American Bankers Association
ABA Securities Association
Futures Industry Association
Institute of International Bankers
International Swaps and Derivatives Association
Investment Company Institute
Securities Industry and Financial Markets Association

Commodity Exchange Act Sections
4s(k)(1)-(2), 4s(l), 5b(a) and 22(a)(1)(B)

July 1, 2011

By electronic submission to www.cftc.gov

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments on Proposed Order regarding Effective Date for Swap Regulation (76 Fed. Reg. 35,372); Request for No-Action Relief; and Petition for Exemption Pursuant to Section 4(c) of the Commodity Exchange Act

Dear Mr. Stawick:

The undersigned trade associations appreciate the opportunity to submit these comments to the Commodity Futures Trading Commission (the "Commission") on its proposed order (the "Proposed Order") regarding the effective dates of various key provisions under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1] Our members comprise many of the most active participants in the swap markets. We strongly support Dodd-Frank's goals of increasing transparency, controlling systemic risk, and promoting market integrity in those markets.

[1] 76 Fed. Reg. 35,372 (June 17, 2011).

We appreciate the Commission's efforts to implement the requirements of Dodd-Frank in a manner that minimizes market disruption and avoids subjecting market participants to obligations that they would be unable to fulfill until additional rulemaking has been completed and an appropriate implementation period has transpired. As discussed in greater detail below, we are writing to request that the Commission clarify certain ambiguities raised by the Proposed Order and, where appropriate, grant additional relief to enhance legal certainty and ensure an orderly and coordinated implementation process.

BACKGROUND

The Commission proposes, among other measures, to provide exemptive relief from certain obligations to comply with many provisions of Subtitle A of Title VII of Dodd-Frank as of July 16, 2011 (the "Statutory Effective Date"). For purposes of the Proposed Order, the Commission divides Dodd-Frank provisions into four groups:

- Category 1 includes provisions that, in the Commission's view, "require a rulemaking" in order to become effective. Since market participants would not be required to comply with Category 1 provisions until not less than 60 days after the relevant required rulemaking has been promulgated, the Commission has not proposed any additional exemptive relief for those provisions.

- Category 2 includes provisions that, in the Commission's view, are "self-effectuating" but reference terms that require further definition. The Commission has proposed, pursuant to its general exemptive authority under Section 4(c) of the Commodity Exchange Act ("CEA"),[2] to provide an exemption from most of these provisions until the earlier of the effective date of a final rule defining the relevant term(s) or December 31, 2011. While the Commission has such exemptive authority with respect to most Category 2 provisions, as explained further below, certain important and potentially problematic exceptions remain.

- Category 3 includes "self-effectuating" provisions that repeal current provisions of the CEA but do not reference any terms that require further definition, including those current CEA provisions that exempt certain swap transactions from Commission regulation as futures.[3] The repeal of these provisions runs the

[2] Statutory references are to the CEA as amended by Dodd-Frank, unless otherwise specified.

[3] These provisions include existing CEA Sections 2(d)(1) (transactions in excluded commodities between eligible contract participants ("ECPs") that are not traded or executed on an electronic trading facility), 2(d)(2) (principal-to-principal transactions in excluded commodities between certain ECPs that are traded or executed on an electronic trading facility), 2(e) (transactions on an electronic trading facility satisfying the requirements of existing CEA Sections 2(d)(2), 2(g) or 2(h)(3)), 2(g) (transactions subject to individual negotiation between ECPs in commodities other than agricultural commodities and not executed or traded on a trading facility), 2(h)(1)-(2) (transactions in exempt commodities between ECPs that are not entered into on a trading facility), 2(h)(3)-(7) (principal-to-principal transactions in exempt commodities between

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risk of creating uncertainty, and potentially consequential disputes, about the distinction between swaps and futures contracts. To address this uncertainty, the Commission is proposing to adopt an exemption under Section 4(c) that would expand on the current exemption from the CEA in Part 35 of its regulations so that it parallels the broader statutory exemptions that will be repealed on the Statutory Effective Date, subject to the application of specified Commission anti-fraud and anti-manipulation authority and Dodd-Frank provisions and related regulations.

- Category 4 includes provisions that the Commission views as "self-effectuating" and for which it is not proposing to grant relief.

