



U.S. COMMODITY FUTURES TRADING COMMISSION

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**Office of the
General Counsel**

July 8, 2013

Mr. Dominic Mancini
Deputy and Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Fifth Status Report on “Phase One” of the Commodity Futures Trading
Commission’s Plan for Retrospective Review of Agency Regulations under Executive
Order 13563

Dear Administrator Mancini:

Attached please find the fifth status report on “Phase One” of the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) Plan for Retrospective Review of Agency Regulations in accordance with Executive Order 13563 (“CFTC Plan” or “Plan”). The CFTC, an independent regulatory agency, voluntarily developed the Plan and published it in the Federal Register on June 30, 2011 (76 FR 38328, June 30, 2011) (entitled “Reducing Regulatory Burden: Retrospective Review under E.O. 13563”).

As part of its ongoing efforts to implement the Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”), the CFTC has modernized a significant portion of its regulatory scheme. The attached fifth status report describes both the new regulations and the modifications to existing regulations the Commission issued recently to implement the Dodd-Frank Act.

Please contact me or Assistant General Counsel Maria Godel if you have questions or for further information.

Sincerely,

Jonathan L. Marcus
General Counsel

Fifth Status Report on CFTC Retrospective Review of Agency Regulations¹

The CFTC Plan

The CFTC's Plan consists of two phases. In its Federal Register Release (76 FR 38328, June 30, 2011), the CFTC observed that "[i]n determining the extent to which [the CFTC's] existing regulations have needed to be modified to conform to the Dodd-Frank Act's new requirements, the Commission already has subjected many of its rules to scrutiny." Accordingly, the CFTC stated, "'Phase One' of the Commission's retrospective review of its existing regulations is (and has been) well underway as a significant effort prior to the issuance of Executive Order 13563 and the [February 2, 2011] OIRA Memorandum." 76 FR 38328-38329.

The Commission explained that "after the substantial completion of the promulgation of final rules under the Dodd-Frank rulemaking process, including the revision of various existing Commission regulations to conform to the requirements of the Dodd-Frank legislation" the Commission intends to begin "Phase Two" of its Plan. 76 FR at 38329. The Commission stated that in Phase Two, the CFTC "intends to begin the process of the periodic, retrospective review of the remainder of its regulations (*i.e.*, those regulations that were not reviewed as part of the Dodd-Frank effort)." *Id.*

CFTC Status Report Update (since January 11, 2013 Status Report)

Since the initial issuance of its Plan, the CFTC has examined and revised a number of its existing regulations as part of its implementation of the Dodd-Frank Act. The CFTC also has issued a number of new regulations that reflect new regulatory requirements. In adopting these new regulations, where relevant and appropriate the Commission has examined industry best practices and existing Commission regulatory requirements and practices.

In this status report update, we are providing a summary of all of the Commission final rules issued since the fourth status report was issued in January 2013, in order to provide full regulatory context for the retrospective reviews undertaken during this period.

¹ The CFTC submitted its first status report on Phase One of the CFTC Plan on November 7, 2011. Subsequently, the CFTC submitted its second (June 7, 2012), third (October 16, 2012), and fourth (January 11, 2013) status reports.

--Final Rule Regarding Core Principles and other Requirements for Swap Execution Facilities, 17 CFR Part 37 (78 FR 33476)

The final rules interpreting the core principles and other requirements for swap execution facilities (SEFs), which were statutorily provided for with the passage of the Dodd-Frank Act, apply to the registration and operation of SEFs. These final rules establish the first comprehensive regulatory framework, including registration, operation, and compliance requirements for SEFs. The final rules interpret a broad statutory registration provision that requires any person who operates a facility for the trading of swaps to register as a SEF or as a designated contract market (“DCM”). Also, the final rules interpret the statutory definition of a SEF as a trading platform where multiple participants have the ability to execute swaps by accepting bids and offers made by multiple participants in the platform. Finally, the final rules interpret statutory requirements that to be registered and maintain registration, a SEF must comply with fifteen enumerated core principles and any requirement that the Commission may impose by rule or regulation.

