

# J.B. GROSSMAN | | P.A. | |

Attorneys At Law

J.B. Grossman  
Attorney at Law

150 North University Drive  
Suite 200  
Fort Lauderdale, FL 33324  
TEL. 954.452.1118  
Fax: 954.916.4448  
[JBG@JBGrossmanpa.com](mailto:JBG@JBGrossmanpa.com)  
[www.jbgrossmanpa.com](http://www.jbgrossmanpa.com)

Friday, February 10, 2012

Commodity Future Trading Commission  
c/o David A. Stawick  
Secretary of the Commission  
Three Lafayette Center  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

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

Re: Response to Request for Comment Concerning RIN 3038-AD64; Definition of Actual Delivery, pursuant to 7 U.S.C. §2(c)(2)(D)(ii)(III)(aa) of the Commodity Exchange Act.

The undersigned firm is often called upon to provide comment on matters associated with the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.* (“CEA”). Through the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) website we became aware of the Commission’s request for comment RIN 3038-AD64; Definition of Actual Delivery, pursuant to 7 U.S.C. §2(c)(2)(D)(ii)(III)(aa) of the CEA. We are pleased to provide this letter/comment as a response to the Commission’s interpretive action/request for comments regarding the term “actual delivery” as set forth in Section 2(c)(2)(D)(ii)(II)(aa) of the Commodities Exchange Act (“CEA”) pursuant to Section 742(a) of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (“Dodd-Frank Act”).

## The Enactment

The Dodd-Frank Act added a new subsection into Section 2(c)(2) of the CEA. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong., § 742(a) (2010) [*hereinafter* Dodd-Frank Act]; 7 U.S.C. § 2(c)(2) (2011). That text, Section 2(c)(2)(D) — as created by the Dodd-Frank Act, Section 742(a) — states:

February 10, 2012

(D) RETAIL COMMODITY TRANSACTIONS.—

(i) APPLICABILITY.—Except as provided in clause (ii), this subparagraph shall apply to any agreement, contract, or transaction in any commodity that is—

(I) entered into with, or offered to (even if not entered into with), a person that is not an eligible contract participant or eligible commercial entity; and

(II) entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

(ii) EXCEPTIONS.—This subparagraph shall not apply to—

(I) an agreement, contract, or transaction described in paragraph (1) or subparagraphs (A), (B), or (C), including any agreement, contract, or transaction specifically excluded from subparagraph (A), (B), or (C);

(II) any security;

(III) a contract of sale that—

(aa) results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved; or

(bb) creates an enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with the line of business of the seller and buyer; or

(IV) an agreement, contract, or transaction that is listed on a national securities exchange registered under section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)); or

(V) an identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)).

(iii) ENFORCEMENT.—Sections 4(a), 4(b), and 4b apply to any agreement, contract, or transaction described in clause (i), as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery.

Dodd-Frank Act, § 742(a); 7 U.S.C. § 2(c)(2)(D).

Under the text of Section 2(c)(2)(D)(ii), Congress created five exceptions to its own statutory language and coverage. *See* Dodd-Frank Act, § 742(a); 7 U.S.C. § 2(c)(2)(D)(ii)(I)–(V). One exception states “[t]his subparagraph shall not apply to a contract of sale<sup>1</sup> that results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved.” Dodd-Frank Act, § 742(a); 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa) (emphasis added). The term “actual delivery” is not defined under the CEA; however, the definition of the term “actual delivery” is currently being evaluated by the Commission, and is the underlying purpose of this letter/comment. *See* CFTC Interpretive Letter, *Retail Commodity Transactions Under the*

---

<sup>1</sup> The term “contract of sale” includes sales, agreements of sale, and agreements to sell. 7 U.S.C. § 1a(7).

February 10, 2012

*Commodity Exchange Act Section 2(c)(2)(D)* (CFTC Office of General Counsel, RIN 3038-AD64, Dec. 1, 2011), at 6 [*hereinafter* CFTC Interpretive Letter].

### The Meaning of the Term Actual Delivery

This CFTC Interpretive Letter is attempting to define the term “actual delivery” to be the functional equivalent of the term “physical delivery.”<sup>2</sup> *See id.* at 7–10. The Commission states that “actual delivery” will be accomplished if the seller: (1) has physically delivered the entire quantity of the commodity purchased by the buyer into the possession of the buyer (plus transferred title of the commodity to the buyer), *or* (2) placed the commodity into the possession of a depository not affiliated with the seller (plus transferred title of the commodity to the buyer). *Id.* at 8. Therefore, “actual delivery” will not occur if the seller fails to make *physical delivery* of the commodity, even though: (1) the seller has created a book entry that the purchase of the commodity by the buyer has been covered or hedged by the seller through a third party contract; (2) the seller transferred title to the buyer but the title document fails to identify the physical location of the commodity, the quality specifications of the commodity, the identity of the party transferring title of the commodity, and the segregation/allocation status of the commodity; *or* (3) the seller rolls-over, off-sets, or nets-out the purchase of the commodity with another transaction or settles in cash with the buyer. *Id.* at 9–10.

