



STATE STREET

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Via: <http://comments.cftc.gov>

June 28, 2011

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Effective Date for Swap Regulation – 76 Fed. Reg. 35372 (June 17, 2011)

Dear Mr. Stawick:

State Street Corporation (“State Street”)¹ appreciates the opportunity to comment on the recent release by the Commodity Futures Trading Commission (the “Commission”) describing a proposed order (the “Order”) relating to the effective date for swap regulation.² As described in the Release, the Order would, among other things, grant relief from certain provisions of the Commodity Exchange Act (the “CEA”) that will or may apply to certain transactions in exempt or excluded commodities as a result of the repeal of various CEA exemptions and exclusions as of July 16, 2011, the date on which certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) automatically become effective. As discussed below, State Street is concerned that excluded electronic trading facilities that are permitted to operate pursuant to the provisions of Sections 2(d)(2) and 2(e) of the CEA may be precluded from doing so after that date if the Order is issued in the form described in the Release.

¹ With over \$22.6 trillion of assets under custody and administration and \$2.1 trillion of assets under management at March 31, 2011, State Street is a leading specialist in meeting the needs of institutional investors worldwide. Our customers include mutual funds, collective investment funds and other investment pools, corporate and public retirement plans, insurance companies, foundations, endowments and investment managers. Including the United States, we operate in 26 countries and more than 100 geographic markets worldwide.

² See 76 Fed. Reg. 35372 (June 17, 2011) (the “Release”).

As noted in the Release, the Order would temporarily exempt a transaction in exempt or excluded commodities, and any person or entity offering or entering into such transaction, from the CEA (other than certain anti-fraud and anti-manipulation provisions thereof) if the transaction otherwise would comply with the Commission's Part 35 regulations notwithstanding that: (1) the transaction may be executed on a multilateral transaction execution facility; (2) the transaction may be cleared; (3) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA prior to July 16, 2011; (4) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (5) no more than one of the parties to the transaction is entering into the transaction in conjunction with its line of business, but is neither an eligible contract participant nor an eligible swap participant, and the transaction was not and is not marketed to the public (the "line of business provision"). The Release further provides that the exemptive relief to be provided under the Order would be available only to transactions, and persons offering or entering into such transactions, that fall within the scope of Sections 2(d), 2(e), 2(g), 2(h), and 5d of the CEA as in effect prior to July 16, 2011 or the line of business provision described above, and that such temporary relief would be available from July 16, 2011 until the earlier of (i) December 31, 2011 and (ii) the repeal or replacement of the Commission's Part 35 or Part 32 regulations, as applicable (the "Relief Period").

State Street operates a foreign exchange trading platform, which includes the trading of non-deliverable foreign exchange forward contracts ("NDFs") and is evaluating whether to operate one or more swap execution facilities ("SEFs") for the trading of interest rate and credit default swaps, foreign currency ("FX") options and NDFs. Under existing law, (i) the commodities that underlie those contracts are all excluded commodities, as that term is defined in CEA Section 1(a)(13), (ii) transactions that are effected in those excluded commodities on electronic trading facilities are excluded from certain provisions of the CEA when effected in reliance on Section 2(d)(2) thereof, and (iii) an electronic trading facility that offers those contracts is similarly excluded from otherwise-relevant provisions of the CEA under Section 2(e). Based on the description of the Order set forth in the Release, it appears that the Commission envisions that the Order would temporarily exempt, during the Relief Period, transactions in excluded commodities that occur on electronic trading facilities, and such facilities themselves, from certain provisions of the CEA to the extent that such transactions and electronic trading facilities satisfy the conditions for the existing exemptions in Sections 2(d)(2) and 2(e), respectively, as if such exemptions were not repealed on July 15, 2011.

Footnote 39 of the Release, however, provides that the exemption that would be provided under the Order would not be available to an electronic trading facility that is not already operating as an exempt commercial market ("ECM") pursuant to Sections 2(h)(3)–(7) of the CEA or to an electronic board of trade ("EBOT") that is not already operating pursuant to Section 5d of the CEA as of July 15, 2011. Thus, while the text of the Release indicates that electronic trading facilities that operate, either currently or at any point during the Relief Period, under Section 2(d)(2) of the CEA would fall within the scope of the Order, footnote 39 could be

interpreted to exclude such facilities, many of which currently operate platforms for the trading of interest rate, foreign currency and credit default swaps, from the scope of the Order.

