

proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military or foreign affairs function of the United States. (See 5 U.S.C. 553(a)(1)). This final rule implements the United States new policy to recognize the new and independent state of the Republic of South Sudan as announced by the President. No other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are not applicable. Therefore, this regulation is issued in final form. In addition, the Department finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for the reasons provided above. Accordingly, this regulation is made effective immediately upon publication.

List of Subjects

15 CFR Part 738

Exports.

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, parts 738 and 740 of the EAR (15 CFR parts 730–774) are amended as follows:

PART 738—[AMENDED]

■ 1. The authority citation for 15 CFR Part 738 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c; 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010).

Supplement No. 1 to Part 738—[Amended]

- 2. Supplement No. 1 to part 738—Commerce Country Chart—is amended
- a. By adding in alphabetical order the “Country” “South Sudan, Republic of”; and
- b. By adding for “South Sudan, Republic of” an “X” in columns “CB1”, “CB2”, “NP1”, “NS1”, “NS2”, “MT1”, “RS1”, “RS2”, “CC1” and “CC3”.

PART 740—[AMENDED]

■ 3. The authority citation for 15 CFR Part 740 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 7201 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010).

■ 4. Supplement No. 1 to Part 740—Country Groups—is amended by adding in alphabetical order “South Sudan, Republic of” to “Country Group B”.

Dated: July 6, 2011.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038–AD23

Agricultural Commodity Definition

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, which amends the Commodity Exchange Act (“CEA” or “Act”), includes provisions applicable to “a swap in an agricultural commodity (as defined by the [CFTC]).” Neither Congress nor the CFTC has previously defined that term for purposes of the CEA or CFTC regulations. On October 26, 2010, the Commission requested comment on a proposed definition. After reviewing the comments submitted in response to the proposed definition, the Commission has determined to issue these final rules in essentially the same form as originally proposed, subject to a minor revision to the commodity-based index provision.

DATES: *Effective Date*—September 12, 2011.

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SUPPLEMENTARY INFORMATION:

Part I—Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹ Title VII of the Dodd-Frank Act² amended the CEA³ 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.

The Dodd-Frank Act includes provisions applicable to “a swap in an agricultural commodity (as defined by the [CFTC]).” Neither Congress nor the CFTC has previously defined “agricultural commodity” for purposes of the CEA or CFTC regulations. On October 26, 2010, the Commission issued a notice of proposed rulemaking requesting comment on a proposed definition of agricultural commodity (the “NPRM”).⁴ After reviewing the comments submitted in response to the proposed definition,⁵ the Commission has determined to issue this final definition in essentially the same form as originally proposed, subject to a minor revision to the commodity-based index provision, for purposes of the CEA and Commission regulations.

¹ 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>.

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

³ 7 U.S.C. 1 *et seq.*

⁴ 75 FR 65586, Oct. 26, 2010.

⁵ Those comments are available on the Commission’s Web site at: <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=868>.

A. Statutory Framework—"Agricultural Commodity"

1. Pre Dodd-Frank Act

For a detailed discussion of the pre Dodd-Frank statutory history relating to the term agricultural commodity, please review the NPRM at 75 FR 65586–65587.

2. The Dodd-Frank Act

In addition to deleting two existing CEA provisions that referenced agricultural commodities,⁶ the Dodd-Frank Act contains several new provisions relating to agricultural commodities. Section 721(a)(21) of the Dodd-Frank Act adds a new section 1a(47) to the CEA defining the term "swap." As part of the definition, clause (iii) of section 1a(47)(A) provides that a swap includes "any agreement, contract, or transaction commonly known as * * * an agricultural swap. * * *" ⁷

Section 723(c)(3)(A) of the Dodd-Frank Act, which is a free-standing provision that does not amend the CEA, contains a general rule whereby, except as provided in section 723(c)(3)(B), "no person shall offer to enter into, enter into, or confirm the execution of, any swap in an agricultural commodity (as defined by the [CFTC])." Section 723(c)(3)(B) provides that a swap in an agricultural commodity may be permitted pursuant to the Commission's exemptive authority under CEA section 4(c), "or any rule, regulation, or order issued thereunder (including any rule, regulation, or order in effect as of the date of enactment of this Act) by the [CFTC] to allow swaps under such terms and conditions as the Commission shall prescribe."

Section 733 of the Dodd-Frank Act adds a new section 5h to the CEA that governs the registration and regulation of swap execution facilities. New CEA section 5h(b)(2) provides that a swap execution facility "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."

Section 737 of the Dodd-Frank Act amends CEA section 4a and specifically directs the Commission to adopt position limits for futures, DCM-traded options, and swaps that are economically equivalent to futures and exchange-traded options for physical

commodities other than excluded commodities—that is, exempt and agricultural commodities. Section 737 also sets timeframes for the adoption of such position limits for both exempt and agricultural commodities.

B. Regulatory Framework—"Agricultural Commodity"

For a detailed discussion of the history surrounding the Commission's regulatory framework related to the term agricultural commodity, please review the NPRM at 75 FR 65588–65589. Under current regulations, the term agricultural commodity is significant primarily for parts 32 and 35.⁸ The final definition is not anticipated to have any significant substantive impact outside of those rules.

In relation to parts 32 (dealing with commodity options) and 35 (dealing with swaps), the Commission, in a separate proposed rulemaking, has proposed (1) to treat all commodity options that fall within the Dodd-Frank definition of swap (including options on either agricultural or non-agricultural commodities) the same as any other swap, thereby doing away with the need to distinguish between an agricultural commodity and any other type of commodity for the purpose of identifying the applicable options rules, and (2) to treat swaps in an agricultural commodity the same as any other swap, thereby doing away with the need to distinguish between an agricultural commodity and any other type of commodity for the purpose of identifying the applicable swaps rules.⁹ The definition will also inform the Commission's planned rulemaking addressing speculative position limits on both agricultural and exempt commodities.¹⁰

⁸ 17 CFR part 32 and 17 CFR part 35.

