BILLING CODE: 3038-AD57

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

Exemptive Order Regarding Compliance with Certain Swap Regulations

RIN 3038-AD85

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed exemptive order and request for comment.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is proposing to grant, pursuant to section 4(c) of the Commodity Exchange Act ("CEA"), temporary exemptive relief in order to allow non-U.S. swap dealers and non-U.S. major swap participants to delay compliance with certain entity-level requirements of the CEA (and Commission regulations promulgated thereunder), subject to specified conditions. Additionally, with respect to transaction-level requirements of the CEA (and Commission regulations promulgated thereunder), the relief would allow non-U.S. swap dealers and non-U.S. major swap participants, as well as foreign branches of U.S. swap dealers and major swap participants, to comply only with those requirements as may be required in the home jurisdiction of such non-U.S. swap dealers and non-U.S. major swap participants (or in the case of foreign branches of a U.S. swap dealer or U.S. major swap participant, the foreign location of the branch) for swaps with non-U.S. counterparties. This relief would become effective concurrently with the date upon which swap dealers and major swap participants must first apply for registration and expire 12 months following the publication of this proposed order in the Federal Register. Finally, U.S. swap

dealers and U.S. major swap participants may delay compliance with certain entity-level requirements of the CEA (and Commission regulations promulgated thereunder) from the date upon which swap dealers and major swap participants must apply for registration until January 1, 2013.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by RIN number 3038-AD85, by any of the following methods:

- The agency's website, at http://comments.cftc.gov. Follow the instructions for submitting comments through the website.
- Mail: David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581.
- Hand Delivery/Courier: Same as mail above.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a

petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the proposal will be retained in the public comment file and will be considered as required under the Administrative Procedures Act[2] and other applicable laws, and may be accessible under the Freedom of Information Act.[3]

FOR FURTHER INFORMATION CONTACT: Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, (202) 418-5977, gbarnett@cftc.gov; Jacqueline H. Mesa, Director, Office of International Affairs, (202) 418-5386, jmesa@cftc.gov; Carlene S. Kim, Assistant General Counsel, Office of General Counsel, (202) 418-5613, ckim@cftc.gov, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), [4] which amended the CEA and established a new regulatory framework for swaps. The legislation was enacted to reduce systemic risk, increase transparency, and promote market integrity within the financial system

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[1] See 17 CFR 145.9.

[2] 5 U.S.C. 551, et seq.

[3] 5 U.S.C. 552.

[4] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

by, among other things: (1) providing for the registration and comprehensive regulation of swap dealers (each, an "SD") and major swap participants (each, an "MSP"); (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and data reporting regimes with respect to swaps, including real-time public reporting; and (4) enhancing the Commission's rulemaking and enforcement authorities over all registered entities, intermediaries, and swap counterparties subject to the Commission's oversight.

To implement the Dodd-Frank Act, the Commission has promulgated rules pursuant to the various new provisions of the CEA, including those specifically applicable to SDs and MSPs. Examples of such provisions include CEA section 4s(a) (governing registration of SDs and MSPs)[5] and section 4s(j) (requiring SDs and MSPs to establish a comprehensive internal risk management program).[6] Rules to implement other requirements in the provisions of the CEA have been proposed but not finalized. These include CEA section 4s(e) (governing capital and margin requirements for SDs and MSPs)[7] and CEA section 4s(i) (relating to the timely and accurate processing and netting of swaps entered by SDs and MSPs).[8]

Further, the Commission approved for publication a proposed interpretive guidance and policy statement ("Cross-Border Interpretive Guidance") on the application of the CEA's swap provisions and the implementing Commission regulations to cross-border activities and transactions.[9] A brief overview of the Cross-Border Interpretive Guidance follows.

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[5] 7 U.S.C. 6s(a).

[6] 7 U.S.C. 6s(j).

[7] 7 U.S.C. 6s(e).

[8] 7 U.S.C. 6s(i).

[9] [CITE TO THE CB GUIDANCE RELEASE]

II. Cross-Border Interpretive Guidance

To provide greater clarity to market participants regarding their obligations under the Dodd-Frank Act, the Commission has published the Cross-Border Interpretive Guidance. Broadly speaking, the Cross-Border Interpretive Guidance sets forth the manner in which the Commission proposes to interpret section 2(i) of the CEA[10] as it applies to the requirements under the Dodd-Frank Act and the Commission's regulations promulgated thereunder regarding cross-border swap activities.

Specifically, in the Cross-Border Interpretive Guidance, the Commission described the general manner in which it proposes to consider: (1) whether a non-U.S. person's swap dealing activities are sufficient to require registration as a "swap dealer",[11] as further defined in a joint release adopted by the Commission and the SEC (collectively, the "Commissions"); (2) whether a non-U.S. person's swap positions are sufficient to require registration as a "major swap participant",[12] as further defined in a joint release adopted by the Commissions;[13] and (3) the treatment of foreign branches, agencies, affiliates, and subsidiaries of U.S. SDs and of U.S. branches of non-U.S. SDs. The Cross-Border Interpretive Guidance also proposes, in certain circumstances, to permit a non-U.S. SD or non-U.S. MSP to comply with comparable and

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[10]Section 722(d) of the Dodd-Frank Act, which amended the CEA to add a new section 2(i), provides that the swaps provisions of the CEA apply to cross-border transactions and activities when certain conditions are met, namely, when such activities have a "direct and significant" connection with activities in, or effect on, commerce in the United States or when they contravene Commission rulemaking. See 7 U.S.C. 2(i).

[11] 7 U.S.C. 1a(49).

[12] 7 U.S.C 1a(33).

[13] See "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant' and 'Eligible Contract Participant'; Final Rule, 77 FR 30596, May 23, 2012.

comprehensive foreign regulatory requirements in order to satisfy applicable statutory and regulatory requirements under Title VII of the Dodd-Frank Act.[14] Finally, the Cross-Border Interpretive Guidance sets forth the manner in which the Commission proposes to interpret section 2(i) of the CEA as it applies to the clearing, trading, and certain reporting requirements under the Dodd-Frank Act with respect to swaps between counterparties that are not SDs or MSPs.

III. Proposed Relief

A. Scope of Relief

In order to ensure an orderly transition to the Dodd-Frank Act's regulatory regime and to provide certainty to market participants and in response to commenters' requests,[15] the Commission is proposing to provide temporary exemptive relief pursuant to section 4(c) of the CEA.[16] Specifically, the relief would allow non-U.S. SDs and non-U.S. MSPs[17] to delay compliance with certain Entity-Level Requirements (as defined below) under the Dodd-Frank Act (and the Commission's regulations thereunder), subject to specified conditions described herein. Under the proposed relief, non-U.S. SDs and non-U.S. MSPs would be afforded additional time to prepare for the application of the Entity-Level Requirements with assurances that they would not be in violation of the CEA as a result. This would, in turn, facilitate an

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[14] The Cross-Border Interpretive Guidance does not address the scope of the Commission's authority under CEA section 2(i) over non-swap agreements, contracts, transactions or markets within the Commission's jurisdiction or persons who participate in or operate those markets.

