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June 30, 2011

By Electronic and United States Mail

Mr. David A. Stawick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Effective Dates for Swap Regulation

Dear Mr. Stawick:

This letter is submitted on behalf of the Derivatives and Futures Law Committee (the "Committee") of the Section of Business Law of the American Bar Association in response to the request for comments by the U.S. Commodity Futures Trading Commission (the "Commission") in its notice of proposed order and request for comment referenced above.¹

The comments expressed in this letter represent the views of the Committee only and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the American Bar Association (the "ABA"). In addition, this letter does not represent the official position of the ABA Section of Business Law.

¹ Effective Date for Swap Regulation, 76 Fed. Reg. 35372 (June 17, 2011) (the "Proposed Order"). The Committee is comprised of lawyers who work extensively in the area of derivatives law, including private practitioners, members of the law departments of businesses, government and self-regulatory organizations, and law professors, as well as some economists. Its membership draws from all constituencies of the derivatives industry, including, among others, commercial end users, clearinghouses and exchanges, banks and other financial institutions, commodity trading advisors, investment advisers, futures commission merchants, broker-dealers, hedge funds, and energy-industry and other companies involved with the purchase, sale and processing of many commodities. The Committee's work concerns the legal and policy issues relating to derivatives, including exchange-traded futures and options contracts and over-the-counter ("OTC") transactions. The Committee focuses on the regulation of these markets and their participants (e.g., exchanges, clearing organizations, swap dealers, commercial market users, speculators, intermediaries, and investment managers) by the Commission, the U.S. Securities and Exchange Commission ("SEC"), federal energy and banking regulators, international regulators, self-regulatory organizations, and state authorities.

The Commission has issued the Proposed Order to provide much-needed clarification to market participants in connection with the timing and effective date of certain provisions of Subtitle A of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.² Title VII will impose significant new restrictions on and establish heightened regulatory oversight for market participants who engage in swaps, and when fully effective will result in a significant expansion of the Commodity Exchange Act (“CEA”).

The Committee commends the Commission and its Staff for proposing temporary relief from certain provisions of the Dodd-Frank Act. We strongly support the Commission’s desire to provide both guidance and exemptive relief with respect to the timing and compliance obligations of Title VII’s provisions. Action is essential to avoid disruption of the markets. Market participants are unable to know the new legal and regulatory requirements and boundaries governing their activities in swaps markets until the Commission adopts final rules implementing the Dodd-Frank Act.

Our comments, set forth below, generally address those areas where we believe additional clarification of the intended scope of relief would be helpful and where the Commission should provide greater relief than proposed. Recognizing that time is of the essence, we have tried to make these comments brief and targeted.

A. The Dodd-Frank Act and the CEA authorize broader relief

The Committee respectfully submits that the Commission should both (i) interpret Section 754 of the Dodd-Frank Act more broadly to acknowledge that all provisions identified as “Category 1” or “Category 2” require rulemaking, and combine these provisions into a single category and (ii) provide temporary relief from the application of all material terms of Subtitle A of Title VII of Dodd-Frank until the final rules for swaps are in place, specifically citing Dodd-Frank Section 712(f) as part of its statutory authority for granting the temporary relief. The Committee believes that a more comprehensive approach would be consistent with the provisions of the statute and would better achieve the objective of permitting markets to continue to function and transition to the new regulatory requirements without disruption than the more narrow interpretations and more complex exemptive structure the Commission has proposed. A more comprehensive approach also would be more easily understood and applied by market participants and would better avoid the potential that gaps in relief or misperceptions about the extent of relief would cause detrimental, incongruous or inefficient outcomes.

The Committee believes that Congress in Dodd-Frank Sections 754 and 712(f), as well as CEA Section 4(c), intended to (i) ensure that the provisions of Title VII did not become effective until all necessary rulemakings, including rulemaking as to definitions, were completed and (ii) expressly authorized the Commission to temporarily grant relief from the application of all material terms of Subtitle A of Title VII of the Dodd-Frank Act beyond the July 16, 2011

² Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the “Dodd-Frank Act” or “Dodd-Frank”).

effective date until all final rules necessary for the rational implementation of Title VII are in place.

