

**MEMO# 12160**

July 3, 2000

## **CFTC PROPOSED CLARIFICATION OF SWAPS EXEMPTION**

[12160] July 5, 2000 TO: INVESTMENT ADVISERS COMMITTEE No. 18-00 SEC RULES COMMITTEE No. 93-00 RE: CFTC PROPOSED CLARIFICATION OF SWAPS EXEMPTION The Commodity Futures Trading Commission has proposed amendments to Part 35 of its rules under the Commodity Exchange Act (CEA) to expand and clarify the operation of the exemption for swaps transactions.<sup>1</sup> The amendments are intended to provide greater legal certainty to the OTC markets and to reduce systemic risks. According to the proposing release, the amendments respond to changes that have occurred in the OTC derivatives markets. The exemption provides that a contract, agreement or transaction is exempt from all provisions of the CEA, and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to such agreement, is exempt for such activity from all provisions of the CEA (with certain exceptions) if various conditions are met. One condition is that the contract, agreement or transaction must be entered into solely between "eligible participants." "Eligible participant" is defined to include, among other entities, an investment company subject to regulation under the Investment Company Act of 1940, and an employee benefit plan subject to ERISA that has total assets exceeding \$5 million or whose investment decisions are made by an investment adviser subject to regulation under the Investment Advisers Act of 1940. The proposed amendments would, among other things: • delete specific reference to "swaps" within the exemption in order to clarify that an instrument's denomination as a "swap" was not, and is not, an independent condition of the exemption; • delete the requirement that exempt transactions not be fungible or standardized; • make clear that creditworthiness of the counterparty to the transaction is not a condition of the exemption in the case of transactions submitted for clearance or settlement to a clearing organization as provided under CFTC rules; and • provide that transactions entered into in reliance on the swaps exemption are not subject to claims for rescission solely due to a violation of the exemption's requirements. <sup>1</sup> Commodity Futures Trading Commission, Exemption for Bilateral Transactions, Proposed Rulemaking (June 8, 2000), 65 Fed. Reg. 39033 (June 22, 2000). <sup>2</sup> Comments on the proposed amendments must be filed by August 7, 2000. If there are issues that you would like the Institute to consider addressing in a possible comment letter, please contact me at (202) 326-5822 or frances@ici.org by Friday, July 14th. Frances M. Stadler Deputy Senior Counsel Attachment Attachment (in .pdf format)

should not be considered a substitute for, legal advice.