We know of no reason why the Commission would favor ECMs and EBOTs over electronic trading facilities that operate under Sections 2(d)(2) and 2(e) of the CEA or limit the proposed relief to electronic trading facilities that are currently in operation. Thus, in order to resolve any potential ambiguity on this point, we respectfully request that the final Commission Order delete footnote 39 and make clear that an electronic trading facility that operates in compliance with the requirements of Sections 2(d)(2) and 2(e) of the CEA, as in effect prior to July 16, 2011, will be permitted to conduct business operations on a temporary basis during the Relief Period, without regard to whether the electronic trading facility is currently operating or instead commences operations at some point during the Relief Period.

In addition, limiting relief under the Order to those firms that operated, prior to the effectiveness of Dodd-Frank, as ECMs and EBOTs would have an adverse effect on other firms that have not yet commenced operations but wish to register as SEFs. In this regard, the Commission's proposed SEF rules would permit an applicant to apply for temporary "grandfather relief" from registration if, among other things, the applicant submits transaction data that substantiates that the execution or trading of swaps has occurred and continues to occur on the applicant's trading system or platform at the time the applicant submits its request for grandfather relief.³ It is apparent that the Commission contemplated at the time it proposed those requirements that it would have final regulations for SEFs in place by July 15, 2011.⁴ It is equally apparent that those rules will not be finalized by that date.

Thus, limiting exemptive relief under the Commission's Order and grandfather relief under the SEF rules to the small number of firms that are already operating an electronic trading platform or system for the trading of exempt commodities (in the case of ECMs) or the trading of futures contracts on excluded commodities (in the case of EBOTs) would have the effect of making it impossible for new entrants – who would have to wait for the SEF rules to be adopted and their applications to be approved – to compete with existing market participants, who would be able to continue operating under the Commission Order and SEF grandfather relief while their applications for SEF registration remain pending. This is antithetical to the principles of free and open competition that have been central to the Commission's administration of the CEA for the last three-and-a-half decades and the principles of Dodd-Frank itself.

Such a restriction is also wholly unnecessary, given that the SEF registration requirements are not self-effectuating and, therefore, cannot become effective until (at the earliest) 60 days after

³ Proposed Regulation 37.3(b) would additionally require the applicant to submit a satisfactory application for SEF registration and a certification that the applicant believes its operations under the temporary grandfather provisions will be in compliance with the SEF rules. 76 Fed. Reg. 1214, 1238 (January 7, 2011).

⁴ See 76 Fed. Reg. at 1235 ("The statutory deadline for final regulations is July 15, 2011").

publication of final rules for the registration of SEFs. As such, the Commission has the authority under the CEA and Dodd-Frank to permit SEFs that are not in existence on July 16, 2011 to commence operating under the Order and, in turn, to seek temporary grandfather relief under the SEF regulations. We respectfully submit that it would be a mistake not to do so.

Finally, the Commission has previously made clear that the exemption provided by Part 35 of its Regulations permits agency transactions by eligible swap participants on behalf of other eligible swap participants.⁵ We, therefore, further request that the Commission Order make clear that eligible swap participants and eligible contract participants may continue to rely on the Part 35 exemption to effect transactions in excluded or exempt commodities, either directly or through brokers and other agents, as currently permitted by Part 35.

* * *

State Street appreciates the opportunity to submit these comments on the Order. If the Commission has any questions concerning the matters discussed in this letter, please contact me at (617) 664-1783.

Sincerely,



David C. Phelan
Executive Vice President and General Counsel

cc: Jeffrey N. Carp, State Street Corporation, EVP and Chief Legal Officer

Stefan M. Gavell, State Street Corporation, EVP and Head of
Regulatory, Industry and Government Affairs

Honorable Gary Gensler

Honorable Michael Dunn

Honorable Jill E. Sommers

Honorable Bart Chilton

Honorable Scott O'Malia

⁵ “After careful consideration of [the] comments, the Commission is modifying the definition of eligible [swap] participant to permit agency transactions by eligible participants on behalf of other eligible participants[.]” 65 Fed. Reg. 78030, 78033 (December 13, 2000).

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