

## COMMODITY FUTURES TRADING COMMISSION

### Request for Comment on a Petition To Exempt Certain Over-the-Counter Agricultural Swaps From Certain of the Requirements Imposed by Commission Regulation 35.2, Pursuant to Section 4(c) of the Commodity Exchange Act

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of request for comment.

**SUMMARY:** The Commodity Futures Trading Commission (Commission) is requesting comment on whether to exempt certain over-the-counter (OTC) swaps from certain of the requirements otherwise imposed by Commission Regulation 35.2. Specifically, the Kansas City Board of Trade (KCBT), a designated contract market, and the Kansas City Board of Trade Clearing Corporation (KCBTCC), a registered derivatives clearing organization (DCO), have petitioned for an exemption permitting them to list for clearing and to clear, respectively, wheat calendar swaps. Authority for granting such an exemption is found in Section 4(c) of the Commodity Exchange Act (CEA).

**DATES:** Comments must be received on or before December 14, 2009.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov/http://frwebgate.access.gpo/cgi-bin/leaving>. Follow the instructions for submitting comments.

- *E-mail:* [secretary@cftc.gov](mailto:secretary@cftc.gov). Include "KCBT/KCBTCC Section 4(c) Petition" in the subject line of the message.

- *Fax:* 202-418-5521.

- *Mail:* Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Courier:* Same as mail above.

All comments received will be posted without change to <http://www.CFTC.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Phyllis P. Dietz, Associate Director, 202-418-5449, [pdietz@cftc.gov](mailto:pdietz@cftc.gov), or Eileen A. Donovan, Special Counsel, 202-418-5096, [edonovan@cftc.gov](mailto:edonovan@cftc.gov), Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

### I. The KCBT/KCBTCC Petition

KCBT and KCBTCC (Petitioners) jointly submitted a request to the Commission for an exemptive order under Section 4(c) of the CEA.<sup>1</sup> The order would permit KCBT to list certain wheat calendar swaps for "clearing only" and permit KCBTCC to clear those wheat calendar swaps (cleared-only contracts).<sup>2</sup> The contract size (5,000 bushels), position limits (5,000 contracts for any single month and 6,500 contracts for all months combined), and minimum price fluctuations (\$.0025) of the cleared-only contracts would be the same as those of the KCBT wheat futures contract. However, the cleared-only contracts would be cash-settled, in contrast to KCBT's wheat futures contract, which is physically-settled, and would be listed for any of the 12 calendar months, as compared to the wheat futures contract which is listed only for March, May, July, September, and December.

The OTC wheat calendar swaps would be negotiated between eligible swap participants in the OTC market and then cleared by clearing members acting on behalf of their own customers or the customers of non-clearing member FCMs or non-member FCMs. Previous requests to clear OTC agricultural swaps were limited to clearing member FCMs acting on behalf of their own customers.<sup>3</sup>

In support of their request, Petitioners represent that daily large trader reporting information allows KCBT to monitor for position concentration among non-clearing member and non-member FCMs, and the risk management and financial surveillance procedures of the non-clearing member and non-member FCMs' designated self-regulatory organizations (DSROs) are similar or identical to those employed by KCBT. The Commission requests comment on the impact of permitting the OTC wheat calendar swaps to be

cleared by clearing FCMs on behalf of the customers of non-clearing member FCMs or non-member FCMs, and whether there are any conditions that should be placed upon DSROs or FCMs to facilitate risk management in connection with such transactions in the cleared-only contracts.

Part 35 of the Commission's regulations<sup>4</sup> exempts swap agreements and eligible persons entering into such agreements from most provisions of the CEA.<sup>5</sup> The term "swap agreement" is defined to include, among other types of agreements, a "commodity swap."<sup>6</sup> Part 35 was promulgated pursuant to authority conferred upon the Commission in Section 4(c) of the CEA to exempt certain transactions in order to promote innovation and competition.<sup>7</sup> Various exemptions and exclusions were subsequently added to the CEA by the Commodity Futures Modernization Act of 2000 (CFMA),<sup>8</sup> but none apply to agricultural contracts.<sup>9</sup>

Part 35 requires, among other things, that a swap agreement not be part of a fungible class of agreements that are standardized as to their material economic terms<sup>10</sup> and that the creditworthiness of any party having an interest under the agreement be a material consideration in entering into or negotiating the terms of the agreement.<sup>11</sup> Under the arrangement proposed by Petitioners, a cleared-only contract could be offset by another cleared-only contract. Thus, clearing of the OTC wheat calendar swaps would result in contracts that are fungible with other cleared-only contracts with equivalent terms. In addition, the creditworthiness of the counterparty would not be a consideration. Accordingly, the OTC swaps KCBTCC would clear would not satisfy all of the conditions of Part 35.<sup>12</sup>

<sup>4</sup> 17 CFR Part 35 (Commission regulations are hereinafter cited as "Reg. \_\_\_\_").

<sup>5</sup> Jurisdiction is retained for, among other things, provisions of the CEA proscribing fraud and manipulation. See Reg. 35.2.