[15] See Letter from Securities Industry and Financial Markets Association and Institute of International Bankers, dated, April 25, 2012, available on the Commission's website at http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/index.htm.

[16] 7 U.S.C. 6(c).

[17] As used in this proposed exemptive order, the term "non-U.S. swap dealer" refers to swap dealers that are non-U.S.-based as well as those that are foreign affiliates of a U.S. person. Similarly, the term "non-U.S. MSP" refers to MSPs that are non-U.S.-based, as well as foreign affiliates of a U.S. person.

orderly transition to the Entity-Level Requirements of the Dodd-Frank Act regulatory regime, while minimizing undue disruptions to current market operations.

An exception to the foregoing relief from the Entity-Level Requirements relates to the Swap Data Repository ("SDR") reporting requirement[18] and part 20 of the Commission's regulations ("Large Trader Reporting"). Specifically, non-U.S. SDs and non-U.S.MSPs would be required to comply with the SDR reporting requirement for all swaps with U.S. person counterparties ("U.S. counterparties"), upon its compliance date. Under the proposed exemptive order, the reporting obligations of an SD under the Large Trader Reporting regulations would apply (or not apply) in the same manner as the SDR reporting requirements would apply (or not apply) to such SD.

However, under the proposed exemptive order, non-U.S. SDs and non-U.S. MSPs that are not affiliates or subsidiaries of a SD would be permitted to delay compliance with the SDR reporting requirement for swaps with non-U.S. counterparties. The Commission believes that this approach would facilitate such registrants' phasing in of their compliance with the SDR reporting requirement, without substantially undermining the regulatory objectives of SDR reporting. The Commission is not proposing to extend similar relief to non-U.S. SDs and non-U.S. MSPs that are affiliates or subsidiaries of a U.S. SD given the Commission's supervisory interest in data related to the swap activities of non-U.S. SDs and non-U.S. MSPs that are part of a U.S.-based affiliated group.

The Commission also proposes to grant, with respect to Transaction-Level Requirements (as defined below), temporary relief to non-U.S. SDs and non-U.S. MSPs, as well as foreign

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[18] See 7 U.S.C. 2(a)(13)(G). The Commission believes that the data reported to, and collected by, SDRs will be important to its ability to effectively monitor and address the risk exposures of individual market participants (including SDs and MSPs) and the concentration of risk within the swaps market more generally.

branches of U.S. SDs and U.S. MSPs, for swaps with a non-U.S. counterparty in order that they comply only with the regulations as may be required in the home jurisdiction of the non-U.S. SD or non-U.S. MSP (or in the case of foreign branches of a U.S. SD or a U.S. MSP, the foreign location of the branch).[19] With respect to swaps with a U.S. counterparty, however, these registrants would be required to comply with all applicable Transaction-Level Requirements that are in effect. Given the nature of these requirements (i.e., they may be applied on a transaction-by-transaction basis) and their importance to the protection of U.S. counterparties, the Commission would require non-U.S. SDs and non-U.S. MSPs, as well as foreign branches of U.S. SDs and U.S. MSPs, to comply with all applicable Transaction-Level Requirements with respect to such counterparties.[20]

The relief for non-U.S. SDs and non-U.S. MSPs (and foreign branches of U.S. SDs and U.S. MSPs with respect to Transaction-Level Requirements) would become effective on the compliance date for registration of SDs and MSPs and expire 12 months following the publication of this proposed order in the Federal Register. The Commission is committed to an orderly transition to the Dodd-Frank Act's regulatory regime. In furtherance of that objective, the Commission intends to consider extending the effectiveness of this exemptive relief at its expiration based on, among other things, whether and when substituted compliance with foreign regulatory requirements for non-U.S. persons is available.

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[19] Under the proposed Cross-Border Interpretive Guidance and for purposes of this order, a foreign branch of a U.S. person is deemed a U.S. person. Accordingly, swaps entered between a foreign branch of a U.S. person with another foreign branch of a U.S. person would be subject to the Dodd-Frank Transaction-Level Requirements. The Commission solicits comments on whether, for purposes of this order, substituted compliance should be permitted for such swaps, which effectively would allow foreign branches to comply only with the regulations as may be required in the foreign location of the branches.

[20] This relief does not cover swaps between non-SDs and non-MSPs. Any such swaps involving a U.S. counterparty would be subject to applicable Dodd-Frank Act requirements as set forth in the Cross-Border Interpretive Guidance.

With respect to U.S. SDs and U.S. MSPs, the Commission proposes to permit such registrants to delay compliance with certain Entity-Level Requirements under the Dodd-Frank Act (and the Commission's regulations thereunder) until January 1, 2013. Under the proposed relief, U.S. SDs and U.S. MSPs would be afforded additional time to prepare for the application of the Entity-Level Requirements so as to ensure an orderly transition, while minimizing undue disruptions to current market operations. This relief with respect to Entity-Level Requirements, however, does not extend to swap data recordkeeping, SDR reporting or Large Trader Reporting requirements. That is, U.S. SDs and U.S. MSPs would be required to comply with the swap data recordkeeping, SDR and Large Trader Reporting requirements for all swaps. Finally, the Commission reiterates that a U.S. person would be expected to apply for registration as an SD or MSP by the effective date of the Swap Definitional Rule.

Finally, the relief for U.S. SDs and U.S. MSPs (with respect to Entity-Level Requirements) would be effective until January 1, 2013. The Commission believes that allowing U.S. registrants additional time as specified is appropriate in light of the importance of implementing the Dodd-Frank Act regulatory regime as expeditiously as possible while taking due consideration of the need for U.S. registrants to effect an orderly transition to the new regulatory regime.

B. Conditions to Relief

Under this proposal, a non-U.S. SD or non-U.S. MSP seeking relief from the specified Entity-Level Requirements must satisfy certain conditions. First, the non-U.S. person that is required to register as an SD or MSP must apply to become registered as such when registration is required. Second, within 60 days of applying for registration, the non-U.S. applicant would be

required to submit to the National Futures Association ("NFA") a compliance plan addressing how it plans to comply, in good faith, with all applicable requirements under the CEA and related rules and regulations upon the effective date of the Cross-Border Interpretive Guidance.[21]

At a minimum, such plan would provide, for each Entity-Level and Transaction-Level Requirement, a description of: (1) whether the non-U.S. SD or non-U.S. MSP plans to comply with each of the Entity-Level and Transaction-Level Requirements that are in effect at such time or plans to seek a comparability determination and rely on compliance with one or more of the requirements of the home jurisdiction, as applicable; and (2) to the extent that the non-U.S. SD or non-U.S. MSP would seek to comply with one or more of the requirement(s) of the home jurisdiction, a description of such requirement(s). The Commission notes that such person may modify or alter the compliance plan as appropriate, provided that they submit any such amended plan to NFA.[22]

The Commission further notes that the proposed relief does not limit the applicability of any CEA provision or Commission regulation to any person, entity or transaction except as provided in the proposed order. In addition, the proposed relief would not affect any effective date or compliance date set out in any specific Dodd-Frank Act rulemaking by the Commission.

