adopt its final rules in a logical order that provides market participants with necessary legal certainty.<sup>28</sup>

## **2. Commission Determination**

The Commission has determined to retain, as proposed, an outmost expiry date of July 16, 2012 for two reasons. First, the Commission continues to believe that it is appropriate and prudent to periodically review the extent and scope of any relief provided from the CEA, as amended by the Dodd-Frank Act.<sup>29</sup> The Commission anticipates that additional rulemakings to implement the Dodd-Frank Act will be completed during the extended period of exemptive relief between December 31, 2011 and July 16, 2012. 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 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. Second, particularly with respect to part two of the July 14 Order, the limitation of this extension of exemptive relief to no later than July 16, 2012 is consistent with the transitional relief provided by the Congress in section 723(c) of the Dodd-Frank Act regarding former CEA

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<sup>27</sup> SIFMA at 2.

<sup>28</sup> SIFMA at 2-3. Although beyond the scope of the Notice, SIFMA also reiterated its request that the Commission provide a comprehensive rulemaking schedule and implementation plan, as well as clear positions on the extraterritorial scope of Title VII and treatment of inter-affiliate transactions, as set forth in its November 4 Letter on the Commission's proposed compliance and implementation schedules for clearing, trade execution, documentation and margin. SIFMA at 3.

<sup>29</sup> The Commission's position in this regard is unchanged from the first Effective Date for Swap Regulation proposal, 76 FR 35372, 35374, June 17, 2011.

section 2(h) and section 734(c) of the Dodd-Frank Act regarding former CEA section 5d (i.e., for “not longer than a 1-year period” following the general effective date of title VII).<sup>30</sup> As stated in the Notice, should the Commission deem it appropriate to terminate or extend any exemptive relief under part two of the July 14 Order, the Commission will be in a better position to comprehensively evaluate and consider any tailored exemption at that time.<sup>31</sup>

## **B. Application to Agricultural Swaps**

### **1. Comments**

CME sought clarification on the application of the proposed amendment to agricultural swaps.<sup>32</sup> CME stated that it was not clear from the Notice whether the proposed relief: (1) would apply only to agricultural swaps that meet part 35 as in effect prior to December 31, 2011; or (2) includes agricultural swaps that meet part 35 as in effect prior to December 31, 2011 notwithstanding that: (i) the transaction may be executed on a multilateral transaction execution facility; (ii) the transaction may be cleared; (iii) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA prior to July 16; (iv) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (v) 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. CME believes the latter is

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<sup>30</sup> See Orders Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade, 75 FR 56513, Sept. 16, 2010.

<sup>31</sup> 76 FR at 66002.

<sup>32</sup> CME at 2-3.

consistent with new Commission regulation § 35.1, and that the Commission should make this clear in the text of any final order issued pursuant to the Notice.<sup>33</sup>

CME further stated that pursuant to the Notice and new regulation § 35.1, starting on January 1, 2012, swaps based on agricultural commodities, like swaps based on exempt and excluded commodities, may trade on either a DCM, ECM or exempt board of trade (“EBOT”) (until such time as status as a swap execution facility (“SEF”) is available). CME believes the Commission should make this clear in the text of any final order issued pursuant to the Notice.<sup>34</sup>

## **2. Commission Determination**

Prior to the Dodd-Frank Act, the CEA did not permit transactions in agricultural commodities on ECMs or EBOTs.<sup>35</sup> Nothing in the Notice or the Commission’s recently promulgated § 35.1<sup>36</sup> provide that agricultural swaps may trade on an ECM or EBOT. Rather, regulation § 35.1 allows agricultural swaps to transact subject to the laws and rules applicable to all other swaps, and to transact on DCMs, SEFs, “or otherwise” to the same extent that all other swaps are allowed to trade on DCMs, SEFs, “or otherwise.”<sup>37</sup> To interpret the phrase “or otherwise”, in conjunction with the exemptive relief issued herein, as expanding the permissible role for ECMs and EBOTs to agricultural commodities would be: (1) contrary to the plain language of the pre-Dodd-Frank exemptions for ECMs and EBOTs; and (2) inconsistent with the

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<sup>33</sup> Id.

