

Commission has accredited by order at or before the time the product was tested, even if the order did not include the test methods specified in this notice. If the third party conformity assessment body has not been accredited by a Commission order as a firewalled conformity assessment body, the Commission will not accept a certificate of compliance based on testing performed by the third party conformity assessment body before it is accredited, by Commission order, as a firewalled conformity assessment body;

- For tests conducted using the CPSC Test Method, the test was conducted on or after July 27, 2009. The Commission has chosen July 27, 2009, because it is the date the Commission posted a test method for testing component parts for phthalates on the Commission Web site: (<http://www.cpsc.gov/about/cpsia/CPSC-CH-C1001-09.2.pdf>). The test method was updated on April 1, 2010, to the current method (<http://www.cpsc.gov/about/cpsia/CPSC-CH-C1001-09.3.pdf>). The Commission will accept phthalates content certifications for products tested before January 1, 2012, if the product was tested using either CPSC-CH-C1001-09.2 or CPSC-CH-C1001-09.3. The Commission acknowledges that, on March 3, 2009, it released a test method that involved testing the entire product (<http://www.cpsc.gov/about/cpsia/CPSC-CH-C1001-09.1.pdf>) (“March 2009 test method”). The Commission will not accept phthalates content certifications for products tested using the March 2009 test method (CPSC-CH-C1001-09.1). The Commission considers testing the entire product to be less protective of children because mouthable component parts with high concentrations of phthalates in products with large quantities of nonplasticized parts would be able to pass the test because the total mass of the product would dilute the overall phthalate measure.

- For tests conducted using the Chinese Test Method, the test was conducted on or after June 18, 2008. The Commission has chosen June 18, 2008, because that is the date that the Chinese Test Method was issued.

- The third party conformity assessment body’s application for accreditation is accepted by CPSC by the mandatory effective date, as established by the Commission;

- The accreditation scope in the application for accreditation expressly includes one or both of the acceptable test methods identified earlier in part I of this document;

- The test results show compliance with the applicable current standards; and
- The third party conformity assessment body’s accreditation and inclusion of one or both of the test methods (identified earlier in part I of this document) in its scope remain in effect through the effective date for mandatory third party testing and manufacturer certification for the subject products’ respective standards.

Dated: July 29, 2011.

**Alberta E. Mills,**

*Acting Secretary, Consumer Product Safety Commission.*

[FR Doc. 2011-19678 Filed 8-9-11; 8:45 am]

**BILLING CODE 6355-01-P**

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 35

**RIN 3038-AD21**

#### Agricultural Swaps

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is charged with proposing rules to implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). The Dodd-Frank Act provides that swaps in an agricultural commodity (as defined by the Commission) are prohibited unless entered into pursuant to a rule, regulation or order of the Commission adopted pursuant to certain provisions of the Commodity Exchange Act (“CEA” or “Act”). On February 3, 2011, the Commission requested comment on a set of proposed rules that would, among other things, implement regulations whereby swaps in agricultural commodities may transact subject to the same rules as all other swaps. The proposed rules for swaps in an agricultural commodity would repeal and replace the Commission’s current regulations concerning the exemption of swap agreements. After reviewing the comments submitted in response to the proposed rules, the Commission has determined to issue these final rules for swaps in an agricultural commodity in the form as originally proposed. The February 3, 2011, proposed rules also included provisions that would substantially amend the Commission’s regulations regarding commodity option

transactions. However, in this final rule the Commission is only issuing the rules for swaps in an agricultural commodity. The proposed rules for commodity option transactions will be addressed at a later date.

**DATES:** *Effective Date*—December 31, 2011.

**FOR FURTHER INFORMATION CONTACT:**

Donald Heitman, Senior Special Counsel, (202) 418-5041, [dheitman@cftc.gov](mailto:dheitman@cftc.gov), or Ryne Miller, Attorney Advisor, (202) 418-5921, [rmiller@cftc.gov](mailto:rmiller@cftc.gov), Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:**

#### I. Introduction

##### A. Dodd-Frank Act

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>1</sup> Title VII of the Dodd-Frank Act<sup>2</sup> amended the CEA<sup>3</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission’s rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight.

##### B. Proposed Agricultural Swaps Rules

Section 723(c)(3) of the Dodd-Frank Act provides that swaps in an agricultural commodity (as defined by the Commission)<sup>4</sup> are prohibited unless entered into pursuant to a rule, regulation or order of the Commission adopted pursuant to CEA section 4(c).

<sup>1</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

<sup>2</sup> Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010.”

<sup>3</sup> 7 U.S.C. 1 *et seq.*

<sup>4</sup> As discussed below, in accordance with the mandate of the Dodd-Frank Act, the Commission recently promulgated a final rule defining the term “agricultural commodity.” See 76 FR 41048, July 13, 2011.

Further, section 733 of the Dodd-Frank Act, new CEA section 5h(b)(2), provides that a swap execution facility (“SEF”) may not list for trading or confirm the execution of any swap in an agricultural commodity (as defined by the Commission) except pursuant to a rule or regulation of the Commission allowing the swap under such terms and conditions as the Commission shall prescribe.

As a result of the Dodd-Frank changes, on February 3, 2011, the Commission published in the **Federal Register** a notice of proposed rulemaking to withdraw current part 35 of the Commission’s regulations<sup>5</sup> and replace it with a new part 35 that would essentially permit the transaction of swaps in an agricultural commodity (or, “agricultural swaps”)<sup>6</sup> subject to the same rules and regulations applicable to any other swap (the “NPRM”).<sup>7</sup> The NPRM was preceded by an advanced notice of proposed rulemaking wherein the Commission sought general comment on the agricultural swaps provisions in the Dodd-Frank Act (the “ANPRM”).<sup>8</sup> The NPRM included an overview and summary of the comments received on the ANPRM, which generally favored treating agricultural swaps the same as every other swap.

### C. Proposed Commodity Options Rules

Because the Dodd-Frank Act statutory definition of a swap includes commodity options (other than options on futures),<sup>9</sup> the NPRM also included proposed provisions that would substantially amend the Commission’s regulations regarding commodity option transactions. At this time, the Commission is only finalizing the rules for agricultural swaps in amended part

35 of the Commission’s regulations. The proposed rules for commodity options—including proposed amendments to parts 3, 32, and 33—will be addressed at a later date.

### D. Final Agricultural Swaps Rules

Accordingly, the preamble to this final rule reviews the statutory and regulatory framework governing agricultural swaps, as discussed in the NPRM,<sup>10</sup> provides an overview and summary of the comments received on the agricultural swaps rules proposed in the NPRM, and includes an explanation of the final rules issued herein. This preamble also includes a discussion of CEA section 4(c), the primary statutory authority for the agricultural swaps rules,<sup>11</sup> and a detailed discussion of the costs and benefits of the final rule, along with a review of those comments specifically addressing the costs and benefits of the proposed agricultural swaps rules.

## II. Agricultural Swaps Background

### A. Pre Dodd-Frank Swaps Provisions

As explained in the NPRM, beginning in 2000, bilateral swaps between certain sophisticated counterparties were generally exempted from the Commission’s jurisdiction pursuant to pre Dodd-Frank CEA section 2(g),<sup>12</sup> which was added to the CEA by the Commodity Futures Modernization Act of 2000 (“CFMA”).<sup>13</sup> However, pre Dodd-Frank section 2(g) specifically excluded an “agreement, contract, or transaction” in an “agricultural commodity” from the CFMA swaps exemption.<sup>14</sup> While the term

“agricultural commodity” is not specifically defined in the Act, the Commission recently adopted a final rule defining “agricultural commodity.”<sup>15</sup>

The effect of the pre Dodd-Frank CEA sections explicitly excluding agricultural commodities from the CFMA statutory swaps exemptions and exclusions was that swaps involving exempt and excluded commodities were allowed to transact largely outside of the Commission’s jurisdiction or oversight, while swaps in agricultural commodities had to continue to rely on authority found in pre-CFMA law. As discussed in greater detail below, that pre-CFMA authority was found in part 35 of the Commission’s regulations.