In order to address likely interim and, in some cases, longer-term uncertainties raised by the Proposed Order, we respectfully request that the Commission (i) clarify the categorization of provisions within Categories 1 and 2, (ii) grant relief with respect to those Category 2 provisions outside the scope of its Section 4(c) authority, (iii) confirm that the Commission is granting an exemption pursuant to CEA Section 4(c) with respect to Dodd-Frank's expansion of private rights of action under the CEA to violations involving swaps, (iv) adopt a permanent exemption pursuant to CEA Section 4(c) for any contract, agreement or transaction conducted as a swap transaction in accordance with provisions of the CEA applicable to swaps (as and to the extent effective), subject to such clear exceptions as the Commission may determine appropriate, (v) adopt a permanent exemption pursuant to CEA Section 4(c) for any contract, agreement or transaction proposed to be excluded from the definitions of "swap" and "security-based swap," and (vi) confirm that amendments to CEA Sections 2(c)(2)(B), 2(c)(2)(C) and 2(c)(2)(E) regarding retail forex transactions will not become effective until the relevant required rulemakings have been completed.[4]

DISCUSSION

I. Category 1 Provisions

The Commission has listed as Category 1 provisions those provisions for which Dodd-Frank expressly specifies a Commission rulemaking. We note in this regard that a number of these provisions are dependent not only on the specific Commission

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eligible commercial entities that are executed or traded on an electronic trading facility) and 5d (transactions in commodities having a nearly inexhaustible deliverable supply or no cash market between ECPs that are traded on an electronic board of trade).

[4] Given the complexity of determining the interdependencies of various Dodd-Frank provisions, we also request that the Commission continue to examine, and continue to accept comments relating to, the appropriate categorization of these provisions throughout the implementation process.

rulemaking identified by Dodd-Frank but are also interdependent on related rulemakings as well as, in each case, on key definitions. Accordingly, we recommend that the Commission clarify that these Category 1 provisions are also Category 2 provisions, and, as a result, should additionally be the subject of Section 4(c) relief, to the extent the Commission is authorized to provide such relief.

We further recommend that, either in the Commission's final Order, or in related Commission action prior to July 16, the Commission clarify with greater specificity the various dependencies that will determine the effective dates of the various Category 1 provisions.[5] Many provisions in Categories 1 and 2 will depend on multiple rulemakings, and so should not take effect until all mutually interdependent rulemakings have been completed.[6]

For example, swap dealer registration should not be required until the "swap dealer" definition, cross-border application of Dodd-Frank, treatment of inter-affiliate transactions, and capital and margin requirements have all been finalized. Additionally, many Category 1 provisions involve substantive obligations of persons that are subject to registration requirements under Dodd-Frank. In the case of these provisions, we urge the Commission to clarify, as the SEC has done, that these compliance obligations apply to those persons who are registered, or required to be registered, in the relevant category under Dodd-Frank. As a result, the effective dates of compliance obligations under these provisions are, and should be clarified by the

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[5] See also Letter from Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, to the Commission, dated June 9, 2011 (discussing the timing of swap reporting requirements); Letter from Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, to the Commission, dated June 2, 2011 (regarding the reopening of comment periods and the order of final rulemakings); Letter from the Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association to the Commission, dated May 4, 2011 (regarding the implementation schedule of various Title VII provisions.)

[6] We note that the Securities and Exchange Commission ("SEC") has considered such interdependencies in implementing a process for review of security-based swaps submitted for clearing. According to Section 3C(b)(2)(B) of the Securities Exchange Act of 1934, as amended by Dodd-Frank (the "Exchange Act"), security-based swaps listed for clearing as of the date of enactment of Dodd-Frank will be considered "submitted" to the SEC for review as of the Statutory Effective Date. In order to avoid a situation in which these security-based swaps are deemed to have been submitted for clearing and, therefore, must be reviewed within 90 days even though rules regarding the process for submission and review are not yet in place, the SEC has obtained consent, pursuant to Section 3C(b)(3) of the Exchange Act, from the relevant clearing agencies to extend the 90-day deadline for SEC review of a submission to 90 days after the rule governing the process for submission has been finalized. See Order Pursuant to Sections 15F(b)(6) and 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions and Other Temporary Relief, Together with Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, and Request for Comment, SEC Release No. 34-6678, at n. 40 (June 15, 2011) ("SEC Effective Date Order"). We request that the Commission confirm it will take a consistent approach to CEA Sections 2(h)(2)(B) and (C) in order to avoid further uncertainty regarding the process for submission and review of swaps for mandatory clearing.

Commission as, dependent on the effective date of the related registration frameworks (taking into consideration any appropriate implementation intervals, as determined by the Commission).

Additionally, in limiting the Category 1 provisions to those provisions for which Dodd-Frank expressly specifies a Commission rulemaking, we believe that the Commission has adopted a construction of Section 754 of Dodd-Frank that is narrower than Congress intended or Section 754, by its terms, provides. The Commission has itself recognized the definition of the term "swap" as a Category 1 provision and has clarified that, until the Commission's required rulemaking on the swap definition is effective, the definition is not effective. That definition and others are utilized in nearly all provisions in Dodd-Frank and it is not obvious to the undersigned how provisions that rely on a definition can be effective before the effective date of the definition itself. Put into the vernacular of Dodd-Frank, the definitional rulemaking is no less "required" for the effectiveness of the relevant provision than the Commission's related substantive implementing rulemaking.