⁹ The proposal to treat agricultural swaps the same as swaps in other commodities was issued following an advance notice of proposed rulemaking ("ANPRM") that specifically asked whether swaps in an agricultural commodity should be treated any differently than other swaps. See 75 FR 59666, Sept. 28, 2010. The overwhelming majority of the comments supported adopting a rule that would treat swaps in an agricultural commodity the same as all other swaps, and the proposed agricultural swaps rules that followed the ANPRM so provide. (See: Commodity Options and Agricultural Swaps, 76 FR 6095, February 3, 2011). If the final agricultural swaps rules should reverse course and prohibit or limit agricultural swaps, the Commission will take appropriate action to address any impact such rule change might have with respect to the definition set out herein.

¹⁰ See § 737(a) of the Dodd-Frank Act; see also Position Limits for Derivatives, 76 FR 4752, Jan. 26, 2011.

Part II—Summary of Comments; Commission Response to Comments

As noted above, on October 26, 2010 the Commission published for comment a notice of proposed rulemaking that proposed a definition of "agricultural commodity" for purposes of the Commodity Exchange Act and Commission regulations.¹¹ The NPRM proposed a four category definition, including:

1. The enumerated commodities listed in section 1a of the CEA, including such things as wheat, cotton, corn, the soybean complex, livestock, etc.;

2. A general operational definition that covers: "All other commodities that are, or once were, or are derived from, living organisms, including plant, animal and aquatic life, which are generally fungible, within their respective classes, and are used primarily for human food, shelter, animal feed, or natural fiber;"

3. A catch-all category for commodities that would generally be recognized as agricultural in nature, but which do not fit within the general operational definition. In addition to the specified commodities named in category three (tobacco and the products of horticulture), category three would also include other commodities that, in future, would be classified as "agricultural commodities" as a result of Commission action: "Tobacco, products of horticulture, and such other commodities used or consumed by animals or humans as the Commission may by rule, regulation, or order designate after notice and opportunity for hearing;" and

4. Finally, a provision applicable to: "Commodity-based contracts based wholly or principally on a single underlying agricultural commodity."

In response to the NPRM, the Commission received twelve formal comment letters¹² representing a broad range of interests, including producers, merchants, swap dealers, commodity funds, futures industry organizations, academics, and policy organizations. In particular, comment letters were received from the following persons or entities: The Agricultural Swaps Working Group ("Ag Swaps Working Group"), comprised of financial institutions that provide risk management and investment products

¹¹ 75 FR 65586, Oct. 26, 2010.

¹² The comment file also includes records of discussions with three external parties (Land O'Lakes, Inc., a mixed group of agricultural and academic interests, and an agricultural risk manager from Kansas). At those meetings and/or phone calls, issues tangential to the agricultural commodity definition rulemaking were discussed between visitors and Commission representatives.

⁶ Pre Dodd Frank CEA sections 2(g) and 5a(b)(2)(F).

⁷ See new CEA section 1a(47)(A)(iii)(XX) as added by section 721(a)(21) of the Dodd-Frank Act.

to agricultural end users; BOK Financial (“BOK”); Better Markets, Inc. (“Better Markets”); Commodity Markets Council (“CMC”); Dairy Farmers of America, Inc. (“DFA”); the Gavlion Group, LLC (“Gavlion”); Institute for Agriculture and Trade Policy (“IATP”); CME Group, Inc. (“CME Group”); Minneapolis Grain Exchange (“MGEX”); National Council of Farmer Cooperatives (“NCFC”); National Grain and Feed Association (“NGFA”); and Michael Greenberger (“Professor Greenberger”), a professor from the University of Maryland Law School. In addition, on May 4, 2011, the Commission re-opened the comment period on several of the Dodd-Frank rulemakings, including the proposed agricultural commodity definition, to June 3, 2011.¹³ Of the additional comments received, three specifically addressed substantive concerns related to the proposed agricultural commodity definition—one letter from Chris Barnard, discussed below; one letter from the National Milk Producers Federation (“NMPF”), generally supporting the proposed definition; and one letter from MGEX, reiterating the arguments made in its earlier comments.¹⁴

With minor variations discussed below, the majority of commenters supported the definition of agricultural commodity as proposed. The following statement from the NGFA is representative:

The NGFA is supportive of the Commission’s efforts to define the term “agricultural commodity” for purposes of implementing provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Generally, we believe the proposed rule takes a straightforward and common-sense approach to the issue and we have no current objection to the categorization of various agricultural commodities as detailed in the proposed rule.

In response to the Commission’s questions, the NGFA at this time is not aware of additional commodities that should be included in the definition, though they may not fit neatly into the proposed rule; nor are we aware of commodities that do fit the

proposed definition but should not be included. However, to accommodate situations that could arise in the future as new products are developed, the NGFA agrees that it would be prudent for the Commission to maintain some flexibility to consider or reconsider the status of any particular commodity as questions may arise in the context of specific markets or transactions.¹⁵

Many of the commenters specifically supported the fact that the proposed definition excludes biofuels.¹⁶ In addition, several commenters further noted the appropriateness of the definition in a regulatory regime where the Commission may decide to treat agricultural swaps as it does all other swaps.¹⁷

General support for the proposed definition; request for clarification on category two. Several commenters offered their general support for the definition as proposed, requesting only that the Commission clarify in any final rule that the second category of the agricultural commodity definition is self-effectuating and will encompass commodities that are now, or in the future may be, subject to swaps, futures, and options trading, without the need for additional CFTC action.¹⁸ These commenters suggested that such clarification would be consistent with Congress’ definition of “commodity” in the CEA, which includes certain enumerated commodities and “all other goods and articles, * * * and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.”¹⁹

In response to this request, the Commission wishes to clarify that the general operational definition found in the second category is self-executing and will encompass commodities that are now, or in the future may become subject to swaps, futures, and options trading, without the need for additional CFTC action. In this regard, the rule defines those commodities that are agricultural commodities. It does not matter whether futures, swaps, or options are being traded in the commodity—either now or in the future.