<sup>34</sup> CME at 3.

<sup>35</sup> Specifically, the statutory provisions authorizing ECMs (pre Dodd-Frank CEA section 2(h)) applied to transactions in exempt commodities, and the statutory provisions authorizing EBOTs (pre Dodd-Frank CEA section 5d) applied to transactions in excluded commodities. Agricultural commodities are neither exempt nor excluded commodities.

<sup>36</sup> See Agricultural Swaps, 76 FR 49291, Aug. 10, 2011.

<sup>37</sup> Id. at 49296.

intent underlying the July 14 Order to preserve the status quo during implementation of the new swap regulatory regime.<sup>38</sup> Accordingly, the Commission now clarifies that new part 35<sup>39</sup> and the exemptive relief issued herein, and any interaction of the two, do not operate to expand the pre-Dodd-Frank scope of transactions eligible to be transacted on either an ECM or EBOT to include transactions in agricultural commodities.

To clarify this point, and as compared to the proposed amended order, the Commission has reformatted this final order by moving the text addressing transactions that meet part 35 as in effect prior to December 31, 2011, to a paragraph separate from the text addressing transactions that meet part 35 as in effect prior to December 31, 2011 notwithstanding that: (i) the transaction may be executed on a multilateral transaction execution facility; (ii) the transaction may be cleared; (iii) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA prior to July 16; (iv) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (v) 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.

**C. Expiry Date Applicable to ECMs and EBOTs Operating Pursuant to Grandfather Relief Authorized by Section 723(c)(1)-(2) of the Dodd-Frank Act and their Market Participants and Clearing Organizations.**

**1. Comments**

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<sup>38</sup> The Notice stated: “[T]he proposed extension of this exemptive relief ‘will allow markets and market participants to continue to operate under the regulatory regime as in effect prior to July 16, 2011. . . .’” 76 FR 65999, at 66001. The regulatory regime as in effect prior to July 16, 2011, did not permit transactions in agricultural commodities on ECMs or EBOTs.

<sup>39</sup> See footnote 36, above.

Two commenters, Nodal Exchange and LCH, expressed concern with the expiry date of the second part of the relief contained in the proposed amended order<sup>40</sup> as it applies to ECMs that have petitioned for the grandfather relief authorized by section 723(c)(1)-(2) of the Dodd-Frank Act<sup>41</sup> and/or to such ECMs' market participants or clearing organizations. As set forth above, the Commission proposed to amend the July 14 Order to extend the expiry date of the second part of the relief until the earlier of: (1) July 16, 2012; or (2) such other compliance date as may be determined by the Commission.

Nodal Exchange is an ECM that has filed for grandfather relief under the ECM "Grandfather Order" issued by the Commission pursuant to the authority provided by section 723(c)(1)-(2) of the Dodd-Frank Act.<sup>42</sup> The ECM Grandfather Order permits ECMs that satisfy specified conditions to continue to operate pursuant to the provisions of former CEA section 2(h)(3)-(7) until July 15, 2012. Among the applicable conditions are the requirements that the ECM must have filed a formal SEF or DCM application with the Commission within sixty days after the effective date of final regulations implementing the provisions of either section 733 or section 735 of the Dodd-Frank Act,<sup>43</sup> whichever is applicable, and that the ECM's SEF or DCM application be pending before the Commission.

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<sup>40</sup> As noted above, part two of the July 14 Order provides temporary exemptive relief from the provisions of the CEA that apply, or may apply, to certain agreements, contracts, and transactions in exempt or excluded commodities as a result of the repeal of the exemptions and exclusions contained in former CEA sections 2(d), 2(e), 2(g), 2(h), and 5d as of July 16, 2011. See sections 723(a)(1) and 734(a) of the Dodd-Frank Act.