In this regard, we note that nothing in Dodd-Frank would limit the Commission's ability to establish effective dates for definitional or other rulemakings that differ for the various statutory provisions that depend on the relevant definitions or other rulemakings. Accordingly, definitions for certain key terms, such as the term "swap," could come into effect with respect to specific provisions of Dodd-Frank at the time when any substantive rulemaking implementing the relevant provision comes into effect.

To the extent the Commission determines, however, to proceed on the basis of its proposed construction of Section 754, it is critical that the Commission utilize the full extent of its authority to provide appropriate implementation relief, as more fully discussed in Parts II and III below.

II. Category 2 Provisions

We support the Commission's proposed relief for Category 2 provisions, which is needed to provide market participants with certainty while Dodd-Frank's definitional and other rules are still pending. However, as the Commission notes, Dodd-Frank's limitations on the Commission's authority under CEA Section 4(c) will prevent it from granting such relief for certain Category 2 provisions.[7] Additionally, it is not clear whether the Commission is proposing to provide an interim exemption from Dodd-Frank's expansion of private rights of action under CEA Section 22(a)(1)(B) to "swaps," as defined under Dodd-Frank. Absent relief, those provisions would take effect on the Statutory Effective Date. Accordingly, we respectfully request that the Commission clarify that it is

[7] See infra notes 12, 13 and 14.

granting relief from provisions that would provide a private right of action with respect to swaps prior to the effective date of the swap definition.

We are also, as a practical matter, concerned that the proposed December 31, 2011 sunset date of the Proposed Order and the related proposed no-action relief for provisions outside the scope of CEA Section 4(c) (the "Draft No-Action Relief")[8] will only lead to the same uncertainty later this year that currently confronts the market. A pre-determined, global sunset date is not necessary for the Commission to periodically re-examine the scope and extent of the Proposed Order and Draft No-Action Relief to ensure that they are appropriately tailored to the Dodd-Frank implementation schedule.[9] Indeed, appropriate tailoring would instead seem to require that the relief be set to expire on a provision-by-provision basis as related substantive requirements of Dodd-Frank are implemented. This is the approach that the SEC has taken in its parallel relief under Subtitle B of Title VII.[10] This approach would not prevent the Commission, as it adopts final rules throughout the rest of 2011, from rescinding the proposed relief for particular provisions as the relief is superseded by those rulemakings. In the meantime, it would allow the market to operate from a presumption of legal certainty, rather than the possible uncertainty that would be created by the proposed sunset date.[11]

A. Provisions Outside the Scope of Section 4(c)

The Commission notes that certain Category 2 provisions may fall outside the scope of the Commission's Section 4(c) exemptive authority, as amended by Dodd-Frank. According to the Commission, those provisions include the designation and duties of the chief compliance officers ("CCOs") for swap dealers and major swap participants ("MSPs"),[12] requirements for swap dealers and MSPs to offer segregation of initial margin for uncleared swaps[13] and the requirement for a person performing the functions of a derivatives clearing organization ("DCO") with respect to swaps to be registered with the Commission.[14]

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[8] Draft Staff No-Action Relief: Application of certain CEA provisions after July 16, 2011, available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/noaction061411.pdf.

[9] See Proposed Order at 35375.

[10] See SEC Effective Date Order, supra note 6.

[11] If the Commission does not adopt this approach, then we urge it, at a minimum, to extend the sunset date to July 21, 2012, consistent with the transitional period specified in Sections 723(c) and 734 of Dodd-Frank.

[12] CEA Section 4s(k)(1)-(2).

[13] CEA Section 4s(l).

[14] CEA Section 5b(a).

We understand that the Commission and its staff are considering whether to issue no-action relief regarding these provisions.[15] However, because compliance with these provisions would be impossible from a practical perspective until further rulemakings have been completed, and, as we note in Part I above, in the case of swap dealers and MSPs, these substantive obligations should apply only to registrants, we believe these provisions should instead be viewed as Category 1 provisions. As such, these provisions would not become effective until the necessary rulemakings and registration frameworks have been finalized.

1. CCO and Segregation Requirements

As a practical matter, compliance with CEA Sections 4s(k)(1)-(2) (CCO designation and duties) and 4s(l) (segregation requirements for uncleared swaps) will not be possible until related Commission rulemakings have been finalized. For instance, to comply with these requirements, market participants must know which entities will be "swap dealers" and "major swap participants" and so have an obligation to appoint a CCO and offer segregation. Market participants must also know which transactions will be viewed as "swaps" subject to Commission regulation and so may give rise to segregation obligations. Until the joint rules further defining these terms are in place,[16] and the cross-border application of Dodd-Frank's swap provisions has been clarified, market participants will not know when they must comply with the CCO rules and initial margin segregation rules for uncleared swaps.