Request for consideration of public comment regarding the classification of new commodities. Other commenters asked that the Commission provide a means for the public to comment upon

and appeal any Commission decision to include or exclude a particular commodity from the list of agricultural commodities under any category of the definition. As proposed, such a comment and appeal process is contemplated only for commodities that may fall under category three of the Commission’s definition. In particular, subparagraph three of the agricultural commodity definition would allow the Commission to designate any other commodity used or consumed by animals or humans to be an agricultural commodity “by rule, regulation or order * * * after notice and opportunity for hearing.”²⁰ CMC asked for a clarification or expansion of this process:

We therefore urge the Commission to provide for an appeals process for new instruments. To elaborate, we request that a consistent process and time period be instated for appealing a CFTC decision to include or exclude a particular commodity from the list of agricultural commodities. We acknowledge that the CFTC in its [NPRM] has made a provision for public hearings for Category 3 agricultural commodities, but we request that a process for public comments and appeals be made broadly available in the context of including or excluding an agricultural commodity under any category of the definition.²¹

On this topic, NGFA commented that in order to accommodate situations that could arise in the future as new products are developed, it would be prudent for the Commission to maintain some flexibility to consider or reconsider the status of any particular commodity as questions may arise in the context of specific markets or transactions.

In considering these comments, the Commission has determined that the proposed definition, in conjunction with the Commission’s existing rules, already accommodates any concerns raised. With respect to commodities already listed in categories one or two, the NPRM that preceded these final rules provided an opportunity to question or challenge the inclusion or exclusion of any commodity listed in those categories. With respect to commodities not covered by the first two categories, category three of the proposed definition permits the Commission to designate any particular commodity as an “agricultural commodity,” but only after notice and an opportunity for hearing. Therefore, any time the Commission wishes to designate a particular commodity as an “agricultural commodity,” it must

¹³ See 76 FR 25274, May 4, 2011.

¹⁴ Illustrated by the following quote from the NMPF letter, the majority of the comments filed for the June 3, 2011 deadline addressed issues outside of the scope of the agricultural commodity definition; e.g. end user concerns, cooperative associations, and the general regulatory regime for swaps:

NMPF agrees that the proposed rule provides a reasonable definition of “agricultural commodity”, with respect to milk, dairy products, and common dairy feedstuffs.

However, this agreement must be seen in the context of our concerns about the potential over-regulation of farmers, farmer cooperative associations, and other commercial end users, including small and limited resource farmers.

See letter from NMPF.

¹⁵ See letter from NGFA.

¹⁶ See, e.g., letters from Gavlion, IATP, and the Ag Swaps Working Group.

¹⁷ In fact, the Commission has recently proposed to treat agricultural swaps the same as any other swap: See Commodity Options and Agricultural Swaps, 75 FR 6095, Feb. 3, 2011.

¹⁸ See, e.g., letters from CME Group, the Ag Swap Working Group, Gavlion, and DFA.

¹⁹ See CEA section 1a(4).

²⁰ See NPRM at 75 FR 65586 at 65593, Oct. 26, 2010.

²¹ See letter from CMC.

follow the procedures attendant to a normal notice and comment rulemaking (*i.e.*, issuing a notice of proposed rulemaking, allowing a comment period, and then issuing a final rule or order). In addition, any action by the Commission to remove a commodity from the definition would constitute a regulatory amendment that would similarly require a notice and comment rulemaking.

To the extent interested parties want to request that the Commission amend or add to the definition on their own initiative, they may submit a petition for issuance, amendment, or repeal of any rule pursuant to Commission regulation 13.2.

New or innovative commodity products. While generally supportive of the proposed definition, a comment letter from IATP expressed concern with respect to the commercial commodification of currently experimental commodities, "It perhaps goes without saying that the modification of traditional commodities by synthetic biology and other nanotechnologies will pose many and complex regulatory challenges to protect the public interest, should these commodities be traded under contracts subject to CFTC rules."²²

The Commission believes that categories two and three of the definition, as proposed, appropriately provide for the inclusion of new or innovative commodities within the definition of "agricultural commodity"—should such a determination become necessary.²³ These "new" commodities will likely fall under category two of the agricultural commodity definition as being "used primarily for human food, shelter, animal feed or natural fiber." And if they do not fall under category two, the Commission may use category three to issue a rule or order labeling them as agricultural commodities.

Commodity-based indexes. Several commenters focused on subparagraph four of the proposed definition, which would include "commodity-based contracts based wholly or principally on a single underlying agricultural commodity."²⁴ MGEX commented that subparagraph four should be withdrawn altogether, arguing that cash-settled and electronically traded contracts on indexes (such as contracts on MGEX's

various wheat, corn, and soybean cash-bid indexes) should remain outside of the definition of agricultural commodity.²⁵

The NCFC commented that, without information on the practical effects of using a larger or smaller threshold than the proposed "more than 50%" to define "principally," it supports the more than 50% level of a single commodity as proposed. However, they suggested future review of that level if concerns are raised or potential issues need to be addressed.²⁶

Two commenters, Professor Greenberger and Better Markets, objected to the fact that the "based wholly or principally on a single underlying agricultural commodity" approach used in the proposed definition would fail to include indexes that contained several different agricultural commodities but had no concentration of greater than 50% of any one commodity. Professor Greenberger argued that, "The Commission should include a contract based on an index that includes agricultural commodities within the definition of agricultural commodity, so that it may be subject, *inter alia*, to the later rulemakings on speculative position limits under [section] 737 of the Dodd-Frank Act." Better Markets expressed the concern that the proposed definition could enable a person to avoid compliance with other regulatory provisions specific to agricultural commodities, such as speculative position limits. As a potential solution, Better Markets proposed a revision to subparagraph four that would evaluate commodity-based indexes on a pro-rata basis, with no minimum or maximum percentage criterion. Under the Better Markets proposal, any contract on a commodity-based index could be both (1) a contract on agricultural commodities for that percentage of the index that is based on any agricultural commodity, and (2) a contract on non-agricultural commodities for that percentage of the index that is based on any non-agricultural commodity.²⁷

²⁵ As will be discussed further below, MGEX's comment may be based in part on confusion in the Commission's wording of subparagraph four. As proposed, subparagraph four applies to "commodity-based contracts" when in fact the wording should have read "commodity-based indexes," and has been so corrected in the final rule.