Part 35 originally provided a broad exemption for certain swap agreements and applied to swaps in all commodities.<sup>16</sup> After the CFMA amendments to the CEA, which statutorily exempted swaps on “exempt” and “excluded” commodities from virtually all of the Commission’s jurisdiction, part 35 remained relevant only for agricultural swaps. With the exception of three outstanding exemptive orders related to cleared agricultural basis and calendar swaps<sup>17</sup>

between eligible contract participants from the Commission’s jurisdiction. Pre Dodd-Frank CEA section 2(d)(1) excluded any such bilateral “agreement, contract, or transaction” in excluded commodities from Commission jurisdiction, while pre Dodd-Frank CEA section 2(h)(1) created a similar exemption for a “contract, agreement or transaction” in exempt commodities. Both sections 2(d)(1) and 2(h)(1) were also among the CEA provisions repealed by the Dodd-Frank Act, effective July 16, 2011.

<sup>15</sup> See Agricultural Commodity Definition, 76 FR 41048, July 13, 2011.

<sup>16</sup> Part 35 provides eligible swap participants (as defined in § 35.1(b)(2)) with a general exemption from the CEA for a swap that is not part of a fungible class of agreements that are standardized as to their material economic terms, where the creditworthiness of each counterparty is a material consideration in entering into or determining the terms of the swap, and the swap is not entered into and traded on or through a multilateral transaction execution facility. See § 35.2.

<sup>17</sup> Part 35, at § 35.2(d), also provides that “any person may apply to the Commission for exemption from any of the provisions of the Act (except 2(a)(1)(B) [liability of principal for act of agent]) for other arrangements or facilities, on such terms and conditions as the Commission deems appropriate, including but not limited to, the applicability of other regulatory regimes.” See 17 CFR 35.2(d). The Commission has granted three such exemptions, which have in each instance been styled as exemptive orders pursuant to CEA section 4(c). See

1. Order (1) Pursuant to Section 4(c) of the Commodity Exchange Act (a) Permitting Eligible Swap Participants To Submit for Clearing and ICE Clear U.S., Inc. and Futures Commission Merchants To Clear Certain Over-The-Counter Agricultural Swaps and (b) Determining Certain Floor Brokers and Traders To Be Eligible Swap Participants; and (2) Pursuant to Section 4(d) of the Commodity Exchange Act, Permitting Certain Customer Positions in the Foregoing Swaps and Associated

<sup>5</sup> 17 CFR part 35.

<sup>6</sup> When this notice refers to “agricultural swaps,” it is referring to swaps in an agricultural commodity, as identified in section 723(c)(3) of the Dodd-Frank Act.

<sup>7</sup> See Commodity Options and Agricultural Swaps, 76 FR 6095, February 3, 2011.

<sup>8</sup> See Agricultural Swaps, 75 FR 59666, Sept. 28, 2010.

<sup>9</sup> Section 721 of the Dodd-Frank Act adds new section 1a(47) to the CEA, defining “swap” to include not only “any agreement, contract, or transaction commonly known as,” among other things, “an agricultural swap” or “a commodity swap,” but also “[an] option of any kind that is for the purchase or sale, or based on the value, of \* \* \* commodities \* \* \*.” However, the NPRM notes that the new swap definition did not include options on futures, options on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof, that is subject to the Securities Act of 1933 and the Securities Exchange Act of 1934 (see new CEA section 1a(47)(B)(iii)), and foreign currency options entered into on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (see new CEA section 1a(47)(B)(iv)).

<sup>10</sup> See NPRM, 76 FR at 6096 at 6096–97, Feb. 3, 2011.

<sup>11</sup> In addition to 4(c), these final rules are also being adopted pursuant to the Commission’s authority under CEA section 4c(b)—just as original part 35 was adopted pursuant to both CEA section 4(c) and 4c(b).

<sup>12</sup> Pre Dodd-Frank section 2(g) provided:

No provision of this Act (other than section 5a (to the extent provided in section 5a(g)), 5b, 5d, or 12(e)(2)) shall apply to or govern any agreement, contract, or transaction in a commodity other than an agricultural commodity if the agreement, contract, or transaction is—

(1) Entered into only between persons that are eligible contract participants at the time they enter into the agreement, contract, or transaction;

(2) Subject to individual negotiation by the parties; and

(3) Not executed or traded on a trading facility.

Pre Dodd-Frank CEA section 2(g). Note that section 2(g) is among those sections of the CEA that were repealed by the Dodd-Frank Act, effective July 16, 2011.

<sup>13</sup> Pre Dodd-Frank CEA section 2(g) was added to the CEA as section 105(b) of the CFMA, enacted as Appendix E to Public Law 106–554.

<sup>14</sup> Notably, pre Dodd-Frank CEA section 2(g) is not the only statutory provision added by the CFMA that excluded or exempted bilateral swaps

(which orders exempt certain swaps transactions from part 35's non-fungibility and counterparty creditworthiness requirements), part 35 is the sole existing authority under which market participants may transact agricultural swaps that are not options.<sup>18</sup>

### B. Dodd-Frank Swaps Provisions

#### i. Non-Agricultural Swaps

As explained in the introduction, the Dodd-Frank Act amended the CEA to remove the CFMA swaps exemptions and exclusions and to create a new regulatory regime for swaps. Under the CEA, as amended by the Dodd-Frank Act, only eligible contract participants ("ECPs")<sup>19</sup> may enter into a swap, unless such swap is entered into on a designated contract market ("DCM"),<sup>20</sup> in which case any person may enter into the swap.<sup>21</sup>

New CEA section 2(h), as added by section 723(a)(3) of the Dodd-Frank Act, establishes a clearing requirement for swaps. Under that subsection, the Commission would determine, based on factors listed in the statute, whether a swap, or a group, category, type, or class of swaps, should be required to be

cleared. A swap that is required to be cleared must be executed on a DCM or a SEF,<sup>22</sup> if a DCM or SEF makes the swap available for trading. Swaps that are not required to be cleared may be executed bilaterally.

Section 731 of the Dodd-Frank Act adds a new section 4s to the CEA that provides for the registration and regulation of swap dealers and major swap participants.<sup>23</sup> The new requirements for swap dealers and major swap participants include, in part, capital and margin requirements, business conduct standards, and reporting, recordkeeping, and documentation requirements.

Section 737 of the Dodd-Frank Act amends current CEA section 4a regarding position limits. Under the Dodd-Frank provisions and amended CEA section 4a, the Commission is directed to establish position limits as appropriate for futures and options traded on or subject to the rules of a designated contract market, and swaps that are economically equivalent to such futures and exchange-traded options for both exempt and agricultural commodities.