<sup>41</sup> Section 723(c) of the Dodd-Frank Act permitted persons to submit to the Commission, within 60 days of the enactment of the Dodd-Frank Act, a petition to remain subject to former section 2(h) of the CEA and authorized the Commission to allow such persons to continue to operate subject to former section 2(h) of the CEA for not longer than a one year period.

<sup>42</sup> See Orders Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade, 75 FR 56513, Sept. 16, 2010.

<sup>43</sup> Sections 733 and 735 of the Dodd-Frank Act include Core Principles and other statutory requirements applicable to SEFs and DCMs, respectively.



Nodal Exchange requested that the proposed amended order be modified in two ways. First, Nodal requested that “the Commission provide relief to ECMs compliant with the grandfathering provisions by extending the second part of the July 14 Order for these compliant ECMs until the latter of (1) July 16, 2012; or (2) such other compliance date as may be determined by the Commission.”<sup>44</sup> In support of its request, Nodal stated that “[s]ince the Dodd-Frank Act eliminates ECMs by no later than July 16, 2012, it would appear that Nodal Exchange must become a registered DCM or SEF by July 16, 2012.”<sup>45</sup> Nodal asserted, however, that it “appears highly unlikely that Nodal Exchange will be able to be either a registered DCM or SEF by July 16, 2012 because the rules for neither DCMs nor SEFs have been finalized” and because “based on the proposed rules for DCMs, the 180-day statutory review period will probably govern the application review process.”<sup>46</sup>

Nodal claimed that its “markets will be disrupted if Nodal Exchange cannot be registered as a DCM or SEF by July 16, 2012, unless Nodal Exchange can be permitted to continue to operate as an ECM until the Commission grants appropriate registration.”<sup>47</sup> Nodal also claimed that “[w]ithout further guidance from the Commission consistent with the ECM transition period of section 723(c) of the Dodd-Frank Act,” the proposed amended order “creates unnecessary

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<sup>44</sup> Nodal at 2 (emphasis in the original).

<sup>45</sup> Id. at 1.

<sup>46</sup> Id. at 2.

<sup>47</sup> Id.

uncertainty for Nodal Exchange, its participants, its clearing house LCH.Clearnet,<sup>48</sup> and the LCH.Clearnet clearing members for Nodal Exchange participants.”<sup>49</sup>

Second, Nodal asserted that with respect to non-ECM entities such as Nodal Exchange participants and their LCH clearing members, extending the relief in the July 14 Order until the earlier of: (1) July 16, 2012; or (2) such other compliance date as may be determined by the Commission “creates uncertainty in the timeline for compliance with the new regulatory regime,” noting that it is “unclear what circumstances could cause ‘such other compliance date’ to be determined by the Commission.”<sup>50</sup> Accordingly, Nodal Exchange requested that the Commission provide exemptive relief to “non-ECM market participants” by extending the second part of the July 14 Order until July 16, 2012 without qualification.<sup>51</sup>

In a related comment, LCH similarly requested that the Commission extend the exemptive relief in the second part of the July 14 Order to July 16, 2012 “without any qualification.”<sup>52</sup> LCH.Clearnet Limited, one of the LCH’s operating companies, is registered with the Commission as a derivatives clearing organization (“DCO”) and provides clearing services for Nodal Exchange. According to LCH, the second part of the Commission’s July 14 Order permits LCH.Clearnet Limited to continue to clear transactions for Nodal Exchange.<sup>53</sup>

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<sup>48</sup> Nodal represents that all of its contracts are cleared by LCH.Clearnet. Id. at 1, fn. 1.

<sup>49</sup> Id. at 2.

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> LCH at 1.

<sup>53</sup> Id. at 2.