1. Section 754 of the Dodd-Frank Act

Section 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 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.

Under Section 754, any provision of Title VII that requires a rulemaking should not take effect until at least 60 days after publication of the final rule implementing the provision. To be sure, certain provisions of Title VII expressly mandate rulemaking and some even impose a specific deadline for certain final rules, but the plain language of Section 754 is not limited only to those provisions. If a provision uses a term that the Commission needs to define, that provision “requires a rulemaking” to be implemented. Indeed, Congress specifically mandated definitional rulemaking and the Commission has repeatedly recognized that such rulemakings are required to implement the Dodd-Frank Act. The same principle applies to any provision of Dodd-Frank that requires rulemaking to assure rational, wise and fair implementation.

Provisions that include terms that require further definition cannot be interpreted, nor the obligations imposed by them ascertained with certainty, until those definitions have been adopted. Reading Section 754 more narrowly 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. Accordingly, we do not believe it is necessary or desirable for the Commission to distinguish, for purposes of its Proposed Order, between “Category 1” provisions that expressly require rulemaking and “Category 2” provisions that include terms as to which rulemaking is required. Instead, the “Category 2” provisions are appropriately identified as requiring rulemaking.³

Even if the Commission were to read Section 754 narrowly, we believe, as discussed below, it should use its authority under Dodd-Frank Section 712(f), which confers broad powers with respect to implementation, CEA Section 4(c) and other applicable provisions of the Dodd-Frank Act to authorize the more expansive exemptive relief we suggest.

³ We note that this interpretation also is supported by principles of Constitutional due process that require statutes to be reasonably clear in their terms to persons of ordinary intelligence and by prudential concerns in the sound effectuation of statutes.

2. *Section 712(f) of the Dodd-Frank Act*

Congress placed the responsibility for properly, fairly and successfully implementing Title VII of the Dodd-Frank Act with the Commission and the SEC. Congress appreciated that implementing this expansive statutory scheme for the complex and previously unregulated swap markets necessarily would require a deliberative and intensive process, the success of which rested on the sound exercise of the Commission's and the SEC's informed expertise and judgment. Section 712(f), thus, granted the Commission and the SEC, among other things, broad power to, within their respective jurisdictions, adopt rules, grant exemptions, and conduct any studies deemed appropriate to assure the proper and fair implementation of Title VII of the Dodd-Frank Act following its July 16, 2011 effective date. Therefore, even if Section 754 is read more narrowly than we suggest, the Commission still would be able to rely on Section 712(f) as authority for the exemptions we recommend.

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(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. The authority to “exempt persons, agreements, contracts, or transactions from provisions of this Act, under the

terms of this Act” broadly authorizes 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. Further, we believe the exemptive authority of the Act is broader even than the authority specifically conferred by the CEA. Especially in light of the very different language of Section 712(e), the “Act” as used in Section 712(f) refers to the Dodd-Frank Act itself, rather than to the CEA or the Securities Exchange Act as amended by the Dodd-Frank Act.⁴

Section 712(f) places only two restrictions on the Commission’s and the SEC’s respective exemptive powers with respect to effective dates for implementation. First, each agency may unilaterally grant exemptions only within the jurisdictional limitations of each as established by the Dodd-Frank Act as a whole.⁵ We note, in this connection, 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 any exemptions be made consistently with all Dodd-Frank provisions establishing the jurisdictional boundaries of the agencies. It is not properly read to limit exemptive authority to only the authority otherwise conferred in specific provisions of the CEA or the Securities Exchange Act, which may be used in the ongoing administration of each statute for granting permanent exemptions. Second, as set forth in the “provided, however” language at the end of the Section, exemptions may not take effect before the effective date of the Dodd-Frank provisions to which they relate because they are not necessary before that date.