#### ii. Agricultural Swaps

Notwithstanding the new swaps regime in the Dodd-Frank Act, section 723(c)(3) of Dodd-Frank prohibits swaps in an "agricultural commodity" (as defined by the Commission)<sup>24</sup> unless the swap is entered into pursuant to an exemption granted under CEA section 4(c). The requirements of section 4(c) are discussed in greater detail, below.<sup>25</sup>

Dodd-Frank section 723(c)(3)(B) includes a "grandfather" clause providing that any rule, regulation, or order regarding agricultural swaps that was issued pursuant to the Commission's section 4(c) exemptive authority, and that was in effect on the date of enactment of the Dodd-Frank Act, would continue to be permitted

under such terms and conditions as the Commission may prescribe. Such rules, regulations or orders include part 35 with respect to agricultural swaps and the agricultural basis and calendar swaps noted above.

In addition to the provisions in section 723(c)(3), section 733 of the Dodd-Frank Act, new CEA section 5h(b), provides that a SEF may not list for trading or confirm the execution of any swap in an agricultural commodity (as defined by the Commission) except pursuant to a rule or regulation of the Commission allowing the swap under such terms and conditions as the Commission shall prescribe.

### III. Agricultural Swaps Proposal in the NPRM

The NPRM proposed repealing existing part 35 in its entirety and replacing it with the following:

#### PART 35—SWAPS IN AN AGRICULTURAL COMMODITY (AGRICULTURAL SWAPS)

##### § 35.1 Agricultural swaps, generally.

(a) Any person or group of persons may offer to enter into, enter into, confirm the execution of, maintain a position in, or otherwise conduct activity related to, any transaction in interstate commerce that is a swap in an agricultural commodity subject to all provisions of the Act, including any Commission rule, regulation, or order thereunder, otherwise applicable to any other swap; and

(b) In addition to paragraph (a) of this section, any transaction in interstate commerce that is a swap in an agricultural commodity may be transacted on a swap execution facility, designated contract market, or otherwise in accordance with all provisions of the Act, including any Commission rule, regulation, or order thereunder, applicable to any other swap eligible to be transacted on a swap execution facility, designated contract market, or otherwise.

In the NPRM, the Commission requested specific input on the following questions related to the agricultural swaps proposal:

1. Generally, would the proposed rulemaking provide an appropriate regulatory framework for the transacting of agricultural swaps?

2. Does the proposal for new part 35 appropriately address all outstanding issues as they relate to the transaction of swaps in an agricultural commodity?

3. By limiting participation in agricultural swaps that are transacted outside of a DCM to persons that meet the CEA definition of an eligible

Property To Be Commingled With Other Property Held in Segregated Accounts, 73 FR 77015, Dec. 18, 2008;

2. Order (1) Pursuant to Section 4(c) of the Commodity Exchange Act, Permitting the Chicago Mercantile Exchange to Clear Certain Over-the-Counter Agricultural Swaps and (2) Pursuant to Section 4d of the Commodity Exchange Act, Permitting Customer Positions in Such Cleared-Only Contracts and Associated Funds To Be Commingled With Other Positions and Funds Held in Customer Segregated Accounts, 74 FR 12316, Mar. 24, 2009; and

3. Order (1) Pursuant to Section 4(c) of the Commodity Exchange Act, Permitting the Kansas City Board of Trade Clearing Corporation To Clear Over-the-Counter Wheat Calendar Swaps and (2) Pursuant to Section 4d of the Commodity Exchange Act, Permitting Customer Positions in Such Cleared-Only Swaps and Associated Funds To Be Commingled With Other Positions and Funds Held in Customer Segregated Accounts, 75 FR 34983, June 21, 2010.

<sup>18</sup> Issues related to options on agricultural commodities were reviewed in detail in the NPRM, 76 FR 6095 at 6097–98, Feb. 3, 2011. As noted above, final rules regarding the post Dodd-Frank treatment of commodity options will be addressed by the Commission at a later date.

<sup>19</sup> "Eligible contract participant" is defined in CEA section 1a(18). A proposal to further define the term is also currently pending. See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 FR 80174, Dec. 21, 2010 (joint rulemaking with Securities and Exchange Commission ("SEC")). The comment period closed February 22, 2011.

<sup>20</sup> A designated contract market is a board of trade designated as a contract market under CEA section 5.

<sup>21</sup> See new CEA section 2(e) as added by section 723(a)(2) of the Dodd-Frank Act.

<sup>22</sup> The requirements for SEFs are set forth in new CEA section 5h.

<sup>23</sup> "Swap dealer" is defined in new CEA section 1a(49), as added by section 721(a)(21) of the Dodd-Frank Act. "Major swap participant" is defined in new CEA section 1a(33), as added by section 721(a)(16) of the Dodd-Frank Act.

<sup>24</sup> See the recently adopted definition of agricultural commodity at 76 FR 41048, July 13, 2011.

<sup>25</sup> Generally speaking, section 4(c) provides that, in order to grant an exemption, the Commission must determine that: (1) The exemption would be consistent with the public interest and the purposes of the CEA; (2) any agreement, contract, or transaction affected by the exemption would be entered into by "appropriate persons" as defined in section 4(c); and (3) any agreement, contract, or transaction affected by the exemption would not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.

contract participant and permitting non-ECPs to enter into a swap on a DCM, has the proposed rulemaking satisfied the requirements of CEA section 4(c)(3), which requires that any agreements, contracts or transactions exempted under this provision should be limited to those “entered into solely between appropriate persons?”

4. Do the proposals omit or fail to appropriately consider any other areas of concern regarding agricultural swaps?

#### IV. Summary of Comments

##### A. General Overview

Thirty-one formal comment letters substantively addressed the NPRM,<sup>26</sup> representing a broad range of interests, including agricultural producers, merchants, swap dealers, commodity funds, futures industry organizations, academics/think tanks, a US government agency, and private individuals. The comments addressing the agricultural swaps proposal came from Gaviion Group, LLC (“Gaviion”), a feed manufacturer; the Agricultural Commodity Swaps Working Group (a/k/a “Commodity Options and Agricultural Swaps Working Group”), which is comprised of financial institutions, including Barclays Capital, Citigroup, Credit Suisse Securities (USA) LLC, JPMorgan Chase & Co., Morgan Stanley, and Wells Fargo & Company, that provide risk management and investment products to agricultural end-users; Chris Barnard, an individual; Dairy Farmers of America (“DFA”); the Independent Bakers Association, which represents over 200 small to medium sized, mostly family owned wholesale bakeries and allied industry trades; NextEra Energy Resources, LLC, owners of electricity generation assets; CME Group, Inc. (“CME”); Futures Industry

<sup>26</sup>The public comment file for the NPRM is available at: <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=968>. This summary references each of the comments that substantively addressed the NPRM, whether submitted in response to the original NPRM or in response to the re-opened comment period. See *Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 76 FR 25274, May 4, 2011 (this is the Commission’s **Federal Register** release that extended the comment deadline for multiple Dodd-Frank rulemakings to June 3, 2011). Only those comments submitted in response to 76 FR 25274 that specifically addressed the agricultural swaps proposal are included in this summary. In addition, the comment file for the NPRM also included multiple comments that did not directly address the Commodity Options and Agricultural Swaps NPRM (for example, see the comments from Majed El Zein, B.J. D’Milli, Maryknoll Office for Global Concerns, Maryknoll Fathers and Brothers, J.C. Hoyt, and Jon Pike). Of these, several addressed other proposed Commission rulemakings, and those comments are being considered in conjunction with the other rulemakings.