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[21] Additionally, a U.S. SD or U.S. MSP whose foreign branch seeks to rely on the exemptive relief with respect to swaps with non-U.S. counterparties must submit a compliance plan addressing how it plans to comply, in good faith, with all applicable Transaction-Level Requirements under the CEA upon the expiration of this proposed exemptive order.

[22] The Commission anticipates that compliance plans would be updated on a periodic basis as new regulations are adopted and come into effect. Such updates should be submitted to NFA. Any such submission should identify the name of the registrant, the fact that the submission is made in reliance upon and pursuant to this exemptive relief, and contact name and information.

IV. Section 4(c) of the Commodity Exchange Act

Section 4(c)(1) of the CEA authorizes the Commission to "promote responsible economic or financial innovation and fair competition" by exempting any transaction or class of transaction from any of the provisions of the CEA (subject to certain exceptions) where the Commission determines that the exemption would be consistent with the public interest.[23] Under section 4(c)(2) of the CEA, the Commission may not grant exemptive relief unless it determines that: (1) the exemption is appropriate for the transaction and consistent with the public interest; (2) the exemption is consistent with the purposes of the CEA; (3) the transaction will be entered into solely between "appropriate persons";[24] and (4) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.[25] The Commission may grant such an exemption by rule, regulation or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative. In enacting section 4(c), Congress noted that the goal of the provision is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.[26]

As noted earlier, the Commission is proposing to issue this relief in order to ensure an orderly transition to the Dodd-Frank Act regulatory regime and to provide greater legal certainty to market participants regarding their obligations under the CEA with respect to their cross-

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[23] 7 U.S.C. 6(c)(1).

[24] CEA section 4(c)(3), 7 U.S.C. 6(c)(3), includes within the term "appropriate persons" a number of specified categories of persons deemed appropriate under the CEA for entering into swaps exempted by the Commission under section 4(c). This includes persons the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

[25] CEA Section 4(c)(2), 7 U.S.C. 6(c)(2) .

[26] See "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 FR 56512, 56513, Sept. 16, 2010.

border activities. The proposed relief also would advance the congressional mandate concerning harmonization of international standards, consistent with section 752(a) of the Dodd-Frank Act. In that section, Congress directed that, in order to "promote effective and consistent global regulation of swaps and security-based swaps," the Commission, "as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation" of swaps and security-based swaps.[27] The proposed relief, by providing U.S.- and non-U.S. registrants the latitude necessary to develop and modify their compliance plans as the regulatory structure in their home jurisdiction changes, would promote greater regulatory consistency and coordination with international regulators.

The Commission emphasizes that the proposed order is temporary in duration and reserves the Commission's anti-fraud and anti-manipulation enforcement authority. As such, the Commission believes that the proposed order would be consistent with the public interest and purposes of the CEA. For similar reasons, the Commission believes that the proposed order would not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA. Finally, the Commission believes that the order would be limited to appropriate persons within the meaning of section 4c(3)(K) since the SDs and MSPs eligible for the relief are likely to be financial institutions active in the swaps market.[28] The Commission seeks comment on whether the proposed temporary exemptive order is consistent with the public interest and the other requirements of CEA section 4(c).

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[27] See section 752(a) of the Dodd-Frank Act.

[28] CEA Section 4(c)(3)(K), 7 U.S.C. 6(c)(3)(K) (appropriate persons may include such "other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections").

V. Terms "U.S. Person," "Entity-Level Requirements," and "Transaction-Level Requirements"

A. U.S. Person

In the Cross-Border Interpretive Guidance, the Commission proposes to interpret the term "U.S. person" by reference to the extent to which swap activities or transactions involving one or more such persons have the relevant effect on U.S. commerce. Specifically, as proposed, the term "U.S. person" would include, but not be limited to: (1) any natural person who is a resident of the United States; (2) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in each case either (A) organized or incorporated under the laws of the United States[29] or having its principal place of business in the United States ("legal entity") or (B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person; (3) any individual account (discretionary or not) where the beneficial owner is a U.S. person; (4) any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership or equity interest is held, directly or indirectly, by a U.S. person(s); (5) any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA; (6) a pension plan for the employees, officers, or principals of a legal entity with its principal place of business inside the United States; and (7) an estate or trust, the income of which is subject to United States income tax regardless of source.

Under the interpretation of the term "U.S. person" in the Cross-Border Interpretive

[29] United States would mean the United States, its states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and any other territories or possessions of the United States government, its agencies or instrumentalities.

Guidance, a foreign branch or agency of a U.S. person would be covered by virtue of the fact that it is an extension of a U.S. person. By contrast, a foreign affiliate or subsidiary of a U.S. person would be considered a non-U.S. person. Solely for purposes of the temporary exemptive relief provided in the proposed order, the Commission adopts the interpretation of the term "U.S. person" as set forth in the Cross-Border Interpretive Guidance.

B. Entity-Level and Transaction-Level Requirements

Solely for purposes of the temporary exemptive relief provided in the proposed order, the Commission incorporates the proposed categories of Entity-Level and Transaction-Level Requirements, as set forth in the Cross-Border Interpretive Guidance.

1. Entity-level requirements

In the Cross-Border Interpretive Guidance, the Commission proposes to divide the Dodd-Frank Act requirements that would apply to SDs and MSPs into those that: (1) apply to an SD or MSP at an entity level (i.e., to the firm as a whole); and (2) apply at a transactional level (i.e., to specific transactions). Specifically, the entity-level requirements under Title VII of the Dodd-Frank Act and the Commission's regulations promulgated thereunder relate to: (1) capital adequacy; (2) chief compliance officer; (3) risk management; (4) swap data recordkeeping; (5) reporting to an SDR; and (6) physical commodity swaps reporting (collectively, the foregoing requirements are referred to herein as "Entity-Level Requirements"). The first subcategory of Entity-Level Requirements relating to capital adequacy, chief compliance officer, risk management, and swap data recordkeeping relate to risks to a firm as a whole. These requirements address and manage risks that arise from a firm's operation as an SD or MSP. Individually, they represent a key component of a firm's internal risk controls. Collectively, they

constitute a firm's first line of defense against financial, operational, and compliance risks that could lead to a firm's default or failure. In short, these requirements relate to risks to a firm as a whole.

At the core of a robust internal risk controls system is the firm's capital -- and particularly, how the firm identifies and manages its risk exposure arising from its portfolio of activities.[30] Equally foundational to the financial integrity of a firm is an effective internal risk management process, which must be comprehensive in scope and reliant on timely and accurate data regarding its swap activities. To be effective, such system must be under the supervision of a strong and independent function. These internal controls-related requirements - namely, the requirements relating to chief compliance officer, risk management, swap data recordkeeping - are designed to serve that end.