In the final rules, the Commission adopted many of its proposed regulations that each SEF must meet to comply with section 5h of the Commodity Exchange Act (“CEA”), both initially upon registration and on an ongoing basis, and related guidance, and acceptable practices. As a result of the written comments received and dialogue and meetings with the public, the Commission also revised or eliminated a number of regulations that were proposed in the SEF Notice of Proposed Rulemaking (“NPRM”), and, in a number of instances, has codified more flexible guidance and/or acceptable practices in lieu of the proposed regulations. In determining the scope and content of the final SEF regulations, the Commission has carefully considered the costs and benefits for each rule with particular attention to the public comments. Additionally, the CFTC has taken into account the concerns raised by commenters regarding the potential effects of specific rules on SEFs offering different swap contracts and trading systems or platforms and the importance of the statutory differences between SEFs and DCMs.

--Final Rule Regarding the Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement under the Commodity Exchange Act, 17 CFR Parts 37 and 38 (78 FR 33606)

These final rules, which establish a process for a DCM or SEF to make a swap subject to a statutory trade execution requirement, were adopted by the Commission to interpret new requirements promulgated by the Dodd Frank Act. Section 723(a)(3) of the Dodd-Frank Act added section 2(h)(8) of the CEA to require that swap transactions subject to the clearing requirement must be traded on either a DCM or SEF, unless no DCM or SEF “makes the swap available to trade” or the transaction is not subject to the clearing requirement under section 2(h)(7) (*i.e.*, the “trade execution requirement”). The final rules establish a schedule to phase in compliance with the trade execution requirement.

The CFTC received 32 written comments from members of the public on the proposed rulemaking regarding this process, hosted a public roundtable, and participated in several meetings with market participants. As a result of the written comments received and dialogue with market participants, the Commission in this final rule has revised and/or eliminated certain provisions that were proposed in the notice in order to streamline the process.

--Final Rule Regarding Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 17 CFR Part 42 (78 FR 32866)

The CFTC promulgated final rules that group swaps into separate swap categories, establish methodologies for setting appropriate minimum block sizes for block trades and large notional off-facility swaps in each category, and prevent disclosure of the identities of swap counterparties in connection with the real-time public reporting of swap transaction and pricing data.

Section 727 of the Dodd-Frank Act amends the CEA by inserting section 2(a)(13). Section 2(a)(13) sets out several requirements that are relevant to the rules the Commission is adopting. First, this section requires public availability of swap transaction data in such form and at such times as the Commission determines appropriate to enhance price discovery. Section 2(a)(13) further requires the Commission to specify criteria for determining what constitutes a “large notional swap transaction (block trade)” for the purposes of applying time delays for reporting such transactions to the public. Finally, section 2(a)(13) requires the Commission to protect the identities and maintain the anonymity of business transactions and market positions of swap counterparties.

These final rules: (1) specify the criteria for determining swap categories and methodologies for determining the appropriate minimum block sizes for large notional off-facility swaps and block trades; and (2) provide increased protections for the identities of swap counterparties to large swap transactions and certain other commodity swaps.

The final rules set forth in 17 CFR 43.6 specify swap categories within the five asset classes previously established by the real-time reporting final rule: interest rate, credit, equity, foreign exchange, and other commodity. Swaps within each asset class are generally grouped based on common risk and liquidity profiles, as determined by the Commission.

The final rules provide in 17 CFR 43.6 that the CFTC will set appropriate minimum block sizes for the swap categories within each asset class. The rules implement a two-period, phased-in approach. The Commission prescribes appropriate minimum block sizes during an initial period, which will last until registered swap data repositories have collected at least one year of reliable data for each asset class. The CFTC then will analyze and use this data to establish post-initial appropriate minimum block sizes for each swap category using a methodology set forth in the rules. The CFTC will update these post-initial appropriate minimum block sizes no less than once a year.

The final rules establish measures in 17 CFR 43.4 to protect the identities of swap counterparties and maintain the anonymity of their business transactions and market positions in connection with the public dissemination of publicly reportable swap transactions. The rules amend existing Commission regulations to establish “cap sizes” for notional and principal amounts that mask the total size of a swap transaction based upon a methodology set forth in the rules for a given swap category. The term “cap size” is defined as the maximum limit of the principal or notional amount of a swap that is publicly disseminated. The rules also establish limits on the public dissemination of certain publicly reportable swap transactions in the other commodity asset class, which have specific delivery or pricing points.