Association and International Swaps and Derivatives Association (“FIA & ISDA”); National Grain and Feed Association (“NGFA”); Professor Michael Greenberger, University of Maryland School of Law, referencing his comment letter submitted for the agricultural commodity definition notice of proposed rulemaking; National Council of Farmer Cooperatives (“NCFC”); Commodity Markets Council (“CMC”), a trade association made up of U.S. futures exchanges and commercial end-users of futures and derivatives markets; and National Milk Producers Federation (“NMPF”). In addition, the NPRM received several comments that only addressed options,<sup>27</sup> and several comments requesting exemptive relief for the transition period following the effective date of the Dodd-Frank Act.<sup>28</sup>

##### B. Comments on the Agricultural Swaps Proposal

Just as with the comments received on the ANPRM, the vast majority of commenters who expressed an opinion on the topic supported treating agricultural swaps under the same regulatory scheme as other categories of swaps, as the Commission proposed. The following statements are representative of this sentiment:

The use of agricultural swaps has been constrained relative to other swaps by virtue of being subject to CFTC regulatory requirements, while other swaps have been exempted from CFTC oversight. As the Commission’s proposed rule notes, the passage of the Dodd-Frank Act changes the regulatory structure for all swaps and institutes a number of safeguards, including the limitation that only eligible contract participants (ECPs) may engage in swaps

<sup>27</sup> See, e.g., comments from The Financial Services Roundtable, which represents 100 of the largest integrated financial services companies in the United States; Edison Electric Institute and Electric Power Supply Association; Federal Energy Regulatory Commission; American Public Gas Association (“APGA”), which represents publicly-owned natural gas distribution systems; Air Transport Association of America (“ATA”); Amcot, an association of U.S. cotton marketing cooperatives; Coalition of Physical Energy Companies, an association of businesses that produce, process, and merchandize energy commodities at retail and wholesale levels; National Rural Electric Cooperative Association, American Public Power Association, and Large Public Power Council, all representing U.S. not-for-profit consumer-owned electric utilities in a joint letter; Working Group of Commercial Energy Firms, a group of unspecified firms which indicated that their primary business is the physical delivery of energy commodities to industrial, commercial and residential consumers; and Hess Corporation.

<sup>28</sup> See, e.g., comments filed on the Commission’s **Federal register** release that re-opened the comment period (76 FR 25274, May 4, 2011) from the Commodity Options and Agricultural Swaps Working Group; INTL FCStone Inc.; NEW Cooperative Inc.; NGFA; NCFC; and Innovative Ag Services Co.

unless entered into on a designated contract market; mandatory clearing requirements for swaps; and registration, reporting, business standards, and capital and margining requirements for swap dealers and major swap participants. The NGFA believes that these safeguards provide more-than-ample protection in the swaps marketplace for both agricultural and non-agricultural swaps and that there is no compelling reason to place additional burdens on agricultural swaps.” NGFA letter at 2.

In our view, applying a single, uniform set of rules to all swaps will advance the public interests that Dodd-Frank and the CEA are designed to promote and benefit the users of these products.” CME letter at 1.

We are pleased that, if enacted, the [NPRM] would revise existing CFTC regulations in order to treat agricultural commodity swaps as “swaps,” subjecting them to the same regulatory regime as all other commodity swap transactions under Dodd-Frank.” FIA & ISDA letter at 2.

NCFC believes the changes and amendments in the proposed rule will provide an appropriate regulatory framework for the transacting of agricultural swaps. NCFC letter at 1.

Similar sentiments were expressed by Gaviion, Amcot, CMC, the Commodity Options and Agricultural Swaps Working Group, and Barnard.

One comment, from the National Milk Producers Foundation (NMPF), suggested that the Commission use its CEA section 4(c) authority to provide a broad-based exemption exclusively tailored for agricultural swaps transactions by certain agricultural end-users to transact outside of much of the Dodd-Frank swaps regime. The Commission believes that the logical place to address end-user concerns, such as those raised by the NMPF comment, is in the participant definitions and the end-user rules, which are yet to be finalized. The NMPF comment letter has been included in the record for those rulemakings. Addressing the concerns of end-users generally, rather than creating special rules for agricultural end-users, is consistent with the Commission’s proposed approach to treat agricultural swaps the same as all other swaps.

##### C. Comments Regarding Whether the Agricultural Swaps Proposal Satisfies the CEA Section 4(c) Requirements

Commenters generally expressed the opinion that the proposal to allow agricultural swaps to be treated the same as other commodity swaps meets the requirements of Section 4(c)(2) of the CEA.<sup>29</sup> CME noted the robust

<sup>29</sup>CEA section 4(c)(2) requires the CFTC to determine, prior to granting a 4(c) exemption, that (1) Such exemption is consistent with the public interest and purposes of the CEA, and (2) the exempted agreement, contract, or transaction will

regulatory regime introduced for the trading of all swaps under the Dodd-Frank Act and stated that “permitting agricultural swaps to transact under the same terms and conditions as other swaps will provide greater certainty and stability to the agricultural swaps market and will advance many of Dodd-Frank’s goals, including increased pre-trade price transparency, and the reduction of systemic risk through the use of central counterparty clearinghouses.” Commenters also believed that the proposal would satisfy the Section 4(c)(2) requirement that transactions subject to this exemption would only be entered into by appropriate persons. In this regard, CME noted that “Under Dodd-Frank, only market participants that qualify as eligible contract participants (‘ECPs’) may trade swaps in the OTC market. All other market participants must trade swaps on, or subject to the rules of, a DCM, where they will have the full protections that all DCM users enjoy \* \* \* these provisions should limit participation in agricultural swaps to appropriate persons.” Similar sentiments were expressed by Gavilon, FIA & ISDA, NCFE, and the Commodity Options and Agricultural Swaps Working Group.

One commenter (Professor Greenberger) was generally opposed to the trading of agricultural swaps under the same conditions as other physical commodity swaps. This commenter expressed the belief that speculative investment in agricultural derivatives “is incontrovertibly a main driving force of rising commodity prices and price volatility,” and that such price instability harms agricultural producers. He believes that Congress specifically intended for the CFTC to provide special protections to agricultural producers in trading swaps and that the rulemaking runs counter to Congress’ intent by providing for equal treatment of agricultural swaps and all other commodity swaps. However, Professor Greenberger did not offer an alternative approach, and the Commission does not find further reasoning to support treating agricultural swaps in a manner different than any other swap.

#### D. Comments on the Treatment of Commodity Options

As noted above, the options issues raised in the NPRM received multiple substantive comments, which will be

be entered into solely by appropriate persons and will not have a material adverse effect on the ability of the Commission or a contract market to discharge its regulatory or self-regulatory duties under the CEA.

addressed by the Commission at a later date.

#### E. Issues Outside the Scope of the Proposed Rulemaking

Although recognizing that their comments were outside the scope of the subject rulemaking, several commenters requested that the Commission provide clarity regarding the treatment of certain types of swap participants and transactions within the overall regulatory scheme for swaps. In this regard, several commenters requested that the Commission clarify that agricultural producer cooperatives that enter into swaps with their own members or third parties in the course of marketing their members’ agricultural products should be considered to be end-users for purposes of the Dodd-Frank clearing exception, and further that the Commission should clarify that producer cooperatives are excluded from the definitions of swap dealer and major swap participant (*see*, for example, comments from NGFA, NCFE, and DFA). The Commission has issued proposed rules regarding: (1) The end-user exception to mandatory clearing of swaps pursuant to § 723 of the Dodd-Frank Act;<sup>30</sup> and (2) further definition of certain terms regarding market participants, including the terms “swap dealer” and “major swap participant,” pursuant to § 712(d) of the Dodd-Frank Act.<sup>31</sup> Accordingly, the Commission is considering those comments in the context of drafting the end-user exception and the participant definitions rules.