²⁶ See letter from NCFC.

²⁷ Better Markets proposed that subparagraph four read as follows: "Commodity-based contracts based on a single underlying agricultural commodity; provided that contracts based on composite prices in the form of an index, which composite prices include one or more agricultural commodities, shall be considered to be one or more commodity-based contracts pro-rata based on the relevant weighting

Thus, for example, a person holding a contract on an index that is equally weighted in corn and soybeans would be considered to have a position in both corn and soybeans and this position would be aggregated with other corn and/or soybeans positions held by that trader for purposes of complying with speculative position limits applicable to either commodity.

Chris Barnard's letter similarly suggested that the Commission should revise category four to apply to "commodity-based [indexes] based wholly or principally on underlying agricultural commodities."

In considering these comments, the Commission has determined to refine category four as follows:

(a) In the final rule, the Commission has removed references to contracts and added references to indexes, confirming that category four applies to commodity-based indexes, rather than commodity-based contracts on an index.

(b) In addition to the revisions described in (a), the text of category four has been revised to include commodity-based indexes "based wholly or principally on underlying agricultural commodities"—as opposed to "based wholly or principally on a single underlying agricultural commodity." As a general matter, the Dodd-Frank Act gives the Commission the authority to prohibit or otherwise limit swaps in an agricultural commodity. In the event that the Commission did take steps to generally prohibit or otherwise limit swaps in an agricultural commodity, there would be legitimate concern about the potential proliferation of "agricultural commodity-based indexes" (and contracts thereon) being designed to replicate the economic terms of otherwise prohibited swaps in an agricultural commodity.

However, because the Commission has proposed to permit swaps in an agricultural commodity to transact subject to the same rules applicable to all other swaps, that concern is almost certainly moot.²⁸ There will be no incentive for regulatory arbitrage as between an agricultural swap and a swap on an index that is economically equivalent to an agricultural swap because both transactions would be subject to the same regulatory scheme. Nonetheless, in response to certain concerns raised by Professor Greenberger, Better Markets, and Mr. Barnard, the Commission is expanding the commodity-based index category of the agricultural commodity definition to

of each such single agricultural commodity in the index."

²⁸ See footnote 9, above.

²² See letter from IATP.

²³ In this context, the Commission believes that the definition is appropriately flexible to incorporate food substitutes and other similar products should there be a need to do so at some point in the future.

²⁴ See NPRM at 75 FR 65586 at 65593, Oct. 26, 2010.

include not only any index that is concentrated at greater than 50% in a single agricultural commodity, but also any index concentrated at greater than 50% in agricultural commodities generally. Thus, for example, an index composed of 25% each, wheat, corn, soybeans, and gold would fall within the definition because more than 50% of that index is composed of agricultural commodities, and any contract on that index would be a contract on an agricultural commodity.

(c) As described above, the Better Markets comment letter also raised a related concern about the potential for avoiding position limits by using swaps on an index as an alternative to swaps on an agricultural commodity. Professor Greenberger expanded the concern, arguing that any multiple commodity index that references any farm product should be included in the definition of agricultural commodity. The Commission has considered these comments and notes the following:

(1) As proposed,²⁹ position limits would be applied on a contract by contract basis. That is, the inquiry into whether an index is an “agricultural commodity” is not relevant, because there are no position limits that would apply broadly to a contract on an “agricultural commodity.” Rather, the proposed position limits apply to positions in specific contracts, known as reference contracts (for example, the CBOT corn contract, the CBOT wheat contract, *etc.*), options thereon, and swaps economically equivalent thereto. The relevant inquiry becomes whether a contract on an index (or pro rata portion thereof) is economically equivalent to a reference contract, as defined in the proposed position limit rules, and not whether an index is or is not an agricultural commodity.

(2) The position limit rules directly address contracts on a commodity-based index that would be used in an attempt to circumvent the position limit rules. Specifically, the proposed position limit rules provide that “a commodity index contract that incorporates the price of a commodity underlying a referenced contract’s commodity, which is used to circumvent speculative position limits, shall be considered to be a referenced contract for the purpose of applying the [proposed position limit rules].”³⁰

(d) As indicated above, MGEX favored withdrawing category four altogether, arguing that cash-settled and electronically traded contracts on indexes (such as contracts on MGEX’s

various wheat, corn, and soybean cash-bid indexes) should remain outside of the definition of agricultural commodity. In response, the Commission initially notes that Dodd-Frank directs the Commission to adopt a definition of agricultural commodity. Pursuant to section 723(c)(3) of the Dodd-Frank Act, swaps in an agricultural commodity (as defined by the Commission) are prohibited unless permitted by a CEA section 4(c) exemption. However, because the agricultural swaps proposal³¹ will, if adopted as proposed, permit agricultural swaps to transact subject to the same rules applicable to any other swap, it appears that the practical effect of being labeled an agricultural commodity (or avoiding the label of agricultural commodity) will be immaterial.