No less important to the financial integrity of a firm is the SDR reporting requirement. SDR reporting ensures the Commission access to the information it needs to effectively supervise the risk exposure of its registrants and, thus, serves to lower their risk of failure. Given the functions of these reporting requirements, each must be applied on a firm-wide basis, across all swaps, in order to ensure that the Commission has a comprehensive and accurate picture of its activities. Otherwise, the intended benefits of these Entity-Level Requirements would be significantly compromised, if not undermined.

Each of the Entity-Level Requirements is summarized below.

i. Capital requirements

[30] By way of illustration, consistent with the purpose of the capital requirement, which is to reduce the likelihood and cost of an SD's default by requiring a financial cushion, an SD's or MSP's capital requirements would be set on the basis of its overall portfolio of assets and liabilities.

Section 4s(e)(3)(A) of the CEA specifically directs the Commission to set capital requirements for SDs and MSPs that are not subject to the capital requirements of prudential regulators (hereinafter referred to as "non-bank SDs and MSPs").[31] Pursuant to section 4s(e)(3), the Commission proposed regulations, which would require non-bank SDs and MSPs to hold a minimum level of adjusted net capital (i.e., "regulatory capital") based on whether the non-bank SD or MSP is: (1) also a futures commission merchant ("FCM"); (2) not an FCM, but is a non-bank subsidiary of a bank holding company; or (3) neither an FCM nor a non-bank subsidiary of a bank holding company.[32]

ii. Chief compliance officer

Section 4s(k) requires that each SD and MSP designate an individual to serve as its chief compliance officer ("CCO") and specifies certain duties of the CCO.[33] Pursuant to section 4s(k), the Commission recently adopted § 3.3, which requires SDs and MSPs to designate a CCO who

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[31] See 7 U.S.C. 6s(e)(3)(A). Section 4s(e) of the CEA explicitly requires the adoption of rules establishing capital and margin requirements for SDs and MSPs, and applies a bifurcated approach that requires each SD and MSP for which there is a prudential regulator to meet the capital and margin requirements established by the applicable prudential regulator, and each SD and MSP for which there is no prudential regulator to comply with the Commission's capital and margin regulations. See 7 U.S.C. 6s(e). Further, systemically important financial institutions ("SIFIs") that are not futures commission merchants ("FCMs") would be exempt from the Commission's capital requirements, and would comply instead with Federal Reserve Board requirements applicable to SIFIs, while non-bank (and non-FCM) subsidiaries of U.S. bank holding companies would calculate their Commission capital requirement using the same methodology specified in Federal Reserve Board regulations applicable to the bank holding company, as if the subsidiary itself were a bank holding company. The term ''prudential regulator'' is defined in CEA section 1a(39) as the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency. See 7 U.S.C. 1a(39).

[32] See 7 U.S.C. 6s(e). See also 76 FR 27802, May 12, 2011, available at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-10881a.pdf. "The Commission's capital proposal for [SDs] and MSPs includes a minimum dollar level of $20 million. A non-bank [SD] or MSP that is part of a U.S. bank holding company would be required to maintain a minimum of $20 million of Tier 1 capital as measured under the capital rules of the Federal Reserve Board. [An SD] or MSP that also is registered as an FCM would be required to maintain a minimum of $20 million of adjusted net capital as defined under [proposed] § 1.17. In addition, an [SD] or MSP that is not part of a U.S. bank holding company or registered as an FCM would be required to maintain a minimum of $20 million of tangible net equity, plus the amount of the [SD's] or MSP's market risk exposure and OTC counterparty credit risk exposure." See id. at 27817.

[33] See 7 U.S.C. 6s(k).

would be responsible for administering the firm's compliance policies and procedures, reporting directly to the board of directors or a senior officer of the SD or MSP, as well as preparing and filing (with the Commission) a certified report of compliance with the CEA.[34]

iii. Risk management

Section 4s(j) of the CEA requires each SD and MSP to establish internal policies and procedures designed to, among other things, address risk management, monitor compliance with position limits, prevent conflicts of interest, and promote diligent supervision, as well as maintain business continuity and disaster recovery programs.[35] The Commission recently adopted implementing regulations (§§ 23.600, 23.601, 23.602, 23.603, 23.605, 23.606, and 23.607).[36] The Commission also recently adopted § 23.609, which requires certain risk management procedures for SDs or MSPs that are clearing members of a derivatives clearing organization ("DCO").[37]

iv. Swap data recordkeeping

CEA section 4s(f)(1)(B) requires SDs and MSPs to keep books and records for all

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[34] See 17 CFR 3.3.

[35] 7 U.S.C. 6s(j).

[36] 17 CFR 23.600, 23.601, 23.602, 23.603, 23.605, 23.606, and 23.607; "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants," 77 FR 20128, Apr. 3, 2012 (relating to risk management program, monitoring of position limits, business continuity and disaster recovery, conflicts of interest policies and procedures, general information availability, and antitrust considerations, respectively).

[37] 17 CFR 23.609, "Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management," 77 FR 21278 (Apr. 9, 2012). In the same release, the Commission also adopted § 23.608, which prohibits SDs providing clearing services to customers from entering into agreements that would: (1) disclose the identity of a customer's original executing counterparty; (2) limit the number of counterparties a customer may trade with; (3) impose counterparty-based position limits; (4) impair a customer's access to execution of a trade on terms that have a reasonable relationship to the best terms available; or (5) prevent compliance with specified time frames for acceptance of trades into clearing.

activities related to their business.[38] Section 4s(g)(1) requires SDs and MSPs to maintain trading records for each swap and all related records, as well as a complete audit trail for comprehensive trade reconstructions.[39] Pursuant to these provisions, the Commission adopted §§ 23.201and 23.203, which require SDs and MSPs to keep records including complete transaction and position information for all swap activities, including documentation on which trade information is originally recorded.[40] SDs and MSPs also must comply with part 46 of the Commission's regulations, which addresses the recordkeeping requirements for swaps entered into before the date of enactment of the Dodd-Frank Act ("pre-enactment swaps") and data relating to swaps entered into on or after the date of enactment but prior to the compliance date of the SDR reporting rules ("transition swaps").[41]

v. Swap data reporting

CEA section 2(a)(13)(G) requires all swaps, whether cleared or uncleared, to be reported to a registered SDR.[42] CEA section 21 requires SDRs to collect and maintain data related to swaps as prescribed by the Commission, and to make such data electronically available to regulators.[43] SDs and MSPs would be required to comply with part 45 of the Commission's regulations, which set forth the specific transaction data that reporting counterparties and

[38] 7 U.S.C. 6s(f)(1)(B).

[39] 7 U.S.C. 6s(g)(1).

[40] 17 CFR. 23.201and 23.203; "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants," 77 FR 20128, Apr. 3, 2012. These requirements also require an SD to provide the Commission with regular updates concerning its financial status, as well as information concerning internal corporate procedures.

[41] 17 CFR 46.1 et seq.; "Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps," 76 FR 22833, Apr. 25, 2011.

[42] 7 U.S.C. 2(a)(13)(G).