We note that the Commission, as explained in footnote 15 of the Proposed Order, is contemplating issuing no-action letters with respect to certain provisions, such as Section 724(c) of the Dodd-Frank Act which adds new CEA Section 4s. As explained above, however, the breadth of the Commission’s authority under Section 712(f) to grant temporary exemptive relief reaches to all Subtitle A of Title VII provisions. We respectfully submit that the Commission should rely on Section 712(f) to provide relief with respect to such provisions as Section 724(c) rather than no-action letters.⁶

⁴ 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.

⁵ Section 712 of the Dodd-Frank Act is but one of a number of provisions that establishes the conditions under which the Commission and the SEC must act jointly or separately, and establishes the boundaries of the jurisdiction of each. Section 712(f) grants the Commission and the SEC authority to grant exemptions unilaterally only within their respective jurisdictional boundaries.

⁶ Section 724(c) addresses segregation of initial margin requirements for uncleared swaps by swap dealers and major swap participants at the election of the counterparty, and also imposes notification and reporting requirements. The Commission has proposed rules relating to the implementation of Section 724(c) (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)), but has not yet adopted final rules. If the

3. CEA Section 4(c)

The Commission has traditionally relied on CEA Section 4(c) to grant exemptions from the CEA. The Proposed Order at footnote 15 expresses concern that Dodd-Frank Section 721(d) may limit the Commission's future exemptive authority under Section 4(c): "[t]he Commission's authority to provide exemptive relief under CEA section 4(c), as amended by section 721(d) of the Dodd-Frank Act, may not extend to certain Category 2 provisions..."⁷ The Committee believes that any limitation that Section 721(d) may impose on the Commission's authority to grant *permanent* exemptions from the CEA does not limit the intended breadth of the Commission's authority under Section 712(f) to grant *temporary* exemptions with respect to effective dates that the Commission deems appropriate for the implementation of a final Dodd-Frank regulatory framework.

B. The Commission should more precisely tailor the sunset provision in the Proposed Order

Section 754 of the Dodd-Frank Act provides that, to the extent a provision of Title VII requires a rulemaking, such provision will not go into effect until a date set by the Commission that will be at least 60 days after publication of the final rule or regulation implementing such provision (and not before July 16, 2011). The Proposed Order 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, 2011.⁸

We respectfully believe that imposing the sunset provision is unnecessary. We recognize that the Commission has included the December 31, 2011 expiration date as an incentive to ensure that its own final rulemaking is in place by that date. We do not believe an incentive is needed. The Commission and its Staff have worked professionally and diligently to promulgate

requirements of Section 724(c) were to become effective before the final rules implementing them are adopted, market participants would be subjected to substantial legal uncertainty regarding compliance requirements. Footnote 15 of the Proposed Order reflects the Commission's appreciation of this dilemma. We note that the SEC is granting temporary exemptive relief from the parallel provisions relating to segregation requirements for uncleared security-based swaps. SEC Release No. 34-64678, Order Pursuant to Sections 15F(b)(6) and 36 of the Securities Exchange Act of 1934 Granting 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, and Request for Comment (June 15, 2011). We are uncertain why the Commission believes its authority to grant comparable relief is more limited.

⁷ 76 Fed. Reg. at 35374, fn. 15.

⁸ 76 Fed. Reg. at 35374.

all required rules and undoubtedly will continue to do so.⁹ If the Commission chooses to retain the mandatory sunset provision, it should consider that the Proposed Order potentially could create uncertainty about the effective dates of the affected provisions and the effect of final rulemaking on the relief proposed for the following reasons:

- Because the Proposed Order's 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, adoption of final product definitions or entity definitions may trigger the effectiveness of provisions for which there is still no rulemaking or guidance as to how to comply, or for which the Commission is proposing a phased or extended compliance date. 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 2,¹⁰ requires the segregation of initial margin for uncleared swaps by swap dealers and major swap participants at the election of the counterparty, and also imposes notification and reporting requirements. The Commission has proposed rules relating to the implementation of Section 724(c),¹¹ but has not yet adopted final rules. 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 either clear requirements as to how to comply or any extended effectiveness period the Commission might choose to implement in light of comments received on its proposed rules. We thus believe the Commission should revise the Proposed Order to trigger effectiveness of the relevant provisions only when *both* the definitional rulemaking and the substantive rulemaking for the relevant provision become effective.
- The Proposed Order creates a potential "gap period" for any rule that has a prescribed effective date after December 31, 2011, including any final rule adopted fewer than 60 days before December 31, 2011. As previously noted, under Section 754, when rulemaking is required, final rules cannot take effect until a date set by the Commission that is at least 60 days after the adoption of such final rule. As a result, final rules adopted after November 1, 2011 cannot become effective before December 31, 2011. Moreover, the Commission has indicated that it will provide extended periods after the adoption of some final rules and before those rules become effective to allow market participants adequate time to put in place the systems, policies and procedures necessary for compliance with those rules. Accordingly, even if the Commission adopts all final

⁹ We note that the SEC has chosen not to impose the mandatory sunset provision. In the interest of harmonization of the Commission and the SEC rulemakings under the Dodd-Frank Act, we encourage the Commission to reconsider its proposed mandatory sunset provision.

¹⁰ As discussed above, we believe the better reading of Title VII would be that Section 724(c), by using terms that require rulemaking, itself requires rulemaking.

¹¹ 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).

rules before December 31, 2011, there may still be a gap period, during which time the exemptive order will have expired but the final rules will have not yet gone into effect. Although the Commission has the ability to provide further relief after the expiration of the relief to be granted in the final Order, we believe the final order should contain language specifically addressing situations where final rules are adopted within 60 days before December 31, 2011, or where a final rule otherwise has a prescribed effective date after December 31, 2011. Otherwise, market participants likely will have difficulty determining which obligations become effective on January 1, 2012.

We believe the best approach would be to eliminate the sunset provision. Nevertheless, if the Commission were to adopt the sunset provisions for December 31, 2011, we suggest the following language for the final order, which we believe would better achieve market certainty and an orderly transition while still acknowledging the Commission's concerns about having 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) have not been adopted, or (2) with respect to any provision for which final rules (including final definitional rules) have been adopted, on the later of the effective date of all final definitional rules used in the relevant provisions or the effective date for the provision as set forth in the final rules relating thereto."

C. The Commission should expressly clarify the application of the term "eligible contract participant" during the period of exemption

We understand that the Commission intends that the Dodd-Frank Act's amendments to the definition of "eligible contract participant" ("ECP") would not go into effect on July 16, 2011. 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.'"¹² We believe, however, that because "eligible contract participant" expressly requires rulemaking, the amendments to the CEA definition would not take effect even in the absence of exemptive relief.¹³ We ask, however, that the Commission's final order expressly confirm this.

¹² 76 Fed. Reg. at 35374.

¹³ We note, for instance, that Dodd-Frank 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) to require that, for some commodity pools that engage in OTC foreign currency transactions all participants in a commodity pool must be ECPs in order for the pool itself to qualify as an ECP. We understand the Proposed Order to provide that the look-through provision will not take effect until 60 days after the Commission adopts final rules defining "eligible contract participant."

D. The Commission should expressly clarify the application of the term “appropriate persons”

The Commission should exercise its authority under CEA Section 4(c)(3)(K) to make it clear in its final order that the “appropriate persons” who qualify for exemptive relief under the order include individuals whose total assets exceed \$10 million and persons relying on the “line of business” exemption to engage in swaps without ECP status. The Commission’s Proposed Order potentially might be misread to limit “appropriate persons” to introducing brokers, commodity pool operators, commodity trading advisors, and associated persons thereof, even though this appears to be inconsistent with the treatment of exemptions for transactions that rely on Part 35.

