

CFTC Issues Final Order to Provide Temporary Relief from Provisions of the Dodd-Frank Act Slated to Become Effective on July 16, 2011 and Releases Agenda for Upcoming Meetings

July 15, 2011

On July 14, 2011, the Commodity Futures Trading Commission (CFTC) finalized its order providing temporary exemptive relief from certain provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) that would otherwise take effect tomorrow (July 16, 2011). A copy of the final order is available [here](#). According to the final order's preamble and a press release issued by the CFTC, the final order is essentially the same as the corresponding proposed order originally published by the CFTC on June 17, 2011. A copy of Sutherland's Legal Alert addressing the CFTC's proposed order is available [here](#).

Temporary Relief From Certain Provisions of the Dodd-Frank Act Provided by the CFTC's Final Order

The CFTC's order provides temporary exemptions from certain provisions of the Commodity Exchange Act (the CEA) in two parts:

- The first part provides temporary relief from provisions of the CEA added or amended by the Dodd-Frank Act that reference one or more terms such as "swap," "swap dealer," "major swap participant," and "eligible contract participant" which the Dodd-Frank Act requires to be further defined. These provisions are listed in Category 2 of the Appendix to the CFTC's final order. The temporary relief under this portion of the order will expire upon the earlier of: (1) the effective date of the applicable final rule further defining the relevant term; or (2) December 31, 2011.
- The second part provides 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 defined in the CEA and which generally include financial, metals, and energy commodities) as a result of Title VII's repeal of various exemptions and exclusions under the CEA after July 16, 2011. These provisions are listed in Category 3 of the Appendix to the CFTC's order. This exemption is based on the exemption for swap agreements in Part 35 of the CFTC's existing regulations and will expire upon the earlier of (1) the CFTC's repeal or withdrawal of Part 35; or (2) December 31, 2011.

Provisions of the Dodd-Frank Act Not Covered by the CFTC's Relief Order

Provisions of Title VII that require rulemakings do not self-effectuate on July 16, 2011, and are therefore not covered by the CFTC's order. These provisions are listed in Category 1 of the Appendix to the CFTC's order and include some of the most significant new requirements for swap transactions under Title VII, including mandatory clearing and platform execution, capital and margin requirements, documentation requirements, recordkeeping requirements and reporting requirements. These provisions will take effect no less than 60 days after the CFTC (or other regulators) publish final versions

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of the applicable rulemakings. It is expected that the effective dates and/or compliance deadlines for a number of these provisions and corresponding rulemakings could be after December 31, 2011.

There are several additional important conditions to the CFTC's temporary exemptive relief, including:

- The CFTC's order does not apply to the statutory provisions of the Dodd-Frank Act listed in Category 4 of the Appendix to the order.
- The order does not limit the CFTC's anti-fraud or anti-manipulation authority under the CEA.
- The order does not apply to any provision of the Dodd-Frank Act or the CEA that will have already become effective prior to July 16, 2011 (e.g., those relating to position limits under Section 737 of the Dodd-Frank Act).
- The order does not affect any effective date set forth in any rulemaking issued by the CFTC to implement provisions of the Dodd-Frank Act.
- The order does not affect the applicability of any provision of the CEA to futures contracts or options on futures contracts, or to cash markets

Commissioner O'Malia's Concurrence With the CFTC's Order

In connection with the CFTC's order, Commissioner Scott D. O'Malia released a concurring statement in which he generally supported the CFTC's exemptive relief but disapproved of the lack of harmonization between the CFTC's exemptive relief and the exemptive relief issued by the Securities and Exchange Commission (the SEC), which is in the form of multiple exemptive orders and interim final rules.

Contrast with SEC Relief and Implementation Plan. Commissioner O'Malia also criticized the CFTC's general non-responsiveness to market participants' comments regarding the December 31, 2011 sunset provision in the CFTC's order and requests for a documented implementation plan. With respect to the sunset provision in the CFTC's order, Commissioner O'Malia argued that the "arbitrary" December 31, 2011, date effectively "cuts short the very legal certainty" that the exemptive order is designed to provide and contradicts the SEC's decision to extend its exemptive relief until its final rulemakings become effective. Finally, in light of the SEC's ongoing development of a Dodd-Frank rulemaking implementation plan and market participants' public requests to the CFTC for a similar implementation plan, Commissioner O'Malia called upon the CFTC to publish such a plan in August.

Future CFTC Meetings

The CFTC is scheduled to have an open meeting on July 19, 2011, to consider one proposed rule on Customer Clearing Documentation, Timing of Acceptance for Clearing and Clearing Member Risk Management, and four final rules on (1) Process for Review of Swaps for Mandatory Clearing; (2) Part 40 Provisions Common to Registered Entities; (3) Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act; and (4) Removing Any Reference to or Reliance on Credit Ratings in Commission Regulations; Proposing Alternatives to the Use of Credit Ratings. The CFTC also plans to meet on August 4, 2011, to consider several final rules.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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