113TH CONGRESS
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HOUSE OF REPRESENTATIVES
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Part 2

SWAP JURISDICTION CERTAINTY ACT

JUNE 10, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. LUCAS, from the Committee on Agriculture, submitted the following

R E P O R T

[To accompany H.R. 1256]

[Including cost estimate of the Congressional Budget Office]

The Committee on Agriculture, to whom was referred the bill (H.R. 1256) to direct the Securities and Exchange Commission and the Commodity Futures Trading Commission to jointly adopt rules setting forth the application to cross-border swaps transactions of certain provisions relating to swaps that were enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

BRIEF EXPLANATION

H.R. 1256 would require a joint rulemaking from the CFTC and SEC on cross-border swaps regulation pursuant to Section 722(d) of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111–203) (the Dodd-Frank Act), and would presume that all G20 nations would be granted substituted compliance to regulate institutions operating within their borders unless the CFTC and SEC jointly determine otherwise.

PURPOSE AND NEED

As the global financial system has evolved, U.S. institutions have expanded their derivatives operations overseas to provide services to both U.S. and non-U.S. customers. At the same time, foreign institutions have established subsidiaries and branches in the U.S. to offer derivatives directly to U.S. customers. The growth of this cross-border activity makes questions regarding the application of

the Dodd-Frank Act to activities that occur outside the U.S. (known as "extraterritoriality") complex and critical.

Section 722(d) of Title VII sets forth that provisions of the Dodd-Frank Act shall not apply to activities outside the United States unless those activities: (1) have a direct and significant connection with activities in, or effect on, commerce of the United States, or (2) contravene such rules or regulations as the CFTC prescribes are necessary to prevent evasion of the Dodd-Frank Act. This is consistent with historical practice by both the CFTC and the prudential regulators in their treatment of foreign entities with operations in the U.S, or of U.S. entities with regard to their operations in foreign jurisdictions. Generally, the regulatory agencies have deferred to foreign regulatory authorities for the supervision of entities located abroad if the agencies found that those entities were subject to a regulatory regime comparable to that imposed by the U.S.

However, in April of 2012, the prudential regulators proposed a rule for the application of margin requirements as required by Title VII for Major Swap Participants and Swap Dealers. Under the prudential regulators' proposal, margin requirements would apply to all transactions of U.S. financial institutions—whether they involve their U.S. or non-U.S. customers. For example, a foreign subsidiary of a U.S. bank in Europe would be subject to the Dodd-Frank Act's margin rules even when dealing with European customers.

On June 29, 2012, the CFTC issued proposed "interpretive guidance" for the cross-border application of Title VII of the Dodd-Frank Act.[1] The release of this guidance, approved by all five commissioners, was done so without the concurrent release of similar guidance from the SEC for security-based swaps and, as it was not in the form of a proposed rule, did not include a cost-benefit analysis. When the guidance was released, CFTC Commissioner Jill Sommers stated that "[CFTC] staff had been guided by what could only be called the 'Intergalactic Commerce Clause' of the United States Constitution, in that every single swap a U.S. person enters into, no matter what the swap or where it was transacted, was stated to have a direct and significant connection with activities in, or effect on, commerce of the United States. This statutory and constitutional analysis of the extraterritorial application of U.S. law was, in my view, nothing short of extra-statutory and extra-constitutional."[2]

On December 13, 2012, the Committee on Agriculture Subcommittee on General Farm Commodities and Risk Management held a hearing where Commissioners Sommers and Chilton testified alongside top regulators from Japan and the European Commission. Combined, the three regulatory jurisdictions represented by witnesses at our hearing comprised an overwhelming majority of the global derivatives marketplace. Based on testimony the subcommittee received, there appeared to be a serious lack of coordination between both foreign and domestic regulators.

For example, Mr. Masamichi Kono with the Financial Services Agency of Japan (who at the time was Chairman of the International Organization of Securities Commissions) testified during the hearing that "much needs to be done" by the CFTC and that

[1] *See* http://www.cftc.gov/PressRoom/PressReleases/pr6293-12.

[2] *See Statement of Concurrence, Commissioner Jill Sommers*, Jun. 29, 2012, available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/sommersstatement062912.

"it is important that the details of the applicable laws and regulations are made clear as much as possible before their implementation in order to minimize regulatory uncertainty."[3] Further, with respect to minimizing risk in the marketplace—a goal central to the creation of the Dodd-Frank Act—Mr. Kono testified that:

> [s]uch risks need not be addressed by extraterritorial application of the U.S. laws and regulations; rather, the U.S. authorities could rely on foreign regulators upon establishing of course that the foreign regulators have the required authority and competence to exercise appropriate regulation and oversight over those entities and activities. This is what we consider as the most efficient and effective approach, in line with the principles of international comity between sovereign jurisdictions.

