
Commodity Futures Trading Commission Clarifies Which Provisions of the Dodd-Frank Act are Now Effective; Delays Effective Date of Others

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In an action that will affect every participant in the over-the-counter swaps market, as well as futures exchanges and derivatives clearing organizations, the Commodity Futures Trading Commission ("CFTC") by Order dated July 14, 2011,¹ confirmed that certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") are now effective, while at the same time clarifying that most provisions of the Dodd-Frank Act relating to swaps regulation are delayed until the CFTC issues final implementing rules and repeals several of its existing rules. The staff of the CFTC also issued no-action relief with respect to certain provisions of the Dodd-Frank Act.² Together, these actions effectively preserve the status quo with respect to trading over-the-counter swaps and options pending further implementation of the Dodd-Frank Act's provisions.

Title VII of the Dodd-Frank Act generally became effective on July 16, 2011. The CFTC on July 11, 2011, issued an Order granting temporary relief from the provisions of the Commodity Exchange Act ("CEA") added or amended by the Dodd-Frank Act, thus delaying the effective date of many provisions of the Dodd-Frank Act relating to swaps regulation. The CFTC Order also provides temporary exemptive relief from the repeal of various exemptions or exclusions in the CEA for contracts, agreements or transactions in excluded or exempt commodities. CFTC staff have also issued no-action relief relating to specified provisions of the Dodd-Frank Act. These actions are temporary and expire no later than December 31, 2011.

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The CFTC Order is divided into four categories:

Category 1: Provisions of the Dodd-Frank Act that on their face do not become effective until the CFTC issues implementing rules;

Category 2: Provisions of the Dodd-Frank Act that would be effective, but for the fact that they reference terms that the CFTC must define through rules;

Category 3: Provisions of the Dodd-Frank Act that repeal exemptions or exclusions in current law; and

Category 4: Provisions of the Dodd-Frank Act that are now effective.

Which provisions of the Dodd-Frank Act are now effective?

The CFTC specifically listed in an Appendix to its Order all of the provisions of the Dodd-Frank Act amending the CEA that are now in effect. Among these are the CEA's amended Core Principles by which derivatives clearing organizations ("DCOs") and designated contract markets ("DCMs") must operate, the requirement that DCOs appoint a chief compliance officer, and protection for whistleblowers from retaliation by their employers. In addition, the provisions prohibit engaging in disruptive trading practices, such as violation of bids and offers, intentional or reckless disregard for orderly execution during a closing period, or bidding or offering with the intent to cancel the bid or offer before execution (*i.e.*, "spoofing") in connection with trading on a futures exchange (or when authorized, a swaps execution facility).³

Specifically with respect to swaps, as of July 16, 2011, unless reserved in the swap agreement, no Dodd-Frank Act related requirement may qualify as a termination event under the swap and a private right of action is available for violations in connection with the trading of swaps.

Finally, as discussed in a separate WilmerHale Client Alert to be issued shortly, the CFTC has also adopted a new antifraud and anti-manipulation rule which will become effective on August 15, 2011. This new antifraud rule will apply broadly to all market participants in the futures and swaps markets, and to certain cash market transactions.

How does the CFTC Order affect over-the-counter trading of swaps?

In general, the CFTC's actions temporarily preserve the status quo with respect to trading in the over-the-counter swaps market.

The CFTC identified in the Appendix a significant number of provisions of the Dodd-Frank Act that do not become effective until the CFTC issues implementing rules (Category 1). These include, among

others, the provisions governing the registration of swap dealers, the terms under which swap dealers may conduct business, the capital and margin rules that will apply, registration of swap execution facilities and swap data repositories, and various reporting requirements. The effective date of these provisions is automatically delayed until the CFTC adopts final implementing rules.

The CFTC Order temporarily exempts market participants and others from most of the provisions of the Dodd-Frank Act that reference the terms "swap," "swap dealer," "major swap participant," or "eligible contract participant" until the CFTC issues final rules defining these terms (Category 2). Among the provisions that are subject to this exemption are the provisions relating to the mandatory clearing and trade execution of swaps, the requirement for registration of swaps clearing organizations, and various reporting requirements related to swap transactions.

The CFTC Order also addresses the effect of Dodd-Frank's repeal of certain provisions of current law (Category 3). The CFTC Order confirms that contracts, agreements or transactions in excluded and exempt commodities for the time being may continue to be transacted in reliance on Part 35 of the CFTC's rules relating to swaps and Part 32 of its rules relating to over-the-counter options. In addition, the CFTC under its exemptive authority extended the applicability of the Part 35 exemption for swaps to all swaps in excluded and exempt commodities regardless of whether they are standardized, cleared or executed on a multilateral transaction execution facility. The provisions of Parts 35 and 32 continue to apply to agricultural swaps and options on the same terms as in effect prior to the issuance of the CFTC Order.

Who is covered by the temporary exemption?

The CFTC Order applies to all eligible swap participants ("ESPs") under Part 35 of the CFTC's rules, all persons offering or entering into the transaction that are eligible contract participants ("ECPs") as that term was defined in the CEA prior to July 16, 2011, and a party entering into the transaction in conjunction with its line of business that is not marketed to the public.

What is included in the staff no-action relief?

In addition, the staff issued temporary no-action relief for three provisions of the Dodd Frank Act for which the CFTC believed it did not have exemptive authority. These are the provisions of the Dodd-Frank Act that: (1) require swap dealers (and major swap participants) to offer to segregate customer funds securing a swap transaction; (2) prohibit a clearing organization from clearing swaps unless registered as a DCO; and (3) require a swap dealer or major swap participant to appoint a chief compliance officer.

When will the exemptions expire?

The CFTC Order and the related staff no-action will expire the earlier of December 31, 2011 or in the case of Category 2 rules, no sooner than 60 days following adoption of the relevant CFTC

implementing rule. In the case of Category 3, the exemptive relief will apply until repeal of Part 35 and Part 32 of CFTC rules.

How does the relief relate to futures, options and retail foreign currency?

The CFTC has made clear that the exemptive relief relating to swaps in no way applies to, or limits its authority with respect to, futures, options and retail foreign currency.

The CFTC also has made clear that the exemptions do not in any way limit the CFTC's anti-manipulation or antifraud authority with respect to swaps.

The CFTC Order and staff no-action relief are intended to preserve the status quo with respect to trading over-the-counter swaps and option transactions pending adoption of the final Dodd-Frank Act implementing rules by the CFTC and its phasing in of the applicability of various provisions of the Dodd-Frank Act. However, market participants should be aware that certain provisions of the Dodd-Frank Act are now effective and that the exemptive relief is temporary.

¹"Effective Date for Swap Regulation," Final Order of the Commodity Futures Trading Commission, dated July 14, 2011, available at:
cftc.gov/ucm/groups/public/@newsroom/documents/file/ordereffectivedate071411.pdf.

² "Staff No-Action Relief: Application of certain CEA provisions after July 16, 2011- the general effective date of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act," dated July 14, 2011, available at:
www.cftc.gov/ucm/groups/public/@newsroom/documents/file/noactionletter071411.pdf.

³ The CFTC issued a proposed interpretive order on disruptive practices on February 24, 2011 to provide interpretive guidance on the three statutory disruptive practices created by Section 747 of the Dodd-Frank Act, "Antidisruptive Practices Authority," 53 Fed. Reg. 14943 (March 18, 2011).

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