LCH acknowledged that LCH.Clearnet's "DCO designation must be amended before Nodal Exchange's change in registration [to a DCM or SEF] occurs."<sup>54</sup>

LCH commented that the Commission "created unnecessary uncertainty for LCH.Clearnet Limited, Nodal, and LCH.Clearnet clearing members for firms trading on Nodal by proposing that the extension of the July 14 Order would expire 'upon the earlier of: (I) July 16, 2012; or (II) such other compliance date as may be determined by the Commission.'"<sup>55</sup> Stating that "no explanation for the 'other compliance date' language" was provided, LCH maintained that the addition of this language "raises the spectre that the Commission could rescind the exemptive relief at any time for any reason or without allowing sufficient time for LCH.Clearnet Limited to apply for and receive an amended order of registration."<sup>56</sup> LCH stated that extending the expiration date of the second part of the July 14 Order to July 16, 2012 without qualification would be "consistent with the transitional period for ECMs provided in section 723(c) of Dodd-Frank" and the Commission's goal of striving "to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime."<sup>57</sup>

## **2. Commission Determination**

Although these comments came from an ECM and its clearing organization, the points raised in these comments also are applicable to EBOTs that are operating under essentially the same Grandfather Order requirements as ECMs.<sup>58</sup> Accordingly, in modifying the proposed

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<sup>54</sup> Id.

<sup>55</sup> Id. (emphasis in the original).

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> See Orders Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade, 75 FR 56513, Sept. 16, 2010.

amended order to address the comments received regarding ECMs, the Commission also has determined to modify the proposed amended order to address EBOTs.

While the final order continues to provide that the exemption set forth in the second part of the order generally shall expire upon the earlier of July 16, 2012 or such other compliance date as may be determined by the Commission, it has been modified to provide that the exemption will not expire prior to July 16, 2012 in certain circumstances. Specifically, no other compliance date will be determined (and thus, the exemption will remain in effect until July 16, 2012) for agreements, contracts, and transactions (and for persons offering, entering into, or rendering advice or rendering other services with respect to, such agreements, contracts or transactions) that: (1) are executed on an ECM or EBOT that is operating under the terms of the Commission's ECM/EBOT Grandfather Order and that complies with all of the applicable conditions of the ECM/EBOT Grandfather Order; and (2) are cleared by a Commission-registered DCO. This modification is narrow. It applies only to agreements, contracts, and transactions that are executed on a grandfathered ECM or EBOT and are cleared by a registered DCO, and it is restricted in scope to those specific requirements or provisions of the CEA (and relevant implementing regulations) that otherwise would apply to such agreements, contracts, and transactions and that are inconsistent with the ECM or EBOT Grandfather Order.<sup>59</sup>

As noted by the commenters, the Commission, in proposing the amendments to the July 14 Order, sought to ensure that current practices will not be unduly disrupted during the

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<sup>59</sup> This modification does not affect the applicability of general provisions applicable to DCOs or clearing requirements that the Commission may promulgate under the Dodd-Frank Act that may become effective before July 16, 2012. Such requirements would still apply to the DCO and transactions that are not executed on an ECM or EBOT.

transition to the new regulatory regime.<sup>60</sup> The Commission also stated that it believes it is in the interest of the public and market participants to continue to provide regulatory certainty regarding the applicability of title VII of the Dodd-Frank Act.<sup>61</sup> The modification contained in the final order will further these objectives by providing greater consistency between the expiration of this exemptive relief and the terms of the ECM/EBOT Grandfather Order authorized by Congress in sections 723(c) and 734(c) of the Dodd-Frank Act. It also will reduce the likelihood of legal uncertainty that could arise were the exemptive relief applicable to grandfathered ECMs and EBOTs that execute particular transactions and the DCOs that clear those same transactions subject to disparate expiration dates. In this way, ECMs and EBOTs that are compliant with the conditions contained the ECM/EBOT Grandfather Order, their market participants, and their DCOs and clearing members, are more likely to operate without disruption through the end of the grandfather relief period authorized by the Dodd-Frank Act -- July 16, 2012.