CMC also requested that the Commission clarify that certain types of transactions (embedded options in forward contracts<sup>32</sup> and book-outs<sup>33</sup>) fall within the definition of an excluded forward contract rather than the definition of a swap. Similarly, Amcot requested clarification that “equity

<sup>30</sup> See End-User Exception to Mandatory Clearing of Swaps, 75 FR 80747, Dec. 23, 2010 (comment period closed June 3, 2011).

<sup>31</sup> See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 75 FR 80174, Dec. 21, 2010 (joint rulemaking with Securities and Exchange Commission (“SEC”), comment period closed June 3, 2011).

<sup>32</sup> See Characteristics Distinguishing Cash and Forward Contracts and “Trade” Options, Interpretive Statement of the Commission’s General Counsel, 50 FR 39656, Sept. 30, 1985, regarding the differences between forward contracts and options.

<sup>33</sup> A book-out is a separate, subsequent agreement whereby two commercial parties to a forward contract, who find themselves in a delivery chain or circle at the same delivery point, can agree to settle (or “book-out”) their delivery obligations by exchanging a net payment. See Statutory Interpretation Regarding Forward Transactions, 55 FR 39188, Sept. 25, 1990.

trades” or “options to redeem” cotton from the U.S. Department of Agriculture’s Commodity Credit Corporation marketing loan program would not be considered swaps. The Working Group of Commercial Energy Firms provided several examples of “transactions that energy market participants do not historically consider options, but nonetheless contain an element of optionality \* \* \* and should not be regulated as swaps.” These include daily natural gas calls, wholesale full requirements contracts for power, tolling agreements in organized wholesale electricity markets, physical daily heat rate call options, and capacity contracts. APGA and ATA requested that the Commission clarify that certain variable amount delivery contracts that are common in the energy sector be excluded from the definition of a swap. Where applicable, those comments are being considered by the Commission, jointly with the SEC, in considering further definitions of terms regarding certain products, including the term “swap,” pursuant to § 712(d) of the Dodd-Frank Act.<sup>34</sup>

## V. Explanation of the Final Rules for Swaps in an Agricultural Commodity

### A. Introduction

After considering the complete record in this matter, including all comments on both the ANPRM and NPRM, the Commission is adopting the revisions to part 35 as proposed. Broadly speaking, the new rules will implement regulations whereby swaps in agricultural commodities may transact subject to the same rules as all other swaps.

Specifically, the final rules adopted herein will operate to withdraw existing part 35 of the Commission’s regulations—thus withdrawing the provisions originally adopted in 1993 to provide legal certainty for the bilateral swaps market by largely exempting bilateral swaps meeting the part 35 conditions from CEA regulation.<sup>35</sup> In its place, pursuant to the exemptive authority in CEA section 4(c) and the Commission’s authority in CEA section 4c(b),<sup>36</sup> these final rules adopt a new

<sup>34</sup> See footnote 31, above.

<sup>35</sup> “[Part 35 \* \* \*] exempt[s] swap agreements (as defined herein) meeting specified criteria from regulation under the Commodity Exchange Act (the “Act”). This rule was proposed pursuant to authority recently granted the Commission, a purpose of which is to give the Commission a means of improving the legal certainty of the market for swaps agreements.” 58 FR 5587, Jan. 22, 1993.

<sup>36</sup> Recall that original part 35 was adopted pursuant to CEA sections 4(c) and 4c(b). The Commission is clarifying now that the new part 35, which will apply only to swaps in agricultural

part 35 to provide the primary authority for transacting swaps in an agricultural commodity as authorized by sections 723(c)(3) and 733 of the Dodd-Frank Act.

#### B. Withdrawal of Current Part 35

In enacting the Futures Trading Practices Act of 1992 (the “1992 Act”),<sup>37</sup> Congress added section 4(c) to the CEA and authorized the Commission, by rule, regulation, or order, to exempt any agreement, contract or transaction, or class thereof, from the exchange-trading requirement of CEA section 4(a), or (with minor exceptions not relevant here) from any other provision of the Act.<sup>38</sup> Pursuant to its new authority in section 4(c),<sup>39</sup> the Commission proposed in 1992<sup>40</sup> and adopted in 1993<sup>41</sup> part 35 of the Commission’s regulations, generally exempting certain swap agreements from the CEA. As explained above, part 35 originally applied to all commodities—that is, exempt, excluded, and agricultural commodities. However, certain amendments to the CEA made by the CFMA had the effect of making part 35 relevant only for swaps in agricultural commodities.

The Dodd-Frank Act amends, repeals, or replaces many CEA sections added by the CFMA (including repealing the statutory exemptions for swaps in excluded and exempt commodities at pre Dodd-Frank CEA sections 2(d), 2(g), and 2(h)). To avoid any uncertainty as to whether the Commission will allow bilateral swaps in non-agricultural commodities to revert to reliance on existing part 35 for exemption from the CEA and the Dodd-Frank amendments, the Commission is now repealing and replacing current part 35 in its entirety.

#### C. New Part 35

The provisions of new part 35, as proposed in the NPRM and as adopted herein, generally provide that agricultural swaps may be transacted subject to all provisions of the CEA, and any Commission rule, regulation or order thereunder, that is otherwise applicable to swaps. New part 35 also

commodities, is similarly adopted pursuant to the authorities found in CEA sections 4(c) and 4c(b).

<sup>37</sup> Public Law 102–546 (Oct. 28, 1992).

<sup>38</sup> While section 4(c) was amended by the Dodd-Frank Act, for the purposes of this rulemaking its function and effect have not changed. See 4(c) discussion, below.

<sup>39</sup> As noted above, original part 35 was also adopted pursuant to the Commission’s authority in CEA section 4c(b).

<sup>40</sup> See the original proposal at 57 FR 53627, Nov. 12, 1992. See also 57 FR 58423, Dec. 28, 1992, extending the comment period for an additional fourteen days.

<sup>41</sup> 58 FR 5587, Jan. 22, 1993.

clarifies that by issuing a rule allowing agricultural swaps to transact subject to the laws and rules applicable to all other swaps, the Commission is allowing agricultural swaps to transact on DCMs, SEFs, or otherwise to the same extent that all other swaps are allowed to trade on DCMs, SEFs, or otherwise.

#### D. Effective Date

The repeal of original part 35 and the rules in new part 35 shall become effective on December 31, 2011. This will coincide with the expiration of the 4(c) transition relief promulgated by the Commission to accommodate the phasing in of the Dodd-Frank swaps rules.<sup>42</sup>

#### VI. Findings Pursuant to Section 4(c)

As noted above, section 723(c)(3)(A) of the Dodd-Frank Act prohibits swaps in an agricultural commodity. However, section 723(c)(3)(B) of the Dodd-Frank Act explicitly provides that the Commission may permit swaps in an agricultural commodity pursuant to CEA section 4(c), the Commission’s general exemptive authority, “under such terms and conditions as the Commission shall prescribe.” Accordingly, the amendments to part 35 adopted herein are adopted pursuant to CEA section 4(c), as amended by the Dodd-Frank Act.<sup>43</sup>

Section 4(c)(1) of the CEA authorizes the CFTC to exempt any transaction or class of transactions from any of the provisions of the CEA (subject to exceptions not relevant here) in order to “promote responsible economic or financial innovation and fair competition.”<sup>44</sup> The Commission may

<sup>42</sup> See Effective Date for Swap Regulation, 76 FR 42508, July 19, 2011 (effective July 14, 2011). As noted by the Commission in the transition relief, existing part 35 remains available until part 35 is repealed or replaced.