<sup>6</sup> Reg. 35.1(b)(1)(i). "Commodity" is defined in Section 1a(4) of the CEA to include a variety of specified agricultural products, "and all other goods and articles, except onions \* \* \* and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."

<sup>7</sup> See 58 FR 5587 (Jan. 22, 1993).

<sup>8</sup> Public Law 106-554, 114 Stat. 2763 (2000).

<sup>9</sup> See, e.g., Sections 2(d), (g), and (h) of the CEA, 7 U.S.C. 2(d), (g), and (h).

<sup>10</sup> Reg. 35.2(b).

<sup>11</sup> Reg. 35.2(c).

<sup>12</sup> The contracts that the KCBT proposes to list for clearing-only would, however, meet the requirements of paragraphs (a) and (d) of Reg. 35.2 in that they would be entered into solely between eligible swap participants and executed OTC.

<sup>1</sup> A copy of the petition is available on the Commission's Web site at <http://www.cftc.gov>.

<sup>2</sup> The Petitioners also requested that the Commission issue an order under Section 4d of the CEA that would permit KCBTCC and futures commission merchants (FCMs) to commingle customer funds used to margin, secure, or guarantee the cleared-only contracts with other funds held in segregated accounts. Although the CEA does not require the Commission to provide public "notice and opportunity for hearing" in connection with the issuance of a 4d order (as is required for an order requested under Section 4(c)), public comments regarding the Petitioners' request for a 4d order are being accepted on the Commission's Web site.

<sup>3</sup> See 74 FR 12316 (Mar. 24, 2009) (order permitting clearing of corn, wheat, and soybean swaps by the Chicago Mercantile Exchange); 73 FR 77015 (Dec. 18, 2008) (order permitting clearing of coffee, sugar, and cocoa swaps by ICE Clear U.S.).

However, Part 35 further permits “any person [to] apply to the Commission for exemption from any of the provisions of the Act \* \* \* for other arrangements or facilities.”<sup>13</sup> Petitioners have requested that the Commission grant an order under Section 4(c) of the CEA that would exempt cleared-only contracts to the same extent as contracts that are exempt pursuant to Part 35 of the Commission’s regulations.

## II. Section 4(c) of the Commodity Exchange Act

Section 4(c)(1) of the CEA empowers the Commission to “promote responsible economic or financial innovation and fair competition” by exempting any transaction or class of transactions from any of the provisions of the CEA (subject to exceptions not relevant here) where the Commission determines that the exemption would be consistent with the public interest.<sup>14</sup> The Commission may grant such an exemption by rule, regulation, or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative.

In enacting Section 4(c), Congress noted that the goal of the provision “is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.”<sup>15</sup> The Petitioners represent that permitting the clearing of the OTC wheat calendar swaps by KCBTCC may benefit the marketplace by providing market participants the ability to combine

flexible negotiation with central counterparty guarantees and capital efficiencies. In addition, Petitioners represent that they expect the cleared-only contracts to provide a risk management tool with unique attributes, *i.e.*, contract months and settlement features, to address price risk and to complement KCBT’s wheat futures and options contracts.

Section 4(c)(2) provides that the Commission may grant an exemption only when it determines that the requirements for which the exemption is being provided should not be applied to the agreements, contracts, or transactions at issue, and the exemption is consistent with the public interest and the purposes of the CEA; that the agreements, contracts, or transactions will be entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory responsibilities under the CEA.<sup>16</sup> Thus, the Commission is requesting comment on whether it should exempt the OTC wheat calendar swaps that are proposed to be cleared by KCBTCC and listed by KCBT, as described above, to the same extent as other contracts that are exempt pursuant to Part 35 of the Commission’s regulations.

The purposes of the CEA include “promot[ing] responsible innovation and fair competition among boards of trade, other markets, and market participants.”<sup>17</sup> It may be consistent with these and the other purposes of the CEA, and with the public interest, for the cleared-only contracts described herein to be exempt as are other contracts under Part 35 of the Commission’s regulations. However, the exception of agricultural commodities

from the exemptions and exclusions provided under the CFMA for OTC transactions may be relevant to the analysis. Accordingly, the Commission is requesting comment as to whether an exemption from the requirements of the CEA should be granted in the context of these transactions.

In light of the above, the Commission also is requesting comment as to whether this exemption would affect its ability to discharge its regulatory responsibilities under the CEA, or with the self-regulatory duties of any designated contract market.

## III. Request for Comment

The Commission requests comment on all aspects of the issues presented by Petitioners’ exemption request.

## IV. Related Matters

### A. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)<sup>18</sup> imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. An exemptive order issued by the Commission would not be associated with a collection of information. Accordingly, the PRA does not apply.

### B. Cost-Benefit Analysis

Section 15(a) of the CEA<sup>19</sup> requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, Section 15(a) simply requires the Commission to “consider the costs and benefits” of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: Protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to

<sup>13</sup> Reg. 35.2(d).

<sup>14</sup> Section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (c)(ii) and (D) of section 2(a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest.

