

## **H.R. 238, the Commodity End-User Relief Act**

### **Section-by-Section**

Sec. 1 is the short title of the bill.

Sec. 2 is the table of contents.

#### **Title I – Customer Protections**

##### *Sec. 101 Enhanced Protections for Futures Customers*

Sec. 101 amends section 17 of the Commodity Exchange Act (CEA) to require that each member of a registered futures association (e.g., the National Futures Association (NFA)) maintain written policies concerning the maintenance of residual interest in segregated accounts, cleared swaps collateral accounts, and secured amount funds in foreign futures and options customer accounts. The member must also establish rules to govern the withdrawal, transfer or disbursement by a futures commission merchant (FCM) of the same funds.

##### *Sec. 102 Electronic Confirmation of Customer Funds*

Sec. 102 amends section 17 of the CEA to require an FCM to use an electronic system to report financial and operational information to the NFA in accordance with such terms and conditions that the NFA establishes. A registered FCM must require any depository institution that holds segregated accounts and the customer secured amount funds to report balances to the NFA.

##### *Sec. 103 Notice and Certifications Providing Additional Customer Protections*

Sec. 103 amends section 17 of the CEA to require an FCM to immediately report to the CFTC and a Self-Regulatory Organization (SRO) (e.g., NFA) when an FCM's adjusted net capital, or the funds in a customer's account, segregated account or secured amount account, are less than required by regulation. It also requires the chief compliance officer of an FCM to file with the Commission a yearly assessment of the FCM's internal compliance programs.

##### *Sec. 104 Futures Commission Merchant Compliance*

Sec. 104 amends section 4d of the CEA to allow an FCM one business day after a trade to comply with the amounts of money, securities and property required to be held in a customer account by section 4d(a)(2) of the CEA.

##### *Sec. 105 Certainty for Futures Customers and Market Participants*

Sec. 105 amends section 20(a) of the CEA to allow the use of the cash, securities or other property, subject to certain security interests or other contractual rights, of a bankrupt commodity broker to satisfy any deficient public customer account.

## **Title II – Commodity Futures Trading Commission (CFTC) Reforms**

### *Sec. 201 Extension of Operations*

Sec. 201 amends section 12(d) of the CEA authorizes appropriations of \$250 million to the CFTC for each fiscal year from FY 2017 through FY 2021.

### *Sec. 202 Considerations by the Commodity Futures Trading Commission of the Costs and Benefits of its Regulations and Orders*

Sec. 202 amends section 15(a) of the CEA to more closely align the CFTC's cost benefit requirements with those of executive order 13563. The section requires that the CFTC's cost benefit analysis of a proposed regulation or order be performed by the Chief Economist and published with the proposed rule or order along with the statutory justification.

### *Sec. 203 Division Directors*

Sec. 203 amends section 2(a) of the CEA to clarify that each CFTC Division Director serves at the pleasure of the Commission.

### *Sec. 204 Office of the Chief Economist*

Sec. 204 amends section 2(a) of the CEA to establish the Office of the Chief Economist (OCE). The structure and powers of the OCE generally mirror those of the Office of General Counsel.

### *Sec. 205 Procedures Governing Actions Taken by Commission Staff*

Sec. 205 amends section 2(a)(12) of the CEA to require that the Commission publish internal procedures governing the issuance of a response to a formal petition for guidance, or an exemptive, a no-action, or an interpretive letter. The internal procedures shall require that the Commissioners be provided with the final version of the matter to be issued with sufficient notice to review the matter prior to its issuance.

### *Sec. 206 Strategic Technology Plan*

Sec. 206 amends section 2(a) of the CEA to require the Commission to file with the authorizing committees, a strategic technology plan every 5 years. The plan shall include a detailed technology strategy focused on market surveillance and risk detection, and must include a detailed accounting of how the funds provided for technology will be used.

### *Sec. 207 Internal Risk Controls*

Sec. 207 amends section 2(a)(12) of the CEA to require that the Commission consult with the Chief Economist in developing internal risk control mechanisms to safeguard the storage and

privacy of market data by the Commission. Special attention should be given to market data sharing agreements and academic research performed at the Commission using market data.

*Sec. 208 Subpoena Duration and Renewal*

Sec. 208 amends section 6(c)(5) of the CEA to require that an omnibus order of investigation issued by the Commission authorizing the issuance of subpoenas shall be for a finite period, and may only be renewed only by Commission vote.