On December 13, 2012, Mr. Patrick Pearson with the European Commission also testified before the Committee about regulatory conflicts between the United States and 27 member nations of the European Union. With respect to the risk posed to global markets if international regulators do not properly coordinate the regulation of the markets, he stated that:

> [T]rades will not be able to be cleared. If they can't be cleared, they won't take place. This means that firms and users will not hedge their risks, or firms will hedge their risks but they will only take place within one jurisdiction, which means that risk will be concentrated in one jurisdiction on the planet. That could be the United States. If your firms can't hedge their risks outside of the United States, they'll have to hedge them here. The consequences of that is obviously a fragmented market and a significant concentration of financial risk in the U.S. system, and this is exactly what we tried to prevent with our global regulatory reform.

On April 18, 2013, the finance ministers of the European Commission, France, Germany, United Kingdom, Japan, Switzerland, Russia, South Africa and Brazil wrote to Treasury Secretary Jacob Lew stating that "[w]e are already starting to see evidence of fragmentation in this vitally important financial market as a result of lack of regulatory coordination" and "[w]e are concerned that, without clear direction from global policymakers and regulators, derivatives markets will recede into localised and less efficient structures, impairing the ability of business across the globe to manage risk."

As of the writing of this Report, global regulators have yet to harmonize their approach to global derivatives regulation. On December 21, 2012, the CFTC granted an exemptive order delaying application of the cross-border swaps provisions of the Dodd-Frank Act until July 12, 2013. In order to address the serious concerns voiced by both international and domestic regulators, H.R. 1256 would require a joint rulemaking from the CFTC and SEC on cross-border swaps regulation. The bill would also require that the CFTC and SEC presume that all G20 nations, or other foreign ju-

[3] *See* Subcommittee on General Farm Commodities and Risk Management Hearing Report, Dec. 13, 2012; available at http://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/transcripts/112/112-35New.pdf.

risdictions as determined jointly by the agencies, would be granted substituted compliance to regulate institutions operating within their borders unless the CFTC and SEC jointly determine otherwise.

SECTION-BY-SECTION

Section 1 is the short title of the bill.

Section 2(a) requires the CFTC and the SEC joint rulemaking setting forth the application of the U.S. swaps requirements relating to swaps and security-based swaps transacted between U.S. and non-U.S. persons.

Section 2(b) requires the jointly issued rules to address the nature of connections to the U.S., which of the U.S. swap requirements shall apply to the activities of non-U.S. persons, U.S. persons and their branches, agencies, subsidiaries and affiliates outside the U.S. that require a non-U.S. person to register as a swap dealer, security based swap dealer, major swap participant or [major] security-based swap participant.

Section 2(c) states that the Commissions may issue no guidance, memorandum of understanding or any such other agreement satisfies the requirement to issue a joint rule in accordance with the APA.

Section 2(d)(1) requires the Commissions to jointly exempt from U.S. swaps requirements non-U.S. persons that are in compliance with the swaps regulatory of a G20 member nation or other foreign jurisdictions, unless the Commissions jointly determine that the G20 member nation swap regulatory requirements are not broadly equivalent to the United States swap requirements.

Section 2(d)(2) sets out a schedule for the exemptions required by this act. Joint determinations for the 5 largest combined swap and security-based swap markets by notional amount are due on the date on which final rules are issued. The next five largest markets by notional amount are due one year after the on date final rules are issued. The determination on the remaining markets is due 18 months after the date the final rules are issued.

Section 2(d)(3) requires the Commissions to jointly establish criteria for determining if a foreign jurisdiction is not "broadly equivalent" to U.S. swap regulatory requirements. The Commissions then jointly determine which U.S. swaps requirements will apply to persons or transactions involving that foreign jurisdiction.

Section 2(d)(4) requires that once the final rules are issued the Commissions shall jointly assess the regulatory requirements of the G20 members nations to determine if one or more categories or regulatory requirements of a foreign jurisdiction is not broadly equivalent to U.S. swaps requirements.

Section 2(e) requires the Commissions to report to Congress any determination that a foreign jurisdiction is not broadly equivalent to the U.S. swaps requirements within 30 days of that determination.

Section 2(f) are the definitions of the terms "G20 member nation", "U.S. person", and "United States swaps requirements".