The Commission’s interpretation of the term “actual delivery,” though would essentially make the stated statutory exception under Section 2(c)(2)(D)(ii)(III)(aa) unnecessary.<sup>3</sup> For example, why would Congress need to establish Section 2(c)(2)(D)(ii)(III)(aa) exempting contracts that result in a physical delivery unless Section 2(c)(2)(D)(i), the section describing what is encompassed in the subparagraph’s inclusions, contemplated that a transaction would not typically lead to locational delivery to the buyer, as is the typical commercial practice in the precious and industrial metal industry.

Additionally, the Commission’s interpretation of the term “actual delivery” is at odds with the term “delivery” as defined under the Uniform Commercial Code (“UCC”) Article 2 – Sale of Goods. The UCC Article 2 defines “delivery” as “the voluntary transfer of physical possession or control of goods.” U.C.C. § 2-103(1)(e) (2011). Essentially, “delivery” under the UCC Article 2 is defined as “physical delivery,” and no section within the UCC Article 2 utilizes the term “actual

---

<sup>2</sup> The Commission states that its determination of the term “actual delivery” under Section 2(c)(2)(D) of the CEA is guided by several relevant factors: (1) the ownership, possession, title, and physical location of the commodity purchased/sold; (2) the nature of the relationship between the buyer, seller, and possessor of the commodity; and (3) the manner in which the purchase/sale was recorded and completed. CFTC Interpretive Letter, at 8.

<sup>3</sup> It seems odd that the Commission is attempting to define “actual delivery” to mean the same as “physical delivery” when Congress could have made use of the term “physical delivery” when drafting Section 742(a) of the Dodd-Frank Act (i.e., Section 2(c)(2)(D) of the CEA).

February 10, 2012

delivery,” nor is this term “actual delivery” even mentioned once within this Code. Furthermore, the UCC Article 2 states that where “delivery” is to be made without moving the goods, title to the goods passes when the seller delivers such document to the buyer, *or* at the time and place of contracting, depending on whether the goods are identified at the time of contracting. U.C.C. §§ 2-401(3)(a)–(b). Thus, under the UCC Article 2, when the goods are to be sold but not moved, “physical delivery” of the goods is satisfied when the seller delivers a tangible document of title to the buyer, *or* when the contract of sale is executed.<sup>4</sup>

The Colorado Commodity Code, one of the first states to adopt the Model State Commodity Code, also makes use of the term “physical delivery” rather than the term “actual delivery.” *See* COLO. REV. STAT. § 11-53-105 (2011). For example, the statute lists as an exemption from the ban on commodity transactions:<sup>5</sup>

A commodity contract for the purchase of one or more precious metals which requires, and under which the purchaser receives, within twenty-eight calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased by such payment; except that, for purposes of this paragraph (b), physical delivery shall be deemed to have occurred if, within such twenty-eight-day period: Such quantity of precious metals purchased by such payment is delivered (whether in specifically segregated or fungible bulk form) into the possession of a depository (other than the seller). . . .

*Id.* § 11-53-105(b) (emphasis added). Given the explicit language of this exemption under the Colorado Commodity Code, it is apparent that Congress created its exemption under Section 2(c)(2)(D)(ii)(III)(aa) by modeling it after the language of the Model State Commodity Code — noting that Congress simply could have used the term “physical delivery,” but rather it decided to use the term “actual delivery.” Therefore, Congress utilized the term “actual delivery” because it carries a different meaning and significance than “physical delivery,” and the CFTC Interpretive Letter’s use of the term “actual delivery” to be equivalent to the term “physical delivery” is contrary to Congress’s statutory intent.

Moreover, the Commission states (in a footnote) that if the agreement, contract, or transaction results in “physical delivery” as stated under the Model State Commodity Code, then

---

<sup>4</sup> Also, the UCC Article 2 states that “[s]ubject to these provisions and to the provisions of Article 9, title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.” U.C.C. § 2-401(1). Thus, the contracting parties may determine how to effectuate “delivery” through multiple and different delivery methods. Also, the UCC Article 2 places a minor limitation on “delivery” by limiting the passage of title to the goods — declaring that “[t]itle to goods cannot pass under a contract for sale prior to their identification to the contract. . . .” U.C.C. § 2-401(1) (emphasis added). However, the parties to the transaction/sale can easily satisfy this identification requirement because identification “can be made at any time and in any manner explicitly agreed to by the parties.” U.C.C. § 2-501(1).