[43] 7 U.S.C. 24a.

registered entities must report to a registered SDR; and part 46, which addresses the recordkeeping requirements for pre-enactment swaps and data relating to transition swaps.

vi. Physical commodity swaps reporting (Large Trader Reporting)

CEA section 4t[44] authorizes the Commission to establish a large trader reporting system for significant price discovery swaps (of which economically equivalent swaps subject to part 20 reporting are a subset) in order to implement the statutory mandate in CEA section 4a[45] for the Commission to establish position limits, as appropriate, for physical commodity swaps. Pursuant thereto, the Commission adopted part 20 rules requiring SDs, among other entities, to submit routine position reports on certain physical commodity swaps and swaptions.[46] Just as with SDR reporting, part 20 reporting serves the Dodd-Frank Act's objective to enhance regulatory oversight of the swaps market. In fact, a stated reason for the Commission's adoption of part 20 was its ability to, in effect, perform the function of physical commodity SDRs until such time as such entities are operational and have the ability to convert swaps into positions.[47]

2. Transaction-level requirements

The transaction-level requirements under Title VII of the Dodd-Frank Act and the Commission's regulations (proposed or adopted) include: (1) clearing and swap processing; (2) margining (and segregation) for uncleared swaps; (3) trade execution; (4) trade confirmation; (5) swap trading relationship documentation; (6) real-time public reporting; (7) portfolio reconciliation and compression; (8) daily trading records; and (9) external business conduct

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[44] 7 U.S.C. 6t.

[45] 7 U.S.C. 6a.

[46] "Large Trader Reporting for Physical Commodity Swaps," 76 FR 43851, July 22, 2011.

[47] See 76 FR 43851, 43852.

standards (collectively, the foregoing requirements are referred to herein as "Transaction-Level Requirements"). Broadly speaking, the Transaction-Level Requirements closely relate to the financial protection of SDs, MSPs and their counterparties, pre- and post-trade transparency, and other market-oriented regulatory safeguards.

i. Clearing and swap processing

Section 2(h)(1) of the CEA requires a swap to be submitted for clearing to a DCO if the Commission has determined that the swap is required to be cleared, unless one of the parties to the swap is eligible for an exception from the clearing requirement and elects not to clear the swap.[48] Closely interlocked with the clearing requirement are the following swap processing requirements: (1) the recently finalized § 23.506, which requires SDs and MSPs to submit swaps promptly for clearing; and (2) § 23.610, which establishes certain standards for swap processing by SDs and MSPs that are clearing members of a DCO.[49]

ii. Margin (and segregation) requirements for uncleared swaps

Section 4s(e) of the CEA requires the Commission to set margin requirements for SDs and MSPs that trade in swaps that are not cleared.[50] In addition, with respect to swaps that are not submitted for clearing, section 4s(l) requires that an SD or MSP notify the counterparty of its

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[48] 7 U.S.C. 2(h)(1), (7).

[49] 17 CFR 23.506, 23.610 and "Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management," 77 FR 21278, Apr. 9, 2012.

[50] See 7 U.S.C. 6s(e). See also "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants," 76 FR 23732, 23733-40, Apr. 28, 2011. Section 4s(e) explicitly requires the adoption of rules establishing margin requirements for SDs and MSPs, and applies a bifurcated approach that requires each SD and MSP for which there is a prudential regulator to meet the margin requirements established by the applicable prudential regulator, and each SD and MSP for which there is no prudential regulator to comply with the Commission's margin regulations. In contrast, the segregation requirements in section 4s(1) do not use a bifurcated approach – that is, all SDs and MSPs are subject to the Commission's rule regarding notice and third party custodians for margin collected for uncleared swaps.

right to require segregation of funds provided as margin, and upon such request, to segregate the funds with a third-party custodian for the benefit of the counterparty.

iii. Trade execution requirement

Integrally linked to the clearing requirement is the trade execution requirement, which is intended to bring the trading of mandatorily cleared swaps onto regulated exchanges. Specifically, section 2(h)(8) of the CEA provides that unless a clearing exception applies and is elected, a swap that is subject to a clearing requirement must be traded on a designated contract market ("DCM") or swap execution facility ("SEF"), unless no DCM or SEF makes the swap available to trade.[51]

iv. Swap trading relationship documentation

CEA Section 4s(i) requires each SD and MSP to conform to Commission standards for the timely and accurate confirmation, processing, netting, documentation and valuation of swaps. Pursuant thereto, the Commission has proposed § 23.504(a), which would require SDs and MSPs to "establish, maintain and enforce written policies and procedures" to ensure that the SD or MSP executes written swap trading relationship documentation.[52] Under proposed §§ 23.505(b(1), 23.504 (b)(3), and 23.504(b)(4), the swap trading relationship documentation must include, among other things: all terms governing the trading relationship between the SD or MSP and its counterparty; credit support arrangements; investment and rehypothecation terms for

[51] See 7 U.S.C. 2(h)(8).

[52] See "Swap Trading Relationship documentation Requirements for Swap Dealers and Major Swap Participants, 76 FR 6715," Feb. 8, 2011.

assets used as margin for uncleared swaps; and custodial arrangements.[53] Further, the swap trading relationship documentation requirement applies to all swaps with registered SDs and MSPs.

v. Portfolio reconciliation and compression

CEA section 4s(i) directs the Commission to prescribe regulations for the timely and accurate processing and netting of all swaps entered into by SDs and MSPs. Pursuant to CEA section 4s(i), the Commission proposed regulations §§ 23.502 and 23.503, which would require SDs and MSPs to perform portfolio reconciliation and compression, respectively, for all swaps.[54] Proposed § 23.503(c) would require all SDs and MSPs to participate in bilateral compression exercises and/or multilateral portfolio compression exercises conducted by their self-regulatory organizations or DCOs of which they are members.[55] Further, participation in multilateral portfolio compression exercises is mandatory for dealer-to-dealer trades.

vi. Real-time public reporting

Section 2(a)(13) of the CEA directs the Commission to promulgate rules providing for the public availability of swap transaction data on a real-time basis.[56] In accordance with this

[53] The requirements under section 4s(i) relating to trade confirmations is a Transaction-Level Requirement. Accordingly, proposed § 23.504(b)(2), which requires an SD's and MSP's swap trading relationship documentation to include all confirmations of swaps, will apply on a transaction-by-transaction basis.

[54] See "Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants," 75 FR 81519, Dec. 28, 2010.

[55] See 17 CFR 23.503(c), 75 FR 81519, Dec. 28, 2010.

