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Filed Electronically

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

Re: Effective Dates

Dear Mr. Stawick:

The Commodity Futures Trading Commission (the "CFTC" or "Commission") recently proposed an order (the "Order")¹ to grant temporary relief in two parts with respect to various requirements of the Commodity Exchange Act (the "CEA") pursuant to its Section 4(c) exemptive authority. In part one, the Commission is proposing to temporarily exempt persons or entities with respect to provisions of the CEA added or amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")² that reference one or more terms regarding entities or instruments that Title VII of the Dodd-Frank Act ("Title VII") requires be "further defined," such as the terms "swap," "swap dealer," "major swap participant," or "eligible contract participant," to the extent that such provisions or portions of such provisions specifically relate to such referenced terms. In part two, the Commission is proposing to grant relief from certain provisions of the CEA that will or may apply to certain agreements, contracts, and transactions in exempt or excluded commodities as of July 16, 2011 as a result of the repeal of various CEA exemptions and exclusions. The Committee on Futures and Derivatives

¹ Effective Date for Swap Regulation: Notice of Proposed Order and Request for Comment, 76 Fed. Reg. 35372 (June 17, 2011).

² Public Law No. 111-203, 124 Stat. 1376 (2010).

Regulation (the "Committee") of the New York City Bar Association (the "Association") appreciates the Commission inviting comment on the proposed Order.

The Association is an organization of over 23,000 members. Most of its members practice in the New York City area. However, the Association also has members in nearly every state and over 50 countries. The Committee consists of attorneys knowledgeable about the trading and regulation of futures contracts and over-the-counter derivative products, and it has a practice of publishing comments on legal and regulatory developments that have a significant impact on futures and derivatives markets.

In this letter, we urge the Commission to use its ample exemptive authority to:

- address potential regulatory "gap periods" created by the proposed Order;
- provide clarity with respect to eligible contract participant ("ECP") status and provisions relating to swap position limits; and
- provide temporary exemptive relief for transactions currently covered by CEA Sections 2(d), 2(e), 2(g), 2(h) and 5d.

Commission Has Ample Authority to Grant Relief Required to Effect a Smooth Transition to the New Regulatory Regime

Although we welcome the Commission's efforts to effect a smooth transition to the new swaps regime, we are concerned that the proposed Order would provide relief that is too narrow and may lead to market uncertainty and incongruous or inefficient outcomes.³ Under the Commission's approach, the provisions of Title VII are grouped into one of four categories. Only the provisions contained within two of such categories (*i.e.*, Categories 2 and 3) would be subject to exemptive relief under the proposed Order.

We believe that the Commission has broad rulemaking authority that allows the Commission to effect comprehensive relief that will provide for a smooth transition to the new regulatory regime on a schedule established by the Commission, with the full benefit of final regulations and guidance. We urge the Commission to use such broad authority to delay the effectiveness of certain provisions of the Dodd-Frank Act, while allowing other provisions to become effective on July 16, 2011. In making the determination as to which provisions should be delayed, we believe that the Commission should consider whether a delay is necessary and appropriate for effecting an orderly transition to a new regulatory regime, and not necessarily the

³ The Securities and Exchange Commission ("SEC"), which issued an order designed to provide clarity and grant exemptive relief with respect to the provisions of Title VII that relate to security-based swaps, has noted that it "believes it would not be reasonable to require market participants to put systems in place or hire personnel based on a regulatory scheme that is not fully in place. To require otherwise, depending on the content of the final rules, might require these entities to incur costs to change their systems again in a relatively short period of time." Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, 76 *Fed. Reg.* 36287 (June 22, 2011), at n.27. The proposed Order would have exactly the harmful effect described above because it allows some provisions to become effective despite anticipated revisions in final rulemakings.

category into which a specific provision is placed. We urge the Commission to use its ample authority to address the problems indentified in this letter.

We believe that Section 4(c) of the CEA provides the Commission with ample authority to grant the expanded relief requested in this letter. In addition, we believe the Commission can rely on Section 754 of the Dodd-Frank Act to provide expansive exemptive relief. Section 754 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 the 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.

We believe that Section 754 should not be read narrowly to include only those provisions in which Congress has explicitly stated the Commission “shall” adopt rules or engage in rulemaking. Rather, it should be interpreted to include any provision that requires further definition or rulemaking or that is otherwise incomplete in the absence of further rulemaking. Provisions that include terms that require further definition cannot be interpreted, nor the obligations imposed by them ascertained with any certainty, until those definitions have been adopted. Reading Section 754 more narrow would produce incoherent results and directly conflict with the well-settled rule of construction that statutes must be read as a whole, not as a series of isolated provisions.