In addition to confusion over the parties and transactions to which these requirements will apply, market participants also lack clarity as to how they can achieve compliance. For instance, until the business conduct requirements applicable to swap dealers and MSPs have been finalized, the duties of a CCO will be entirely unclear, and the individual serving as CCO will not know the obligations with which he or she must ensure compliance. In addition, segregation under Section 4s(l) would require the establishment of accounts in which to segregate collateral with independent third party custodians. The scope of permissible custodians, the types of permitted custody arrangements and the eligible investments for segregated collateral are each, however, subject to further Commission rulemaking.[17] Moreover, the establishment of custodial accounts and the adoption of policies and procedures setting forth the proper collection and maintenance of collateral will require significant expenditures of resources and time; market participants should not be forced to

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[15] See Draft No-Action Relief, supra note 8.

[16] See Dodd-Frank Section 712(d) (requiring the Commission and SEC to further define these terms); Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 75 Fed. Reg. 80154 (Dec. 21, 2010) ("Entity Definitions Proposal"); Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29818 (May 23, 2011) ("Product Definitions Proposal").

[17] See CEA Section 4s(l)(1)(B)(ii).

make such expenditures twice: first, to comply with what Section 4s(l) ***may*** require pending final rules, and, second, to comply with what it ***does*** require once final rules are adopted.

We also believe it is clear that Congress intended Sections 4s(k)(1)-(2) and 4s(l) to apply ***only*** to ***registered*** swap dealers and MSPs (or persons required to be registered as swaps dealers or MSPs). Although neither provision explicitly limits its application to registered swap dealers and MSPs, this omission can hardly have been intentional: both provisions are components of CEA Section 4s, which unequivocally requires registration of swap dealers and MSPs (with no provision for an exemption).[18] Congress also clearly could not have intended for the Commission to be responsible for enforcing compliance with substantive (as opposed to anti-fraud) regulatory requirements by persons not subject to Commission oversight as registrants and likely not even known to the Commission.

We therefore urge the Commission, consistent with the discussion in Part I above, to regard CEA Sections 4s(k)(1)-(2) and 4s(l) as Category 1 provisions, since they "require a rulemaking," including the Commission's rulemakings for the definitions of "swap dealer" and "major swap participant," the definition of "swap," registration of swap dealers and MSPs, business conduct standards (for CCOs) and custodial arrangements (for segregation).[19] We note that the SEC has interpreted the effectiveness of parallel provisions applicable to security-based swap dealers and major security-based swap participants to be delayed pending the effectiveness of related registration rules.[20]

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[18] Section 4s contains several inconsistent references to "swap dealers and major swap participants," on the one hand, and "***registered*** swap dealers and major swap participants," on the other. Compare the reference in Section 4s(b)(4) to "swap dealers and major swap participants" to "persons that are ***registered*** as swap dealers or major swap participants" in Section 4s(d)(1); and the reference in Section 4s(h)(1) to "***registered*** swap dealers and major swap participants," with the reference to "swap dealers and major swap participants" in Section 4s(h)(3), which specifies the business conduct rules to be adopted by the Commission and to be adhered to by "***registered*** swap dealers and major swap participants." This lack of attention to the distinction between registered and unregistered status was likely not considered consequential by Congress because, for example, Dodd-Frank includes no statutory exemptions from registration as a swap dealer.

[19] As we note above, the Commission should regard all Category 2 provisions and Category 1 provisions the same, as under the terms of the Commission's categorization, every Category 2 provision "requires a rulemaking" for one or more of the definitions of "swap," "swap dealer," "major swap participant" and "eligible contract participant," each of which the Commission has proposed to treat as a Category 1 provision. It is also not clear whether a provision, the material terms of which are subject to further rulemaking, would be viewed as enforceable by a court. Even if the Commission does determine to treat all Category 2 provisions as Category 1 provisions as we suggest, it should still provide exemptive relief under Section 4(c), as articulated in the Proposed Order, to the extent it has such authority. This additional exemptive relief would be consistent with the approach adopted by the SEC and would provide market participants with certainty that they will not be subject to these provisions until the necessary rulemakings have been completed.

[20] See SEC Effective Date Order, supra note 6, at n. 199. Although the SEC has granted an exemption from requirements under Section 3E(f) of the Exchange Act for segregation of initial margin for uncleared security-based swaps, rather than interpreting that provision as dependent on registration requirements, it is notable that Exchange Act Section 3E(f) differs from CEA Section 4s(l) in at least two ways: it is not part

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If the Commission does not re-categorize these provisions as we suggest, we request that the Commission adopt a non-enforcement position (or Commission staff provide assurances that it would not recommend that the Commission commence an enforcement action against market participants, as has been proposed in the Draft No-Action Relief) for failure to comply with CEA Sections 4s(k)(1)-(2) and 4s(l) until the effective date of related rulemakings regarding swap dealers and MSPs and issue a corresponding 4(c) order exempting affected persons from private rights of action for failure to perform obligations under CEA provisions for which the Commission or its staff determines to adopt a non-enforcement position.

