

and analysis of potential impacts on marine mammal.

NMFS was a cooperating agency (as defined by the Council on Environmental Quality (40 CFR 1501.6)) in the preparation of the Draft and Final EISs. NMFS has reviewed the Final EIS and has adopted it. Therefore, the preparation of another EIS or EA is not warranted.

#### Determinations

NMFS has determined that the impact of construction and operation of the Northeast Gateway Port Project may result, at worst, in a temporary modification in behavior of small numbers of certain species of marine mammals that may be in close proximity to the Northeast Gateway LNG facility and associated pipeline during its construction and subsequent operation. These activities are expected to result in some local short-term displacement and will have no more than a negligible impact on the affected species or stocks of marine mammals.

This determination is supported by measures described in this document under “*Marine Mammal Mitigation, Monitoring and Reporting*” and NMFS’ Biological Opinion on this action.

As a result of the described mitigation measures, no take by injury or death is requested, anticipated or authorized, and the potential for temporary or permanent hearing impairment is very unlikely due to the relatively low noise levels (and consequently small zone of impact) and would be avoided through the incorporation of the shut-down mitigation measures described in this document.

While the number of marine mammals that may be harassed will depend on the distribution and abundance of marine mammals in the vicinity of the port construction and operations, the estimated number of marine mammals to be harassed is small.

#### Authorization

NMFS has issued an IHA to Northeast Gateway and Algonquin for the taking (by Level B harassment) during construction and operation of the Northeast Gateway Port, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: May 7, 2007.

**James H. Lecky**

*Director, Office of Protected Resources,  
National Marine Fisheries Service.*

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## COMMODITY FUTURES TRADING COMMISSION

### Proposal To Exempt the Trading and Clearing of Certain Credit Default Products Traded on the Chicago Board Options Exchange and Cleared Through the Options Clearing Corporation Pursuant to the Exemptive Authority in § 4(c) of the Commodity Exchange Act

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed order and request for comment.

**SUMMARY:** The Commodity Futures Trading Commission (“CFTC” or the “Commission”) is proposing to exempt the trading and clearing of certain credit default products that are proposed to be traded on the Chicago Board Options Exchange (“CBOE”) and cleared through the Options Clearing Corporation (“OCC”) from any applicable provisions of the Commodity Exchange Act (“CEA”).<sup>1</sup> Authority for this exemption is found in Section 4(c) of the CEA.<sup>2</sup>

**DATES:** Comments must be received on or before May 29, 2007.

**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 “OCC Clearing Credit Default Options” in the subject line of the message.

- *Fax:* 202-418-5521.

- *Mail:* Send to Eileen A. Donovan, Acting 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:** John C. Lawton, Deputy Director and Chief Counsel, 202-418-5480, [jlawton@cftc.gov](mailto:jlawton@cftc.gov), and Robert B. Wasserman, Associate Director, 202-418-5092, [rwasserman@cftc.gov](mailto:rwasserman@cftc.gov), Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

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

<sup>2</sup> 7 U.S.C. 6(c).

## I. Introduction

The OCC is both a Derivatives Clearing Organization (“DCO”) registered pursuant to Section 5b of the CEA, 7 U.S.C. 7a-1, and a securities clearing agency registered pursuant to Section 17A of the Securities Exchange Act of 1934 (“1934 Act”).<sup>3</sup> The CBOE is a national securities exchange registered as such under Section 6 of the 1934 Act.<sup>4</sup>

CBOE has filed with the Securities and Exchange Commission (“SEC”) proposed rule changes to provide for the listing and trading on CBOE of cash-settled, binary call options based on credit events in one or more debt securities.<sup>5</sup> These options are referred to as Credit Default Options (“CDOs”), and would pay the holder a specified amount upon the occurrence, as determined by CBOE, of a “Credit Event,” defined to mean an “Event of Default” on any debt security issued or guaranteed by a specified “Reference Entity.”

CBOE has also filed with the SEC proposed rule changes to provide for the listing and trading on CBOE of Credit Default Basket Options (“CDBOs”).<sup>6</sup> These are similar in concept to CDOs, except that a CDBO covers more than one Reference Entity, and for each Basket Component (that is, a single Reference Entity) a notional value (a fraction of the aggregate Notional Face Value of the basket) and a recovery rate is specified. Upon the occurrence of a Credit Event involving a particular Reference Entity, the payout to the holder is equal to the product of (a) The Notional Face Value of that Basket Component multiplied by (b) one minus the recovery rate specified in advance for that Basket Component. CDBOs may be of the multiple-payout variety, or of the single-payout variety, where a payout occurs only the first time a Credit Event is confirmed with respect to a Reference Entity prior to expiration.

