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SUBCOMMITTEE ON GENERAL FARM COMMODITIES
AND RISK MANAGEMENT
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Good morning Chairman Conaway, Ranking Member Boswell, and members of the Subcommittee. I am Dan Berkovitz, and I am privileged to serve as the General Counsel at the Commodity Futures Trading Commission (“CFTC” or “Commission”). I thank you for inviting me to today’s hearing on the CFTC’s rulemaking process to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

The Dodd-Frank Act

On July 21, 2010, President Obama signed the Dodd-Frank Act. The Act amended the Commodity Exchange Act (“CEA”) to establish a comprehensive new regulatory framework for swaps and made similar amendments to securities laws for security-based swaps. Title VII of the Dodd-Frank Act was enacted to reduce risk, increase transparency and promote market integrity within the financial system. To accomplish these goals, the Act:

1. Provides for the registration and comprehensive regulation of swap dealers and major swap participants;
2. Imposes clearing and trade execution requirements on standardized derivatives products;
3. Creates robust recordkeeping and real-time reporting regimes; and
4. Enhances 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 brings to the swaps markets the same basic regulatory goals of transparency and risk reduction that have governed the regulation of the futures and securities markets since the 1930s. The measures provided in the Act to lower risk and improve transparency are intended to improve the ability of American businesses to use these markets and derivatives to reduce their risks and costs.

Rulemakings

The Dodd-Frank Act generally requires the CFTC to issue rules that are required to implement the provisions of the Act within 360 days from the date of enactment. Under Dodd-Frank, the effective date of any such rule shall be at least 60 days after publication of the final rule implementing such provision.

The CFTC is working deliberatively and efficiently to issue these rules. The rulemaking process is guided by two basic principles. First, the CFTC is working to ensure that its rules implement the substantive requirements of the statute and follow the intent of Congress. Second, the CFTC is relying extensively on consultation with other regulators, both domestic and international, and the participation of market participants and other interested members of the public. The Commission's rulemakings are conducted in compliance with the Administrative Procedure Act and other applicable laws.

Rulemaking Teams

As the Congress was finalizing the Dodd-Frank Act, the CFTC formed 30 rulemaking teams to begin to implement the Act's rulemaking requirements. Each team consists of a team leader from one of the CFTC divisions, as well as staff from the other CFTC divisions. Chairman Gensler held the first meeting with the 30 team leads the day before the President signed the Act into law.

A number of months ago the CFTC created a 31st rulemaking team tasked with developing conforming rules to update the CFTC's existing regulations to take into account the provisions of the Dodd-Frank Act. The CFTC has thus far proposed rulemakings or interpretive orders in 28 of the 31 areas.

Public Participation

The CFTC is committed to a transparent and open rulemaking process. The Commission has encouraged public participation throughout this process. The CFTC's rulemakings to

implement the Dodd-Frank Act have included the following opportunities for public participation:

Public participation during rulemakings. Immediately after the Dodd-Frank Act was passed, the CFTC solicited comments from the public regarding the rules required to be proposed under the Act. These pre-proposal initiatives included staff roundtables, meetings with market participants, several advance notices of proposed rulemakings, and the establishment of public comment mailboxes and files on the CFTC website. As of this past Monday, we had received 2,907 submissions from the public through these email inboxes. The Commission also encourages the public to submit comments once rules are proposed, and provides a number of ways for comments to be submitted. As of Monday, we had received 8,991 comments in response to notices of proposed rulemaking.

Transparency of all public comments and meetings. The CFTC posts all written comments received and summaries of all meetings with the public on Dodd-Frank Act rulemakings on the Commission's website, at cftc.gov. These summaries of meetings identify the participants and the issues discussed. Any written materials provided to the agency for these meetings are posted on the CFTC website. As of this past Monday, we have had 675 such meetings.

Open meetings. The Commission has utilized thirteen public meetings to issue proposed rules under the Dodd-Frank Act. The meetings are broadcast live via webcast and a call-in

telephone number is available for the public to connect to a live audio feed. Archived webcasts are available on our website as well.

Consultation and Coordination

The CFTC has engaged in extensive consultation and cooperation with other federal financial regulators, both foreign and domestic, to seek input on the rulemakings and to harmonize the regulations of the swaps markets to the fullest extent practical.

Domestically, the CFTC has worked closely with the Securities and Exchange Commission (“SEC”), the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Controller of the Currency and other prudential regulators. The consultation and collaboration with these agencies includes sharing many of the staff memos, term sheets and draft documents. The CFTC also is working closely with the Treasury Department and the new Office of Financial Research. As of last Friday, CFTC staff has had 598 meetings with other U.S. regulators on implementation of the Act.

In addition to working with the agency’s domestic counterparts, the CFTC has reached out to, and is consulting and coordinating with, international regulators to harmonize the approach to swaps oversight globally. As with domestic regulators, the CFTC is sharing memos, term sheets and draft documents with international regulators as well. Discussions have focused on clearing and trading requirements, clearinghouses generally and swaps data reporting issues, among many other topics.

Specifically, the CFTC has been consulting directly and sharing documentation with the European Commission (“E.C.”), the European Central Bank, the United Kingdom Financial Services Authority and the new European Securities and Markets Authority. Three weeks ago, Chairman Gensler traveled to Brussels to meet with the European Parliament’s Economic and Monetary Affairs Committee and discussed the most important features of swaps oversight reform.