2. DCO Registration

Although the Commission has an operational regime for registration of DCOs that provide clearing for exchange-traded futures contracts, many of the requirements applicable to DCO activity with respect to swaps, including clearing member participation standards, financial resource and other requirements, are the subject of pending Commission rulemakings. Moreover, pending final rules defining the term "swap," it is not clear which persons may be required to register as DCOs. For instance, until definitional rules are final, market participants will not know with certainty which credit default swaps will constitute "swaps" (and so give rise to DCO registration requirements), which will constitute "security-based swaps" (and so give rise to securities clearing agency registration requirements), and which will constitute "mixed swaps" (and so give rise to both DCO and securities clearing agency registration requirements). Similarly, the scope of the DCO registration requirement for foreign exchange products depends on the pending exemption proposal from the Department of the Treasury.

Accordingly, we believe that the Commission should regard Section 5b(a) as a Category 1 provision due to its dependence on these other rulemakings.[21] In the alternative, we request that the Commission adopt a non-enforcement position (or Commission staff provide assurances that it would not recommend that the Commission commence an enforcement action against market participants, as has been proposed in the Draft No-Action Relief) for failure to comply with CEA Section 5b(a) until the effective date of related rulemakings regarding the definition of "swap" and the regulation of DCOs with respect to swap activities and issue a Section 4(c) order exempting affected persons from private rights of action for failure to perform obligations under this provision.

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of the statutory section addressing registration and regulation of security-based swap dealers and major security-based swap participants (Exchange Act Section 15F), and it is within the scope of the SEC's exemptive authority under Section 36 of the Exchange Act.

[21] See supra Part I.

We also encourage the Commission to exercise its statutory authority to permanently or temporarily exempt from registration as a DCO those foreign clearing organizations whose activities are expected to: (i) be subject to "comprehensive, comparable supervision or regulation . . . by the appropriate government authorities in the home country of such organization;"[22] or (ii) not "have a direct and significant connection with activities in, or effect on, commerce of the United States."[23] Commission action in this regard would be consistent with the provisions of Dodd-Frank Section 752, which instructs the Commission (as well as the SEC and the prudential regulators) to "consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation" of swaps.

We believe the Commission's Part 30 regime governing the offer and sale of foreign futures and options, which is based on mutual recognition and risk disclosure, provides an appropriate model for Commission action. The undersigned associations would be pleased to work with the Commission in implementing a comparable regime for cleared swaps.

Requiring foreign clearing organizations to be registered with the Commission would subject such organizations to duplicative and, perhaps, conflicting regulation. As important, it would impose a substantial burden on clearing member intermediaries. Futures commission merchants ("FCMs") located in the U.S. would have to become members of clearing organizations in foreign jurisdictions, with a concomitant obligation to become registered with, and subject to regulation in, such jurisdictions. Such registration could also have significant tax consequences. Alternatively, the clearing member located in the clearing organization's jurisdiction would elect to be registered with the Commission as an FCM. In either case, the clearing member intermediary would be subject to conflicting regulatory programs.

Requiring foreign derivatives clearing organizations to be registered with the Commission will likely reduce U.S. customer choice in clearing if such organizations, or their clearing members, elect to forego registration.[24]

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[22] CEA Section 5b(h).

[23] CEA Section 2(i).

[24] We appreciate that a foreign derivatives clearing organization, for unrelated reasons, may choose to become registered with the Commission. We would welcome an opportunity to work with the Commission in developing an appropriate regulatory scheme that would permit clearing members of such an organization to hold U.S. customer funds without being required to register with the Commission as FCMs.

B. Private Rights of Action

Section 749 of Dodd-Frank amends CEA Section 22(a)(1)(B) to apply the CEA's private rights of action provisions to violations involving "swaps," as defined by Dodd-Frank and subject to further definition by the Commission. Therefore, under the Commission's proposed categorization, it is clear that Section 749's amendment to CEA Section 22(a)(1)(B) should logically fall under Category 2, and accordingly be the subject of a temporary exemption under CEA Section 4(c).

