

Staff No-Action Relief: Application of certain CEA provisions after the general effective date of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.¹ Title VII of the Dodd-Frank Act amends the Commodity Exchange Act (“CEA”)² to establish a comprehensive new regulatory framework for swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commission with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight.³

Section 754 of the Dodd-Frank Act states that, unless otherwise provided, the provisions of subtitle A of title VII of the Dodd-Frank Act⁴ “shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.” Thus, the general effective date for provisions of title VII that do not require a rulemaking was July 16, 2011.

Section 712(d)(1) of the Dodd-Frank Act requires the Commission and the SEC to undertake a joint rulemaking to “further define” certain terms used in title VII, including the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant.”⁵

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

² 7 U.S.C. 1 et seq.

³ Title VII also includes amendments to the federal securities laws to establish a similar regulatory framework for security-based swaps under the authority of the Securities and Exchange Commission (“SEC”).

⁴ All of the amendments to the CEA in title VII are contained in subtitle A. Accordingly, for convenience, references to “title VII” in this Notice shall refer only to subtitle A of title VII.

⁵ Section 712(d)(1) provides: “Notwithstanding any other provision of this title and subsections (b) and (c), the Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors [of the Federal Reserve System], shall further define the terms ‘swap’, ‘security-based swap’, ‘swap dealer’, ‘security-based swap dealer’, ‘major swap participant’, ‘major security-based swap participant’, and ‘security-based swap agreement’ in section 1a(47)(A)(v) of the Commodity Exchange Act (7 U.S.C. 1a(47)(A)(v)) and section 3(a)(78) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(78)).”

Section 721(c) requires the Commission to adopt a rule to “further define” the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant” to prevent evasion of statutory and regulatory obligations.⁶ The Commission and the SEC have jointly issued two notices of proposed rulemaking that address these further definitions.⁷

The Commission’s final rulemakings further defining the terms in sections 712(d) and 721(c) were not expected to be in effect as of July 16, 2011 (i.e., the general effective date set forth in section 754 of the Dodd-Frank Act). Accordingly, on July 14, 2011 the Commission exercised its exemptive authority under CEA section 4(c)⁸ and its authority under section 712(f) of the Dodd-Frank Act by issuing an order entitled “Effective Date for Swap Regulation” (hereinafter the “July 14 Order”).⁹ In so doing, the Commission sought to address concerns that had been raised about the applicability of various regulatory requirements to certain agreements, contracts, and transactions after July 16, 2011, and thereby ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime.

In tailoring the scope of its relief, the Commission grouped the provisions of title VII of the Dodd-Frank Act into four major categories: (1) provisions that require a rulemaking; (2) self-effectuating provisions (i.e., do not require a rulemaking) that reference terms that require further definition; (3) self-effectuating provisions that do not reference terms that require further definition and that repeal provisions of current law; and (4) self-effectuating provisions for which the Commission did not grant exemptive relief.¹⁰ The Commission explained that the July 14 Order did not cover category 1 provisions because under section 754 of the Dodd-Frank Act, provisions requiring a rulemaking become effective “not less than 60 days after publication of the final rule” (but not before July 16, 2011). As such, category 1 provisions were not self-effectuating on July 16 and, therefore, it was unnecessary to provide exemptive relief. Category 4 provisions also were outside the scope of the July 14 Order, and, the Commission explained, therefore went into effect on July 16, 2011.

⁶ Section 721(c) provides: “To include transactions and entities that have been structured to evade this subtitle (or an amendment made by this subtitle), the Commodity Futures Trading Commission shall adopt a rule to further define the terms ‘swap’, ‘swap dealer’, ‘major swap participant’, and ‘eligible contract participant’.”

⁷ See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 75 FR 80174, Dec. 21, 2010 and Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818, May 23, 2011.

⁸ 7 U.S.C. 6(c).

⁹ Effective Date for Swap Regulation, 76 FR 42508 (issued and made effective by the Commission on July 14, 2011; published in the Federal Register on July 19, 2011). Section 712(f) of the Dodd-Frank Act states that “in order to prepare for the effective dates of the provisions of this Act,” including the general effective date set forth in section 754, the Commission may “exempt persons, agreements, contracts, or transactions from provisions of this Act, under the terms contained in this Act.” Section 754 specifies that unless otherwise provided in Title VII, provisions requiring a rulemaking become effective “not less than 60 days after publication of the final rule” (but not before July 16, 2011).

¹⁰ The provisions in each category are set forth in the Appendix to the July 14 Order.

