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CFTC Issues Interpretation of the Term ‘Actual Delivery’

On December 2, 2011, the Commodity Futures Trading Commission (CFTC) issued an interpretation of the term “actual delivery,” which is used in Section 2(c)(2)(D)(ii)(III)(aa) of the Commodity Exchange Act (CEA). Section 2(c)(2)(D)(ii)(III)(aa) provides an exception to the CEA’s regulation of retail commodity transactions. *See* Retail Commodity Transactions Under the Commodity Exchange Act, *76 Fed. Reg. 77670* (Dec. 14, 2011). The interpretation is effective December 14, 2011, but the CFTC will accept comments until February 13, 2012, and may revise the interpretation in response to public comments.

What are retail commodity transactions?

Section 2(c)(2)(D) of the CEA grants the CFTC jurisdiction over certain retail commodity transactions. “Retail commodity transaction” refers to any agreement, contract or transaction in any commodity that is entered into with or offered to a person other than an eligible contract participant or eligible commercial entity on a leveraged or margined basis, or financed by the offeror, or the counterparty [or a person acting in concert with the offeror or counterparty on a similar basis]. Among other things, retail commodity contracts do not include **retail foreign exchange contracts** and contracts that either result in actual delivery within 28 days or create an enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery, respectively in connection with their line of business.

When does “actual delivery” occur?

Under the CFTC’s interpretation, actual delivery occurs only if the seller both physically delivers the commodity and transfers title to the buyer. The CFTC notes that determining whether actual delivery has occurred “requires consideration of evidence regarding delivery beyond the four corners of contract documents.” *See* 7. Accordingly, the CFTC will take a functional approach and examine “how the agreement, contract, or transaction is marketed, managed, and performed, instead of relying solely on language used by the parties.” *See* 7. The CFTC notes that relevant factors in this determination will include: ownership, possession, title and physical location of the commodity purchased or sold, both before and after execution of the transaction, the nature of the relationship between the parties and the manner in which the purchase or sale is recorded and completed.

The CFTC provides five examples to illustrate its interpretation. According to these examples, actual delivery will occur if, within 28 days, the seller both transfers title to the buyer and physically delivers the entire quantity of the commodity purchased to the buyer or to certain types of qualified depositories. “Actual delivery” will not occur if delivery is shown only in book entry form, or if the agreement, contract or transaction is rolled, offset or otherwise netted within another transaction or settled in cash between the buyer and the seller.

Does this interpretation apply to other types of transactions?

The CFTC states that the interpretation does not address any provision of the CEA other than Section 2(c)(2)(D)(ii)(III)(aa). This means the CFTC does not intend the

interpretation to address the meaning or scope of contracts of sale of a commodity for future delivery, the forward contract exclusion from the term “future delivery” or “swap” or existing CFTC policies relating to the forward contract exclusion, including the Brent Oil interpretation. These long-standing interpretations on forward contracts do not require actual delivery to occur in order for the relevant transaction to be excluded from the CEA. It is important that the CFTC not use the actual delivery interpretation to narrow its forward contract interpretations because doing so could disrupt commodity markets.