We also believe the Commission can rely on Section 712(f) of the Dodd-Frank Act to provide the relief requested. Section 712(f) states:

Beginning on the date of enactment of this Act and notwithstanding the effective date of any provision of this Act, the Commodity Futures Trading Commission and the Securities and Exchange Commission may, in order to prepare for the effective dates of the provisions of this Act—

- (1) promulgate rules, regulations, or orders permitted or required by this Act;
- (2) conduct studies and prepare reports and recommendations required by this Act;
- (3) register persons under the provisions of this Act; and
- (4) exempt persons, agreements, contracts, or transactions from provisions of this Act, under the terms contained in this Act,

provided, however, that no action by the Commodity Futures Trading Commission or the Securities and Exchange Commission described in paragraphs (1) through (4) shall become effective prior to the effective date applicable to such action under the provisions of this Act.

Section 712(e) states that “[u]nless otherwise provided in this title, or an amendment made by this title, the Commodity Futures Trading Commission or the Securities and Exchange Commission, or both, shall individually, and not jointly, promulgate rules and regulations required of each Commission under this title or an amendment made by this title not later than

360 days after the date of enactment of this Act.” Thus, Section 712(e), unlike Section 712(f), distinguishes between the *provisions of* Title VII and the *amendments made by* Title VII.

Especially in light of the different language of Section 712(e), we believe that “Act” as used in Section 712(f) clearly refers to the Dodd-Frank Act itself, rather than the CEA or the Securities Exchange Act, in each case as amended by the Dodd-Frank Act. Reading these provisions together, we believe that the requirement in Section 712(f)(4) that exemptions be made “under the terms of” the Dodd-Frank Act is intended to require that they be made under the provisions establishing or limiting regulatory authority under the Dodd-Frank Act as a whole, rather than referring to the substance of the exemptive authority available under provisions of the CEA or the Securities Exchange Act as amended by the Dodd-Frank Act. Section 712(f) specifies that it is intended to allow the Commission and the SEC to prepare for the effective dates of the provisions of the Dodd-Frank Act. We believe the authority to “exempt persons, agreements, contracts, or transactions from provisions of this Act, under the terms of this Act” should be read broadly to authorize exemptions that are necessary to prepare for such effective dates, so long as the Commission does not infringe on the jurisdiction of another agency or act in violation of an express prohibition set forth in the Dodd-Frank Act.

Potential “Gap Period” Created by December 31, 2011 Sunset Date of the Proposed Order

The Order, as proposed, would provide temporary exemptive relief until the earlier of “[t]he effective date of the applicable final rule further defining the relevant term” and December 31, 2011.⁴ We are concerned that, since the proposed exemptive relief is tied to the effective date of the final rule defining the relevant term rather than to the effective date of final rules implementing the relevant provisions, the adoption of final product definitions or entity definitions could trigger the effectiveness of provisions for which there still were no rules or guidance as to how to comply, or for which the Commission were proposing a phased or extended compliance date.⁵ Therefore, we recommend that the Commission provide that no provision of Title VII with respect to which the CFTC determines to promulgate rules will become effective until both such rulemaking *and* any definitional rulemaking become effective.

In addition, as proposed, the Order would create a potential “gap period” for any rule adopted within 60 days before December 31, 2011⁶ or that has an effective date after December

⁴ 76 *Fed. Reg.* at 35374.

⁵ For example, Section 724(c), which does not appear on the Commission’s Category 1 or Category 4 lists and, thus, appears to fall into Category 2, requires the segregation of initial margin for uncleared swaps by swap dealers and major swap participants at the election of the counterparty and imposes notification and reporting requirements. The Commission has proposed rules relating to the implementation of Section 724(c), but has not yet adopted final rules. See Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy, 75 *Fed. Reg.* 75432 (December 3, 2010). If the Commission’s definitional rules were to become effective before the effective date of the final rules implementing Section 724(c), market participants might find themselves bound by the requirements of Section 724(c) without the benefit of clear requirements as to how to comply.

⁶ For example, although the exemptive relief provided in the Order will expire on December 31, 2011, if a final rule is adopted at the end of November 2011, it cannot go into effect before the end of January 2012 (or such later time as the Commission determines), creating a one-month (or greater) gap period during which time

31, 2011, during which time the exemptive relief would have expired but the final rules would not yet be effective.⁷ While the CFTC has the authority to provide further relief after the expiration of the Order, addressing such gap periods in the Order would eliminate both the need for additional interim rules, orders or other relief, and the disruption of markets to which the resulting legal uncertainty would likely lead.

Therefore, we suggest the following language for the final order, which would address both of the above-referenced concerns while still providing for a sunset provision: “This order shall expire on (1) December 31, 2011, with respect to any provision for which final rules (including final definitional rules) were not adopted on or before December 31, 2011, or (2) with respect to any provision for which final rules (including final definitional rules) were adopted on or before December 31, 2011, on the later of the effective date of all final definitional rules used in the provision and the effective date of the provision as set forth in the final rules adopting such provision.”