[56] See 7 U.S.C. 2(a)(13). See also "Real-Time Public Reporting of Swap Transaction Data," 77 FR 1182, 1183, Jan. 9, 2012.

mandate, the Commission promulgated part 43 rules on December 20, 2011, which provide that all "publicly reportable swap transactions" must be reported and publicly disseminated.[57]

vii. Trade confirmation

Section 4s(i) of the CEA[58] requires that each SD and MSP must comply with the Commission's regulations prescribing timely and accurate confirmation of swaps. The Commission has proposed § 23.501, which requires, among other things, a timely and accurate confirmation of all swaps and life cycle events for existing swaps.[59]

viii. Daily trading records

Pursuant to CEA section 4s(g)(1), the Commission adopted § 23.202, which requires SDs and MSPs to maintain daily trading records, including records of trade information related to pre-execution, execution, and post-execution data that is needed to conduct a comprehensive and accurate trade reconstruction for each swap. The final rule also requires that records be kept of cash or forward transactions used to hedge, mitigate the risk of, or offset any swap held by the SD or MSP.[60]

ix. External business conduct standards

Pursuant to CEA section 4s(h), the Commission has adopted external business conduct

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[57] Part 43 defines a "publicly reportable swap transaction" as (1) any swap that is an arm's-length transaction between two parties that results in a corresponding change in the market risk position between the two parties; or (2) any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of a swap. See Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182, Jan. 9, 2012.

[58] 7 U.S.C. 6s(i).

[59] See 17 CFR 23.501; "Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants," 75 FR 81519, Dec. 28, 2010.

[60] See "Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants," 77 FR 20128, Apr. 3, 2012.

rules, which establish business conduct standards governing the conduct of SDs and MSPs in dealing with their counterparties in entering into swaps.[61]

VI. Request for Comment

The Commission requests comment on all aspects of this proposed exemptive order.

VII. Related Matters

A. Paperwork Reduction Act.

1. Overview

The Paperwork Reduction Act ("PRA")[62] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Part of this proposed rulemaking would result in new collection of information requirements within the meaning of the PRA. The Commission therefore is required to submit this proposal to the Office of Management and Budget ("OMB") for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. Under this proposal, certain registrants claiming relief from the specified Entity-Level Requirements and Transaction-Level Requirements would be required to satisfy certain conditions that have PRA implications. The Commission will, by separate action, publish in the Federal Register a notice and request for comments on the paperwork burden associated with this exemptive order in accordance with 5 CFR 1320.8. If approved, this new collection of information will be mandatory.

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[61] See 7 U.S.C. 6s(h). See also 77 FR 9734, 9822-29.

[62] 44 U.S.C. 3501 et seq.

B. Consideration of Costs and Benefits

Section 15(a) of the CEA[63] requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its own discretionary determinations with respect to the section 15(a) factors.

Summary of the Proposed Exemption

As discussed above, for a non-U.S. SD or non-U.S. MSP (or U.S. applicant relating to transaction-level requirements in the case of a branch of a U.S. SD) that has submitted a compliance plan describing how it will come into compliance with the swap requirements of the CEA as they become effective, the proposed exemptive order would delay the compliance date for certain Entity-Level Requirements and, to a more limited extent, Transaction-Level Requirements. An important exception to the foregoing is compliance with the CEA requirement regarding SDR reporting and the Large Trader Reporting requirement. For those requirements, non-U.S. SDs and non-U.S. MSPs must comply without delay with respect to transactions with U.S. counterparties.

With respect to transactions with a U.S. counterparty, non-U.S. registrants would be required to comply with all Transaction-Level Requirements that are in effect. With respect to transactions with a non-U.S. counterparty, the non-U.S. SD or non-U.S. MSP, as well as foreign

[63] 7 U.S.C. 19(a).

branches of U.S. SDs and U.S. MSPs, need only comply with such regulations as may be required by the home jurisdiction of such non-U.S. registrant (or in the case of a branch, the foreign location of the branch). U.S. SDs and U.S. MSPs would be permitted to delay compliance with Entity-Level Requirements, except the swap data recordkeeping, SDR reporting and Large Trader Reporting requirements.

Costs

As discussed above, the proposed order is exemptive in that it would provide eligible persons with relief in the form of additional time with which to comply with certain regulatory requirements. As with any exemptive order, the proposed order is permissive – eligible persons are not required to avail themselves of the exemptive relief provided. Accordingly, the Commission assumes that an entity will rely on the proposed exemption only if the anticipated benefits warrant the costs attendant to the condition that requires the filing of a compliance plan. Although there is significant uncertainty in the number of swap entities that will seek to register as SDs and MSPs, as well as the number of swap entities that will submit a compliance plan in order to obtain exemptive relief, the Commission believes it is reasonable to estimate that between 40 and 80 non-U.S. SDs and MSPs will submit compliance plans.[64] The average cost of preparing and submitting the required compliance plan for such non-U.S. SDs and MSPs initially is estimated to be approximately $31,190 per registrant, or a total aggregate cost of between $1,247,600 (assuming that 40 SDs and MSPs submit a compliance plan) and $2,495,200 (assuming that 80 SDs and MSPs submit a compliance plan). This estimate is based on the hourly cost of personnel that are capable of evaluating both Commission and home country

[64] The Commission currently estimates that approximately 125 entities will be covered by the definitions of the terms "swap dealer" and "major swap participant." See "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant' and 'Eligible Contract Participant'"; Final Rule, 77 FR 30596, 30713, May 23, 2012. However, not all of these entities are eligible for or will seek exemptive relief.

regulations in light of the non-U.S. persons' operations.[65] Further, the condition that requires the filing of a compliance plan is not static – that is, the condition requires that the non-U.S. person submit, if necessary, a revised plan to account for any material changes since the filing of the initial plan. The Commission estimates that in most cases the cost of submitting a revised plan or plans will be the same as the cost of preparing and submitting the initial plan.

In addition, the Commission estimates that an additional 20 to 45 U.S. SDs or U.S. MSPs whose foreign branch seeks to rely on the exemptive relief with respect to swaps with non-U.S. counterparties will submit a compliance plan. In this case, the compliance plan must only address how the registrant plans to comply, in good faith, with all applicable Transaction-Level Requirements under the CEA upon the expiration of this proposed exemptive order. The average cost of preparing and submitting the required compliance plan for such non-U.S. SDs and MSPs initially is estimated to be approximately $18,714 per U.S. registrant, or a total aggregate cost of between $374,280 (assuming that 20 U.S. SDs and MSPs submit a compliance plan) and $842,130 (assuming that 45 SDs and MSPs submit a compliance plan). This estimate is based on the hourly cost of personnel that are capable of evaluating both Commission and home country regulations in light of the U.S. persons' foreign branch operations.[66] Further, the condition that

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[65] Although different registrants may choose to staff preparation of the compliance plan with different personnel, Commission staff estimates that, on average, an initial compliance plan could be prepared and submitted with 70 hours of attorney time, as follows: 10 hours for a senior attorney at $830/ hour, 30 hours for a mid-level attorney at $418/hour, and 30 hours for a junior attorney at $345/ hour. To estimate the hourly cost of senior and junior-level attorney time, Commission staff consulted with a law firm that has substantial expertise in advising clients on similar regulations. For the hourly cost of the mid-level attorney, Commission staff reviewed data contained in Securities Industry and Financial Markets Association ("SIFMA"), Report on Management and Professional Earnings in the Securities Industry, Oct. 2011, for New York, and adjusted by a factor for overhead and other benefits, which the Commission has estimated to be 1.3.

