

CFTC Proposes to Extend July 14 Temporary Exemptive Relief Order

October 28, 2011

Last week the Commodity Futures Trading Commission (“CFTC”) approved the issuance of a Proposed Amendment to a July 14, 2011, Temporary Exemptive Relief Order (the “July 14 Order”) that grants market participants temporary exemptive relief from certain provisions of the Commodity Exchange Act (“CEA”) that otherwise would have taken effect on July 16, 2011, the general effective date of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). The Proposed Amendment would extend the latest expiration date of the July 14 Order from December 31, 2011, to July 16, 2012, and would add provisions to account for the repeal and replacement of Part 35 of the CFTC’s regulations on December 31.

The Federal Register version of the Proposed Amendment is available [here](#). Comments may be submitted in response to the Proposed Amendment via the CFTC’s website, www.cftc.gov, until November 25, 2011.

The July 14 Order

Section 754 of the Dodd-Frank Act states that the provisions of Title VII shall take effect on the later of (1) July 16, 2011, or (2) to the extent a provision requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision. The July 14 Order was intended to address market participants’ concerns about the applicability of various regulatory requirements imposed by the Dodd-Frank Act given that on July 16 the CFTC had not yet commenced issuing final rulemakings to implement the new regulatory regime for swaps.

In promulgating the July 14 Order, the CFTC grouped Title VII’s provisions into four categories: (1) “Category 1” provisions that require a rulemaking and cannot become effective until final rules are issued and effective; (2) “Category 2” provisions that are self-effectuating (*i.e.*, do not require a rulemaking) but reference one or more terms that require further definition (*e.g.*, “swap dealer,” “major swap participant,” and “eligible contract participant”); (3) “Category 3” provisions that repeal CEA exemptions and exclusions pertaining to certain transactions in exempt or excluded commodities (primarily financial and energy commodities, respectively); and (4) “Category 4” provisions, which are other self-effectuating provisions.

The July 14 Order granted exemptive relief with respect to Category 2 and Category 3 provisions. As to the Category 2 provisions, the July 14 Order exempted compliance therewith only to the extent that such provisions specifically relate to the referenced term that is not yet further defined. As drafted, this exemptive relief will remain in effect until the earlier of (1) the effective date of final rules pertaining to the terms that require further definition, or (2) December 31, 2011. As to the Category 3 provisions, the July 14 Order grants relief from the regulatory requirements Title VII imposes on certain agreements, contracts and transactions in exempt or excluded commodities that were previously exempt from regulation pursuant to then-existing Sections 2(d), 2(e), 2(g) and 2(h) of the CEA. As drafted, this exemptive relief

© 2011 Sutherland Asbill & Brennan LLP. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

will remain in effect until the earlier of (1) December 31, 2011 or (2) the repeal of Part 35 of the CFTC's regulation.¹

For additional information about the July 14 Order, please see Sutherland's Legal Alert dated July 15, 2011, available [here](#).

The Proposed Amendment

The Proposed Amendment would extend the July 14 Order's latest expiration date, December 31, 2011, to the earlier of (1) July 16, 2012, or (2) such other compliance date as may be determined by the CFTC. This is intended to address the potential circumstance in which CFTC rules to further define the terms "swap dealer," "major swap participant" and "eligible contract participant" are not yet effective on December 31, 2011. Also, the Proposed Amendment would expressly include any agreement, contract or transaction that fully meets the conditions of Part 35 of the CFTC's regulations as in effect on December 31, 2011. Although the July 14 Order relied on Part 35 of the CFTC's regulations to grant relief for certain transactions in exempt or excluded commodities, it did not apply to agricultural commodity transactions that fully meet the conditions of Part 35 because those transactions, by virtue of their compliance with Part 35's requirements, were already exempt. Existing Part 35 of the CFTC's regulations will be repealed and replaced on December 31, 2011 by a recently issued CFTC final rule that states that "agricultural swaps may be transacted subject to all provisions of the CEA, and any [CFTC] rule, regulation or order thereunder, that is otherwise applicable to swaps." Accordingly, the Proposed Amendment would ensure that agricultural commodity transactions, in addition to transactions in exempt or excluded commodities (which are already addressed by the July 14 Order), remain permissible until (1) July 16, 2012, or (2) such other compliance date as the CFTC may determine.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

| | | |
|---------------------|--------------|--|
| James M. Cain | 202.383.0180 | james.cain@sutherland.com |
| Paul B. Turner | 713.470.6105 | paul.turner@sutherland.com |
| Catherine M. Krupka | 202.383.0248 | catherine.krupka@sutherland.com |
| Warren N. Davis | 202.383.0133 | warren.davis@sutherland.com |
| William H. Hope II | 404.853.8103 | william.hope@sutherland.com |
| Mark D. Sherrill | 202.383.0360 | mark.sherrill@sutherland.com |
| Ann M. Battle | 202.383.0842 | ann.battle@sutherland.com |

¹ The exemptive relief granted to Category 3 provisions relied on Part 35 of the CFTC's regulations. Pursuant to the July 14 Order, a transaction in exempt or excluded commodities is exempt if it substantially complies with Part 35, notwithstanding that: (1) the transaction may be executed on a multilateral transaction execution facility; (2) the transaction may be cleared; (3) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA (prior to the enactment of the Dodd-Frank Act); (4) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (5) no more than one of the parties to the transaction is entering into the transaction in conjunction with its line of business, but is neither an eligible contract participant nor an eligible swap participant, and the transaction was not and is not marketed to the public.

Doyle Campbell
Meltem F. Kodaman
Raymond A. Ramirez

212.389.5073
202.383.0674
202.383.0868

doyle.campbell@sutherland.com
meltem.kodaman@sutherland.com
ray.ramirez@sutherland.com