With regard to category 2 provisions, the Commission's July 14 Order provided temporary exemptive relief from the provisions of the Dodd-Frank Act that reference one or more of the terms set forth in sections 712(d) and 721(c), including the terms "swap," "swap dealer," "major swap participant," or "eligible contract participant," to the extent that requirements or portions of such provisions specifically relate to such referenced terms. This exemptive relief was set to expire on the earlier of the effective date of the applicable final rule that further defines the relevant term or December 31, 2011.

For category 3 provisions, the Commission's July 14 Order provided temporary relief, based on part 35 of the Commission's regulations,¹¹ from certain provisions of the CEA that apply, or may apply, to certain agreements, contracts, and transactions in exempt or excluded commodities (and any person offering or entering into such agreements, contracts, and transactions) as a result of the repeal of various CEA exemptions and exclusions as of July 16, 2011. The relief was set to expire on the earlier of December 31, 2011 or the repeal or replacement of part 35.

On December 19, 2011, the Commission issued an Order amending the July 14 Order. The July 14 Order, as amended, provides temporary exemptive relief by: (1) extending the potential latest expiration date of the July 14 Order from December 31, 2011 to July 16, 2012; and (2) adding provisions to account for the repeal and replacement (as of December 31, 2011) of part 35 of the Commission's regulations. In light of these amendments, the Division of Clearing and Risk ("DCR"), the Division of Swap Dealer and Intermediary Oversight ("DSIO") and the Division of Market Oversight ("DMO") (together "Divisions")¹² are issuing this Staff No-Action Relief (which modifies the staff no-action letter that was originally issued July 14, 2011) to continue the relief from certain category 2 provisions of the Dodd-Frank Act and CEA that may not be eligible for the exemptive relief provided by the Commission in its July 14 Order, as amended.

These provisions are:

- Section 724(c) of the Dodd-Frank Act, which enacted new CEA section 4s(l),¹³ and imposes upon swap dealers and major swap participants certain segregation requirements with respect to collateral for uncleared swaps;
- Section 725(a) of the Dodd-Frank Act, to the extent that it amended CEA section 5b(a)¹⁴ to prohibit a derivatives clearing organization ("DCO") from performing

¹¹ See 17 CFR 35.1 et seq.

¹² Subsequent to the issuance of the July 14 Order, the Commission restructured its organization to fulfill its expanded responsibilities under the Dodd-Frank Act. That restructuring, among other things, created DCR and DSIO, and also eliminated the former Division of Clearing & Intermediary Oversight (which had issued the prior staff no-action relief).

¹³ 7 U.S.C. 6s(l).

¹⁴ 7 U.S.C. 7a-1(a)(1)(B).

the functions of a DCO with respect to swaps unless the DCO is registered with the Commission; and

- Section 731 of the Dodd-Frank Act, which enacted new CEA section 4s(k),¹⁵ and provides for the duties and designation of a chief compliance officer for swap dealers and major swap participants.

In order to continue the orderly transition to the new regulatory framework for swaps, and in response to inquiries expressed by market participants regarding the applicability of Dodd-Frank Act provisions during the period between July 16, 2011 and the date(s) that the final definitional rulemakings have been completed, the Divisions will not recommend that the Commission commence an enforcement action against any person for failure to comply with the above referenced provisions during such period. This relief will expire upon the earlier of: (i) the effective date of the applicable final rule further defining the relevant term referenced in the provision; or (ii) July 16, 2012. Further, this relief does not affect any Dodd-Frank Act implementing regulations that the Commission promulgates, including any implementation dates therein. Nor does this relief affect the applicability of any provision of the CEA to futures contracts or options on futures contracts, or to cash markets.

¹⁵ 7 U.S.C. 6s(k).

Nothing in this staff no-action letter in any way limits the Commission's authority with respect to any person, entity or transaction pursuant to CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2), or 13, or the regulations of the Commission promulgated pursuant to such authorities, including regulations pursuant to CEA section 4c(b) proscribing fraud.¹⁶ Further, the no-action position taken herein is taken by the Divisions only and does not bind the Commission or any other Division or Office of the Commission's staff. As with all no-action letters, the Divisions retain the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in their discretion.

Very truly yours,

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Director, DCR

Gary Barnett
Director, DSIO

Richard Shilts
Acting Director, DMO

¹⁶ As described in the Commission's July 14 Order, the Dodd-Frank Act amended the CEA's anti-fraud and anti-manipulation provisions, including CEA section 4b, to cover "swaps." Although, under the July 14 Order, these provisions will not apply to "swaps" under the Dodd-Frank Act because the term "swap" is subject to further definition, nevertheless, they will apply to all transactions other than "swaps" (including, but not limited to, futures contracts, options on futures contracts, transactions with retail customers in foreign currency or other commodities pursuant to CEA section 2(c)(2) (7 U.S.C. 2(c)(2)), and transactions subject to exemptive relief pursuant to part two of the July 14 Order).