The Commission, though, has determined not to modify the expiration date of the second part of the proposed amended order to permit the relief to expire later than July 16, 2012 for the same reasons that it has decided to retain a “sunset” or expiration provision generally. First, the Commission continues to believe that it is appropriate and prudent to periodically review the extent and scope of any exemptive relief provided from the CEA, as amended by the Dodd-Frank Act. Second, the limitation of this exemptive relief to no later than July 16, 2012 is consistent with the transitional relief provided by Congress (*i.e.*, for “not longer than a 1-year period”). Finally, should the Commission deem it appropriate to terminate or extend any exemptive relief

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<sup>60</sup> See, e.g., 76 FR at 66002.

<sup>61</sup> *Id.*

under part two of the July 14 Order, the Commission will be in a better position to comprehensively evaluate and consider any tailored exemption at that time.<sup>62</sup>

## **V. Related Matters**

### **A. Paperwork Reduction Act**

The Paperwork Reduction Act (“PRA”)<sup>63</sup> imposes certain requirements on Federal agencies (including the Commission) in connection with conducting or sponsoring any collection of information as defined by the PRA. These amendments to the July 14 Order will not require a new collection of information from any persons or entities that will be subject to the final order.

### **B. Cost-Benefit Considerations**

Section 15(a) of the CEA<sup>64</sup> 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 requested but received no comments on the consideration of costs and benefits of the proposed amendments discussed in the Notice. In the Notice, the Commission

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<sup>62</sup> See 76 FR at 66002.

<sup>63</sup> 44 U.S.C. 3507(d).

<sup>64</sup> 7 U.S.C. 19(a).

stated that the proposed amendments to the existing July 14 Order would not change the nature or limit the scope of relief granted.<sup>65</sup> The Commission continues to believe that these amendments do not change the nature or scope of the relief granted and, as such, impose no costs beyond the costs imposed by the July 14 Order. Rather, this final order confers an added benefit to market participants and the public by extending the relief provided for in the July 14 Order through no later than July 16, 2012. Accordingly, the consideration of costs and benefits set forth in the July 14 Order may be incorporated by reference in this final order.

## **VI. Amendments to the July 14 Order**

The Commission amends the July 14 Order to read as follows:

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 consistent with the determinations set forth above, which are incorporated in this final order, as amended, by reference, and:

- (1) Exempts, subject to the conditions set forth in paragraph (4), 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:

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<sup>65</sup> See 76 FR 42521.

- a. Applies only with respect to those requirements or portions of such provisions that specifically relate to such referenced terms; and
  - b. With respect to any such provision of the CEA, 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) July 16, 2012.
- (2) Exempts, subject to the conditions set forth in paragraph (4), 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, if the agreement, contract, or transaction complies with part 35 of the Commission's regulations as in effect prior to December 31, 2011. This exemption shall expire upon the earlier of (i) July 16, 2012; or (ii) such other compliance date as may be determined by the Commission.
- (3) Exempts, subject to the conditions set forth in paragraph (4), 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, if the agreement, contract, or transaction complies with part 35 of the Commission's regulations as in effect prior to December 31, 2011, including any agreement, contract, or transaction in an exempt or excluded (but not agricultural) commodity that complies with such provisions then in effect 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:

- a. Such agreements, contracts, and transactions in exempt or excluded commodities (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 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
- b. This exemption shall expire upon the earlier of: (i) July 16, 2012; or (ii) such other compliance date as may be determined by the Commission, except that the exemption shall not expire prior to July 16, 2012 with limited respect to the specific requirements or provisions of the CEA and regulations promulgated thereunder that otherwise would apply to such agreements, contracts, and transactions (and the persons offering, entering into, or rendering advice or

rendering other services with respect to them) and that are inconsistent with the exempt commercial market (“ECM”)/exempt board of trade (“EBOT”) Grandfather Order if (I) such agreements, contracts, and transactions are executed on an ECM or an EBOT that is operating under the terms of, and compliant with the applicable conditions of, the Commission’s ECM/EBOT Grandfather Order which became effective September 20, 2010; (II) such agreements, contracts, and transactions are cleared by a registered derivatives clearing organization; and (III) such ECM or EBOT complies with all other Commission regulations implementing the provisions of the Dodd-Frank Act that are listed in Category 1 of the Appendix to this Order.