Effective Dates of the Revised Definition of ECP and Provisions Relating to Position Limits Should be Delayed Until the Effective Date of the Related Rules

The Dodd-Frank Act amends the definition of ECP in Section 1a(12) of the CEA (renumbered 1a(18) by the Dodd-Frank Act) to, among other things, add a “look-through” to Section 1a(12)(A)(iv)(II) requiring that, for purposes of foreign currency transactions, all participants in a commodity pool must be ECPs for the pool itself to be an ECP. On its face, this amendment could be read to go into effect on July 16, 2011 absent Commission action. The proposed Order would temporarily “exempt persons and entities from the provisions of the CEA, as added or amended by the Dodd-Frank Act, that reference one or more of the terms regarding entities or instruments subject to further definition under Sections 712(d) and 721(c) of the Dodd-Frank Act, including the term ‘eligible contract participant.’” (emphasis added).⁸ We ask that the Commission confirm that the changes to the definition of “eligible contract participant” will be subject to delay under the Order and that market participants can rely on the definition of “eligible contract participant” as set forth in Section 1a(12) of the CEA (as in effect on July 20, 2010). Market participants must know whether to rely on the pre-Dodd-Frank Act or the post-Dodd-Frank Act version of the ECP definition when transacting with counterparties and the requested clarification would provide much needed certainty to these market participants.

market participants arguably would be required to comply with the applicable provision of the Dodd-Frank Act addressed in the final rule (unless further relief is granted by the CFTC), even though the final rule has not yet gone into effect.

⁷ For example, the Commission has also acknowledged that the interdependency of its various rulemakings will likely require implementation in phases, some of which would appear to require periods well in excess of 60 days from the date of any particular rulemaking. See CFTC Concept Release, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/staffconcepts050211.pdf>, which is referenced in the Order at n.6 and accompanying text.

⁸ In Proposed Entity Definitions, 75 *Fed. Reg.* 80173 (December 21, 2010), at Section III.C, the agencies wrote: “. . . the Commissions proposed to further define the term ECP to preclude a Retail Forex Pool with one or more non-ECP participants from qualifying as an ECP. . . .” The look-through proposal is Proposed CFTC rule 1.3(m)(5).

As mentioned above, the Order proposes to temporarily exempt certain persons and entities from the provisions of the CEA, as amended by the Dodd-Frank Act, that reference terms that require further definition. Before swaps can be appropriately included in position limit calculations, market participants must know what constitutes a “swap,” whether their swap positions will be subject to the position limits, what such limits will be, and how to calculate such limits with respect to swaps. Nonetheless, effective July 16, 2011, the Dodd-Frank Act requires that certain swap positions be included in determining whether an entity exceeds specified position limits. We ask that the Commission confirm that the effectiveness of this requirement will be delayed by the Order and that, until the effective date of the requisite definitional rulemakings, the position limits provisions will be construed as not requiring the inclusion of positions in swaps. The requested clarification and temporary delay in effectiveness will, therefore, provide much needed certainty to these market participants.

Safe Harbors of CEA Sections 2(d), 2(e), 2(g), 2(h) and 5d Deleted by the Dodd-Frank Act Should be Preserved Until All Relevant Rules Are in Place

Effective July 16, 2011, the safe harbors in CEA Sections 2(d), 2(e), 2(g), 2(h) and 5d (collectively, the “Safe Harbors”) that are currently available for certain agreements, contracts and transactions in exempt and excluded commodities involving ECPs will be eliminated from the CEA. There is concern that, once the Safe Harbors are eliminated, such agreements, contracts and transactions could be challenged as illegal transactions in off-exchange contracts of sale of a commodity for future delivery.

We understand that the Commission is aware of the problem, and we urge the Commission to eliminate the uncertainty described above by preserving the current Safe Harbors during the period between July 16, 2011 and the effective date of the applicable final rules by clarifying in the final Order that:

- (A) Nothing in the CEA (other than general anti-fraud provisions and Section 12(e)(2)(B)) governs or applies to any agreement, contract or transaction in an excluded or exempt commodity if:
 - (1) the agreement, contract or transaction is entered into only between persons that are ECPs as defined in Section 1a(12) of the CEA (as in effect on July 20, 2010)⁹ at the time at which the persons enter into the agreement, contract or transaction; and
 - (2) the agreement, contract or transaction is not executed or traded on a trading facility;or
- (B) Nothing in the CEA (other than general anti-fraud provisions and Section 12(e)(2)(B)) governs or applies to any agreement, contract or transaction in an excluded commodity if:
 - (1) a. the agreement, contract or transaction is entered into on a principal-to-principal basis between parties trading for their own accounts or by an investment adviser subject to regulation under the Investment Advisers Act of 1940, a commodity trading advisor subject to regulation under this Act, a foreign person