--[Joint] Final Rules and Guidelines Regarding Identity Theft Red Flags, 17 CFR Part 162 (78 FR 23638)

Section 1088 of the Dodd-Frank Act amended the Fair Credit Reporting Act (“FCRA”) to transfer from the Federal Trade Commission (“FTC”) to the CFTC and the Securities and Exchange Commission (“SEC”) responsibility for identity theft rulemaking and related enforcement for the entities the SEC and CFTC regulate. This transfer of authority required the SEC and CFTC to issue identity theft rules “jointly” with the FTC, the banking agencies, and the National Credit Union Administration (collectively, “Agencies”). The SEC and CFTC staffs interpreted the Dodd-Frank mandate to mean that the two agencies would issue rules that are substantially similar to rules the Agencies adopted pursuant to the FCRA in 2007,² and the final rules reflect this approach. The CFTC, jointly with the SEC, has adopted final rules that require certain entities regulated by the two agencies to adopt and administer identity theft red flags programs. The rules are largely identical to the rules the Agencies adopted in 2007 under FCRA, and include examples and guidance to help entities comply with the rules.

The final rules require entities to establish a written program to detect, prevent, and mitigate identity theft in connection with certain accounts. Each entity’s board of directors or board committee must approve the program, and the entity must update the program periodically.³ The final rules also provide guidelines for entities to consider in establishing and implementing the identity theft program.⁴

² In 2003, Congress amended the FCRA to require the Agencies to jointly adopt rules and guidelines regarding the detection, prevention, and mitigation of identity theft. Under the FCRA mandate, the Agencies jointly adopted identity theft rules in 2007.

³ If the entity does not have a board, a designated senior management employee could approve the program.

⁴ The final rules also require certain entities that issue debit cards or credit cards to take precautionary actions when they receive a request for a new card soon after they receive a

Under the FCRA, identity theft red flags rules apply only to “financial institutions” and “creditors,” terms that have specific meaning under the FCRA.⁵ Accordingly, the CFTC’s final rules apply to CFTC-regulated entities that qualify as financial institutions or creditors under the FCRA. These entities include any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, and major swap participant, including those that regularly extend, renew, or continue credit, among others. Because the 2007 rules adopted by the FTC already applied to CFTC-regulated entities, the entities covered by the final rules *should* already have complied with the FTC’s rules. Notably, the final rules do not contain requirements that were not already in the FTC’s rules, nor do they expand the scope of those rules to include new categories of entities that the FTC’s rules did not already cover.

--Final Rule Regarding the Delegation of Authority to Disclose Confidential Information to a Contract Market, Registered Futures Association or Self-Regulatory Organization, 17 CFR Part 140 (78 FR 21522)

In this final rulemaking, the Commission expanded its previous delegated-authority rule—17 CFR § 140.72—for two reasons. First, the delegated-authority rule implemented CEA section 8a(6), which authorizes the Commission to communicate to the proper committee of any registered entity the “full facts concerning any transaction or market operation” to mitigate market disruptions, ensure the best interests of market participants, and effectuate the purposes of the CEA. Second, this final rulemaking clarifies that the rule applies to SEFs and swap data repositories (SDRs), which were entities added to the list of registered entities set forth in CEA section 1a(40), as amended by the Dodd-Frank Act. As a result, the delegated-authority rule

notification of a change of address for a consumer’s account. The Dodd-Frank Act amended FCRA to require the CFTC and SEC to adopt these “card issuer” rules. The CFTC and SEC expect few, if any, entities under their jurisdiction to be subject to the proposed card issuer rules. The CFTC received no comments on the card issuer rules.

⁵ Under FCRA, a “financial institution” means “a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any person that, directly or indirectly, holds a transaction account . . . belonging to a consumer.” 15 U.S.C. 1681a(t). A “transaction account,” as defined in the Federal Reserve Act, is “a deposit or account on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone transfers, or other similar items for the purpose of making payments or transfers to third persons or others.” 12 U.S.C. 461(b)(1)(C). Under FCRA, a “creditor” is generally an entity that advances or loans money to consumers, but is not an entity that “advances funds on behalf of a person for expenses incidental to a service provided by the creditor to that person.” *See* 15 U.S.C. 1681m(e)(4).

makes clear that certain staff may disclose information to boards of trade designated as contract markets, derivatives clearing organizations, SEFs, SDRs, and certain electronic facilities on which a contract determined by the Commission to be a significant price discovery contract is executed or traded.