OCC has filed with the CFTC, pursuant to Section 5c(c) of the CEA and Commission Regulations 39.4(a) and 40.5 thereunder,<sup>7</sup> requests for approval of rules and rule amendments that would enable OCC to clear and settle these CDOs and CDBOs in its capacity as a registered securities clearing agency (and not in its capacity

<sup>3</sup> 15 U.S.C. 78q-1.

<sup>4</sup> 15 U.S.C. 78f.

<sup>5</sup> See Release No. 34-55251, 72 FR 7091 (Feb. 14, 2007).

<sup>6</sup> See *SR-CBOE-2007-026*.

<sup>7</sup> 7 U.S.C. 7a-2(c), 17 CFR 39.4(a), 40.5.

as a DCO).<sup>8</sup> Section 5c(c)(3) provides that the CFTC must approve any such rules and rule amendments submitted for approval unless it finds that the rules or rule amendments would violate the CEA.

The request for approval concerning the CDO product was filed effective March 8, 2007. On April 23, 2007, the review period was extended pursuant to Regulation 40.5(c) until June 6, 2007, on the ground that the CDOs “raise novel or complex issues, including the nature of the contract, that require additional time for review.” The request for approval concerning the CDBO product was filed effective April 23, 2007, and absent an extension the review period is scheduled to run until June 7, 2007.

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

Section 4(c)(1) of the CEA empowers the CFTC 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>9</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>10</sup> Permitting the CDOs and CDBOs to trade on CBOE and be cleared on OCC as discussed above may foster both financial innovation and competition. The CFTC believes that the venue or venues for trading and clearing of instruments such as CDOs and CDBOs should be determined by the competitive forces of the market, particularly where any potential venue would be subject to federal regulatory oversight. The CFTC is requesting comment on whether it should exempt CDOs and CDBOs, as described above, that are traded on CBOE and cleared through OCC, from any provision of the CEA that might be transgressed by trading and clearing those transactions as described above.

In proposing this exemption, the CFTC need not—and does not—find that the CDOs and CDBOs are (or are not) subject to the CEA. During the legislative process leading to the enactment of Section 4(c) of the CEA, the House-Senate Conference Committee noted that:

The Conferees do not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument, or transaction for which an exemption is sought is subject to the Act. Rather, this provision provides flexibility for the Commission to provide legal certainty to novel instruments where the determination as to jurisdiction is not straightforward. Rather than making a finding as to whether a product is or is not a futures contract, the Commission in appropriate cases may proceed directly to issuing an exemption.<sup>11</sup>

CDOs and CDBOs are “novel instruments” and the “determination as to [their] jurisdiction is not straightforward.” Given their potential usefulness to the significant market for credit derivatives products, however, the Commission believes that this may be an appropriate case for issuing an exemption without making a finding as to the nature of these particular instruments.

Section 4(c)(2) 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, 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>12</sup>

The purposes of the CEA include “promot[ing] responsible innovation and fair competition among boards of trade, other markets and market participants.”<sup>13</sup> It may be consistent with these and the other purposes of the CEA, and with the public interest, for the mode of trading of these transactions—whether it is to be through CFTC-regulated markets and clearing organizations or SEC-regulated markets and clearing organizations—to be determined by competitive market forces rather than by regulatory line-drawing. Accordingly, the CFTC is requesting comment as to whether an exemption from the requirements of the CEA should be granted in the context of these transactions.

Section 4(c)(3) 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.” Both CBOE and OCC, as well as their members who will intermediate these transactions, are subject to extensive and detailed regulation by the SEC under the 1934 Act. The CFTC is requesting comment as to whether all persons trading CDOs and CDBOs traded on CBOE and cleared on OCC are appropriate persons.

In light of the above, the Commission also is requesting comment as to whether this exemption will interfere with its ability to discharge its regulatory responsibilities under the CEA, including its ability to determine whether the listing of similar or

<sup>8</sup> See SR-OCC-2007-01 A-1; SR-OCC-2007-06. OCC has filed identical proposed rule changes with the SEC.

<sup>9</sup> Section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1), provides 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>10</sup> HOUSE CONF. REPORT NO. 102-978, 1992 U.S.C.C.A.N. 3179, 3213 (“4(c) Conf. Report”).

<sup>11</sup> 4(c) Conf. Report at 3214-3215.