*Sec. 209 Applicability of Notice and Comment Requirements of the Administrative Procedure Act to Guidance Voted on by the Commission*

Sec. 209 amends section 2(a)(12) of the CEA to apply the notice and comment provisions of the Administrative Procedure Act (APA) to guidance that has the effect of implementing, interpreting or prescribing law or policy and that is issued and voted on by the Commission.

*Sec. 210 Judicial Review of Commission Rules*

Sec. 210 amends the CEA by adding a new section (section 24) committing the original jurisdiction of the review of a CFTC issued final rule to the United States Court of Appeals for the District of Columbia Circuit or the U.S. Court of Appeals for the circuit where the party resides. The court may affirm and enforce or set aside a final rule in whole or in part. This is similar to the judicial review process for rules and orders of the Securities and Exchange Commission set forth in sections 25(a) and (b) of the Securities Exchange Act of 1934 (SEA).

*Sec. 211 GAO Study on Use of Commission Resources*

Sec. 211 requires the GAO to conduct a study of the Commission's resources and assess whether the resources are sufficient to enable the Commission to effectively carry out its duties. The study shall also examine the prior expenditures of the Commission on hardware, software and analytical processes designed to protect customers in the areas of market surveillance and data collection. GAO must also analyze the additional workload undertaken by the Commission and where SROs could be more effectively utilized, as well as the impact risk reduction services have on Commission oversight and compliance.

*Sec. 212 Disclosure of Required Data of Other Registered Entities*

Sec. 212 amends section 8 of the CEA to clarify when the CFTC can disclose proprietary information submitted to the Commission on forms CPO-PQR and Form CTA-PR. The Commission may disclose such information to Congress, but may only disclose this information to a foreign government, Federal department, agency or State, upon an agreement of confidentiality. The information may also be disclosed pursuant to a court order, including a bankruptcy proceeding under title 11 of the United States Code. For purposes of this section, proprietary information includes trading strategies, analytical or research methodologies, trading

data, computer hardware or software containing intellectual property, and any additional information the Commission determines to be proprietary.

### **Title III – End-User Relief**

#### *Sec. 301 Transactions with Utility Special Entities*

Sec. 301 amends section 1a(49) of the CEA by creating within the definition of swap dealer, a new category of transactions in utility operations-related swaps, which shall be reported according to the reporting requirements of uncleared swaps and exempted from inclusion in an entity's general *de minimis* calculation.

#### *Sec. 302 Utility Special Entity Defined*

Sec. 302 amends section 4s(h)(2) of the CEA to add the definition of a “utility special entity” an entity established by a state, or political subdivision thereof, which owns or operates, or anticipates owning or operating, an electric or natural gas operation; supplies, or anticipates supplying, natural gas and or electric energy to another utility special entity; has, or anticipates having, public service obligations under Federal, State or local law or regulation to deliver electric energy or natural gas service to customers; or is a Federal power marketing agency.

#### *Sec. 303 Utility Operations-Related Swap*

Sec. 303 amends section 1a(47) of the CEA to add to the definition of swap a list of “commonly known” transactions to further describe a utility operations-related swap. It further amends section 1a to define a “utility operations related swap” as a swap that is entered into by a utility to hedge or mitigate risk, is not based on an interest rate, credit, equity, or currency asset class nor a metal, agriculture commodity, or crude oil or gasoline commodity for any grade except as used as fuel for electric energy generation, and is associated with the generation, production or sale of natural gas or electric energy.

#### *Sec. 304 End-Users Not Treated as Financial Entities*

Sec. 304(a) amends section 2(h)(7)(C)(iii) of the CEA to exclude from the definition of a financial entity those entities not supervised by a prudential regulator and that are commercial market participants or enter into swaps, futures and other derivatives on behalf of, or to hedge the commercial risk of, non-financial affiliates.

Subsection (b) amends section 1a of the CEA to define a commercial market participant as a producer, processor, merchant, or commercial user of an exempt or agricultural commodity, or the products or byproducts of such commodity.

#### *Sec. 305 Reporting of Illiquid Swaps So as Not to Disadvantage Certain Non-Financial End-Users*

Sec. 305 amends section 2(a)(13) of the CEA to require the Commission to promulgate a rule that would delay the public reporting of a non-cleared swap traded in an illiquid market and entered into by a non-financial entity, to no sooner than 30 days after the transaction has been executed. An illiquid market is defined as any market in which the volume and frequency of trading in swaps is at such a level as to allow identification of individual market participants.