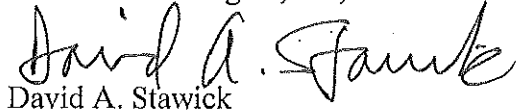
- (4) Provides that the foregoing exemptions in paragraphs (1), (2) and (3) above shall not:
- a. Limit in any way the Commission’s authority with respect to any person, entity, or transaction pursuant to CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2), or 13, or the regulations of the 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 became 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, as amended, shall be effective immediately.

Issued in Washington, DC, on December 19, 2011 by the Commission.

  
David A. Stawick

Secretary of the Commission

NOTE: The following appendix will not appear in the Code of Federal Regulations.

Statement of Commissioner Scott D. O'Malia

For the fourth time this year,<sup>66</sup> I am concurring with the Commission's decision to provide market participants with temporary relief from certain provisions of the Dodd-Frank Act.<sup>67</sup>

Again, I am concurring despite my belief that this iteration of the final exemptive order (the

"Second Iteration") is deeply flawed – just like the July 14, 2011 final order (the "First

Iteration"). By now, it is well known that I object to arbitrary sunsets. It is also well known that

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<sup>66</sup> See "Do What You Can", Opening Statement for the June 14, 2011 Commission Meeting, available at: <http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement061411>; Concurring Statement on the Order Regarding the Effective Date for Swap Regulation, dated July 14, 2011, available at: <http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071411>; Concurring Statement, Second Extension of Temporary Exemptive Relief, dated October 18, 2011, available at: <http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement101811c>.

<sup>67</sup> To provide such relief, the Commission is relying on its exemptive authority under section 4(c) of the Commodity Exchange Act and its authority under section 712(f) of the Dodd-Frank Act.

I object to the Commission's recalcitrance – despite Congressional direction – to set forth comprehensive rulemaking and implementation schedules.<sup>68</sup> I will not expound upon such objections here. Instead, I would like to focus on the Commission's dogmatic adherence to the exemptive approach taken by the First Iteration, even in light of known facts. Such adherence sets a troubling precedent for our Dodd-Frank outstanding proposals.

### *The Goal*

The First Iteration provided for the termination of exemptive relief on December 31, 2011, absent further Commission action (the “December Sunset”). The primary reason that the Commission advanced for the December Sunset was that “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.”<sup>69</sup>

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<sup>68</sup> See H.R. Rep. No. 112-101, at 54 (2011), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt101/pdf/CRPT-112hrpt101.pdf>.

<sup>69</sup> The proposed order for Effective Date for Swap Regulation, 76 FR 35372, 35375 (Jun. 17, 2011). See the final order for Effective Date for Swap Regulation, 76 FR 42508, 42514 (Jul. 19, 2011) (stating that “[t]he Commission has determined, for the reasons discussed in the proposed order, not to alter the expiration date(s) contained in the proposed order.”).

In both the First and Second Iterations, the Commission advanced another reason for a sunset. Essentially, the Commission argued that, with respect to the Category 3 provisions, “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.” 76 FR at 42514. See Section IV(A)(2) of the Second Iteration. With respect to the First Iteration, this statement was somewhat odd, since the December Sunset was earlier – by six months – than the end date for transitional relief specified by those two Dodd-Frank sections. With respect to the Second Iteration, this statement is accurate. However, the transitional relief specified by those two Dodd-Frank sections may have been predicated on the Commission completing its Dodd-Frank rulemakings by the general effective date of July 16, 2011. If the Commission assumes otherwise, then it would be imputing to Congress the intent to place market participants in a Catch-22. Specifically, the Commission would be stating that Congress intended to withdraw transitional relief from market participants before the Commission completes the Dodd-Frank structures to which market participants are explicitly supposed to transition. This imputation may be somewhat ungenerous. I believe that sections 723(c)