The Proposed Order indicates that Part 35 of the Commission’s regulations will continue to be available for transactions that satisfy its conditions until Part 35 is withdrawn, amended or replaced.¹⁴ The Commission is further proposing to exempt temporarily from the general effective date those transactions that comply with only part of the requirements of Part 35 if the persons offering or entering into the transactions are ECPs as defined in the CEA prior to July 16, 2011 or persons relying on the line of business exemption.¹⁵ Individuals whose total assets exceed \$10 million also qualify as eligible swap participants (“ESPs”) under Commission Regulation 35.1(b)(2)(xi) and ECPs as defined in the CEA prior to July 16, 2011. Accordingly, it is appropriate to expressly include such persons in the list of “appropriate persons.” This also would be consistent with the action taken by the Commission when it adopted the ESP definition.¹⁶

E. The Proposed Order should specifically clarify the scope of exemptive relief for options on physical commodities, including making it clear that such relief covers options on agricultural physical commodities

The Commission should clarify in its final order that (i) its grant of relief for options also is based on Sections 712(f) and 723(c)(1), (ii) Part 32, which was adopted pursuant to CEA Section 4c(b), remains in effect without the need for the Commission to take any action or exercise its exemptive authority, and (iii) pursuant to CEA Section 4(c)(1), exemptive relief for options on physical commodities includes all options on agricultural physical commodities. These clarifications will help eliminate any misunderstanding as to the scope of temporary relief for options and thereby better assure that the breadth of exemptions for options on which market participants currently rely will not be affected pending further rulemaking. In this connection, Part 32 does not cover dealer to dealer commodity options, which, since enactment of the exemptions in the Commodity Futures Modernization Act of 2000, dealers have relied on to lay off their exposure to commercial counterparties by trading with other dealers. Without these

¹⁴ 76 Fed. Reg. 35372, at 35375.

¹⁵ *Id.* at 35376.

¹⁶ *See* 57 Fed. Reg. 53627 (November 12, 1992); 58 Fed. Reg. 5587 (January 22, 1993).

dealer to dealer trades, the customer facilitation by dealers will likely diminish as the dealers' means to lay off risk is curtailed. The issue exists for all options, including agricultural options.

Physical commodities other than agricultural commodities currently qualify as exempt commodities, as defined by Section 1a(14) of the CEA (Section 1a(20) as renumbered by Dodd-Frank). Section 2(h)(1)-(2) of the CEA currently exempts bilateral exempt commodity transactions entered into between ECPs from all of the provisions of the CEA, except for the anti-fraud and anti-manipulation provisions. Although the Dodd-Frank Act would repeal these provisions, Section 723(c)(1) of the Dodd-Frank Act allows market participants to petition the Commission within 60 days of enactment of the Dodd-Frank Act to continue operating subject to Section 2(h)(1)-(2) of the CEA, as this provision was in effect prior to the enactment of the Dodd-Frank Act, for a one-year period. The Commission received multiple petitions for such relief.

On September 16, 2010, the Commission issued a notice stating that at that time it would not provide grandfather relief to 2(h)(1)-(2) petitioners seeking to enter into bilateral exempt commodity transactions between eligible contract participants.¹⁷ However, the notice states that if the Commission "later determines that Dodd-Frank Act-required regulations might pose particular difficulties ... the Commission is committed to use its available exemptive authorities to address such a situation."¹⁸ Furthermore, any relief provided under this order would "not be limited to persons who may wish to file a petition."¹⁹ We believe that the Commission should now use its authority under Section 723(c) to provide specific relief for transactions in options on exempt commodities.

As noted in the Proposed Order, Section 712(f) of the Dodd-Frank Act gives the Commission authority to "promulgate rules, regulations, or orders permitted or required" by the Dodd-Frank Act and "exempt persons, agreements, contracts, or transactions from the provisions of the Act, under the terms contained in this Act," in order to prepare for the effective dates of the provisions of Title VII. As discussed above, Section 723(c)(1) provides the Commission with exemptive authority over Section 2(h)(1)-(2) of the CEA. Therefore, the Commission may rely on Section 712(f) as well as Section 723(c)(1) to exempt persons relying on Section 2(h)(1)-(2) in carrying out their bilateral physical commodity transactions, for up to a one year period, following the effective date.

Although commodity options are expressly covered by the definition of a "swap" under Section 1a(43)(A)(i), the Commission also retains its separate plenary authority to regulate

¹⁷ Notice Regarding the Treatment of Petitions Seeking Grandfather Relief for Trading Activity Done in Reliance Upon Section 2(h)(1)-(2) of the Commodity Exchange Act, 75 Fed. Reg. 56512 (Sept. 16, 2010).