Still, the Commission will retain the authority, pursuant to section 723(c)(3) of the Dodd-Frank Act, to revise or amend the agricultural swaps rules and to place further limitations or restrictions on swaps in an agricultural commodity in the future.³² For that reason, the Commission is taking the step now, via the agricultural commodity definition, to remove any incentive for regulatory gaming that could result from being able to avoid the label of agricultural commodity by, for example, creating indexes, and then executing contracts thereon, that act as the functional or economic equivalent of otherwise limited or prohibited swaps on an agricultural commodity.

Accordingly, the Commission is retaining the commodity-based index component in its agricultural commodity definition, as revised herein.

Customer hedging. BOK submitted a comment letter requesting an exemption from section 723(c)(3)(A) of the Dodd-Frank Act³³ for transactions that hedge customer positions, irrespective of whether the underlying commodity is agricultural or non-agricultural. That is, BOK’s letter requests that the Commission provide a confirmation that

hedging transactions involving agricultural commodities will not be subject to the Dodd-Frank Act’s general prohibition of swaps in an agricultural commodity. The Commission believes that the concerns raised by BOK’s letter have generally been addressed in the Commission’s proposed rules for agricultural swaps and commodity options. Those rules would treat agricultural swaps, whether they constitute hedging or speculation, the same as other swaps. Thus, hedging transactions involving agricultural swaps would be subject to the same standards as hedging transactions involving other commodities.³⁴

Category two determinations. MGEX also commented briefly on the Commission’s explanatory example in the NPRM regarding the phrase “used primarily” in category two. Category two covers: “All other commodities that are, or once were, or are derived from, living organisms, including plant, animal and aquatic life, which are generally fungible, within their respective classes, and are used primarily for human food, shelter, animal feed, or natural fiber.” The NPRM explained that the phrase “used primarily” means that if “50% of the peaches harvested, plus one, are used for human food” then peaches are an agricultural commodity. MGEX commented that this definition could lead to a slippery slope of managing the use for each crop and that the definition did not appear to provide for legal certainty.

The Commission has considered MGEX’s comment and determined to retain category two as proposed, including the above-quoted explanation of the phrase “used primarily.” Initially, and as noted above, the difference between being labeled an agricultural commodity and any other type of commodity is likely to have minimal or no impact because: (1) The Commission has proposed rules to treat agricultural swaps the same as any other swap; and (2) the position limit rules proposed by the Commission would apply on a contract-by-contract basis and do not key on whether or not a particular commodity is agricultural.

Beyond that, the Commission is not aware of, and MGEX did not identify, any actual commodity where the “amount used for human food, shelter, animal feed, or natural fiber” is so close to 50% as to present a danger of being gamed for the purpose of avoiding the application of the agricultural commodity definition. The point of the

³¹ 76 FR 6095, Feb. 3, 2011.

³² Note that the authority under section 723(c)(3) only applies to swaps in an agricultural commodity and does not extend to futures on an agricultural commodity.

³³ Swaps in an agricultural commodity, other than those currently permitted (for example, pursuant to part 35), are generally prohibited under section 723(c)(3)(A) of the Dodd-Frank Act, which is the provision cited by BOK. However, section 723(c)(3)(B) provides that the Commission, using its CEA section 4(c) authority, may expand the universe of agricultural swaps that are permitted to trade. The Commission’s recent agricultural swaps and commodity options proposal would permit agricultural swaps transactions to continue subject to all rules otherwise applicable to any other swap. See 75 FR 6095, Feb. 3, 2011.

³⁴ See Commodity Options and Agricultural Swaps, 76 FR 6095, Feb. 3, 2011.

²⁹ See Position Limits for Derivatives, 76 FR 4752, Jan. 26, 2011.

³⁰ *Ibid.*

Commission's proposed definition and accompanying explanation was to draw a reasonable and common sense line between that which is agricultural and that which is not. To the extent the prospect of gaming this aspect of category two of the agricultural commodity definition arises in the future, the Commission also points out that it may use category three of the definition to declare any particular commodity to be agricultural by issuing a rule, regulation, or order so designating "after notice and opportunity for hearing."

Effective date. The final question facing the Commission was: "What should be the effective date of the final definition?"³⁵ CME Group noted that "[o]nce adopted, the definition will also clarify the scope of the exemptions under CEA sections 2(g) and 2(h)—at least until Dodd-Frank takes effect and eliminates these exemptions." However, any clarification needed as between the agricultural commodity definition and pre Dodd-Frank CEA provisions is being addressed in the Commission's Dodd-Frank transition period relief.³⁶ Beyond concerns related to pre Dodd-Frank CEA provisions, NCFC noted that it was "unaware of any reason not to make the definition of agricultural commodity effective upon the publication of the final rule."

Therefore, the Commission has determined that the effective date of the final agricultural commodity definition shall be sixty days after the publication of this final rule, as required by the Dodd-Frank Act. By providing that the definition becomes effective as early as is allowed by the Dodd-Frank Act, the Commission intends to provide legal certainty for market participants as they plan for the regulatory regime that will follow the Dodd-Frank transition relief.

³⁵ The NPRM specifically noted:

[I]f the definition of an agricultural commodity is made effective upon the publication of a final rule, it would provide clarity as to what swaps are or are not eligible for the exemptions found in current CEA [sections] 2(g) and 2(h) until the point at which their repeal by the Dodd-Frank Act becomes effective. Is there any reason not to make the definition of agricultural commodity effective upon the publication of a final rule? Are there swaps currently being transacted under [section] 2(g) or [section] 2(h) that would be considered transactions in an agricultural commodity (and thus potentially, temporarily illegal) under the definition proposed herein? If so, should the effective date of the definition be postponed until the repeal of current CEA [sections] 2(g) and 2(h), for all purposes other than for the setting of speculative position limits, which will become effective prior to the repeal?

See NPRM at 65592.

³⁶ See Effective Date for Swap Regulation, 76 FR 35372, June 17, 2011.