[66] Although different registrants may choose to staff preparation of the compliance plan with different personnel, Commission staff estimates that, on average, an initial compliance plan could be prepared and submitted with 42 hours of attorney time, as follows: 6 hours for a senior attorney at $830/ hour, 18 hours for a mid-level attorney at $418/hour, and 18 hours for a junior attorney at $345/ hour. To estimate the hourly cost of senior and junior-level

requires the filing of a compliance plan by a U.S. person is not static – that is, the condition requires that the U.S. person submit, if necessary, a revised plan to account for any material changes since the filing of the initial plan. The Commission estimates that in most cases the cost of submitting a revised plan or plans will be the same as the cost of preparing and submitting the initial plan.

Apart from the direct costs discussed above, the Commission proposes that the exemptive order may result in indirect costs to the public, including the costs of delayed compliance with the Entity-Level Requirements and, to a more limited extent, Transaction-Level Requirements of the Dodd-Frank Act. The Commission proposes that these costs are not, however, susceptible to meaningful quantification due to a lack of data regarding several key variables, including the probability of a significant market disturbance, the impact of that disturbance on the U.S. public and U.S. entities, and the role of entities subject to the order in creating or propagating such a disturbance. Nevertheless, the Commission seeks comment on any such indirect costs, including empirical data from which to quantify the same.

Benefits

The proposed exemptive order provides a benefit in that it would allow affected entities additional time to transition into the new regulatory regime in a more orderly manner, which promotes stability in the markets as that transition occurs. This, in turn, promotes the integrity and efficiency of the swap markets during the transition period. The phased-in process would eliminate the need for affected persons to file individual applications for exemptive relief and/or

attorney time, Commission staff consulted with a law firm that has substantial expertise in advising clients on similar regulations. For the hourly cost of the mid-level attorney, Commission staff reviewed data contained in Securities Industry and Financial Markets Association ("SIFMA"), Report on Management and Professional Earnings in the Securities Industry, Oct. 2011, for New York, and adjusted by a factor for overhead and other benefits, which the Commission has estimated to be 1.3.

no-action relief, and reduces compliance costs related to the exempted transactions that occur during the transition period. Another benefit will be increased international harmonization because the proposed relief provides U.S. and non-U.S. registrants the latitude necessary to develop and modify their compliance plans as the regulatory structure in their home jurisdiction changes, which would promote greater regulatory consistency and coordination with international regulators.

The primary benefit of the proposed compliance plan condition is that it ensures that non-U.S. persons claiming the exemption would be actively and demonstrably considering and planning for compliance with the Entity-Level and Transaction-Level Requirements under the CEA, as may be applicable. Absent such a condition and the requirement, a non-U.S. person could simply claim the exemption, without making a good-faith effort to comply with the Dodd-Frank Act. Further, the requirement that the plan be updated to reflect any material change in the information initially submitted ensures that the planning for compliance is performed in a thoughtful and continuous manner. Finally, the compliance plan also would assist NFA and Commission staff in preparing for the registration of non-U.S. SDs and non-U.S. MSPs as they develop familiarity with the regulatory regimes of foreign jurisdictions.

In addition, the relief would allow foreign branches of U.S. SDs and MSPs to comply only with those requirements as may be required in the jurisdiction where the foreign branch is located for swaps with non-U.S. counterparties, effective concurrently with the date upon which such SDs and MSPs must first apply for registration until 12 months following the publication of the proposed order in the Federal Register. In addition, U.S. SDs and U.S. MSPs may delay compliance with certain entity-level requirements of the CEA (and Commission regulations

promulgated thereunder) from the date upon which SDs and MSPs must apply for registration until January 1, 2013.

The Commission requests comments on all aspects of the consideration of costs and benefits of the proposed exemptive order discussed in this Notice and any alternatives to the same. Commenters should submit estimates of any costs and benefits perceived, together with any supporting empirical evidence available.

Section 15(a) Factors

Protection of market participants and the public

The Commission expects that the exemptive relief provided in this proposed order would protect market participants and the public by facilitating a more orderly transition to the new regulatory regime than might otherwise occur in the absence of this proposed order. In particular, non-U.S. persons would be afforded additional time to come into compliance than would otherwise be the case, which contributes to greater stability and reliability of the swap markets during the transition process.

As discussed above, to the extent that non-U.S. persons submit a plan for compliance regarding Entity-Level and Transaction-Level Requirements, such persons would experience savings during the interim period. Reduced costs may occur as the result of delaying decisions about new systems, operational patterns, legal agreements, or other business arrangements until such time as a non-U.S. person knows what its obligations will be with respect to the cross-border application of Title VII of the Dodd-Frank Act, as well as by reducing the period of time during which ongoing costs associated with Entity-Level Requirements are borne by that entity.

As discussed above, non-U.S. SDs and non-U.S. MSPs taking advantage of this exemption would have to file a compliance plan with NFA and, if necessary, update the same. The costs of the compliance plan are discussed above.

Efficiency, competitiveness, and financial integrity of the markets

The proposed order would promote efficiency by providing additional time in which eligible persons may implement compliance controls and new technologies, and adjust operational patterns and legal agreements, if necessary. This additional time would minimize the risk that certain entities would withdraw from the market in order to avoid taking steps necessary for compliance.

Price discovery

The Commission has not identified any costs or benefits of the proposed order with respect to price discovery.

Risk management

Entity level risk-management and capital requirements could be delayed by operation of the exemptive order, which could weaken risk management. However, such potential risk is limited by the fact that the proposed exemptive order is finite in the additional time it provides eligible persons.

Other public interest considerations

The Commission has not identified any other public interest costs or benefits of the proposed order.

VIII. Proposed Order

The Commission, in order to provide for an orderly implementation of Title VII of the Dodd-Frank Act, and consistent with the determinations set forth above, which are incorporated in the Final Order by reference, hereby grants, pursuant to section 4(c) of the CEA, temporary relief to non-U.S. swap dealers ("SDs") and non-U.S. major swaps participants ("MSPs"), and to U.S. SDs and U.S. MSPs, including their foreign branches, from certain swap provisions of the CEA, subject to the terms and conditions below.[67]

(1) Non-U.S. Person: A non-U.S. person may delay compliance with respect to Entity-Level Requirements (subject to the condition in paragraph (2) below); provided, however, that: (A) such person shall file with National Futures Association ("NFA") an application to register as an SD or MSP, as applicable, pursuant to Commission Regulation part 3 by the date for which such person must apply for registration; (B) within 60 days of filing its application for registration, such person shall file with NFA a compliance plan addressing how it plans to comply, in good faith, with the applicable Entity-Level and Transaction-Level Requirements under the CEA. At a minimum, such plan would provide, for each Entity-Level Requirement and Transaction-Level Requirement, a description of: (i) whether such person would comply with the Entity-Level and Transaction-Level requirements that are in effect or whether they would seek a comparability determination and rely on compliance with one or more of the requirements of the home jurisdiction; and (ii) to the extent that such person would comply

[67] As used in this order, the terms "U.S. person," "Entity-Level Requirements," and "Transaction-Level Requirements" have the same meanings as provided in the Cross-Border Interpretive Guidance.

with one or more of the requirement(s) of the home jurisdiction, a description of such requirement(s). Such persons may modify or alter the compliance plans as appropriate, provided that they submit any such amended plan to NFA.

