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June 17, 2011

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CFTC Delays Effective Date for Certain Swap Provisions Under Dodd-Frank Act

By [Kevin Page](#) and [Craig Enochs](#)

On June 14, 2011, the Commodity Futures Trading Commission (“**CFTC**”) issued a proposed order (“**Proposed Order**”) that, if adopted, would grant temporary exemptions to certain requirements in Title VII of the Dodd-Frank Act (the “**Act**”) that otherwise would become effective on July 16, 2011.¹

Swap-related requirements under Title VII of the Act, including key amendments to the Commodity Exchange Act (“**CEA**”), generally become effective on July 16, 2011. However, Section 754 of the Act states that if a provision of Title VII requires implementation by agency rulemaking, such provision shall become effective not less than sixty (60) days after publication of the final rule. Over the past few months, the CFTC has introduced numerous proposed rules that implement the Act’s requirements. However, the CFTC acknowledges that certain rulemakings will not be finalized on or before the quickly-approaching July 16, 2011, effective date.

To address concerns regarding which CEA provisions will (or will not) apply as of July 16, 2011, the CFTC is proposing to grant a temporary extension of the effective date with respect to two categories of self-effectuating CEA regulations that, without such extension, might otherwise apply to market participants as of July 16, 2011: (i) CEA provisions added or amended by Title VII that reference key terms which require further definition; and (ii) Title VII provisions that repeal various exemptions and exclusions set forth in the CEA.

Provisions Relating to Key Defined Terms

Certain provisions of Title VII do not themselves require further rulemaking, and thus become effective as of July 16, 2011. However, such provisions reference defined terms such as “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant” that have not yet been finalized, and the CFTC acknowledges that definitional rulemakings will not be finalized on or before July 16, 2011. Therefore, the CFTC proposes temporarily exempting persons from complying with provisions in Title VII that reference terms requiring further definition, such as “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant”, until the earlier of (i) the effective date of the definitional rulemaking for such terms, or (ii) December 31, 2011. Notably, the temporary exemption only applies to the extent the relevant provision (or a portion thereof) specifically relates to the referenced term.

Provisions Repealing CEA Exemptions and Exclusions

The CEA currently exempts from CFTC jurisdiction certain types of bilateral swap transactions in “exempt commodities” (including energy and metals commodities) and “excluded commodities.”² However, Title VII of the Act repeals these exemptions as of July 16,

2011, anticipating that all over-the-counter swap transactions will be subject to CFTC jurisdiction and governed by the Act's regulatory framework. Based on growing concerns raised by market participants regarding timely compliance efforts, the CFTC proposes to temporarily exempt a transaction in an exempt or excluded commodity from CEA requirements (other than fraud or anti-manipulation provisions) until the earlier of (i) December 31, 2011; or (ii) the repeal or replacement of certain CFTC regulations.

Provisions Not Subject to the Proposed Order

The Proposed Order clarifies that regulations subject to further CFTC or SEC rulemaking are not covered by the Proposed Order because such regulations will not become immediately effective as of July 16, 2011.³ In addition, the CFTC has clarified that certain self-effectuating provisions in Title VII that otherwise become effective July 16, 2011 are not covered by the Proposed Order.⁴

The Proposed Order is subject to a 14-day comment period. Market participants may submit comments via the CFTC's website at <http://comments.cftc.gov>.

We will continue to monitor the status of the Proposed Order in order to provide relevant updates. If you have any questions regarding the Proposed Order and how it might impact your Dodd-Frank compliance efforts, please do not hesitate to contact **Craig Enochs** at 713-752-4315 or cenochs@jw.com or **Kevin Page** at 713-752-4227 or kpage@jw.com for additional information.

¹ The Wall Street Transparency and Accountability Act of 2010 is codified in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. A copy of the Federal Register notice relating to the Proposed Order is available online [here](#).

² For example, Section 2(h)(1)-(2) of the CEA provides that transactions in "exempt commodities" between "eligible contract participants" traded on an "over-the-counter" basis (i.e., not via an exchange) are exempt from CFTC jurisdiction. See 7 U.S.C. § 2(h)(1)-(2).

³ The CFTC has published a list of Title VII provisions that are subject to further rulemaking per the Act's terms and thus are not covered by the Proposed Order. Such list is available online [here](#).

⁴ The CFTC has published a list of Title VII provisions that are self-effectuating as of July 16, 2011 but are not otherwise covered by the Proposed Order. Such list is available online [here](#).

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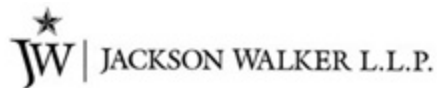
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