

CFTC Proposes Temporary Relief from Certain Provisions of the Dodd-Frank Act Slated to Become Effective on July 16, 2011

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Earlier today, the Commodity Futures Trading Commission (CFTC) issued a proposed order to temporarily exempt swap market participants from certain provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) that will become effective on July 16, 2011.¹ The proposed order, which will be open for public comment for 14 days following its publication in the Federal Register, will provide relief from sections of Title VII that become effective on July 16 and either (a) reference the terms “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant,” or (b) repeal existing Commodity Exchange Act (CEA) exemptions for certain transactions in exempt or excluded commodities (namely Sections 2(d), 2(e), 2(g), 2(h) and 5d of the CEA).

The following discussion is based on comments made by CFTC Commissioners and staff at today’s meeting as well as a fact sheet and Q&A posted on the CFTC’s website, both of which, along with an archived webcast of today’s meeting and a prepublication copy of the proposed order, are available [here](#).

Temporary Relief from Certain Provisions of the Dodd-Frank Act

The general effective date for Title VII of the Dodd-Frank Act is July 16, 2011, 360 days after its enactment.² However, to the extent that a provision of Title VII requires a rulemaking (by the CFTC or another regulator), such provision shall become effective not less than 60 days after publication of a final rule. Although the CFTC was charged with completing its final rules by July 16, CFTC Chairman Gary Gensler has acknowledged that the CFTC will fail to meet this deadline. As a result, certain provisions of the Dodd-Frank Act that require a CFTC rulemaking may not become effective until early next year, at the earliest, while other provisions that do not require a rulemaking will become effective on July 16, 2011. In some cases, although a provision may not require a rulemaking, it may be interrelated with provisions (including some key definitions) that do require a rulemaking. The proposed order is intended to address the uncertainty that has arisen as a result of the foregoing.

The CFTC’s proposed order would grant temporary exemptive relief to market participants in two parts. Part one of the proposed order would recognize the need to further define the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant,” each of which are defined in the Dodd-Frank Act but require further definition in joint rulemakings by the CFTC and SEC. Accordingly, part one of the proposed order would delay the effectiveness of Title VII’s provisions that use those terms until the earlier of December 31, 2011 or the date that the CFTC and SEC complete final rules to further define them. Part two of the proposed order would address the Dodd-Frank Act’s repeal of exemptions for swap transactions that were added to the CEA by the Commodity Futures Modernization Act of 2000. Specifically, part two would temporarily exempt certain transactions in exempt or excluded

¹ The Securities and Exchange Commission (SEC) announced last week that it too will provide exemptive relief to security-based swap market participants. Such relief is not the subject of this Legal Alert – information about the SEC’s proposed exemptive relief is available [here](#).

² §754 of the Dodd-Frank Act states: “Unless otherwise provided in this title, the provisions of this subtitle shall take effect on the later of 360 days after the date of 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.”

commodities (primarily financial and energy commodities) until the repeal or replacement of certain of the CFTC's regulations promulgated in connection with such exemptions or December 31, 2011, whichever is earlier. The proposed order would not apply to futures, options on futures, retail foreign currency or other commodity transactions. Also, the proposed order would not limit the CFTC's ability to pursue fraud and manipulation enforcement actions but, according to CFTC staff, would preclude private rights of action against swap market participants for continuing to engage in swaps after July 16.

At today's meeting, Commissioner Scott O'Malia took issue with the proposed order's December 31, 2011 sunset date because the CFTC has not developed a comprehensive schedule for the issuance of final rules and, absent an extension from the CFTC, the proposed order will expire even if final rules are not completed by that date. To remedy this alleged defect in the proposed order, Commissioner O'Malia introduced an amendment that would permit the proposed order to remain in effect until the CFTC completes its final rules. The amendment was not adopted.

The proposed order does not address all of the self-effectuating provisions contained in Title VII. As such, some of Title VII's provisions will still become effective on July 16. CFTC staff has posted lists on the CFTC website to identify: (a) the provisions of Title VII that are not covered by the proposed order because they require rulemaking by the CFTC and therefore will not become effective until at least 60 days after the CFTC issues final rules (the list is available [here](#)), and (b) additional provisions of Title VII that are not covered by the proposed order and will therefore become effective on July 16, 2011 (the list is available [here](#)). Finally, CFTC staff noted that in some circumstances the CFTC does not have authority to postpone the effectiveness of Title VII; the CFTC will consider issuing no-action relief in these circumstances. Commissioner Jill Sommers expressed concern with the no-action approach and recommended that the CFTC issue other relief instead.

CFTC to Hold Open Meetings in July, August and September to Consider Final Rules

The CFTC also announced that it will hold open meetings on July 7 and 19, August 4 and September 8 and 22 to consider issuing final rules to implement Title VII of the Dodd-Frank Act. Chairman Gensler noted that the CFTC may consider rules pertaining to large trader reporting, the agricultural commodity definition and anti-manipulation in the summer months, and that rules pertaining to clearing, business conduct standards for swap dealers and major swap participants and swap execution facilities will likely be considered in the fall. Finally, Chairman Gensler also urged CFTC staff to expedite their review of public comments received in response to the proposed order issued today so that the order can be finalized at the July 7 meeting.



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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