## *The Facts*

Let us now examine the facts. After all, hindsight should be 20/20. First, the December Sunset has done nothing to ensure that the Commission completes its Dodd-Frank rulemakings more expeditiously. Specifically, the Commission has not completed the definitional rulemakings that Category 2 provisions (as the First and Second Iterations define such term) require to become effective. Additionally, the Commission has not completed the rulemakings on designated contract markets and swap execution facilities that would enable Category 3 provisions (as the First and Second Iterations define such term) to become effective without disrupting existing markets.

Second, the December Sunset has not permitted the Commission to tailor the scope and extent of the current exemption. This is unsurprising. Market participants cannot reasonably comply with Category 2 or 3 provisions unless the Commission completes predicate rulemakings. An arbitrary sunset cannot change this fact. Hence, the Second Iteration emphasizes that “the proposed amendments to the existing July 14 Order would not change the nature or limit the scope of relief granted.”<sup>70</sup>

## *Commission Response*

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and 734(c) of the Dodd-Frank Act, when interpreted in the proper context, do not support a sunset in the Second Iteration.

<sup>70</sup> Section V(B) of the Second Iteration.

As demonstrated above, the December Sunset achieved none of its goals. However, in formulating the Second Iteration, the Commission appears to have ignored inconvenient truths. The Second Iteration extends the December Sunset to July 16, 2012. Simultaneously, the Commission continues its refusal to provide market participants with its plan for the completion of Dodd-Frank rulemakings by July 16, 2012. In fact, at least one market participant has already indicated that – based on reasonable estimates of Commission progress – it would need exemptive relief beyond the new sunset.<sup>71</sup> I am already anticipating fifth and sixth votes on exemptive relief.

*Let's Figure Out the Best Way to Reach the Goal*

I support the Second Iteration because some certainty is better than no certainty. However, if the Commission is truly open to reconsidering its Dodd-Frank proposals – as some have indicated – the Second Iteration should have contained no arbitrary sunset. In the Second Iteration, the Commission displays a troubling willingness to adhere to prior convention.<sup>72</sup> By the fifth and sixth times I have to vote on temporary relief, I hope that the Commission will have agreed to grant market participants much-deserved certainty until applicable rulemakings

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<sup>71</sup> See comment letter from Nodal Exchange, LLC, dated November 23, 2011, to the proposed order on Effective Date for Swap Regulation, 76 FR 65999 (Oct. 25, 2011), available at: <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1102> (stating “[i]t appears highly unlikely that Nodal Exchange will be able to be either a registered DCM or SEF by July 16, 2012 because the rules for neither DCMs nor SEFs have been finalized. Furthermore, based on the proposed rules for DCMs, the 180-day statutory review period will probably govern the application review process. Without further guidance from the Commission...the CFTC Proposed Release created unnecessary uncertainty for Nodal Exchange, its participants, its clearing house LCH.Clearnet, and the LCH.Clearnet clearing members for Nodal Exchange participants.”).

<sup>72</sup> According to the Office of Management and Budget, we have promulgated five final rulemakings that would each result in an annual effect on the American economy of more than \$100 million a year. If the Commission continues to adhere to its Dodd-Frank approach, without consideration of new and applicable facts, then the Commission may impose substantial and unnecessary costs on the American economy – costs that we all can ill-afford.

become effective. Additionally, I hope that the Commission will have provided rulemaking and implementation schedules to market participants, so that they can plan to be in compliance when such rulemakings become effective. As Martin Luther King, Jr. has said: “We must accept finite disappointment, but never lose infinite hope.”