



DERIVATIVES UPDATE

CFTC Proposes Additional Delays in Effective Dates for Swap Provisions of Dodd-Frank

On October 18, 2011, the Commodity Futures Trading Commission (the “CFTC”) issued a notice of proposed amendment and request for comment (the “Proposed CFTC Amendment”)¹ with respect to a final order issued by the CFTC on July 14, 2011 (the “July 14 Order”)² that granted temporary relief from the effectiveness of many provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) through the end of 2011.³ The Proposed CFTC Amendment would further extend effective dates of many Dodd-Frank provisions until July 16, 2012.

Title VII of Dodd-Frank

Title VII of Dodd-Frank made substantial amendments to the Commodity Exchange Act (the “CEA”).⁴ Section 754 of Dodd-Frank provided that amendments made to the CEA, unless otherwise provided under Dodd-Frank, were to become effective automatically on July 16, 2011 (360 days after enactment of Dodd-Frank). While certain provisions of Dodd-Frank expressly required further rulemaking in order to become effective (*e.g.*, certain definitions, as described below), other provisions required no such rulemaking and were scheduled to go into effect on July 16, 2011. However, many of those automatically effective provisions were themselves the subject of proposed CFTC rules or referenced terms defined in part by Dodd-Frank but for which the CFTC and the Securities and Exchange Commission (the “SEC”) were mandated by Dodd-Frank to engage in further definitional rulemaking.

The July 14 Order

In order to prevent widespread disruption of the derivatives markets, the CFTC on July 14, 2011 issued a final order granting temporary relief from the effectiveness of many Dodd-Frank provisions. The July 14 Order divided Title VII provisions into four categories and provided exemptive relief as follows:

¹ Available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-27535a.pdf>.

² Available at <http://www.gpo.gov/fdsys/pkg/FR-2011-07-19/pdf/2011-18248.pdf>.

³ Pub. L. 111-203, 124 Stat. 1376 (2010).

⁴ 7 U.S.C. 1 *et seq.*

- **Category 1 – Provisions that are not self-effectuating and require further CFTC action in order to become effective.** No relief was provided for these provisions, because under Section 754 of Dodd-Frank they could become effective no earlier than 60 days following publication of the applicable final rule (making relief unnecessary).
- **Category 2 – Provisions that are self-effectuating by their own terms, but which reference defined terms that are required to be “further defined” by the SEC and CFTC.** Such defined terms include “swap,” “swap dealer,” “major swap participant” and “eligible contract participant.” The CFTC and SEC have jointly proposed “product”⁵ and “entity”⁶ definitions that will fulfill their statutory mandates to further define these terms. The CFTC has indicated that it expects the commissions to finalize these rules before the end of 2011. These definitional rulemakings are central to the implementation of Dodd-Frank, as they will determine which entities and which transactions are subject to regulation by the CFTC and SEC. The July 14 Order generally granted temporary relief from the effectiveness of all Category 2 provisions until the earlier of (1) the date on which the relevant definitional rulemaking is effective and (2) December 31, 2011, but only to the extent that the requirements in the provisions specifically relate to a referenced term that has yet to be defined as contemplated by Dodd-Frank.
- **Category 3 – Provisions of Dodd-Frank that do not reference terms subject to further definition, but that are self-effectuating and repeal existing CEA provisions excluding or exempting certain over-the-counter derivative transactions from the CEA and CFTC oversight.** Such provisions were eliminated from the CEA automatically on July 16, 2010. However, the July 14 Order preserved the exemptions and exclusions, with respect to the relevant transactions and persons who would otherwise be regulated in connection with such transactions, until the earlier of (1) the date on which the CFTC finalizes the repeal, withdrawal or replacement of its existing regulatory safe harbor for over-the-counter derivatives (Part 35 of the CFTC’s regulations) and (2) December 31, 2011, provided that the applicable transactions comply with Part 35. The July 14 Order included certain additional requirements for continuing to rely on these statutory safe harbors after their removal from the CEA. The CFTC has now promulgated final rules that will replace Part 35 effective as of December 31, 2011, meaning that the relief provided by the July 14 Order with respect to Category 3 provisions would have expired.⁷
- **Category 4 – Provisions of the CEA enacted or amended by Dodd-Frank that became effective on July 16, 2010, for which the CFTC did not provide relief because the CFTC believed relief was not necessary to avoid undue disruption of the derivatives markets.** The July 14 Order provided no relief with respect to Category 4 provisions.

A more complete description of the categories above, along with tables setting forth the Dodd-Frank provisions falling within each category, are included in the July 14 Order.

Proposed Amendments to the July 14 Order

The Proposed CFTC Amendment would extend the temporary relief provided in the July 14 Order with respect to Category 2 and Category 3 provisions. As proposed, the relief provided with respect to Category 2 provisions would expire on the earlier of the finalization of the applicable definitional rules and July 16, 2012, while the relief proposed with respect to Category 3 provisions would expire on the earlier of July 16, 2012 and such other compliance date as the CFTC may determine.

⁵ Available at <http://www.gpo.gov/fdsys/pkg/FR-2011-05-23/pdf/2011-11008.pdf>.

⁶ Available at <http://edocket.access.gpo.gov/2010/pdf/2010-31130.pdf>.

⁷ See Agricultural Swaps, 76 Fed. Reg. 49291 (August 10, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/pdf/2011-20337.pdf>.

In addition, the Proposed CFTC Amendment extends the temporary relief afforded with respect to Category 3 provisions to transactions in agricultural commodities, which were not covered by the July 14 Order. The Proposed CFTC Amendment, like the July 14 Order, would not provide any exemptive relief with respect to Category 1 or Category 4 provisions.

Conclusion

The Proposed CFTC Amendment is open for public comment until November 25, 2011. If adopted in the form currently proposed, market participants will be given additional time to come into compliance with certain regulatory reforms enacted under Dodd-Frank.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

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