

MEMO# 25311

July 5, 2011

Joint Letter Regarding CFTC Proposal for Temporary Relief from Self-Effectuating Provisions of Dodd-Frank Act

[25311]

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 50-11
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 25-11
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 27-11
ETF ADVISORY COMMITTEE No. 44-11
EQUITY MARKETS ADVISORY COMMITTEE No. 41-11
FIXED-INCOME ADVISORY COMMITTEE No. 51-11
SEC RULES MEMBERS No. 79-11
SMALL FUNDS MEMBERS No. 47-11 RE: JOINT LETTER REGARDING CFTC PROPOSAL FOR TEMPORARY RELIEF FROM SELF-EFFECTUATING PROVISIONS OF DODD-FRANK ACT

As we previously informed you, the Commodities Futures Trading Commission (“CFTC”) has proposed temporary exemptions and other relief from certain of the Title VII Dodd-Frank Act requirements [\[1\]](#) that become effective on July 16, 2011 (i.e., the general effective date for provisions of Title VII that do not require rulemaking or otherwise specify an effective date). [\[2\]](#) Last week, ICI joined other trade groups in filing a comment letter regarding the CFTC’s proposed order. [\[3\]](#) The Joint Letter seeks clarity on certain ambiguities raised by the proposed order and additional relief to enhance legal certainty and ensure an orderly and coordinated implementation process for the CFTC’s swap rules. The Joint Letter is briefly summarized below.

Background

The CFTC’s proposed order would provide temporary relief to market participants regarding the transition to the new swap regulatory regime. The relief is divided into two parts. The first part of the proposed order would exempt persons or entities from complying with requirements of the Commodity Exchange Act (“CEA”) that would go into effect on July 16 but that reference the terms “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant.” The proposed relief would apply only with respect to those requirements or portions of such provisions that specifically relate to the referenced terms. It would be granted until the effective date of the definitional rulemaking for these terms or

December 31, 2011, whichever is earlier.

The second part of the CFTC's proposed order would temporarily exempt certain transactions in exempt or excluded commodities from various CEA provisions that will or may apply to certain agreements, contracts and transactions as a result of the repeal of certain CEA exemptions and exclusions as of July 16, 2011. The proposed order would temporarily exempt such transactions until the repeal or replacement of certain of the CFTC's regulations or December 31, 2011, whichever is earlier.

The CFTC's proposed order notes that the CFTC does not have authority under the CEA to grant an exemption for certain Dodd-Frank Act provisions that do not require a rulemaking and do not amend the CEA but that do reference terms requiring further definition and are self-effectuating on July 16, 2011. The CFTC staff is considering whether to issue a no-action letter(s) with respect to these provisions.

Joint Letter

The Joint Letter supports the CFTC's efforts to provide certainty and temporary relief to market participants during the implementation of the swaps rules and, in particular, to avoid subjecting market participants to obligations that they would be unable to fulfill until additional rulemaking and an appropriate implementation period has been completed. The Joint Letter seeks clarification regarding the categorization of provisions and the specific relief afforded to those categories. First, it seeks greater specificity as to the various dependencies that will determine the effective dates of the various Dodd-Frank Act provisions. For example, the Joint Letter requests that the CFTC clarify that the effective date of the compliance obligations for provisions involving substantive obligations of persons that are subject to registration under the Dodd-Frank Act be dependent on the effective date of the related registration frameworks.

Second, the Joint Letter recommends that the CFTC clarify that the relief for provisions that reference terms requiring further definition be provided on a provision-by-provision basis instead of expiring on a global sunset date – December 31, 2011. It explains that a global sunset date only postpones uncertainty until the sunset date and is unnecessary to permit the CFTC to rescind any of the proposed relief, as necessary, if the relief is superseded by final rulemaking. Further, the Joint Letter recommends that the CFTC clarify that the proposed relief would encompass those provisions that would provide a private right of action with respect to swaps entered into prior to the effective date of the swap definition.

Third, the Joint Letter requests that the CFTC provide additional relief to market participants by providing legal certainty under the CEA's futures provisions and state gaming and bucket shop laws. The proposed temporary relief is designed to address the ambiguity created by the Dodd-Frank Act's definition of swap, which will become effective on July 16, 2011 and does not include a functional distinction between futures and swaps contracts. While supporting the proposed relief, the Joint Letter explains that the proposed relief should be expanded to more fully resolve potential disputes about what is and what is not a swap or futures contract. In addition, it states that the definitional uncertainties will not disappear on December 31, 2011, the proposed sunset date for the relief, so the CFTC should adopt a permanent exemption, as appropriate, for any swap conducted in accordance with the provisions of the CEA. [\[4\]](#)

Fourth, the Joint Letter recommends that the CFTC provide clarity regarding the effective date of Dodd-Frank Act provisions for retail foreign exchange transactions. It explains that

the obligations to be imposed on prudentially regulated persons engaging in retail foreign exchange transactions are dependent on the definition of eligible contract participant. This term is subject to further CFTC rulemaking and, consequently, related provisions should be postponed until completion of the related rule proposals.

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[Attachment](#)

endnotes

[1] Title VII is the section of the Dodd-Frank Act that establishes a comprehensive framework for regulating over-the-counter derivatives.

[2] See ICI [Memorandum](#) 25286, CFTC and SEC Grant Temporary Relief from Self-Effectuating Provisions of Dodd-Frank Act (June 20, 2011). See also Effective Date for Swap Regulation, CFTC Notice of Proposed Order and Request for Comment, 76 FR 35372, June 17, 2011 (“proposed order”), available at <http://www.cftc.gov/LawRegulation/FederalRegister/ProposedRules/2011-15195.html>.

[3] Letter from American Bankers Association, ABA Securities Association, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, and Securities Industry and Financial Markets Association, to David A. Stawick, Secretary, CFTC, dated July 1, 2011 (“Joint Letter”).

[4] The Joint Letter explains that the permanent relief is warranted because the CFTC has not proposed to address this concern in the context of its proposed rulemaking further defining the term swap.