Section 2(g) are conforming amendments to the Commodity Exchange Act and the Securities Exchange Act.

COMMITTEE CONSIDERATION

I. HEARINGS

In the 113th Congress, the Full Committee held a hearing March 14, 2013, to examine legislative improvements to Title VII of the Dodd-Frank Act which included H.R. 1256, Swap Jurisdiction Certainty Act. During the hearing, the Committee heard testimony from the Chairman of the U.S. Commodity Futures Trading Commission and six additional witnesses representing a broad spectrum of participants in the derivatives market. Included is testimony from the Honorable Kenneth E. Bentsen, Jr., Acting President and CEO, the Securities Industry and Financial Markets Association:

> Though Title VII was signed into law two-and-a-half years ago, we still do not know which swaps activities will be subject to U.S. regulation and which will be subject to foreign regulation. Section 722 of the Dodd-Frank Act limits the CFTC's jurisdiction over swap transactions outside of the United States to those that "have a direct and significant connection with activities in, or effect on, commerce of the U.S." or are meant to evade Dodd-Frank. Section 772 limits the SEC's jurisdiction over security-based swap transactions outside of the United States to those meant to evade Dodd-Frank. However, the CFTC and SEC have not yet finalized (or, in the SEC's case, proposed) rules clarifying their interpretation of these statutory provisions. The result has been significant uncertainty in the international marketplace and, due to the aggressive position being taken by the CFTC as described below, a reluctance of foreign market participants to trade with U.S. financial institutions until that uncertainty is resolved.
>
> While the CFTC has proposed guidance on the cross-border impact of their swaps rules, that guidance inappropriately recasts the restriction that Congress placed on CFTC jurisdiction over swap transactions outside the United States into a grant of authority to regulate cross-border trades. The CFTC primarily does so with a very broad definition of "U.S. Person," which it applies to persons with even a minimal jurisdictional nexus to the United States. In addition, the CFTC has released several differing interim and proposed definitions of "U.S. Person" for varying purposes, resulting in a great deal of ambiguity and confusion for market participants. SIFMA supports a final definition of U.S. Person that focuses on real, rather than nominal, connections to the United States and that is simple, objective and determinable so a person can determine its status and the status of its counterparties. Equally significant, the CFTC has issued its proposed cross-border release as "guidance" rather than as formal rulemaking process subject to the Administrative Procedure Act. By doing so, the CFTC avoids the need to conduct a cost-benefit analysis, which is critical for ensuring that the CFTC appropriately weighs any costs imposed on market partici-

pants as a result of implementing an overly broad and complex U.S. person definition against perceived benefits.

II. Business Meetings

The Committee on Agriculture met, pursuant to notice, with a quorum present, on March 20, 2013, to consider H.R. 1256, Swap Jurisdiction Certainty Act, and other pending business.

H.R. 1256 was placed before the Committee for consideration. Without objection, a first reading of the bill was waived and it was open for amendment at any point. Chairman Lucas, Mr. Peterson, Mr. David Scott, and Mr. Conaway were recognized for statements, and Counsel was then recognized for a brief explanation of the bill.

There being no amendments, Mr. Peterson was recognized to offer a motion that the bill H.R. 1256 be reported favorably to the House with recommendation that it do pass. The motion was subsequently approved by voice vote.

The Committee then continued with other pending business, and at the conclusion of the meeting, Chairman Lucas advised Members that pursuant to the rules of the House of Representatives Members had 2 calendar days to file any supplemental or minority views with the Committee.

Without objection, staff was given permission to make any necessary clerical, technical or conforming changes to reflect the intent of the Committee. Chairman Lucas thanked all the Members and adjourned the meeting.

Committee Votes

In compliance with clause 3(b) of rule XIII of the House of Representatives, H.R. 1256 was reported by voice vote with a majority quorum present. There was no request for a recorded vote.

Committee Oversight Findings

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Agriculture's oversight findings and recommendations are reflected in the body of this report.

Budget Act Compliance (Sections 308, 402, and 423)

The provisions of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a)(1) of the Congressional Budget Act of 1974 (relating to estimates of new budget authority, new spending authority, new credit authority, or increased or decreased revenues or tax expenditures) are not considered applicable. The estimate and comparison required to be prepared by the Director of the Congressional Budget Office under clause 3(c)(3) of rule XIII of the rules of the House of Representatives and sections 402 and 423 of the Congressional Budget Act of 1974 submitted to the Committee prior to the filing of this report are as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 3, 2013.