Notably, treating CEA Section 22(a)(1)(B) as a Category 2 provision would also be consistent with the SEC's approach to the parallel Exchange Act provision, Section 29(b).[25] Not only is such consistency important for the proper functioning of the swap markets, but it is also required by Dodd-Frank, which explicitly states that "[b]efore commencing any rulemaking or *issuing any order* regarding swaps, swap dealers, major swap participants […], the [Commission] should consult and coordinate to the extent possible with the Securities and Exchange Commission . . . for the purposes of assuring regulatory consistency and comparability to the extent possible."[26] Because the provisions of the CEA and the Exchange Act that create private rights of action extend the reach of, and potential liability under, numerous other provisions of those Acts, including provisions that currently rely on future rulemakings to clarify their requirements, a coordinated approach to the extension of such rights will be particularly important.

We note, however, that footnote 13 in the Proposed Order suggests that, notwithstanding the above, Section 749's amendment to CEA Section 22(a)(1)(B) will be treated as a Category 4 provision.[27] On the other hand, with respect to CEA Section 22(a), the Commission's working list of Category 4 provisions ***only*** includes Section 739 of Dodd-Frank's amendments to CEA Sections 22(a)(4)-(5) (legal certainty for swaps); Section 749's conforming amendment to CEA Section 22(a)(1)(B) is omitted.[28] CEA Sections 22(a)(4)-(5) can be distinguished from Section 22(a)(1)(B) because Sections 22(a)(4)-(5) are intended to

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[25] See SEC Effective Date Order, supra note 6, at Part II.J.

[26] Dodd-Frank Section 712(a)(1) (emphasis added).

[27] Footnote 13 of the Proposed Order states:

> In two cases, a Category 4 provision that amends the CEA references a term that requires further definition, but nevertheless, the Commission does not believe that it is appropriate to include the provision in the proposed order. These provisions are new CEA section 5b(g), 7 U.S.C. 7a–1(g) (depository institutions and SEC-registered clearing agencies clearing swaps prior to enactment are "deemed to be registered" as DCOs); **and amended CEA section 22(a), 7 U.S.C. 25(a) (private right of action with respect to swaps)**.

Proposed Order, supra note 1, at 35374 (emphasis added).

[28] See "Category 4: Self-Effectuating Title VII Provisions that Are Not Subject to CFTC Proposed Temporary Relief re: Effective Date," available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cat4requiredrulemakings061411.pdf.

protect swaps entered into before the enactment of Dodd-Frank. Naturally, it makes sense to apply CEA Sections 22(a)(4)-(5) starting on the Statutory Effective Date. In contrast, Dodd-Frank's amendments to CEA Section 22(a)(1)(B) do not appear to be distinguishable from other Category 2 provisions.

Moreover, were the Commission to allow Dodd-Frank's amendments to CEA Section 22(a)(1)(B) to take effect on the Statutory Effective Date, it could, as the SEC notes with respect to Exchange Act 29(b), be "disruptive to the financial markets, create confusion for both financial institutions and their customers, or result in unnecessary and wasteful litigation."[29] This is particularly the case with respect to those CEA provisions for which relief is provided on a no-action, rather than exemptive, basis. Absent an exemption from Section 22(a)(1)(B), market participants could still face the possibility of private litigations for non-compliance with provisions whose meaning and application the Commission itself implicitly acknowledges remain unclear. As the Supreme Court noted in Connally v. General Construction Co.,[30] due process demands that, in order to hold an individual liable for violation of a rule or standard of conduct, that rule or standard must be sufficiently well-articulated.

Accordingly, we strongly urge the Commission to confirm that it is granting a temporary exemption pursuant to CEA Section 4(c) with respect to Dodd-Frank's expansion of private rights of action under the CEA to violations involving swaps and to provide a specific Section 4(c) exemption with respect to the application of CEA Section 22(a)(1)(B) to any provision that is the subject of a Commission or staff no-action position.

III. Category 3 Provisions

The Commission is proposing to temporarily exempt transactions in exempt or excluded commodities (and any person or entity entering into such transactions) that fall within the scope of existing CEA Sections 2(d), 2(e), 2(h), 2(h) and 5d from the CEA (other than specified anti-fraud and anti-manipulation provisions and Dodd-Frank provisions and related regulations) if the transaction otherwise would comply with Part 35 of the Commission's regulations, notwithstanding that such transaction (1) may be executed on a multilateral execution facility, (2) may be cleared, (3) may be offered or entered into with persons falling within the ECP definition as in effect prior to July 16, 2011, (4) may be part of a fungible class of agreements that are standardized as to their material economic terms and/or (5) may be entered into with a party who does not qualify as an ECP or eligible swap participant, so long as such party is entering into the transaction in conjunction with its line of business and the transaction was not and is not marketed to the public.

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[29] See supra note 25.

[30] 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.")

As discussed further below, we believe the scope of the Commission's proposed relief should be expanded or the Commission should subsequently grant additional Section 4(c) exemptive relief to provide legal certainty under the CEA's futures provisions and state gaming and bucket shop law for swap transactions conducted in accordance with Dodd-Frank's swap provisions as well as transactions that the Commission has proposed to exclude from regulation under Dodd-Frank.

