



Alternative Investment Management Association

Elizabeth M. Murphy,
Secretary,
Securities and Exchange Commission,
100 F Street, NE.,
Washington, DC 20549-1090
USA

Submitted via email: rule-comments@sec.gov

David A. Stawick,
Secretary,
Commodity Futures Trading Commission,
Three Lafayette Centre,
1155 21st Street, NW.,
Washington, DC 20581
USA

Submitted via the [CFTC website](#)

1 July 2011

Dear Sirs,

CFTC proposed order on 'Effective Date for Swap Regulation' and SEC proposed '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'

The Alternative Investment Management Association¹ (AIMA) appreciates the invitation of the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) (together, the Commissions) to comment on the proposed order releases on the effective date for swap regulation and temporary exemptions and relief from compliance with provisions due to take effect on 16 July 2011 (the Releases)².

AIMA's comments

AIMA supports the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) reforms and, in particular, those moves to meet G20 commitments around clearing and reporting of OTC derivative contracts³. AIMA recently submitted comments to CFTC Chairman Gensler on 'Concepts and Questions Regarding Phased Implementation of Effective Dates for Final Dodd-Frank Rules'⁴. We reiterate our comment that, in principle, we do not seek a delay in publication of final rules or the implementation of any of the rules which the Commissions are required to address. However, we recognise that the Dodd-Frank Act sets very tight deadlines for implementation of extremely complex rules, often in areas which have not been regulated

¹ AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector - including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, institutional investors, accountants and lawyers. Our membership comprises over 1,200 corporate bodies in more than 40 countries.

² We comment on the proposals common to both the CFTC's proposed rule release of 17 June 2011 (17 CFR Chapter 1) and the SEC's proposed rule release of 22 June 2011 (17 CFR Part 240), except as otherwise stated.

³ The leaders of the G20 nations' commitment at the September 2009 summit in Pittsburgh that "All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories."

⁴ AIMA response to the CFTC consultation on 'CFTC Staff Concepts and Questions Regarding Phased Implementation of Effective Dates for Final Dodd-Frank Rules' dated 10 June 2011.



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previously. We also recognise the impending deadline of 16 July 2011 for much of the required rulemaking and, therefore, support the Commissions' proposals for temporary relief to persons or entities that would be given compliance obligations under the Commodity Exchange Act of 1936 (CEA) and/or the Securities Exchange Act of 1934 (the Exchange Act), as each amended by the Dodd-Frank Act.

In general, both proposals are clear and provide sufficient guidance for persons and entities to know which rules fall within the order and which do not. However, AIMA notes that the Release does not eliminate the uncertainty surrounding the requirement in amended section 5b(a) of the CEA that no person may clear "swaps" unless registered as a derivatives clearing organisation (DCO), absent an applicable exemption. Although this statutory text clearly requires finalisation of the definition of the term "swap", the Commission notes in the Release that it may not have the authority to extend the implementation timetable for rules on DCOs' authorisation to accept swaps for clearing. Accordingly, the requirement that cleared swaps may only be cleared through registered DCOs currently seems set to take effect from 16 July 2011. As part of their investment and hedging strategies, AIMA members transact in swaps and, in certain circumstances, chose to submit such swaps for clearing. AIMA, therefore, urges the CFTC to take the necessary steps, such as issuance of a no-action letter, to provide the swaps market adequate legal certainty prior to the finalisation of the rulemaking process that would allow market participants to submit swaps for clearing to an unregistered DCO after 16 July 2011 until the enactment of the final rules on DCO-registration⁵.

We support the CFTC's intention to ensure that existing practices should not be "unduly disrupted" during any transition period and we believe, therefore, that it is not necessary to impose a 'sunset clause' of 31 December 2011 on the temporary relief it proposes. The CFTC should, instead, consider taking the same approach as the SEC namely, to provide that the temporary relief will expire for a given rule only upon the effective date (or compliance date, if later) of the applicable final rule. Although we understand the CFTC's arguments that it "anticipates" completing additional rulemakings by 31 December 2011 and that it could always propose further temporary relief orders, it is likely to be both simpler and less disruptive for the market if the current concerns are not repeated in six months' time by requiring further action from the CFTC. The CFTC could, instead, publicise its non-binding intentions for the timing of implementation of final rules, as AIMA proposed in response to the earlier CFTC consultation⁶. As is acknowledged by most parties, the Dodd-Frank Act reforms to swaps and security-based-swaps regulation are particularly complex and final implementing rules require significant time, consideration and industry input. Therefore, the Commissions should not set themselves arbitrary, yet binding, deadlines for publishing final rules.

One area where we have significant concern regarding the rulemaking is in relation to the definition of 'eligible contract participant', which is referred to in certain of the Dodd-Frank Act provisions. As is acknowledged in the SEC's release⁷, there is uncertainty regarding how this term should be defined from the text of the Dodd-Frank Act. There is also uncertainty since the Commissions have proposed to further define the term 'eligible contract participant' to give what the Commissions believe was Congress' intention in respect of certain of the rules that reference this definition⁸. An incorrect definition in this regard may have significant impacts on entities who must comply with rules that rely on this term and, therefore, we support exemptive relief from any rule that relies on the amended definition until further, and much more detailed consideration of the consequences of this change can be given.

⁵ The CFTC has published on its website a 'Draft Staff No-Action Letter Regarding the Application of Certain CEA Provisions after July 16, 2011' for 'discussion purposes only'. We encourage the CFTC to approve and publish this staff no-action letter shortly and for the SEC to take similar action regarding equivalent rules for security-based swaps under the Exchange Act, as amended.

⁶ *Ibid.*

⁷ See pages 18 and 19 of the SEC Release.

⁸ See the SEC and CFTC's proposed rules on 'Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"' dated 7 December 2010 and AIMA's response, date 22 February 2011.



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Conclusion

AIMA supports full and prompt implementation of the Dodd-Frank Act but believes that, given the 16 July 2011 deadline for many of the rules, the remaining work needs to be given additional time to allow the proposed rules to be consulted on, finalised and implemented. Therefore, temporary exemptive relief is necessary and without it there will continue to be significant uncertainty and confusion in the industry regarding the implementation timetable and the actions firms must take to comply with new rules. We would urge the CFTC to remove its 31 December 2011 sunset clause to prevent the same uncertainty and confusion possibly reoccurring in six months' time.

We thank you for this opportunity to comment on the Commissions' Releases and are, of course, very happy to discuss with you in greater detail any of the issues we raise above.

Yours faithfully,

Jiří Król
Director of Government & Regulatory Affairs