<sup>12</sup> Section 4(c)(2) of the CEA, 7 U.S.C. § 6(c)(2), provides 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>13</sup> CEA § 3(b), 7 U.S.C. 5(b). See also CEA § 4(c)(1), 7 U.S.C. 6(c)(1) (purpose of exemptions is “to promote responsible economic or financial innovation and fair competition.”)

identical products on a designated contract market or derivatives transaction execution facility would or would not violate the CEA, or with the self-regulatory duties of any contract market or derivatives transaction execution facility.

### III. Request for Comment

The Commission requests comment on all aspects of the issues presented by this proposed order.

### IV. Related Matters

#### A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")<sup>14</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. The proposed exemptive order would not, if approved, require a new collection of information from any entities that would be subject to the proposed order.

#### B. Cost-Benefit Analysis

Section 15(a) of the CEA, as amended by Section 119 of the Commodity Futures Modernization Act of 2000 ("CFMA"),<sup>15</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) as amended 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 accomplish any of the purposes of the CEA.

The proposed exemptive order may facilitate market competition. The Commission is considering the costs

and benefits of this proposed order in light of the specific provisions of Section 15(a) of the CEA, as follows:

1. *Protection of market participants and the public.* CBOE, OCC and their members who would intermediate CDOs and CDBOs are subject to extensive SEC oversight.

2. *Efficiency, competition, and financial integrity.* The proposed exemption may enhance market efficiency and competition since it could encourage potential trading of CDOs and CDBOs on markets other than designated contract markets or derivative transaction execution facilities. Financial integrity will not be affected since the CDOs and CDBOs will be cleared by OCC, a DCO and SEC-registered clearing agency, and intermediated by SEC-registered broker-dealers.

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

4. *Sound risk management practices.* OCC has described appropriate risk-management practices that it will follow to margin CDOs and CDBOs.

5. *Other public interest considerations.* The proposed exemption may encourage development of credit derivative products through market competition without unnecessary regulatory burden.

After considering these factors, the Commission has determined to seek comment on the proposed order as discussed above. The Commission invites public comment on its application of the cost-benefit provision.

\* \* \* \* \*

Issued in Washington, DC, on May 9, 2007 by the Commission.

Eileen A. Donovan,

Acting Secretary of the Commission.

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### DEPARTMENT OF DEFENSE

### DEPARTMENT OF ENERGY

### ENVIRONMENTAL PROTECTION AGENCY

[Docket No. EPA-HQ-OAR-2006-0957]

### NUCLEAR REGULATORY COMMISSION

#### Multi-Agency Radiation Survey and Assessment of Materials and Equipment Manual

**AGENCY:** Department of Defense, Department of Energy, Environmental Protection Agency, and the Nuclear Regulatory Commission.

**ACTION:** Notice of availability: Reopening of public comment period.

**SUMMARY:** On January 16, 2007 (72 FR 1708) the Department of Defense (DoD), Department of Energy (DOE), U.S. Environmental Protection Agency (EPA), and the U.S. Nuclear Regulatory Commission (NRC) announced for public comment the availability of a draft document, entitled the "Multi-Agency Radiation Survey and Assessment of Materials and Equipment Manual" (MARSAME). A 90-day comment period was provided for the draft MARSAME that expired on April 16, 2007. A request for an extension to the comment period has been received from several stakeholders. The comment period for the draft manual has been reopened for an additional 30 days.

**DATES:** The comment period for the draft manual has been reopened and now expires on June 13, 2007. Comments received after that date will be considered if it is practical to do so, but no assurance can be given for consideration of late comments.

**ADDRESSES:** Submit your comments by one of the methods:

- [www.regulations.gov](http://www.regulations.gov): Follow the on-line instructions for submitting comments.
- <http://www.marsame.org>: Follow the on-line instructions for submitting comments.
- **Mail:** Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Mail Code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460 or Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.
- **Hand Delivery:** Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements must be made for deliveries of boxed information.

Copies of all comments received by one agency will be periodically copied and sent to the others. Copies of the draft MARSAME and all comments received may be examined or copied for a fee electronically in [www.regulations.gov](http://www.regulations.gov), or in hard copy at the HQ EPA Docket Public Reading Room, U.S. Environmental Protection Agency, Room 3334, Docket ID No. EPA-HQ-OAR-2006-0957, 1301 Constitution Ave., NW., Washington, DC 20460, and the NRC Public

<sup>14</sup> 44 U.S.C. 3507(d).

<sup>15</sup> 7 U.S.C. 19(a).