<sup>15</sup> House Conf. Report No. 102–978, 1992 U.S.C.A.N. 3179, 3213.

<sup>16</sup> Section 4(c)(2) of the CEA, 7 U.S.C. 6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that—

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

<sup>17</sup> Section 3(b) of the CEA, 7 U.S.C. 5(b). *See also* Section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1) (purpose of exemptions is “to promote responsible economic or financial innovation and fair competition”).

<sup>18</sup> 44 U.S.C. 3501 *et seq.*

<sup>19</sup> 7 U.S.C. 19(a).

accomplish any of the purposes of the CEA.

The Commission is considering the costs and benefits of an exemptive order in light of the specific provisions of Section 15(a) of the CEA, as follows:

1. *Protection of market participants and the public.* The contracts that are the subject of the exemption request will only be entered into by persons who are "appropriate persons" as set forth in Section 4(c) of the CEA.

2. *Efficiency, competition, and financial integrity.* Extending the exemption granted under Part 35 to the OTC wheat calendar swaps to allow them to be cleared may promote liquidity and transparency in the markets for OTC wheat derivatives as well as wheat futures. Extending the exemption also may promote financial integrity by providing the benefits of clearing to the OTC wheat market.

3. *Price discovery.* Price discovery may be enhanced through market competition.

4. *Sound risk management practices.* Clearing of OTC transactions may foster risk management by the participant counterparties. KCBTCC's risk management practices in clearing these transactions would be subject to the Commission's supervision and oversight.

5. *Other public interest considerations.* The requested exemption may encourage market competition in an agricultural derivatives product without unnecessary regulatory burden.

After considering these factors, the Commission has determined to seek comment on the exemption request as discussed above. The Commission also invites public comment on its application of the cost-benefit provisions of Section 15.

Issued in Washington, DC, on November 6, 2009 by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

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**BILLING CODE P**

## CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC-2009-0093]

### Proposed Extension of Approval of Information Collection; Comment Request—Consumer Opinion Forum

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice.

**SUMMARY:** As required by the Paperwork Reduction Act of 1995 (44 U.S.C.

Chapter 35), the Consumer Product Safety Commission (CPSC or Commission) requests comments on a proposed extension of approval of a collection of information from persons who may voluntarily register and participate in a Consumer Opinion Forum posted on the CPSC Web site, <http://www.cpsc.gov>. The Commission will consider all comments received in response to this notice before requesting an extension of this collection of information from the Office of Management and Budget.

**DATES:** Written comments must be received by the Office of the Secretary not later than January 12, 2010.

**ADDRESSES:** You may submit comments, identified by Docket No. CPSC-2009-0093, by any of the following methods:

Submit electronic comments in the following way:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (e-mail) except through <http://www.regulations.gov>.

Submit written submissions in the following way:

*Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions), preferably in five copies, to:* Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East-West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to <http://www.regulations.gov>. Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** For information about the proposed collection of information call or write Linda L. Glatz, Division of Policy and Planning, Office of Information Technology and Technology Services, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone: (301) 504-7671 or by e-mail to [lglatz@cpsc.gov](mailto:lglatz@cpsc.gov).

**SUPPLEMENTARY INFORMATION:**

## A. Background

The Commission is authorized under section 5(a) of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2054(a), to conduct studies and investigations relating to the causes and prevention of deaths, accidents, injuries, illnesses, other health impairments, and economic losses associated with consumer products. Section 5(b) of the CPSA, 15 U.S.C. 2054(b), further provides that the Commission may conduct research, studies and investigations on the safety of consumer products or test consumer products and develop product safety test methods and testing devices.

In order to better identify and evaluate the risks of product-related incidents, the Commission staff seeks to solicit consumer opinions and perceptions related to consumer product use, on a voluntary basis, through questions posted on the CPSC's Consumer Opinion Forum. Through the forum, consumers will be able to answer questions and provide information regarding their experiences, opinions and/or perceptions on the use or pattern of use of a specific product or type of product. The Consumer Opinion Forum is intended for consumers, 18 years and older, who have access to the Internet and e-mail, who voluntarily register to participate through a participant registration process, and respond to the questions posted in the Consumer Opinion Forum. A link to the Consumer Opinion Forum login page is available on the CPSC Web site, <http://www.cpsc.gov>. Consumers may link directly to the login page for the Consumer Opinion Forum at <https://www.cpsc.gov/cgi-bin/cof/login.aspx>. When new questions are posted on the CPSC Web site, registered participants will be invited via e-mail to respond to various questions, but not more frequently than once every four weeks.

The information collected from the Consumer Opinion Forum will help inform the Commission's evaluation of consumer products and product use by providing insight and information into consumer perceptions and usage patterns. Such information may also assist the Commission in its efforts to support voluntary standards activities, and help the staff identify areas regarding consumer safety issues that need additional research. In addition, based on the information obtained, the staff may be able to provide safety information to the public that is easier to read and is more easily understood by a wider range of consumers. For example, the staff may be able to propose new language or revisions to existing language in warning labels or