<sup>5</sup> The ban on commodity transactions states that “[e]xcept as otherwise provided in section 11-53-104 [exempt person transactions] or 11-53-105 [exempt transactions], no person shall sell or purchase or offer to sell or purchase any commodity under any commodity contract or under any commodity option or offer to enter into or enter into as seller or purchaser any commodity contract or any commodity option.” COLO. REV. STAT. § 11-53-103.

February 10, 2012

the agreement, contract, or transaction is likely to result in “actual delivery” as currently being defined by the Commission under Section 2(c)(2)(D)(ii)(III)(aa) of the CEA. CFTC Interpretive Letter, at 8, n.25. Conversely, if the agreement, contract, or transaction does not result in “physical delivery” as stated under the Model State Commodity Code, then the agreement, contract, or transaction is not likely to result in “actual delivery” as currently being defined by the Commission under Section 2(c)(2)(D)(ii)(III)(aa) of the CEA. *Id.* As stated earlier, the Commission is attempting to define the term “actual delivery” to be the equivalent of “physical delivery,” yet Congress logically and intentionally chose not to employ the term “physical delivery” when drafting Section 742(a) of the Dodd-Frank Act.

### Actual Delivery versus Physical Delivery

There is certainly a distinctive, analytical difference between the terms “actual delivery” and “physical delivery,” and Congress’s use of the term “actual delivery” suggests that it did not intend the term “actual delivery” to equal “physical delivery.” From the standpoint of the precious and industrial metals industry, “actual delivery” signifies that the purchaser has a confirmed and guaranteed right (e.g., economic right) to a certain quantity of metal, but not necessarily that the purchaser have physical possession of the metal. “Physical delivery” indicates that the purchaser holds a certain quantity of metal in a tangible or physical manner. For example, a customer can purchase one-hundred (100) ounces of gold. The customer, upon completion of the transaction, receives a tangible or effective legal title to this gold (e.g., ownership, possessory, and economic interests), but the gold remains locked in some vault/depository. Furthermore, the customer has a right to demand physical delivery of the gold to a specified location, if so desired. Where the customer chooses not to take locational possession of the precious and industrial metal, the customer would have “actual delivery” of the metal, but not necessarily “physical delivery.” “Actual delivery” occurred because the customer received tangible or effective legal title (e.g., ownership, possessory, and economic interests) to the gold after making payment for the gold, although the gold remains stored in some vault/depository. “Physical delivery” would occur if the customer chooses to request that the gold be taken from the vault/depository, and then transported to a selected location. In both delivery cases, the customer owns, holds a possessory right, and holds an economic interest to a certain quantity of gold; with the only difference being whether the customer currently chooses to hold this gold physically in his/her hands, or not.<sup>6</sup>

Congress, knowing of the UCC Article 2 and the Model State Commodity Code, could have made use of the term “physical delivery” in Section 742(a) of the Dodd-Frank Act, but

---

<sup>6</sup> Customers will rarely request “physical delivery” of the metal because the customer is responsible for the shipping costs of transporting the metal. Additionally, the shipping of metal between multiple parties is an impracticable, expensive, inefficient, and time-consuming process. Thus, the customer would incur very high costs, which would naturally reduce the return on investment in the metal, if the customer requested “physical delivery” upon every metal transaction. Rather, the customer is satisfied with “actual delivery” because it minimizes costs and enhances efficiency, while providing the customer with assurances that the metal is securely held in a vault/depository.

February 10, 2012

Congress did not do so; thus, it can and should be concluded that Congress selected the term “actual delivery” to mean something necessarily different from “physical delivery” (i.e., economic control).

### Summation

As the aforementioned discussion/example demonstrates, delivery in the industry of precious and industrial metals does not involve placing bars of metal into boxes and shipping the metal throughout the country/world. This exception under Section 2(c)(2)(D)(ii)(III)(aa) of the CEA expressly states “[t]his subparagraph shall not apply to a contract of sale that results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved.” Dodd-Frank Act, § 742(a); 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa) (emphasis added). Thus, the Commission must defer to the “typical commercial practices” within the cash/spot markets for precious and industrial metals; however, the CFTC Interpretive Letter does not describe any form of a “typical commercial practice” which requires the taking of the metal from some vault/depository and physically delivering it to the purchaser.

Rather, metal is typically placed (and left to remain) in a storage facility, and then title to the metal is passed upon sale (and resale) of the metal. The metal remains locked in some storage facility because there is no need (or desire) to physically deliver the metal — the purchaser receives title to the metal which includes an ownership, possessory, and economic interest in the metals purchased. Title to the metal is all that the purchaser requires in order for the purchaser to capture the inherent economic value of the purchased metal. Therefore, the Commission holds no practical basis for its definition of the term “actual delivery” given the “typical commercial practices” in the industry of precious and industrial metals do not require the *physical delivery* of the commodity to the purchaser.

On Behalf of the Firm

/s/ J.B. Grossman  
J.B. Grossman