*Sec. 306 Relief for Grain Elevator Operators, Farmers, Agricultural Counterparties, and Commercial Market Participants*

Sec. 306 amends the CEA by adding a new section, 4u, which clarifies the recordkeeping requirements of non-registered members of a designated contract market (DCM) or SEF. All recordkeeping requirements and rules for these entities shall be satisfied if the entities maintain a written record of each transaction in a contract for future delivery, option on a future, swap, swaption, trade option, or related cash or forward transaction. The written record is sufficient if it includes the final agreement between the parties and the material economic terms of the transaction.

*Sec. 307 Relief for End-Users Who Use Physical Contracts with Volumetric Optionality*

Sec. 307 amends section 1a(47)(B)(ii) of the CEA to clarify that the exclusion from the definition of the term swap includes contracts that are intended to be physically settled that include any stand-alone or embedded option which, if exercised, results in a physical delivery obligation.

*Sec. 308 Commission Vote Required Before Automatic Change of Swap Dealer De Minimis Level*

Sec. 308 amends section 1a(49)(D) of the CEA to require the Commission to take an affirmative action by rule or regulation to change the \$8 billion *de minimis* exception from the swap dealer definition.

*Sec. 309 Capital Requirements for Non-Bank Swap Dealers*

Sec. 309 amends section 4s(e) of the CEA to require the Commission to permit swap dealers and major swap participants that are not banks to use financial models that calculate minimum capital requirements and minimum initial and variation margin requirements that have been approved for use by banks by prudential regulators or the SEC.

Sec. 309 (b) makes a similar amendment to section 15F(e) of the SEA for security-based swap dealers and major security-based swap participants that are not banks.

*Sec. 310 Harmonization with the Jumpstart Our Business Startups Act*

Sec. 310 requires the CFTC to change its regulation regarding the advertisement for participation in commodity pools. The changes will allow any registered commodity pool that also qualifies

for an exemption from the registration requirements of the Securities Act (SA), to be sold pursuant to the changes made to section 4 of the SA under the Jumpstart our Business Startups Act (P.L. 112-106).

*Sec. 311 Bona Fide Hedge Defined to Protect End-User Risk Management Needs*

Sec. 311 amends section 4a(c) of the CEA to require the Commission to recognize anticipatory hedging transactions as part of the exemption from trading limits.

*Sec. 312 Cross-Border Regulation of Derivatives Transactions*

Sec. 312(a) requires the CFTC to issue a rule within one year of the enactment of the bill that addresses the nature of the connections to the United States that require a non-U.S. person to register as a swap dealer or a major swap participant; which United States swaps requirements shall apply to the swap activities of non-U.S. persons and U.S. persons and their branches, agencies, subsidiaries, and affiliates outside of the United States, and the extent to which such requirements shall apply; and the circumstances under which a person in compliance with the regulatory requirements of a foreign jurisdiction shall be exempt from United States swaps requirements.

Sec. 312(b)(1) requires the CFTC to establish criteria within the rule for determining that one or more categories of a foreign jurisdiction's swaps regulatory requirements are comparable to and as comprehensive as United States swaps requirements including the scope and objectives of the swaps regulatory requirements of the foreign jurisdiction; the effectiveness of the supervisory compliance program administered; the enforcement authority exercised, by the foreign jurisdiction; and other factors as the Commission determines to be necessary or appropriate in the public interest.

Sec. 312(b)(2) requires that the rule provide any non-U.S. person or any transaction between two non-U.S. persons an exemption from U.S. swaps requirements, so long as the person or transaction is in compliance with a comparable foreign jurisdiction's rules. It further requires the rule to set forth the circumstances under which a U.S. person may be exempt from U.S. rules.

Sec. 312(b)(3) requires the CFTC to focus on the outcomes of regulatory requirements rather than the construction of those requirements in developing the rule's criteria.

Sec. 312(b)(4) clarifies that that rule shall prohibit the Commission from taking into account the location of personnel that arrange, negotiate, or execute swaps, for the purposes of determining the applicability of United States swaps requirements

Sec. 312(b)(5) clarifies that rulemaking pursuant to this section shall not limit the CFTC's anti-fraud or anti-manipulation authority.