⁹ For purposes of the new rule, the Committee suggests that the Commission define ECP using its pre-Dodd-Frank Act definition in the CEA.

performing a similar role or function subject as such to foreign regulation, or a person described in clause (i), (ii), (iv), (v), (viii), (ix), or (x) of subparagraph (A) or in subparagraph (C) of Section 1a(12) of the CEA (as in effect on July 20, 2010), in any such case acting as investment manager or fiduciary (but excluding a person acting as broker or performing an equivalent agency function) for another person described in subparagraph (A) or (C) and who is authorized by such person to commit such person to the transaction;

b. the agreement, contract or transaction is entered into only between persons that are ECPs described in subparagraphs (A), (B)(ii), or (C) of Section 1a(12) of the CEA (as in effect on July 20, 2010) at the time at which the persons enter into the agreement, contract, or transaction; and

c. the agreement, contract or transaction is executed or traded on an electronic trading facility; or

(2) a. the agreement, contract or transaction is entered into only between persons that are ECPs as defined in Section 1a(12) of the CEA (as in effect on July 20, 2010);

b. the agreement, contract or transaction is not a contract of sale (or options on such a contract or on a commodity) for future delivery of any security, including any group or index of securities or any interest in, or based on the future value of, any security or any group or index of securities; and

c. the agreement, contract or transaction is traded on or through the facilities of an exempt board of trade ("EBOT"); or

(C) Nothing in the CEA (other than general anti-fraud provisions and Section 12(e)(2)(B)) governs or applies to any agreement, contract or transaction in an exempt commodity if:

(1) the agreement, contract or transaction is entered into on a principal-to-principal basis solely between persons that are eligible commercial entities ("ECE") at the time the persons enter into the agreement, contract, or transaction; and

(2) the agreement, contract or transaction is traded on or through the facilities of an exempt commercial market ("ECM"); or

(D) Nothing in the CEA (other than general anti-fraud provisions and Section 12(e)(2)(B)) governs or applies to any agreement, contract or transaction in any commodity if:

(1) the agreement, contract or transaction is entered into between (i) a party that is either an ECP as defined in Section 1a(12) of the CEA (as in effect on July 20, 2010) or an eligible swap participant ("ESP"), as defined in Part 35, and (ii) a non-ECP or non-ESP party that is entering into the transaction in conjunction with its line of business; and

(2) the agreement, contract or transaction is not marketed to the public.

Further as noted in the Order, the relief provided with respect to any agreement, contract or transaction subject to the Safe Harbors should be available even if the agreement, contract or transaction is cleared by a derivatives clearing organization.

The Committee also believes that any new rules promulgated to address the concerns raised by the elimination of the Safe Harbors should continue to supersede and preempt the application of any state or local law that prohibits or regulates gaming or the operation of bucket shops (other than antifraud provisions of general applicability), as is currently provided for the Safe Harbors by references therein to CEA § 12(e)(2). The Committee proposes that the Order should specifically state that any agreement, contract or transaction subject to the proposed Order will benefit from the preemption of any state or local laws provided by Section 12(e)(2) of the CEA because the relief is granted under Section 4(c) of the CEA.

Section 739 of the Dodd-Frank Act also amended Section 22(a)(4)(B) of the CEA to read:

No agreement, contract, or transaction between eligible contract participants or persons reasonably believed to be eligible contract participants shall be void, voidable, or unenforceable, and no party to such agreement, contract, or transaction shall be entitled to rescind, or recover any payment made with respect to, the agreement, contract, or transaction under this section or any other provision of Federal or State law, based solely on the failure of the agreement, contract, or transaction—

(i) to meet the definition of a swap under section 1a; or

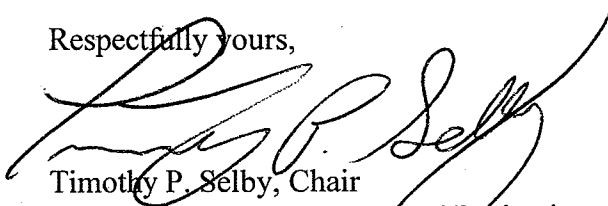
(ii) to be cleared in accordance with section 2(h)(1).

We believe that in order to preserve legal certainty for contracts, agreements or transactions covered by the proposed Order, the Commission must explicitly provide that Section 22(a)(4)(B) of the CEA as amended by the Dodd-Frank Act will become effective July 16, 2011.

* * *

We appreciate the opportunity to present our views to you on this matter of importance to us as practitioners of derivatives law and regulation, and our members are available to discuss any of the above at your convenience.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Timothy P. Selby". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Timothy P. Selby, Chair
The Committee on Futures and Derivatives Regulation
New York City Bar Association

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Committee on Futures and Derivatives Regulation
Timothy P. Selby, Chair

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