<sup>43</sup> In addition to 4(c), these final rules are also being adopted pursuant to the Commission’s authority under CEA section 4c(b)—just as original part 35 was adopted pursuant to both CEA section 4(c) and 4c(b).

<sup>44</sup> New section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1), as amended by the Dodd-Frank Act, 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 5 of this Act) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (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

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>45</sup>

In order to analyze the effect of permitting agricultural swaps to trade under the same terms and conditions as other swaps, it is appropriate to examine some of the major components of the Dodd-Frank Act that apply to swaps generally. The Commission originally performed this review in the NPRM, and repeats the analysis here for convenient reference: Section 727 of the Dodd-Frank Act adds, among other things, a new CEA section 2(a)(13) that mandates that swap transaction and pricing data be made available to the public. Section 723(a)(3) of the Dodd-Frank Act adds a new CEA section 2(h) that provides that the Commission shall determine which swaps are subject to a mandatory clearing requirement. New CEA section 2(h) also provides that swaps that are required to be cleared must be executed on a DCM or SEF, if a DCM or SEF makes the swap available for trading. As noted above, part 35, as it is currently written, does not permit clearing of agricultural swaps and does not contemplate any reporting of agricultural swaps data.

Permitting agricultural swaps to trade under the same terms and conditions as other swaps should provide greater certainty and stability to existing and

retroactively or prospectively, or both, from any of the requirements of subsection (a), or from any other provision of this Act (except subparagraphs (C)(ii) and (D) of section 2(a)(1), except that—

(A) Unless the Commission is expressly authorized by any provision described in this subparagraph to grant exemptions, with respect to amendments made by subtitle A of the Wall Street Transparency and Accountability Act of 2010—

(i) With respect to—

(I) Paragraphs (2), (3), (4), (5), and (7), paragraph (18)(A)(vii)(III), paragraphs (23), (24), (31), (32), (38), (39), (41), (42), (46), (47), (48), and (49) of section 1a, and sections 2(a)(13), (2)(c)(1)(D), 4a(a), 4a(b), 4d(c), 4d(d), 4r, 4s, 5b(a), 5b(b), 5(d), 5(g), 5(h), 5b(c), 5b(i), 8e, and 21; and

(II) Section 206(e) of the Gramm-Leach-Bliley Act (Pub. L. 106–102; 15 U.S.C. 78c note); and

(ii) In sections 721(c) and 742 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

(B) 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) if the Commissions determine that the exemption would be consistent with the public interest.

<sup>45</sup> House Conf. Report No. 102–978, 1992 U.S.C.A.N. 3179, 3213.

emerging markets so that financial innovation and market development can proceed in an effective and competitive manner. Treating all swaps, including agricultural swaps, in a consistent manner should provide greater certainty to markets. The Dodd-Frank Act reporting and trade execution requirements should lead to greater market and price transparency, which may improve market competition, innovation, and development. Centralized clearing of agricultural swaps by robustly regulated central clearinghouses should reduce systemic risk and provide greater certainty and stability to markets by reducing counterparty risk.

As noted above, the NPRM requested comment on whether swaps in agricultural commodities should be subject to the same legal requirements as swaps in other commodities. The overwhelming majority of those comments, as summarized above, did in fact support treating agricultural swaps the same as every other swap. Further, no commenter offered a persuasive argument for treating agricultural swaps differently than other swaps under the Dodd-Frank Act. Thus, no commenter demonstrated that the proposal to treat agricultural swaps the same as every other swap failed to “promote responsible economic or financial innovation and fair competition.”

Section 4(c)(2) of the CEA provides that the Commission may grant exemptions only when it determines that the requirements for which an exemption is being provided should not be applied to the agreements, contracts or transactions at issue; that 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 Commission-regulated markets to discharge their regulatory or self-regulatory responsibilities under the CEA.<sup>46</sup>

<sup>46</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

The purposes of the CEA include “ensur[ing] the financial integrity of all transactions subject to this Act and the avoidance of systemic risk” and “promot[ing] responsible innovation and fair competition among boards of trade, other markets and market participants.”<sup>47</sup> As noted above, centralized clearing of agricultural swaps (which is not permitted under the current part 35 rules) should reduce systemic risk. Also, allowing agricultural swaps to trade under the general swaps rules contained in the Dodd-Frank Act would allow agricultural swaps to trade on SEFs and DCMs (which is prohibited under the current part 35 rules) which may result in increased innovation and competition in the agricultural swaps market. Reducing systemic risk and increasing innovation and competition by permitting agricultural swaps to trade under the same terms and conditions as other swaps would be consistent with the purposes listed above, the general purposes of the CEA, and the public interest.

As noted above, the Dodd-Frank Act contains substantial new clearing and trade execution requirements for swaps. The clearing requirement is designed, among other things, to reduce the counterparty risk of a swap, and therefore to reduce systemic risk. The swap reporting and trade execution requirements should provide additional market information to the Commission, the markets, and the public. Thus, treating agricultural swaps in the same manner as other swaps may enhance the ability of the Commission or Commission-regulated markets to discharge their regulatory or self-regulatory responsibilities under the CEA.

Section 4(c)(3) of the CEA includes within the term “appropriate persons” a number of specified categories of persons, and also in subparagraph (K) thereof “such other persons that the Commission determines to be appropriate in light of \* \* \* the applicability of appropriate regulatory protections.” Section 723(a)(2) of the Dodd-Frank Act adds, among other things, a new CEA section 2(e) that provides: “It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a [DCM].”<sup>48</sup> In light of the comprehensive new regulatory

derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

<sup>47</sup> CEA section 3(b), 7 U.S.C. 5(b).

<sup>48</sup> New CEA section 2(e), (7 U.S.C. 2(e)).

scheme for swaps and the enhancements made to the already robust regulatory system concerning DCMs<sup>49</sup> that are contained in the Dodd-Frank Act, the limitation on participation to eligible contract participants outside of a DCM, and the ability of others to enter into a swap on a DCM, should limit participation to appropriate persons. The Commission requested comment on its analysis of both section 4(c)(2) and section 4(c)(3). As noted in the comment summary above, those commenters addressing the question supported the Commission’s analysis under both 4(c)(2) and 4(c)(3).

## VII. Related Matters

### A. Cost Benefit Considerations

Section 15(a) of the CEA<sup>50</sup> requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of the rulemaking or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the Commission “consider” the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may 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 rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.

#### i. Summary of Proposed Requirements

The proposed rule will replace the swaps exemption in part 35 with new rules providing, in general, that agricultural swaps would be treated the same as all other swaps. As the Commission continues to propose and adopt rules implementing the Dodd-Frank Act, any costs associated with adhering to the substantive requirements that govern swaps generally are and will be addressed in

<sup>49</sup> See, e.g., new CEA section 5(d) (7 U.S.C. 7(d)) as added by section 735(b) of the Dodd-Frank Act and amended CEA section 5c (7 U.S.C. 7a–2) as amended by section 745 of the Dodd-Frank Act.

<sup>50</sup> 7 U.S.C. 19(a).

those various rulemakings applying to swaps generally. For purposes of this discussion, the Commission appropriately considers the costs and benefits of treating agricultural swaps as all other swaps are treated—as compared to adopting or maintaining a separate regulatory regime for agricultural swaps. The Commission has determined that treating agricultural swaps the same as other swaps would result in lower regulatory cost to both market participants and the Commission, because such treatment would eliminate dual regulatory regimes with which market participants must comply and the Commission must oversee.