Part III—Explanation of the Definition

A. Terms of the Final Definition

Except for the revisions to category four (explained more fully below), the terms of the final definition are the same as the terms of the definition as proposed in the NPRM.

B. Explaining the Definition

Category One—Enumerated Agricultural Commodities

Category one includes the "enumerated agricultural commodities" specified in current section 1a(4) of the Act (renumbered as section 1a(9) under the Dodd-Frank Act). While there is considerable overlap between categories one and two, category one includes some commodities that would not qualify under category two. For example, "fats and oils" would include plant-based oils, such as tung oil and linseed oil, which are used solely for industrial purposes (and thus would not fall within category two). Section 1a(4)'s reference to "oils" would not, however, extend to petroleum products.³⁷

Category Two: Operative Definition of Agricultural Commodities

As a general matter, Category 2 seeks to draw a line between products derived from living organisms that are used for human food, shelter, animal feed or natural fiber (covered by the definition) and products that are produced through processing plant or animal-based inputs to create products largely used as industrial inputs (outside the definition). This general operational definition is self-executing and will encompass commodities that are now or in the future may become subject to swaps, futures, and options trading, without the need for additional CFTC action. In this regard, the rule defines those commodities that are agricultural commodities. It does not matter whether futures, swaps, or options are being traded in the commodity—either now or in the future. Thus, a commodity evaluated under category two either is or is not an agricultural commodity regardless of its trading status.

Some of the terms used in describing the second category require further

³⁷ Petroleum products clearly would not fall within the enumerated commodities. "These itemized commodities are agricultural in nature." Philip McBride Johnson, *Commodities Regulation*, § 1.01, p. 3 (1982). The Commission has never even considered treating petroleum products as agricultural commodities. Nor would petroleum products fall within the second category. Even though they could be viewed as derived from living organisms—albeit organisms that lived millions of years ago—such products would not qualify under the "used primarily for human food, shelter, animal feed or natural fiber" standard of category two.

clarification, particularly the terms, "generally fungible," "used primarily," "human food" and "natural fiber."

"*Generally fungible*"—means substitutable or interchangeable within general classes. For example, apples, coffee beans, and cheese are generally fungible within general classes, even though there are various grades and types, and so they would be agricultural commodities. On the other hand, commodities that have been processed and have taken on a unique identity would not be generally fungible. Thus, while flax or mohair are generally fungible natural fibers, lace and linen garments made from flax, or sweaters made from mohair, are not generally fungible and would not be agricultural commodities under category two.

"*Used primarily*"—means any amount of usage over 50%. For example, if 50% of the peaches harvested, plus one, are used for human food, then peaches fall within category two.

"*Human food*"—includes drink. Thus fruit juice, wine, and beer are "food" for purposes of the definition of "agricultural commodity."

"*Natural fiber*"—means any naturally occurring fiber that is capable of being spun into a yarn or made into a fabric by bonding or by interlacing in a variety of methods including weaving, knitting, braiding, felting, twisting, or webbing, and which is the basic structural element of textile products.

Based on the foregoing, therefore, category two would include such products as: Fruits and fruit juices; vegetables and edible vegetable products; edible products of enumerated commodities, such as wheat flour and corn meal; poultry; milk and milk products, including cheese, nonfat dry milk and dry whey; distiller's dried grain; eggs; cocoa beans, cocoa butter and cocoa; coffee beans and ground coffee; sugarcane, sugar beets, beet pulp (used as animal feed), raw sugar, molasses and refined sugar; honey; beer and wine; shrimp; and silk, flax and mohair.

Category two would also include stud lumber, plywood, strand board and structural panels because they are derived from living organisms (trees), are generally fungible (e.g., random length 2 × 4s and 4 × 8 standard sheets of plywood) and are used primarily for human shelter—i.e., in the construction of dwellings. Category two would not, however, include industrial inputs such as wood pulp, paper or cardboard, nor would it include raw rubber, turpentine or rosin. Although derived from living organisms—trees—and generally fungible, none of these products are

used primarily for human food, shelter, animal feed or natural fibers. On the other hand, maple syrup and maple sugar, also derived from trees, would be “agricultural commodities.” Rayon, which is a fiber derived from trees or other plants, falls out of category two because it is not a natural fiber—i.e., it must be chemically processed from cellulose before it becomes fiber.

Category two would include high fructose corn syrup, but not corn-based products such as polylactic acid (a corn derivative used in biodegradable packaging), butanol (a chemical derived from cornstarch and used in plasticizers, resins, and brake fluid) or other plant-based industrial products. Category two would include pure ethanol, which is derived from living organisms (corn and other plants), is generally fungible, and may be used for human food (as an ingredient of alcoholic beverages). However, it would not include denatured ethanol, which is used for fuel and for other industrial uses, because denatured ethanol cannot be used for human food. Likewise, neither would Category 2 include other plant or animal based renewable fuels, such as methane or biodiesel. Fertilizer and other agricultural chemicals, even though they are used almost exclusively in agriculture, would not fall within the definition because they would not fit into the food, shelter, animal feed, or natural fiber category.

Category Three—Other Agricultural Commodities

Category three would include commodities that do not readily fit into the first two categories, but would nevertheless be widely recognized as commodities of an agricultural nature. Such commodities would include, for example, tobacco, products of horticulture (e.g., ornamental plants), and such other commodities used or consumed by animals or humans as the Commission may by rule, regulation or order designate after notice and opportunity for hearing. The Commission would determine the status of any such other commodities for purposes of the Act and CFTC regulations on a case-by-case basis as questions arise in the context of specific markets or transactions.