A. Relief from Futures Provisions

As an initial matter, we strongly support the Commission's proposal to provide temporary relief for previously exempted and excluded swap transactions. Temporary relief is enormously important because, although Dodd-Frank excludes futures contracts (and futures options) from the CEA's "swap" definition, that exclusion does not establish a functional distinction between the two different instruments.[31] Left unresolved, the ambiguity created by the definitional exclusion runs the risk of creating uncertainty, and potentially consequential disputes, about what is and what is not a swap or a futures contract.

We understand that the Commission's proposed Category 3 relief discussed above is intended to address this uncertainty. However, we note that, as Commission rulemakings under Dodd-Frank become effective, transactions may be conducted as "swaps" in ways that fall outside the scope of existing CEA Sections 2(d), 2(e), 2(h), 2(h) and 5d. For instance, swaps entered into between ECPs on a swap execution facility using FCMs or other agents, instead of on a principal-to-principal basis, would not fall within those provisions. As a result, such swaps could also be the subject of uncertainty and disputes as to their characterization.

Furthermore, these uncertainties will not disappear on December 31, 2011, and the Commission has not proposed to address these issues in the context of its proposed further definition of "swap." Accordingly, we believe that the Commission should adopt a permanent exemption (either as part of its currently contemplated order or prior to expiration of its proposed temporary expansion of Part 35) applicable to any contract, agreement or transaction conducted as a swap transaction in accordance with provisions of the CEA

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[31] H.R. 4173, as engrossed in the House of Representatives, excluded "(i) any contract of sale of a commodity for future delivery (or any option on such a contract) or security futures product traded on or subject to the rules of any board of trade designated as a contract market under section 5 or 5f." See H.R. 4173 (E.H.), Section 3101. The Senate incorporated a similar exclusion in the Bill in March 2010: "any contract of sale of a commodity for future delivery or security futures product traded on or subject to the rules of any board of trade designated as a contract market under section 5 or 5f." See Dodd Bill as amended by the Manager's Amendment of March 23, 2010. H.R. 4173, as engrossed by the Senate, however, changed this language to produce the exclusion clause listed in the final bill: "(i) any contract of sale of a commodity for future delivery (or option on such a contract), leverage contract authorized under section 19, security futures product, or agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i)." See H.R. 4173 (E.A.S.), Section 721 and H.R. 4173 (ENR), Section 721.

applicable to swaps (as and to the extent effective), subject to such clear exceptions as the Commission may determine appropriate.

Following the effective date of the Commission's proposed Category 1 provisions (including, in particular, Dodd-Frank Section 723(c)(3) regarding agricultural swaps) the Commission will also need permanently to expand and make effective the relief it has afforded under Part 32 of its regulations (pursuant to CEA Section 4c(b)) by adopting similar or expanded relief pursuant to CEA Section 4(c).

B. Preemption of State Gaming and Bucket Shop Laws

Adopting a permanent exemption for transactions conducted in accordance with the CEA provisions and rules applicable to swaps would have the important additional effect of ensuring that the CEA and Commission regulations continue to preempt state gaming and bucket shop laws with respect to swaps between ECPs. Because Dodd-Frank repeals the application of CEA Section 12(e)(2)(B) to certain previously exempted swap transactions, market participants are concerned that transactions conducted in accordance with the federal statutory provisions and rules applicable to swaps could potentially be subject to challenges for invalidity under state law prohibitions against gaming and bucket shops that in many cases pre-date even federal regulation of futures contracts. If the Commission extends permanent exemptive relief to such transactions, this risk would be eliminated, since CEA Section 12(e)(2)(B) explicitly states that the CEA supersedes state gaming and bucket shop laws in the case of "an agreement, contract or transaction . . . exempted under section 4(c) of this title . . . ."

C. Transactions Excluded from Regulation under Dodd-Frank

We note that the Commission and the SEC have jointly proposed to exclude a number of transactions from the definitions of "swap" and "security-based swap" because, notwithstanding the broad statutory "swap" definition, it is manifestly clear that Congress did not intend for those transactions to be regarded as swaps.[32] Such transactions include a wide range of important financial and commercial transactions, such as mortgage interest rate protection products, certain employment and lease contracts, and forward contracts, among others. As Congress has recognized in the past, the status of these contracts under Dodd-Frank is not the only area of uncertainty that needs to be addressed. Because many of these transactions provide for cash payments based on observable market prices or the occurrence or nonoccurrence of an event, they arguably might be subject to potential invalidation under state gaming and bucket shop laws, absent Section 4(c) relief.

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[32] See Product Definitions Proposal, supra note 16, at 29821.