Hon. FRANK D. LUCAS,
Chairman, Committee on Agriculture,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1256, the Swap Jurisdiction Certainty Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure.

H.R. 1256—Swap Jurisdiction Certainty Act

H.R. 1256 would require the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) to jointly issue rules that define the application of United States regulations to swap transactions undertaken between a U.S. entity and a foreign entity. (A swap is a contract that calls for the exchange of cash between two participants based on an underlying rate or index or the performance of an asset.) Foreign participants in such transactions that are in compliance with the swap requirements of a country that is a member of the Group of Twenty Finance Ministers and Central Bank Governors (G20-member nation) would be exempt from the new requirements under certain conditions.

Based on information from the agencies, CBO expects that implementing H.R. 1256 would require the CFTC and the SEC to develop the new rules and review the regulations of G20-member nations to determine whether exemptions would apply. CBO estimates that the costs to both agencies would be roughly equal—about $4 million each. Under current law, the SEC is authorized to collect fees sufficient to offset the cost of its annual appropriation each year. Therefore, we estimate that the net cost to the SEC would be negligible, assuming appropriation actions consistent with that authority. CBO estimates that implementing H.R. 1256 would cost, on net, $4 million for the CFTC's portion of the total cost, assuming appropriation of the necessary amounts. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

Enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111–203) required both the CFTC and the SEC to develop numerous regulations that affect participants in swap transactions, including margin, clearing, and reporting requirements as well as standards of business conduct. The law did not, however, direct the agencies to develop regulations specifying when those requirements apply to swap transactions occurring between a U.S. entity and a foreign entity. Both agencies have developed proposals to help swap participants determine whether U.S. regulations would apply to such transactions.

CBO estimates that implementing H.R. 1256 would increase the workload of both agencies to undertake a new rulemaking effort and to perform the assessment of the foreign regulations. In addition, CBO expects that the agencies would incur costs to translate the regulations and supporting laws and reports for G20-member nations where English versions are not available.

H.R. 1256 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. Assuming that the SEC increases fees to offset the costs of implementing the additional regulatory activities required by the bill, H.R. 1256 would increase the cost of an existing mandate on private entities required to pay those fees. Based on information from the SEC, CBO estimates that the aggregate cost of the mandate would fall well below the annual threshold for private-sector mandates established in UMRA ($150 million in 2013, adjusted annually for inflation).

The CBO staff contacts for this estimate are Susan Willie (for federal costs) and Paige Piper/Bach (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objections of this legislation are to direct the Commodity Futures Trading Commission and the Securities and Exchange Commission to adopt a joint rule on how they will regulate cross-border swaps transactions as part of the new requirements created in the Dodd-Frank Act.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee report incorporates the cost estimate prepared by the Director of the Congressional Budget Office pursuant to sections 402 and 423 of the Congressional Budget Act of 1974.

ADVISORY COMMITTEE STATEMENT

No advisory committee within the meaning of section 5(b) of the Federal Advisory Committee Act was created by this legislation.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

FEDERAL MANDATES STATEMENT

The Committee adopted as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

EARMARK STATEMENT REQUIRED BY CLAUSE 9 OF RULE XXI OF THE RULES OF HOUSE OF REPRESENTATIVES

H.R. 1256 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI of the Rules of the House Representatives.

DUPLICATION OF FEDERAL PROGRAMS

H.R. 1256 does not establish or reauthorize a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or any related program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

Pursuant to clause 3(c) of rule XIII, the Committee estimates that H.R. 1256 specifically directs the Commodity Futures Trading Commission and the Securities Exchange Commission to conduct 1 joint rule making proceeding within the meaning of 5 U.S.C. 551.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECURITIES EXCHANGE ACT OF 1934

TITLE I—REGULATION OF SECURITIES EXCHANGES

* * * * * * *

SEC. 36. GENERAL EXEMPTIVE AUTHORITY.

(a) AUTHORITY.—

(1) IN GENERAL.—Except as provided in subsection (b), but notwithstanding any other provision of this title, the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

(2) PROCEDURES.—The Commission shall, by rule or regulation, determine the procedures under which an exemptive order under this section shall be granted and may, in its sole discretion, decline to entertain any application for an order of exemption under this section.

(b) LIMITATION.—The Commission may not, under this section, exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions from section 15C or the rules or regulations issued thereunder or (for purposes of section 15C and the rules and regulations issued thereunder) from any definition in paragraph (42), (43), (44), or (45) of section 3(a).