--Final Rule Regarding Clearing Exemption for Swaps between Certain Affiliated Entities, 17 CFR Part 50 (78 FR 21750)

This final rulemaking exempts swaps between certain affiliated entities within a corporate group from the CEA's and its implementing regulations' clearing requirement. The CFTC acted within its general exemptive authority under CEA section 4(c)(1), which permits the Commission to exempt any transaction or class of transactions from certain provisions of the CEA to promote responsible economic or financial innovation and fair competition. Reliance on the inter-affiliate clearing exemption is limited to eligible affiliates that comply with specific conditions.

The final rulemaking defines eligible affiliates in two ways. First, eligible affiliates are affiliated because one of the counterparties directly or indirectly holds a majority ownership interest in the other counterparty affiliate. Second, affiliates are eligible if a third-party directly or indirectly holds a majority ownership interest in both affiliates. Under both ownership definitions, eligible affiliates also must have financial statements that are included in the same consolidated financial statements.

The final rulemaking also requires that both affiliated counterparties must elect not to clear the swap; the terms of the swap must be documented in a swap trading relationship document or, if one of the affiliated counterparties is a swap dealer or a major swap participant, follow relevant documentation requirements listed in Commission regulations; the swap must be subject to a centralized risk management program that is reasonably designed to monitor and manage the risks associated with the swap or if one of the affiliated counterparties is a swap dealer or a major swap participant the requirements of the Commission's Internal Business Conduct Rules; and each swap entered into by the affiliated counterparties with unaffiliated counterparties must be cleared.

The requirement to clear swaps entered into with unaffiliated counterparties may be met by: (1) complying with the Commission's clearing requirement; (2) complying with a foreign jurisdiction's clearing mandate that the Commission has determined is comparable and comprehensive but not necessarily identical, to the Commission's clearing requirement; (3) complying with an exception or exemption from the clearing requirement under the CEA or the Commission's regulations; (4) complying with an exception or exemption under a foreign jurisdiction's clearing mandate, provided that the Commission has determined that the foreign jurisdiction's clearing mandate is comparable and comprehensive but not necessarily identical, to the Commission's clearing requirement, and the foreign jurisdiction's exception or exemption is comparable to an exception or exemption under the CEA or the Commission's regulations; or (5) clearing such swaps through a registered derivatives clearing organization or a clearing

organization that is subject to supervision by appropriate government authorities in the home country of the clearing organization and that has been assessed to be in compliance with the Principles for Financial Market Infrastructures—guidelines issued by international, standard-setting organizations.

The final rulemaking requires the reporting counterparty to report to a swap data repository (“SDR”) or, if no SDR is available, to the Commission: confirmation that both affiliated counterparties are electing not to clear the swap and that each of the electing eligible affiliate counterparties satisfies the requirements of the rule; information about how both affiliated counterparties generally meet their financial obligations associated with entering into non-cleared swaps; and, if the affiliated counterparties are issuers of securities registered under the Securities Exchange Act or are required to file certain securities-related reports, additional information.

--Final Rules Regarding Dual and Multiple Associations of Persons Associated with Swap Dealers, Major Swap Participants and other Commission Registrants, 17 CFR Parts 3 and 23 (78 FR 20788)

This final rulemaking incorporates conforming amendments to existing registration provisions of Regulations 3.12(f) and 23.22. Specifically, this final rulemaking addresses situations of dual and multiple associations where an individual conducts swaps-related activity on behalf of more than one Swap Entity (a Swap Dealer (“SD”) and/or a Major Swap Participant (“MSP”)) or conducts swaps activity on behalf of a Swap Entity and is also registered as an associated person (“AP”) of other Commission registrants.

Pursuant to section 731 of the Dodd-Frank Act, the CFTC has implemented a registration process for SDs and MSPs (Final Registration Regulations).⁶ Although APs of other Commission registrants are generally required to register with the Commission, APs of SDs and MSPs are not required to register as such.⁷ Meanwhile, Regulation 3.12(f)(1)(i) permits dual and multiple associations of a person registered as an AP. Regulation 3.12(f)(1)(iii) provides that each sponsor of the AP is required to supervise the AP, and that each sponsor is jointly and

⁶ 77 FR 2613 (Jan. 19, 2012). Concurrently, through a separate Notice and Order, the Commission delegated to the National Futures Association (NFA) the authority to perform the full range of registration functions with respect to SDs and MSPs. 77 FR 2708 (Jan. 19, 2012).