## ii. Market and Public Concern

(1) Protection of market participants and the public. The Dodd-Frank Act added numerous provisions to the CEA to protect market participants and the public, such as the segregation of funds for uncleared swaps, swap dealer registration and regulation that includes business conduct standards, and limitations on conflicts of interest. Current part 35 exempts qualifying swaps from nearly all sections of the CEA, so that these and other protections contained in Dodd-Frank would not apply to agricultural swaps entered into under part 35. As noted by commenters, in contrast to part 35, the new Dodd-Frank Act regulatory regime is both robust and comprehensive and will provide significant new protections to swap market participants.<sup>51</sup>

(2) Efficiency, competitiveness, and financial integrity of futures markets. Having a single set of regulations governing all swap transactions reduces compliance costs for markets and market participants, as well as eases the administrative burden on the Commission. Commenters agreed with this analysis.<sup>52</sup> Furthermore, if the Commission did not permit agricultural swaps to transact subject to the same laws and rules as other commodity swaps, users of agricultural swaps that

also engage in other types of swaps would be subject to dual regulatory regimes. These streamlined regulations may lead to improved efficiency, competitiveness and financial integrity of futures markets.

(3) Price discovery. The Dodd-Frank Act contains numerous provisions designed to improve price discovery such as the provisions encouraging the clearing of swaps and the trading of swaps on DCMs and SEFs. For instance, the Dodd-Frank Act mandates that swap transaction and pricing data be made available to the public. This reporting and the Dodd-Frank trade execution requirements should foster greater market and price transparency, and thus better price discovery.

(4) Sound risk management practices. Several commenters similarly noted that agricultural swaps are important risk management tools and that such swaps should be available on the same terms and conditions as other swaps that are used to manage risk.<sup>53</sup> In contrast, original part 35, by its terms, would not generally allow for swaps that adhered to the clearing or trade execution provisions contained in Dodd-Frank.

(5) Other public interest considerations. Treating agricultural swaps the same as other swaps would subject those swaps to the numerous provisions in the Dodd-Frank Act that protect market participants and the public, such as the segregation of funds for uncleared swaps, limitations on conflicts of interest, and swap dealer registration and regulation that includes business conduct standards.<sup>54</sup> Moreover, the clearing requirement in the Dodd-Frank Act is intended to reduce systemic risk which should further protect the public. Thus,

<sup>53</sup> “By applying the same regulatory structure and requirements to agricultural swaps as to other commodity swaps, the [NPRM] will promote legal certainty and an efficient allocation of compliance resources. \* \* \* The costs of imposing an alternative regulatory structure on this important and well-functioning market would substantially outweigh any benefits. It could also make it more difficult for agricultural market participants to hedge their commercial risks.” See Commodity Options and Agricultural Swaps Working Group 4/11/11 letter at 2–3; see also Gavilon letters.

<sup>54</sup> “[A] consistent approach to the regulation of all types of commodity swaps would eliminate the need to impose additional conditions on agricultural swaps. Equivalent treatment also would increase regulatory certainty in commodity markets by allowing market participants to structure documentation and compliance protocols consistently across commodity desks. Applying many aspects of the Dodd-Frank Act to agricultural swaps on an equivalent basis as other commodity swaps (e.g., registration, clearing, and reporting) also would promote the Commission’s stated mission of bringing more transparency to the OTC derivatives markets.” Commodity Options and Agricultural Swaps Working Group 10/29/10 letter at 6.

concerns that are special to agricultural swaps that might have existed under the pre Dodd-Frank regulatory regime may be allayed.

## iii. Conclusion

After considering the section 15(a) factors, the Commission has determined that the benefits of amended part 35 outweigh the costs.

## B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (“RFA”) requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.<sup>55</sup> The proposed rule, in replacing part 35, would affect eligible swap participants (“ESPs”) (by eliminating the ESP category and requiring agricultural swap participants to be eligible contract participants (“ECPs”), unless the transaction occurs on a designated contract market (“DCM”). By mandating that agricultural swaps and options be treated as all other swaps, the effect of the proposed rule has the potential to affect DCMs, derivatives clearing organizations (“DCOs”), futures commission merchants (“FCMs”), large traders and ECPs, as well as swap dealers (“SDs”), major swap participants (“MSPs”), commodity pool operators (“CPOs”), swap execution facilities (“SEFs”), and swap data repositories (“SDRs”).

*i. DCMs, DCOs, FCMs, CPOs, large traders, ECPs, and ESPs.* The Commission has previously determined that DCMs, DCOs, FCMs, CPOs, large traders, ECPs, and ESPs are not small entities for purposes of the Regulatory Flexibility Act.<sup>56</sup> Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these final rules will not have a significant economic impact on a substantial number of small entities with respect to these entities.

*ii. SDs, MSPs, SEFs, and SDRs.* SDs, MSPs, SEFs, and SDRs are new categories of registrant under the Dodd-Frank Act. Therefore, the Commission has not previously addressed the question of whether SDs, MSPs, SEFs, and SDRs are, in fact, “small entities” for purposes of the RFA. For the reasons that follow, the Commission is hereby

<sup>55</sup> 5 U.S.C. 601 *et seq.*

<sup>56</sup> See, respectively and as indicated, 47 FR 18618, 18619, Apr. 30, 1982 (DCMs, CPOs, FCMs, and large traders); 66 FR 45604, at 45609, Aug. 29, 2001 (DCOs); 66 FR 20740, 20743, Apr. 25, 2001 (ECPs); and 57 FR 53627, 53630, Nov. 12, 1992 and 58 FR 5587, 5593, Jan. 22, 1993 (ESPs).

<sup>51</sup> “The NGFA believes that these [Dodd-Frank] safeguards provide more-than-ample protection in the swaps marketplace for both agricultural and non-agricultural swaps and that there is no compelling reason to place additional burdens on agricultural swaps.” NGFA letter at 2. See also the Commodity Options and Agricultural Swaps Working Group letters. Also, “In our view, applying a single, uniform set of rules to all swaps will advance the public interests that Dodd-Frank and the CEA are designed to promote and benefit the users of these products.” CME letter at 1.

<sup>52</sup> “[S]treamlining swap regulation so that agricultural swaps are treated the same as other swaps will enable the Commission and Commission-regulated markets to discharge their regulatory duties more efficiently.” CME letter at 2; see also CMC letter and Barnard letter.



determining that none of these entities would be small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these final rules, with respect to SDs, MSPs, SEFs, and SDRs, will not have a significant impact on a substantial number of small entities.

a. SDs: As noted above, the Commission previously has determined that FCMs are not small entities for the purpose of the RFA based upon, among other things, the requirements that FCMs meet certain minimum financial requirements that enhance the protection of customers' segregated funds and protect the financial condition of FCMs generally.<sup>57</sup> SDs similarly will be subject to minimum capital and margin requirements, and are expected to comprise the largest global financial firms. Entities that engage in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers will be exempted from designation as an SD. For purposes of the RFA in this rulemaking, the Commission is hereby determining that SDs are not "small entities" for essentially the same reasons that FCMs have previously been determined not to be small entities.

b. MSPs: The Commission also has determined that large traders are not small entities for the purpose of the RFA.<sup>58</sup> The Commission considered the size of a trader's position to be the only appropriate test for purposes of large trader reporting.<sup>59</sup> MSPs, among other things, maintain substantial positions in swaps, creating substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets. For purposes of the RFA, the Commission is hereby determining that MSPs are not "small entities" for essentially the same reasons that large traders have previously been determined not to be small entities.