(2) Notwithstanding paragraph (1), non-U.S. SDs and non-U.S. MSPs shall be required to comply with the SDR reporting and Large Trader Reporting requirements for all swaps with U.S. counterparties, upon its compliance date. However, during the pendency of this Order, non-U.S. SDs and non-U.S. MSPs that are not affiliates or subsidiaries of a U.S. SD may delay compliance with the SDR reporting and Large Trader Reporting requirements for swaps with non-U.S. counterparties.

(3) With respect to Transaction-Level Requirements as applied to transactions with a non-U.S. counterparty, non-U.S. SDs and non-U.S. MSPs may comply with such regulations only as may be required by the home jurisdiction of such registrants; provided, however, that such registrants shall comply with such requirements that are in effect for all swaps with U.S. counterparties.

(4) The relief provided to non-U.S. SDs and non-U.S. MSPs in this order shall be effective concurrently with the date upon which SDs and MSPs must first apply for registration and expire 12 months following the publication of the proposed order in the Federal Register.

(5) U.S Person: A U.S. person shall apply to register as an SD or MSP by the date such registration is required and shall comply with all applicable Entity-Level and Transaction-Level Requirements that are in effect, except as provided: (A) such person may delay compliance with the Entity-Level Requirements until January 1, 2013, except with respect to swap data recordkeeping, SDR reporting, and Large Trader Reporting requirements. Nevertheless, with respect to Transaction-Level Requirements as applied to swaps with a

non-U.S. counterparty, a foreign branch of a U.S. SD or U.S. MSP may comply with those requirements only as may be required by the foreign location of such branches.

(6) A U.S. SD or U.S. MSP whose foreign branch seeks to rely on the exemptive relief with respect to swaps with non-U.S. counterparties must submit a compliance plan (as described in paragraph (1) herein) addressing how it plans to comply, in good faith, with all applicable Transaction-Level Requirements under the CEA upon the expiration of this proposed exemptive order.

(7) Scope of Relief: The temporary relief provided in this Order: (A) shall not affect, with respect to any swap within the scope of this Order, the applicability of any other CEA provision or Commission regulation (i.e., those outside the Entity-Level and Transaction-Level Requirements); (B) shall not limit the applicability of any CEA provision or Commission regulation to any person, entity or transaction except as provided in this Order; (C) shall not affect the applicability of any provision of the CEA or Commission regulation to futures contracts, or options on future contracts; and (D) shall not affect any effective or compliance date set out in any specific Dodd-Frank Act rulemaking by the Commission.

Finally, the Commission may, in its discretion, condition, suspend, terminate, or otherwise modify this Order, as appropriate, on its own motion.

Issued in Washington, DC on June 29 , 2012, by the Commission.

David A. Stawick,

Secretary of the Commission

Appendices to Exemptive Order Regarding Compliance with Certain Swap Regulations — Commission Voting Summary and Statements of Commissioners

NOTE: The following appendices will not appear in the Code of Federal Regulations

Appendix 1- Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

Appendix 2- Statement of Chairman Gary Gensler

I support the exemptive order regarding the effective dates of certain Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provisions.

Today's exemptive order makes five changes to the exemptive order issued on December 19, 2011.

First, the proposed exemptive order extends the sunset date from July 16, 2012, to December 31, 2012.

Second, the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) have now completed the rule further defining the term "swap dealer" and "securities-based swap dealer." Thus, the exemptive order no longer provides relief as it once did until those terms were further defined.

The Commissions are also mandated by the Dodd-Frank Act to further define the term "swap" and "securities-based swap." The staffs are making great progress, and I anticipate the Commissions will take up this final definitions rule in the near term. Until that rule is finalized, the exemptive order appropriately provides relief from the effective dates of certain Dodd-Frank provisions.

Third, in advance of the completion of the definitions rule, market participants requested clarity regarding transacting in agricultural swaps. The exemptive order allows agricultural swaps cleared through a derivatives clearing organization or traded on a designated contract market to be transacted and cleared as any other swap. This is consistent with the agricultural swaps rule the Commission already finalized, which allows farmers, ranchers, packers, processors and other end-users to manage their risk.

Fourth, unregistered trading facilities that offer swaps for trading were required under Dodd-Frank to register as swap execution facilities (SEFs) or designated contract markets (DCM) by July of this year. These facilities include exempt boards of trade, exempt commercial markets and markets excluded from regulation under section 2(d)(2). Given the Commission has yet to finalize rules on SEFs, this order gives these platforms additional time for such a transition.

Fifth, the Commission is providing guidance regarding enforcement of rules that require that certain off-exchange swap transactions only be entered into by eligible contract participants (ECPs). The guidance provides that if a person takes reasonable steps to verify that its counterparty is an ECP, but the counterparty turns out not to be an ECP based on subsequent Commission guidance, absent other material factors, the CFTC will not bring an enforcement action against the person.

Phased Compliance

I support the proposed release on phased compliance for foreign swap dealers. The release provides phased compliance for foreign swap dealers (including overseas affiliates of U.S. swap dealers) of certain requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Such phased compliance would enable market participants to comply with the Dodd-Frank Act in an orderly fashion. It would allow time for the CFTC to receive public comment on interpretive guidance on the cross-border application of the Dodd-Frank Act.

Under the interpretive guidance, in certain circumstances, market participants may comply with certain Dodd-Frank requirements by complying with comparable and comprehensive foreign regulatory requirements, or what we call "substituted compliance." The release on phased compliance also allows time for the CFTC, foreign regulators and market participants to continue to consult and coordinate on regulation of cross-border swaps activity, as well as the appropriate implementation of substituted compliance.

In this period, foreign swap dealers must file a plan demonstrating how they will eventually comply with Dodd-Frank, which in certain circumstances could be through substituted compliance.

The release provides for phased compliance in the following manner:

- Foreign swap dealers would be required to register with the CFTC upon the compliance date of the registration requirement;
- U.S. and foreign swap dealers must comply with transaction-level requirements with U.S. persons, including branches of U.S. persons;
- For transaction-level requirements, foreign swap dealers, as well as overseas

branches of U.S. swap dealers, transacting with non-U.S. persons is phased for one year.

- Entity-level requirements (other than reporting to SDRs and large trader reporting) that might come under substituted compliance is phased for one year; and
- For foreign swap dealers, swaps with U.S. persons, including branches of U.S. persons, would be required to be reported to a SDR or the CFTC.

In addition, U.S. swap dealers' compliance with certain internal business conduct requirements is phased until January 1, 2013.

The release addresses comments from U.S. and international market participants, and I look forward to additional input on the proposal.

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