⁷ Section 731 did not direct the Commission to adopt regulations that provide for the registration of APs of SDs and MSPs, and, thus, the Commission has not done so. *See* 77 FR at 2613. However, an SD or MSP is prohibited from permitting any person associated with it to effect or be involved in effecting swaps on its behalf if such person is subject to a statutory disqualification. *See* CEA Section 4s(b)(6) and Regulation 23.22(b).

severally responsible for the AP's activities with respect to any customers common to it and any other sponsor with which the AP is associated. However, because, as noted above, the Commission has not adopted regulations requiring the registration of APs of SDs and MSPs, the provisions of Regulation 3.12(f)(1), which apply to a sponsoring registrant with respect to its APs who are registered or seeking to register as such, do not apply to SDs and MSPs and their APs.⁸

To address this issue, the CFTC adopted amendments to Regulations 3.12(f) and 23.22, by adding §§ 3.12(f)(5) and 23.22(c), respectively, to provide that an AP of an SD or MSP may associate with one or more other SDs, MSPs or other Commission registrants (*i.e.*, futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, commodity pool operators, and leverage transaction merchants), and that each SD, MSP or other Commission registrant with whom the AP is associated is required to supervise the AP and is jointly and severally responsible for the conduct of the AP with respect to customers common to it and any other SD, MSP or other Commission registrant with whom the AP is associated. Thus, by harmonizing current Part 3 requirements with those applicable to SDs and MSPs under Part 23 regulations, this final rulemaking streamlines procedures across the futures and swap markets and prevents evasion of the Commission's reporting requirements and related provisions.

--Final Rule Regarding Proceedings before the Commodity Futures Trading Commission, 17 CFR Parts 10, 12 and 171 (78 FR 12933)

The CFTC's Reparations program is designed to provide an inexpensive, expeditious, fair, and impartial forum to adjudicate customer complaints and resolve disputes between futures customers and commodity futures trading professionals. Pursuant to section 14(b) of the CEA, the Commission "may promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient administration" of the Reparations program. To further the mission of the Reparations program, simplify processes in other administrative proceedings, and clarify the authority of its Judgment Officers, the Commission amended its Rules of Practice, Rules Relating to Reparation Proceedings, and its Rules Relating to Review of National Futures Association ("NFA") Decisions. The rule amendments to Parts 10, 12 and 171 simplify and clarify service, filing and formatting requirements, particularly those requirements applicable to electronic service and filing. Adjudicatory rules that are easier to understand and use will lead to increased efficiencies and lower costs for parties in administrative enforcement proceedings,

⁸ Under Regulation 3.12(f)(1), a person registered as an AP may become an AP of another sponsor if the new sponsor files a CFTC Form 8-R with NFA, and NFA, in turn, is required to notify any existing sponsor of the AP that the person has applied to become associated with another sponsor. This notification puts sponsors on notice that their registered APs will subject them to additional supervisory and joint and several responsibility requirements under Regulation 3.12(f). Employment as an AP of an SD or MSP, however, does not require registration with the Commission and, thus, the filing of a Form 8-R with NFA.

in reparations proceedings, and in the appellate review of NFA decisions. These amendments also make the CFTC's Reparations forum less "legalistic" and more user-friendly for *pro se* parties.

Going Forward

In the near future, the Commission will continue to consider proposed and final rules to implement the Dodd-Frank Act. During this period, Phase One of the Commission's retrospective review Plan will continue, and the Commission will review existing regulations as part of its implementation of the Dodd-Frank Act. The CFTC will continue to review the comments it receives with respect to the Dodd-Frank implementing proposals as well as the conforming amendments that it has proposed.

As the CFTC stated in the Federal Register Release publishing its Plan, "[a]fter the substantial completion of the promulgation of final rules under the Dodd-Frank rulemaking process, including the revision of various existing Commission regulations to conform to the requirements of the Dodd-Frank legislation, the Commission intends to begin the process of the periodic, retrospective review of the remainder of its regulations (*i.e.*, those regulations that were not reviewed as part of the Dodd-Frank effort)." (76 FR 38328 at 38329 (June 30, 2011)). This latter process will constitute "Phase Two" of the Commission's retrospective review.