¹⁸ *Id.* at 56513.

¹⁹ *Id.*

commodity options under CEA Section 4c(b), without change or restriction.²⁰ Because the Commission adopted the Part 32 rules, including the exemptions therein, pursuant to Section 4c(b), we agree with the Commission's clarification that Part 32 "will continue to be available with respect to commodity options transactions that meet the conditions therein, until such time as Part 32 may be withdrawn, amended, or replaced by the Commission."²¹ We believe it is important for the Commission to be clear in its order that Part 32 remains in effect and thus those that rely on Part 32 to engage in OTC agricultural options or options on other commodities may continue to do so without disruption to existing practices. Accordingly, the Commission's final order should also cite to Section 4c(b) as authority for its action.

In addition, we believe that the Commission should use its exemptive authority under Section 4(c) to provide relief for options on agricultural physical commodities. Section 4(c)(1) of the CEA provides that the Commission by rule, regulation, or order, may exempt any agreement, contract, or transaction, from any provision of the CEA, either unconditionally or on stated terms or conditions or for stated periods, and either retroactively or prospectively, or both. Section 4(c)(2) of the CEA provides that the Commission may grant exemptions only when it determines that the requirement for which an exemption is being provided "should not be applied to the agreement, contract, or transaction for which the exemption is sought"; that "the exemption would be consistent with the public interest and the purposes" of the CEA; that "the agreement, contract, or transaction will be entered into solely between appropriate persons; and will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties" under the CEA. We believe that an exemption for options on agricultural physical commodities meets these requirements. Moreover, Section 2(a)(1)(A) provides for the Commission's exclusive jurisdiction, except to the extent otherwise provided in Title VII, with respect to agreements (including options) and transactions involving swaps or contracts of sale of agricultural commodities for future delivery traded or executed on a contract market, a swap execution facility, or any other board of trade, exchange, or market. Given that the Dodd-Frank Act does not repeal this authority, the Commission continues to have regulatory authority over options on agricultural commodities.

In particular, we believe that the Commission should treat options on agricultural commodities as it treats options on all other physical commodities. We concur with statements made by the Commission in its proposed rule on commodity options and agricultural swaps that "[p]ermitting agricultural swaps to trade under the same terms and conditions as other swaps should provide greater certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.

²⁰ In fact, new Section 2(d) specifically contemplates that the Commission may continue to regulate commodity options pursuant to its authority under Section 4c(b) notwithstanding that they are also swaps, allowing for seamless statutory authority on which the Part 32 rules are based.

²¹ 76 Fed. Reg. 35376, fn. 36.

Treating all swaps, including agricultural swaps, in a consistent manner should provide greater certainty to markets.”²²

F. The proposed modifications to Part 35 to preserve exemptions for transactions in exempt and excluded commodities should more clearly reflect that they also cover commodity options and should be expanded also to exempt agricultural commodities, swaps and options

The Commission’s “Category 3” includes self-effectuating provisions of Title VII that (i) do not reference terms that require further definition and (ii) repeal provisions of current law. Category 3 would include provisions of Title VII that repeal, effective July 16, 2011, provisions of the CEA that exempt transactions in excluded commodities and exempt commodities. The Commission proposes to address the regulatory gap created by this repeal by temporarily exempting transactions in exempt or excluded commodities (and any person or entity offering or entering into such transactions) from the CEA if the transaction would otherwise comply with Part 35 of the Commission’s Rules as proposed to be modified in the temporary exemption. Part 35 originally was promulgated in 1993 pursuant to the Commission’s general exemptive authority in CEA Section 4(c), and provides a broad-based exemption from the CEA for “swap agreements” in any commodity. The proposed modifications would cause Part 35 to cover such transactions even if (1) such transactions are executed on a multilateral transaction execution facility, (2) such transactions are cleared, (3) such transactions are with parties that are relying on the definition of “eligible contract participant” as it is included in the CEA prior to July 16, 2011, (4) such transactions are standardized, and/or (5) one of the parties is relying on the “line of business” exemption.²³