Sec. 312(c)(1) requires the CFTC to begin assessing the swaps requirements of foreign jurisdictions in accordance with the criteria established pursuant to subparagraph (b)(1).

Following each assessment, the Commission shall determine if the swaps requirements of the foreign jurisdiction are comparable to United States swaps requirements.

Sec. 312(c)(2) provides that one year after the enactment of the bill, swaps regulatory requirements of the eight foreign jurisdictions with the largest swaps markets shall be considered to be comparable to United States swaps requirements. At that time, any non-U.S. person or any transaction between two non-U.S. persons shall be exempt from United States swaps requirements, so long as the person or transaction is in compliance with the swaps requirements of these eight foreign jurisdictions.

Sec. 312(c)(3) allows the CFTC to suspend, in whole or in part, a determination made under paragraph (c)(1) or substituted compliance granted under paragraph (c)(2) if the CFTC determines that the swaps requirements of the foreign jurisdiction are not comparable to United States swaps requirements, using the categories and criteria established under paragraph (b)(1); or the foreign jurisdiction does not exempt from its swaps requirements U.S. Persons in compliance with United States swaps requirements; or the foreign jurisdiction is not providing equivalent recognition of, or substituted compliance for, registered entities domiciled in the United States.

Sec. 312(d) sets forth a process by which any registered entity, any commercial market participant, or any Commission registrant may petition the CFTC to make or change a determination under paragraphs (c)(1) or (c)(3) including the required contents of the petition and the deadline by which the CFTC must respond.

Sec. 312(e) requires that if the CFTC makes determinations by order, the basis for those determinations must be articulated to the authorizing congressional committees in the form of a report submitted within 15 days of the determination. The determination shall not be effective until 15 days following the committees receive the report.

Sec. 312(f) defines the terms “U.S. person,” “United States swaps requirements,” “foreign jurisdiction,” and “swaps regulatory requirements.”

Sec. 312(g) contains conforming amendments.

#### *Sec. 313 Exemption of Qualified Charitable Organizations from Designation and Regulation as Commodity Pool Operators*

Sec. 313 amends section 1a(10) of the CEA by removing from the definition of “commodity pool” investment trusts, syndicates, or similar forms of enterprises that are already exempt from the definition of “investment company” in the Investment Company Act of 1940. This section further requires these entities to follow the disclosure requirements set forth in section 7(e) of the Investment Company Act of 1940.

#### *Sec. 314 Small Bank Holding Company Clearing Exemption*

Sec. 314 amends section 2(h)(7)(C) of the CEA by clarifying that the CFTC's decisions to exempt small banks and savings associations from classification as a financial entity will also be extended to the holding companies of those associations if the total consolidated assets of the holding company are no greater than the asset threshold set by the Commission in determining small bank and savings association eligibility.

#### *Sec. 315 Core Principle Certainty*

Sec. 315 amends section 5h(f) of the CEA to narrow a SEF's monitoring responsibility over "trading in swaps" to swaps trading "only on its own facility" and to provide a SEF with flexibility in developing and implementing its surveillance and monitoring rules. It also replaces the requirement that a SEF hold funds to cover its operating costs for 1 year with the requirement that it hold funds to cover its operating costs for a 90-day period or to conduct an orderly wind-down of operations, whichever is greater. It further modifies the duties of a SEF chief compliance officer and the procedures for SEF annual reports to the CFTC.

#### *Sec. 316 Treatment of Federal Home Loan Bank Products*

Sec. 316 amends section 1a of the CEA to include the Federal Housing Finance Agency for any Federal Home Loan Bank in the definition of an "appropriate federal banking agency". This section also amends section 402 of the Legal Certainty for Bank Products Act of 2000 to include Federal Home Loan Banks in the definition of "bank". These two changes clarify that advances made to financial institutions by the Federal Home Loan Bank System are "banking products" regulated by the Federal Housing Finance Agency and not derivatives subject to regulation by the CFTC.

#### *Sec. 318 Treatment of Certain Funds*

Sec. 318 amends section 1a(11) of the CEA by excluding from the definition of "commodity pool operator" investment advisors, if their company is registered with the SEC and it only offers trading advice on or trades in financial derivatives. It similarly amends section 1a(12) of the CEA to exclude these investment advisors from the definition of "commodity trading advisor."

### **Title IV – Technical Corrections**

Title IV corrects grammatical errors and removes references to outdated terminology and an outdated study in the CEA.