Category Four—Commodity-Based Indexes

The term, “agricultural commodity,” also includes a commodity-based index based wholly or principally on underlying agricultural commodities. Thus, for example, the Minneapolis Grain Exchange (“MGEX”) wheat, corn

and soybean price index contracts³⁸ would be considered contracts on agricultural commodities—that is the underlying single commodity index is an agricultural commodity. Also, any index made up of more than 50% of agricultural commodities, since it is based principally on underlying agricultural commodities, would be considered an agricultural commodity for purposes of including it within the agricultural commodity definition. Thus, for example, a commodity-based index composed of 20% each, wheat, corn, soybeans, crude oil and gold, since it is composed of more than 50% agricultural commodities, would be an agricultural commodity. Therefore, swaps on such an index would be subject to special rules (if any) that might be adopted for agricultural commodity swaps.³⁹

The definition of an “excluded commodity” in current CEA section 1a(13)(iii)⁴⁰ could be read to include any index of agricultural commodities. That definition provides that “excluded commodity” means, among other things, “any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction.” However, such a reading is inconsistent with the requirement in Dodd-Frank that swaps in agricultural commodities be permitted only pursuant to a section 4(c) order of the Commission. For example, a swap contract based on a price index of solely wheat should reasonably be considered as a swap in an agricultural commodity. Applying a mechanical interpretation of the definition of excluded commodity could permit “gaming” by allowing an index based principally, or even overwhelmingly, on agricultural commodities to evade any potential limitations on trading agricultural swaps that are found in the Dodd-Frank Act. For this reason, the definition issued herein would include an index based wholly or principally on underlying agricultural commodities.

³⁸ The MGEX agricultural index products are currently available for corn, soybeans, and various types of wheat. These index products are financially settled to a spot index of country origin pricing as calculated by a firm called Data Transmission Network (“DTN”). Cash settlement is based upon the simple average of the spot prices published on the last three trading days of the settlement month.

³⁹ See Commodity Options and Agricultural Swaps, 75 FR 6095, Feb. 3, 2011.

⁴⁰ New section 1a(19)(iii) as renumbered under the Dodd-Frank Act.

Onions

Onions present a unique case in that onions are the only agricultural product specifically excluded from the enumerated commodities list in current CEA section 1a(4). Also, Public Law 85–839 prohibits the trading of onion futures on any board of trade in the United States.⁴¹ Nothing in the definition issued herein affects the prohibition on onion futures trading.

In defining an agricultural commodity, given that term’s statutory history, as well as the Act’s grammatical construction, it would appear that “agricultural commodity” is a subset of “commodity” and, since onions are excluded from the definition of “commodity,” onions cannot be considered an “agricultural commodity.” However, under the Dodd-Frank Act, the definition of “swap” in new section 1a(47) of the CEA is not limited to transactions based upon “commodities” as defined in current section 1a(4) of the Act. Therefore, under the CEA as amended by Dodd-Frank, a swap may be based upon an item that is not defined as a “commodity.” Thus, onion swaps would seem to be permissible, but would not be considered to be swaps in an “agricultural commodity” under the definition contained herein.

C. Effects of Applying the Definition

It is also important to consider the uses to which the definition will be put—i.e., what would be the practical effect of a commodity being classified as an “agricultural commodity” under the definition contained herein? One effect is that the commodity would be covered by any rules the Commission ultimately adopts for agricultural swaps. If, based on the current commodity options and agricultural swaps proposal,⁴² it is determined that agricultural swaps should be treated the same as other physical commodity swaps, the definition should have no effect in the agricultural swaps context.

The other significant effect of a commodity being classified as an “agricultural commodity” is that the commodity would be subject to the timeframes for speculative position limits for agricultural commodities,⁴³ rather than the timeframes for speculative limits for exempt commodities. As discussed above, the classification of a given commodity as

⁴¹ 7 U.S.C. 13–1.

⁴² See Commodity Options and Agricultural Swaps, 76 FR 6095, Feb. 3, 2011.

⁴³ Pursuant to section 737 of the Dodd-Frank Act, the Commission is required to adopt speculative position limits for agricultural commodities.

“agricultural” vs. “exempt” should have no long-term practical effect on the commodity or how it is traded in the speculative limits context because: (1) The definition will only apply to commodities that are the subject of actual swaps or futures trading; and (2) the speculative limits for any such commodities, as proposed, will be based not on any general across-the-board definition or principle, but on the individual characteristics of each commodity, its swaps/futures market, and its underlying cash market.⁴⁴

Part IV—Related Matters

A. Paperwork Reduction Act

The final rule will not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under the Paperwork Reduction Act.⁴⁵ In the proposed rule, the Commission invited public comment on the accuracy of its estimate that no additional recordkeeping or information collection requirements or changes to existing collection requirements would result from the proposed rule. The Commission received no comments on the accuracy of its estimate.

B. Cost Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before issuing new regulations under the Act. Section 15(a) does not require the Commission to quantify the costs and benefits of new regulations or to determine whether the benefits of adopted regulations outweigh their costs. Rather, section 15(a) requires the Commission to consider the costs and benefits of the subject regulations in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) market efficiency, competitiveness, and financial integrity; (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 of concern and may, in its discretion, determine that, notwithstanding its costs, a particular regulation is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

The agricultural commodity definition is not expected to impose any significant costs on industry participants. In addition, we believe that public interest considerations required by CEA section 15(a) weigh strongly in favor of adopting and issuing the agricultural commodity definition. The public interest benefit is that the definition provides legal certainty for indentifying those commodities that are agricultural commodities—and which may be the subject of a “swap in an agricultural commodity (as defined by the [CFTC]).” See Dodd-Frank section 723(c)(3).⁴⁶ And as stated in the NPRM, defining an agricultural commodity for purposes of the CEA would seem to have limited immediate practical effects. The NPRM noted that the definition will be necessary for other substantive rulemakings, such as the timeframes for setting speculative position limits for exempt and agricultural commodities under section 737 of the Dodd-Frank Act and determining the permissibility of trading agricultural swaps under section 723(c)(3) and section 733 of the Dodd-Frank Act. Those other rulemakings were discussed in the original cost benefit analysis in the NPRM. As those rules have now been proposed, the respective costs and benefits of those rules are discussed in those proposed rules.⁴⁷