(c) DERIVATIVES.—Unless the Commission is expressly authorized by any provision described in this subsection to grant exemptions, *or except as necessary to effectuate the purposes of the Swap Jurisdiction Certainty Act,* the Commission shall not grant exemptions, with respect to amendments made by subtitle B of the Wall Street Transparency and Accountability Act of 2010, with respect to paragraphs (65), (66), (68), (69), (70), (71), (72), (73), (74), (75), (76), and (79) of section 3(a), and sections 10B(a), 10B(b), 10B(c), 13A, 15F, 17A(g), 17A(h), 17A(i), 17A(j), 17A(k), and 17A(l); provided that the Commission shall have exemptive authority under this title with respect to security-based swaps as to the same matters that the Commodity Futures Trading Commission has under the Wall Street Transparency and Accountability Act of 2010 with respect to swaps, including under section 4(c) of the Commodity Exchange Act.

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COMMODITY EXCHANGE ACT

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SEC. 4. (a) Unless exempted by the Commission pursuant to subsection (c) or by subsection (e), it shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting, or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions) unless—

(1) such transaction is conducted on or subject to the rules of a board of trade which has been designated or registered by the Commission as a contract market or derivatives transaction execution facility for such commodity;

(2) such contract is executed or consummated by or through a contract market; and

(3) such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided,* That each contract market or derivatives transaction execution facility member shall keep such record for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, which record shall at all times be open to the inspection of any representative of the Commission or the Department of Justice.

(b)

(1) FOREIGN BOARDS OF TRADE.—

(A) REGISTRATION.—The Commission may adopt rules and regulations requiring registration with the Commission for a foreign board of trade that provides the members of the foreign board of trade or other participants located in the United States with direct access to the electronic trading and order matching system of the foreign board of

trade, including rules and regulations prescribing procedures and requirements applicable to the registration of such foreign boards of trade. For purposes of this paragraph, "direct access" refers to an explicit grant of authority by a foreign board of trade to an identified member or other participant located in the United States to enter trades directly into the trade matching system of the foreign board of trade. In adopting such rules and regulations, the commission shall consider—

(i) whether any such foreign board of trade is subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in the foreign board of trade's home country; and

(ii) any previous commission findings that the foreign board of trade is subject to comparable comprehensive supervision and regulation by the appropriate government authorities in the foreign board of trade's home country.

(B) LINKED CONTRACTS.—The Commission may not permit a foreign board of trade to provide to the members of the foreign board of trade or other participants located in the United States direct access to the electronic trading and order-matching system of the foreign board of trade with respect to an agreement, contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on a registered entity, unless the Commission determines that—

(i) the foreign board of trade makes public daily trading information regarding the agreement, contract, or transaction that is comparable to the daily trading information published by the registered entity for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles; and

(ii) the foreign board of trade (or the foreign futures authority that oversees the foreign board of trade)—

(I) adopts position limits (including related hedge exemption provisions) for the agreement, contract, or transaction that are comparable to the position limits (including related hedge exemption provisions) adopted by the registered entity for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles;

(II) has the authority to require or direct market participants to limit, reduce, or liquidate any position the foreign board of trade (or the foreign futures authority that oversees the foreign board of trade) determines to be necessary to prevent or reduce the threat of price manipulation, excessive speculation as described in section 4a, price distortion, or disruption of delivery or the cash settlement process;

(III) agrees to promptly notify the Commission, with regard to the agreement, contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on a registered entity, of any change regarding—

(aa) the information that the foreign board of trade will make publicly available;

(bb) the position limits that the foreign board of trade or foreign futures authority will adopt and enforce;

(cc) the position reductions required to prevent manipulation, excessive speculation as described in section 4a, price distortion, or disruption of delivery or the cash settlement process; and

(dd) any other area of interest expressed by the Commission to the foreign board of trade or foreign futures authority;

(IV) provides information to the Commission regarding large trader positions in the agreement, contract, or transaction that is comparable to the large trader position information collected by the Commission for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles; and

(V) provides the Commission such information as is necessary to publish reports on aggregate trader positions for the agreement, contract, or transaction traded on the foreign board of trade that are comparable to such reports on aggregate trader positions for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles.

(C) EXISTING FOREIGN BOARDS OF TRADE.—Subparagraphs (A) and (B) shall not be effective with respect to any foreign board of trade to which, prior to the date of enactment of this paragraph, the Commission granted direct access permission until the date that is 180 days after that date of enactment.