The CFTC also has shared documents with the Japanese Financial Services Authority and consulted with Members of the European Parliament and regulators in Canada, France, Germany and Switzerland. Through its consultation with these foreign regulators, the CFTC has sought to bring consistency to regulation of the swaps markets.

In September of last year, the E.C. released its swaps proposal. Similar to the Dodd-Frank Act, the E.C.’s proposal covers the entire derivatives marketplace – both bilateral and cleared – and the entire product suite, including interest rate swaps, currency swaps, commodity swaps, equity swaps and credit default swaps. The proposal includes requirements for central clearing of swaps, robust oversight of central counterparties and reporting of swaps. The E.C. also is considering revisions to its existing Markets in Financial Instruments Directive (“MiFID”), which includes a trade execution requirement, the creation of a report with aggregate data on the markets similar to the CFTC’s Commitments of Traders reports and accountability levels or position limits on various commodity markets.

The CFTC has now issued proposals in most of the rulemaking areas. As the Commission receives comments from the public, it is looking at the entire mosaic of rules and how they interrelate. The Commission will begin considering final rules only after staff can analyze, summarize and consider comments, the Commissioners are able to review the comments and provide guidance to staff, and the Commission consults with fellow regulators on the rules. The Commission has stated that it hopes to move forward in the spring, summer and fall with final rules.

Administrative Procedure Act

The Commission's rulemakings to implement the Dodd-Frank Act are conducted in accordance with the procedural requirements for informal rulemakings under the Administrative Procedure Act ("APA") and other applicable laws. The Commission has provided opportunities for public comment in addition to those specified in the APA, such as providing an opportunity for public comment prior to the issuance of a notice of proposed rulemaking as discussed above.

For most of the proposed rulemakings, the Commission has solicited public comments for a period of 60 days. On some occasions, the public comment period lasted 30 days. The Commission also has discretion to accept late comments. The CFTC website informs persons interested in submitting comments:

"The Commission invites comments on proposed rules. To be assured consideration by the Commission, comments must be filed prior to the close of the official comment period. Comments filed after the close of the official

comment period may be considered, at the Commission’s discretion. After the close of the comment period, persons may continue to submit comments through this website.”

To date, the Commission has accepted and intends to consider all late-filed comments.

The Subcommittee also has requested information regarding the standard for determining when a rule must be re-proposed. The Commission’s actions in this respect also are governed by the APA. In general, the APA requires that an agency provide the public a meaningful opportunity to participate in an agency rulemaking. The first step in the rulemaking process is the publication of a notice of proposed rulemaking (“NPRM”) that includes the substantive terms of the proposed rule and informs the public of the issues that are likely to be significant to the agency’s decision.

The APA does not require the final rule to be identical to the proposed rule. Indeed, in issuing final rules, agencies are expected to consider and respond to comments on the proposed rule. When reviewing a final rule to determine if there was adequate notice and opportunity for comment, the courts will examine whether the connection between the NPRM and the final rule is sufficient for the final rule to be considered a “logical outgrowth” of the proposed rule. For example, courts consider a final rule to be a logical outgrowth if the NPRM expressly asks for comments on a particular issue or otherwise makes clear that the agency is considering a particular course of action.

Phased Implementation

The Commission has specifically requested comment from market participants and interested members of the public on the phase-in of the regulatory requirements that will be established in the final rules.

The CFTC has certain flexibility to set implementation or effective dates of rules promulgated to implement the Act, consistent with the Act's statutory deadlines and requirements. This flexibility allows the Commission to tailor the timing of the implementation of the rules to the ability of entities subject to the new Dodd-Frank regulations to develop the systems, processes, and capabilities to comply with the new requirements. Accordingly, the Commission is considering whether to phase implementation dates based upon a number of factors related to the ability to transition into compliance with the new requirements, including asset class, type of market participant, and whether the requirement would apply to market infrastructures or to specific transactions. The order in which the rules are finalized by the Commission therefore will not necessarily mean that the rules themselves will become effective in that same order, or that the implementation requirements will follow that same sequence.

For example, the Commission may require one asset class or one group of market participants to comply with certain regulatory requirements before other asset classes or other groups of market participants. Similarly, the Commission may require market infrastructure facilities to be in compliance with certain regulatory requirements prior to requiring market participants to use those facilities. Effective dates and implementation schedules for certain rules

may be conditioned upon other rules being finalized, their effective dates and the associated implementation schedules. For instance, the effective dates of some final rules may come only after the CFTC and SEC jointly finalize certain definitions rules.

The Commission is examining issues related to the phasing in of regulatory requirements with respect to the entire set of rules that are being proposed, the regulatory requirements that would thereby be established and the degree of flexibility allowed by the applicable law. The Commission is seeking comments from market participants and regulators, both in the U.S. and abroad, regarding the phasing of implementation of these requirements.

The Subcommittee has also asked about the potential circumstance in which various provisions of the Dodd-Frank Act may become effective prior to the promulgation of implementing regulations. The staff is evaluating these potential circumstances and developing for consideration alternatives within the Commission's authorities in order to ensure that transactions will not be disrupted solely as a result of such transition to the new regulatory regime.

Conclusion

The Commission has established a rulemaking process to implement the Dodd-Frank Act in compliance with the Act's requirements and Congressional intent. The rulemakings are being conducted in an open and transparent manner. The Commission seeks, encourages, and considers public comments. The Commission also will continue to consult and coordinate with other federal regulators and our international counterparts prior to issuing final rules.

Thank you, and I'd be happy to answer questions.