Regarding comments received concerning costs and benefits, Professor Greenberger stressed that the cost benefit analysis should concentrate on protecting the public interest. The professor noted that reasonable food prices are in the public interest and expressed his view that speculative position limits are an effective tool to curb excessive speculation that can artificially raise food prices. Professor Greenberger argued that any multiple commodity index that references any farm product should be included in the definition of agricultural commodity. Much like Professor Greenberger, IATP believed that public interest considerations, including food security, should be paramount in the cost benefit analysis. As noted in the summary of comments above, the proposed position limits rulemaking contains a provision designed to prevent “gaming” of speculative position limits in relation to indexes, including indexes with

agricultural components. In addition, this final rule includes a revised commodity-based index provision that would include any index made up of more than 50% of agricultural commodities in the agricultural commodity definition. In contrast, the proposed rule would only have included an index made up of more than 50% of a single agricultural commodity.

The Commission also notes that category three of the definition, which permits the Commission to designate new agricultural commodities after a notice and comment period, is designed to provide an appropriate level of flexibility for the Commission as unforeseen developments and challenges emerge in relation to agricultural commodities.

The Ag Swaps Working Group, Gavilon, DFA and the CME Group commented that clarifying that the general operational definition in the second category of the agricultural commodity definition is self-executing would increase legal certainty. The Ag Swaps Working Group and DFA added that such a clarification would be in the public interest. As noted in the summary of comments above, the Commission has made such a clarification.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) ⁴⁸ 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. The rules contained herein provide a definition that will largely be used in other rulemakings and which, by itself, imposes no significant new regulatory requirements. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the rules will not have a significant impact on a substantial number of small entities.

List of Subjects in 17 CFR Part 1

Definitions, Agriculture, Agricultural commodity.

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act and, in particular, sections 2(a)(1), 5h, and 8a thereof, 7 U.S.C. 2, 7b–3, and 12a, and pursuant to the authority contained in section 723(c)(3) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010), the Commission

⁴⁴ See Position Limits for Derivatives, 76 FR 4752, Jan. 26, 2011.

⁴⁵ 44 U.S.C. 3501 *et seq.*

⁴⁶ The Commission views this language as a Congressional directive to provide a formal definition of the term “agricultural commodity,” and by issuing this definition, the Commission is following that directive.

⁴⁷ See Position Limits for Derivatives, 76 FR 4752, Jan. 26, 2011, and Commodity Options and Agricultural Swaps, 76 FR 6095, Feb. 3, 2011.

⁴⁸ 5 U.S.C. 601 *et seq.*

hereby amends Chapter 1 of Title 17 of the Code of Federal Regulations as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

- 1. The authority citation for Part 1 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a–6p, 7, 7a, 7b, 7b–3, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23 and 24, unless otherwise noted.

- 2. Section 1.3 is amended by adding paragraph (zz) to read as follows:

§ 1.3 Definitions.

* * * * *

(zz) *Agricultural commodity*. This term means:

(1) The following commodities specifically enumerated in the definition of a “commodity” found in section 1a of the Act: Wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, *Solanum tuberosum* (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, but not onions;

(2) All other commodities that are, or once were, or are derived from, living organisms, including plant, animal and aquatic life, which are generally fungible, within their respective classes, and are used primarily for human food, shelter, animal feed or natural fiber;

(3) Tobacco, products of horticulture, and such other commodities used or consumed by animals or humans as the Commission may by rule, regulation or order designate after notice and opportunity for hearing; and

(4) Commodity-based indexes based wholly or principally on underlying agricultural commodities.

* * * * *

Issued in Washington, DC, on July 7, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Agricultural Commodity Definition—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, O'Malia and Chilton voted in the affirmative; no Commissioner voted in the negative

Appendix 2—Statement of Chairman Gary Gensler

I support the final rulemaking that defines the term, “agricultural commodity.” The Dodd-Frank Act requires that agricultural commodities be defined. In a separate rulemaking, the Commission will determine the requirements that apply to swaps on agricultural commodities.

[FR Doc. 2011–17626 Filed 7–12–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–64832; File No. S7–29–11]

RIN 3235–AL18

Amendment to Rule Filing Requirements for Dually-Registered Clearing Agencies

AGENCY: Securities and Exchange Commission.

ACTION: Interim final rule; request for comment.

SUMMARY: The Securities and Exchange Commission (“SEC” or “Commission”) is adopting an interim final rule to amend Rule 19b–4 under the Securities Exchange Act of 1934 (“Exchange Act”). The amendment expands the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act to include any matter effecting a change in an existing service of a clearing agency registered with the Commission (“Registered Clearing Agency”) that both primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service. The Commission also is making a corresponding technical modification to the General Instructions for Form 19b–4 under the Exchange Act. The amendments to Rule 19b–4 and Form 19b–4 are intended to streamline the rule filing process in areas involving certain activities concerning non-security products that may be subject to overlapping regulation as a result of, in part, certain provisions under Section 763(b) of the Dodd-Frank Wall Street

Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) that would deem some clearing agencies to be registered with the Commission as of July 16, 2011.

DATES: *Effective Date:* July 15, 2011.

Comment Date: Comments on the interim final rule should be submitted on or before September 15, 2011.

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

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7–29–11 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F St., NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–29–11. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for Web site viewing and printing in the Commission’s Public Reference Room, 100 F St., NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT:

Jeffrey S. Mooney, Assistant Director; Joseph P. Kamnik, Senior Special Counsel; and Andrew R. Bernstein, Attorney-Adviser, Office of Clearance and Settlement, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–7010 at (202) 551–5710.

SUPPLEMENTARY INFORMATION: The Commission is adopting an amendment to Rule 19b–4 under the Exchange Act as an interim final rule to expand the list of categories that qualify for