We request that the Commission clarify that commodity options are within the expanded scope of Part 35. Further, we urge the Commission to extend the modification of Part 35 to agricultural commodities, so that swap and options transactions in agricultural commodities also could benefit from the expanded scope of Part 35 as proposed to be modified by the temporary exemption. We recognize that agricultural swaps and swaptions are within the scope of existing Part 35. Our request is to have agricultural swaps be covered by the expanded scope of Part 35 and to have agricultural options also within the expanded scope. That clarification would be consistent with prior Commission orders expanding Part 35 to permit clearing of agricultural basis and calendar swaps,²⁴ and allow market participants continued use of clearing without

²² Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6095, 6103 (Feb. 3, 2011).

²³ The proposal with respect to clause (5) does not state this as clearly as articulated here, but we believe that this is the intent. See 76 Fed. Reg. at 35376. In addition, we note that the Commission has indicated an intention to bring within Part 35 those transactions that would currently be permitted under “sections 2(d), 2(e), 2(g), 2(h), and 5d as in effect prior to July 16, 2011 or the line of business provision.” *Id.* (footnotes omitted). We strongly support this approach, including the potential expansion of the term “swap agreement” to achieve this intention.

²⁴ See the orders granted to ICE Clear US, Inc. (73 Fed. Reg. 77015 (Dec. 18, 2008)), Chicago Mercantile Exchange (74 Fed. Reg. 12316 (March 24, 2009)), and Kansas City Board of Trade (75 Fed. Reg. 34983 (June 21, 2010)).

disruption. The ability to offer agricultural options to farmers and agricultural merchants for hedging their exposure will be dramatically limited if there is not a line of business test for those who do not meet ESP tests.

The Commission has already proposed to amend Part 35 to provide that agricultural swaps be treated like swaps on all other commodities and to permit agricultural options to be treated like agricultural swaps.²⁵ The Commission has the authority to do so under Section 723(c)(3) of the Dodd-Frank Act, which states that “except as provided...no person shall offer to enter into, enter into, or confirm the execution of, any swap in an agricultural commodity...”, but also provides that “a person may offer to enter into, enter into, or confirm the execution of, any swap in an agricultural commodity pursuant to section 4(c) of the Commodity Exchange Act (7 U.S.C. 6(c)) or any rule, regulation, or order issued thereunder (including any rule, regulation, or order in effect as of the date of enactment of this Act) by the Commodity Futures Trading Commission to allow swaps under such terms and conditions as the Commission shall prescribe.” Thus, the Commission clearly has the authority under the Dodd-Frank Act to use its exemptive authority under Section 4(c) to permit transactions in agricultural swaps and to modify the relief under Part 35 to the same degree as proposed for exempt and excluded commodities, *i.e.*, to permit the organized trading and/or clearing of standardized agricultural swaps and options. Particularly in light of the Commission’s proposed rulemaking noted above relating to commodity options and swaps, it makes little sense to continue to apply different regulatory standards for exempt and excluded commodities, and for agricultural commodities.

G. For the avoidance of doubt, the Commission should specifically exempt swaps under Section 4(c) from the application of state gaming and bucket shop laws

The Dodd-Frank Act amendments to Section 12(e) of the CEA have created some ambiguity as to the extent of the preemption of the application of state laws, including state gaming and bucket shop laws, to swaps. We believe that such preemption is intended to be preserved, and we ask that the Commission specifically issue an exemption under Section 4(c) to clarify that preemption under Section 12(e) continues to apply. In adopting this exemption, the Commission, however, should also make clear that it does not constrain the Commission’s authority under new CEA Section 5c(c) to determine that a swap is contrary to the public interest and should not be traded if it involves, among other things, gaming.

²⁵

Supra at note 22.

The Committee appreciates the opportunity to comment on the Commission's proposals, and we respectfully request that the Commission consider the recommendations set forth above. We are prepared to meet with the Commission and its Staff to discuss these matters with them in more detail and to respond to any questions.

Respectfully submitted,



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