c. SEFs: The Dodd-Frank Act defines a SEF to mean a trading system or platform in which multiple participants have the ability to accept bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility that facilitates the execution of swaps between persons and is not a DCM. The Commission has previously determined that a DCM is not a small entity because, among other things, it may only be designated when

it meets specific criteria, including expenditure of sufficient resources to establish and maintain adequate self-regulatory programs. Likewise, the Commission will register an entity as a SEF only after it has met specific criteria, including the expenditure of sufficient resources to establish and maintain an adequate self-regulatory program. Accordingly, as with DCMs, the Commission is hereby determining that SEFs are not "small entities" for purposes of the RFA.

d. SDRs: The Commission has previously determined that DCMs and DCOs are not small entities because of "the central role" they play in "the regulatory scheme concerning futures trading."<sup>60</sup> Because of the "importance of futures trading in the national economy," to be designated as a contract market or registered as a DCO, the respective entity must meet stringent requirements set forth in the CEA.<sup>61</sup> Similarly, swap transactions that are reported and disseminated by SDRs are an important part of the national economy. SDRs will receive data from market participants and will be obligated to facilitate swaps execution by reporting real-time data.<sup>62</sup> Similar to DCOs and DCMs, SDRs will play a central role both in the regulatory scheme covering swaps trading and in the overall market for swap transactions. Additionally, the Dodd-Frank Act allows DCOs to register as SDRs. Accordingly, for essentially the same reasons that DCOs and DCMs have previously been determined not to be small entities, the Commission is hereby determining that SDRs are not "small entities" for purposes of the RFA.

#### C. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA),<sup>63</sup> an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB). The Commission believes that these proposed rules will not impose any new information collection requirements that require approval of OMB under the PRA.

In the NPRM, the Commission noted that, as a general matter, the proposed

<sup>60</sup> 47 FR at 18619 (DCMs) and 66 FR at 45609 (DCOs).

<sup>61</sup> See new CEA section 5(d), as added by section 735(b) of the Dodd-Frank Act regarding DCM core principles and new CEA section 5b(c)(2), as added by section 725(c) of the Dodd-Frank Act regarding DCO core principles.

<sup>62</sup> See new CEA section 21, as added by section 728 of the Dodd-Frank Act.

<sup>63</sup> 44 U.S.C. 3501 *et seq.*

rules would allow agricultural swaps to trade under the same terms and conditions as all other swaps and that the proposed rules do not, by themselves, impose any new information collection requirements. The NPRM also noted that collections of information that may be associated with engaging in agricultural swaps are, or will be, addressed within each of the general swap-related rulemakings implementing the Dodd-Frank Act. The Commission requested public comment on the accuracy of its estimate that no additional information collection requirements or changes to existing collection requirements would result from the rules proposed herein, and none of the comments received addressed this request.

Therefore, the Commission notes that, as a general matter, the final rules adopted herein will allow agricultural swaps to trade under the same terms and conditions as all other swaps and that the final rules do not, by themselves, impose any new information collection requirements. Collections of information that may be associated with engaging in agricultural swaps are, or will be, addressed within each of the general swap-related rulemakings implementing the Dodd-Frank Act.

#### VIII. Final Rules

##### List of Subjects in 17 CFR Part 35

Commodity futures.

In consideration of the foregoing and pursuant to the authority contained in the Act, as indicated herein, the Commission hereby amends chapter I of title 17 of the Code of Federal Regulations as follows:

- 1. Revise part 35 to read as follows:

##### **PART 35—SWAPS IN AN AGRICULTURAL COMMODITY (AGRICULTURAL SWAPS)**

**Authority:** 7 U.S.C. 2, 6(c), and 6c(b); and title VII, sec. 723(c)(3), Pub. L. 111–203, 124 Stat. 1376, unless otherwise noted.

##### **§ 35.1 Agricultural swaps, generally.**

(a) Any person or group of persons may offer to enter into, enter into, confirm the execution of, maintain a position in, or otherwise conduct activity related to, any transaction in interstate commerce that is a swap in an agricultural commodity subject to all provisions of the Act, including any Commission rule, regulation, or order thereunder, otherwise applicable to any other swap; and

(b) In addition to paragraph (a) of this section, any transaction in interstate

<sup>57</sup> 47 FR 18619.

<sup>58</sup> *Id.* at 18620.

<sup>59</sup> *Id.*

commerce that is a swap in an agricultural commodity may be transacted on a swap execution facility, designated contract market, or otherwise in accordance with all provisions of the Act, including any Commission rule, regulation, or order thereunder, applicable to any other swap eligible to be transacted on a swap execution facility, designated contract market, or otherwise.

Issued in Washington, DC, on August 4, 2011, by the Commission.

David A. Stawick, Secretary of the Commission.

Appendices to Agricultural Swaps— Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O'Malia voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rulemaking to authorize agricultural swap transactions and subject them to the same rules applicable to all other swaps transactions. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) prohibits such transactions if the Commodity Futures Trading Commission (CFTC) does not specifically authorize them. The public comments the CFTC received overwhelmingly supported treating agricultural swaps the same as other swaps brought under regulation by the Dodd-Frank Act. Agricultural producers, processors, merchants and handlers will benefit from the ability to use agricultural swaps to hedge their risk and from the transparency of the Dodd-Frank Act.

[FR Doc. 2011-20337 Filed 8-9-11; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9475]

RIN 1545-BF83

Corporate Reorganizations; Distributions Under Sections 368(a)(1)(D) and 354(b)(1)(B); Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document describes a correction to final regulations (TD 9475) that were published on Friday, December 18, 2009 (74 FR 67053). The regulations provide guidance regarding the qualification of certain transactions as reorganizations described in section 368(a)(1)(D) where no stock and/or securities of the acquiring corporation is issued and distributed in the transaction. This document also contains final regulations under section 358 that provide guidance regarding the determination of the basis of stock or securities in a reorganization described in section 368(a)(1)(D) where no stock and/or securities of the acquiring corporation is issued and distributed in the transaction. This document also contains final regulations under section 1502 that govern reorganizations described in section 368(a)(1)(D) involving members of a consolidated group.

DATES: This correction is effective on August 10, 2011 and is applicable on December 18, 2009.

FOR FURTHER INFORMATION CONTACT: Bruce A. Decker, (202) 622-7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9475) that are the subject of this document are under sections 358, 368 and 1502 of the Internal Revenue Code.

Need for Correction

As published, the final regulations (TD 9475) contain an error that may prove to be misleading and is in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment:

PART 1—INCOME TAXES

■ Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805. \* \* \*

■ Par. 2. Section 1.1502-13 is amended by adding paragraph (l)(6) to read as follows:

§ 1.1502-13 Intercompany transactions.

\* \* \* \* \* (l) \* \* \*

(6) Effective/applicability date. (i) In general. Paragraph (f)(7)(i) Example 4.

applies to transactions occurring on or after December 18, 2009.

(ii) [Reserved] \* \* \* \* \*

LaNita Van Dyke, Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2011-20224 Filed 8-9-11; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG-2011-0740]

Drawbridge Operation Regulations; Pequonnock River, Bridgeport, CT, Maintenance

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Metro North (Peck) Bridge across the Pequonnock River, mile 0.3, at Bridgeport, Connecticut. The deviation allows the bridge to remain in the closed position to facilitate miter rail repair.

DATES: This deviation is effective from August 22, 2011 through November 30, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG-2011-0740 and are available online at http://www.regulations.gov, inserting USCG-2011-0740 in the "Keyword" and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, telephone (212) 668-7165, e-mail judy.k.leung-ye@uscg.mil. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION: The Metro North (Peck) Bridge, across the