D. Request for Additional Category 3 Relief

For the reasons noted above, we respectfully request that the Commission modify its proposed order, or adopt an additional order prior to December 31, 2011, so that the Section 4(c) exemption will also encompass:

a) any agreement, contract, or transaction between ECPs conducted in accordance with the swap provisions of the CEA and Commission rules, as and to the extent effective, and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to such agreements, contracts or transactions, other than any agreement, contract, or transaction previously determined by the Commission to be subject to the provisions of the CEA and Commission rules applicable to futures contracts (or options thereon) in accordance with the CEA;[33] and

b) any agreement, contract, or transaction that the Commission and the SEC have proposed to exclude from the definitions of "swap" and "security-based swap."

We request that the Commission adopt these parts of the Section 4(c) order, or a further Section 4(c) order addressing these issues, on a permanent basis, prior to the expiration of any temporary Commission order.

IV. Category 4 Provisions – Retail Forex Transactions

In the Proposed Order, the Commission has listed Dodd-Frank amendments to the CEA Section 1(a)(18) definition of ECP as a Category 1 provision. Certain of those amendments provide that the ECP definition will, for purposes of the retail forex provisions in CEA Sections 2(c)(2)(B) and 2(c)(2)(C), exclude commodity pools with non-ECP participants.[34] Dodd-Frank also includes related conforming amendments to Sections 2(c)(2)(B)(vi) and 2(c)(2)(C)(vii). The scope of transactions subject to those amendments will remain unclear, of course, until the required rulemaking

[33] As with the Commission's proposed exemption, this exemption would not affect (1) 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 CEA Section 4c(b) proscribing fraud, (2) any Dodd-Frank implementing regulations (and any implementation period contained therein) that the Commission promulgates and applies to the subject transactions, market participants, or markets, (3) any Commission rulemaking authority over agreements, contracts, or transactions that may not depend on the terms subject to further definition under Sections 712(d) or 721(c) of Dodd-Frank or (4) any provisions of Dodd-Frank or the CEA that have become effective prior to the Statutory Effective Date or final regulations already issued.

[34] See CEA Section 1a(18)(A)(iv)(II).

further defining the term ECP has been completed.[35] We therefore request that the Commission confirm that, notwithstanding its general classification of Dodd-Frank's retail forex amendments as Category 4 provisions,[36] it will regard the specific provisions whose scope remains uncertain until the Commission's rule further defining ECP has been finalized as Category 1 provisions.

Dodd-Frank also adds a requirement in CEA Section 2(c)(2)(E) that prudentially regulated persons engaging in retail forex transactions comply with such applicable business conduct and other rules as the relevant federal regulatory agency "shall prescribe." Because this provision explicitly requires rulemakings by those agencies, and compliance with the resulting rules, we believe this provision falls squarely within the plain meaning of CEA Section 754 and therefore should appropriately be treated as a Category 1 provision.[37] In any event, these provisions should also, under the Commission's proposed approach, qualify as Category 2 provisions because they expressly reference the term "eligible contract participant," a term that is subject to the Commission's further definitional rulemaking. CEA Section 2(c)(2)(E) should, therefore, also be covered by the Commission's proposed exemptive relief under CEA Section 4(c).[38]

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[35] See Entity Definitions Proposal, supra note 16.

[36] See CEA Sections 2(c)(2)(B) and 2(c)(2)(C).

[37] In its list of Category 4 provisions, the Commission expressly acknowledges that CEA Section 2(c)(2)(E) "[r]equires rulemakings" by prudential regulators. See supra note 28.

[38] If the Commission declines to adopt either of these categorizations, we request, first, that it issue a non-enforcement position (or Commission staff provide assurances that it would not recommend that the Commission commence an enforcement action) for failure to comply with CEA Section 2(c)(2)(E) until the ECP definitional rule and the federal regulatory agency rules applicable to retail forex transactions have been finalized, and, second, that it issue a corresponding 4(c) order exempting affected persons from private rights of action for failure to perform obligations under CEA Section 2(c)(2)(E).

We appreciate this opportunity to comment on the Proposed Order. If you have any questions regarding this letter, please do not hesitate to contact Edward J. Rosen of Cleary Gottlieb Steen & Hamilton LLP, outside counsel to the undersigned in this matter, at 212-225-2820.

Respectfully submitted,

American Bankers Association
ABA Securities Association
Futures Industry Association
Institute of International Bankers
International Swaps and Derivatives Association
Investment Company Institute
Securities Industry and Financial Markets Association

cc: The Honorable Gary Gensler, Chairman
The Honorable Michael Dunn, Commissioner
The Honorable Jill E. Sommers, Commissioner
The Honorable Bart Chilton, Commissioner
The Honorable Scott D. O'Malia, Commissioner

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Trade Association Signatories

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