(2) PERSONS LOCATED IN THE UNITED STATES.—

(A) IN GENERAL.—The Commission may adopt rules and regulations proscribing fraud and requiring minimum financial standards, the disclosure of risk, the filing of reports, the keeping of books and records, the safeguarding of customers' funds, and registration with the Commission by any person located in the United States, its territories or possessions, who engages in the offer or sale of any contract of sale of a commodity for future delivery that is made or to be made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions.

(B) DIFFERENT REQUIREMENTS.—Rules and regulations described in subparagraph (A) may impose different re-

quirements for such persons depending upon the particular foreign board of trade, exchange, or market involved.

(C) PROHIBITION.—Except as provided in paragraphs (1) and (2), no rule or regulation may be adopted by the Commission under this subsection that—

(i) requires Commission approval of any contract, rule, regulation, or action of any foreign board of trade, exchange, or market, or clearinghouse for such board of trade, exchange, or market; or

(ii) governs in any way any rule or contract term or action of any foreign board of trade, exchange, or market, or clearinghouse for such board of trade, exchange, or market.

(c)(1) 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 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, *or except as necessary to effectuate the purposes of the Swap Jurisdiction Certainty Act,* 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 (Public Law 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.

(2) The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) 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.

(3) For purposes of this subsection, the term "appropriate person" shall be limited to the following persons or classes thereof:

(A) A bank or trust company (acting in an individual or fiduciary capacity).

(B) A savings association.

(C) An insurance company.

(D) An investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.).

(E) A commodity pool formed or operated by a person subject to regulation under this Act.

(F) A corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding $1,000,000 or total assets exceeding $5,000,000, or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to in subparagraph (A), (B), (C), (H), (I), or (K) of this paragraph.

(G) An employee benefit plan with assets exceeding $1,000,000, or whose investment decisions are made by a bank, trust company, insurance company, investment adviser registered under the Investment Advisers Act of 1940 (15 U.S.C. 80a–1 et seq.), or a commodity trading advisor subject to regulation under this Act.

(H) Any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing.

(I) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) acting on its own behalf or on behalf of another appropriate person.

(J) A futures commission merchant, floor broker, or floor trader subject to regulation under this Act acting on its own behalf or on behalf of another appropriate person.

(K) Such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

(4) During the pendency of an application for an order granting an exemption under paragraph (1), the Commission may limit the public availability of any information received from the applicant if the applicant submits a written request to limit disclosure contemporaneous with the application, and the Commission determines that—

(A) the information sought to be restricted constitutes a trade secret; or

(B) public disclosure of the information would result in material competitive harm to the applicant.

(5) The Commission may—

(A) promptly following the enactment of this subsection, or upon application by any person, exercise the exemptive authority granted under paragraph (1) with respect to classes of hybrid instruments that are predominantly securities or depository instruments, to the extent that such instruments may be regarded as subject to the provisions of this Act; or

(B) promptly following the enactment of this subsection, or upon application by any person, exercise the exemptive authority granted under paragraph (1) effective as of October 23, 1974, with respect to classes of swap agreements (as defined in section 101 of title 11, United States Code) that are not part of a fungible class of agreements that are standardized as to their material economic terms, to the extent that such agreements may be regarded as subject to the provisions of this Act.

Any exemption pursuant to this paragraph shall be subject to such terms and conditions as the Commission shall determine to be appropriate pursuant to paragraph (1).

(6) If the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act, the Commission shall, in accordance with paragraphs (1) and (2), exempt from the requirements of this Act an agreement, contract, or transaction that is entered into—

(A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission;

(B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or

(C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)).

(d) The granting of an exemption under this section shall not affect the authority of the Commission under any other provision of this Act to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of this Act or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.

(e) LIABILITY OF REGISTERED PERSONS TRADING ON A FOREIGN BOARD OF TRADE.—

(1) IN GENERAL.—A person registered with the Commission, or exempt from registration by the Commission, under this Act may not be found to have violated subsection (a) with respect to a transaction in, or in connection with, a contract of sale of a commodity for future delivery if the person—

(A) has reason to believe that the transaction and the contract is made on or subject to the rules of a foreign board of trade that is—

(i) legally organized under the laws of a foreign country;

(ii) authorized to act as a board of trade by a foreign futures authority; and

(iii) subject to regulation by the foreign futures authority; and

(B) has not been determined by the Commission to be operating in violation of subsection (a).

(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed as implying or creating any presumption that a board of trade, exchange, or market is located outside the United States, or its territories or possessions, for purposes of subsection (a).

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