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[H.R. 2289, the Commodity End-User Relief Act](#)

FLOOR SITUATION

On Tuesday, June 9, 2015, the House will consider [H.R. 2289](#), *the Commodity End-User Relief Act*, under a [structured rule](#). H.R. 2289 was introduced on May 13, 2015, by Rep. Michael Conaway (R-TX) and was referred to the Committee on Agriculture, which ordered the bill reported by voice vote on May 14, 2015.

SUMMARY

H.R. 2289 would authorize appropriations to operate the Commodity Futures Trading Commission (CFTC) through 2019 and make changes in some of the agency's operating procedures. The bill also would amend the Commodity Exchange Act (CEA) to provide greater protections for customer funds held by entities that broker transactions in commodity futures and make important changes to the CEA to reduce regulatory burdens on end-users¹ who use futures and swaps² transactions to efficiently manage business risks.

The major provisions of the bill are as follows:

Title I—Customer Protections

Title I is designed to better protect farmers and ranchers and other end-users who use futures markets by providing for new customer protection provisions. Added protections provided by the Title include:³

- Requiring regulators to electronically confirm customer fund account balances held at depository institutions. Under current law, electronic verification is not required, which in the

¹ An “end-user” is a market participant who produces, uses, or merchandizes commodities and uses derivatives transactions to offset risks (typically future price exposure) faced in physical transactions. For example, a car manufacture might use a derivatives transaction to offset the risk of aluminum or steel rising in the future.

² A “swap” is a contract that calls for an exchange of cash between two participants, based on an underlying rate or index or on the performance of an asset.

³ See Committee on Agriculture, [H.R. 2289 summary](#) at 2.

past enabled criminals to use forged paper documents to steal millions of dollars from commodity futures customers.⁴

- Requiring firms that move more than a certain percentage of customer funds from one account to another to follow strict reporting and permission requirements. Under current law, firms are able to move funds from one account to another without regulators' knowledge, which has occurred in the past before imminent firm bankruptcies, causing confusion and loss of customer funds.⁵
- Requiring firms that become undercapitalized to immediately notify regulators so they can assess the firm's viability and act, if needed, to protect customer funds.
- Requiring firms to file an annual report with regulators containing an assessment of futures commission merchants (FCM)⁶ internal compliance programs.
- Ensuring end users have a full business day to send their margin payments to an FCM, which mitigates costs of over-funding accounts.
- Provisions to increase legal clarity and transparency.

Title II—Commodity Futures Trading Commission Reforms

Title II reforms the Commission's rule-making process and makes certain reforms to enhance oversight and accountability within the Commission. Specifically the Title:

- Requires the CFTC to develop a strategic technology plan every five years focused on market surveillance and risk detection, which must also include a detailed accounting of how funds provided for technology will be used.
- Creates a new Office of the Chief Economist, answerable to the entire Commission, to provide objective economic data and analysis and to develop comprehensive internal risk control mechanisms to safeguard market data.
- Directs the Government Accountability Office (GAO) to conduct a study on the sufficiency of CFTC resources and examine prior expenditures of funds on market surveillance and market data collection, standardization, and harmonization. The study will also explore areas where self-regulatory organizations could reduce the CFTC's workload.

The Title also makes the following changes to the Commission's rulemaking process:

- Modifying the CEA's cost-benefit analysis requirements for proposed rules, in order to harmonize them with those of [Executive Order 13563](#). Moreover, it requires that the cost benefit analysis be performed by the Chief Economist and published within the proposed rule along with the rule's statutory justification.
- Prohibits the Commission from issuing policy statements, guidance, interpretive rules, or other procedural rules that have the ultimate effect of law, without providing the public the notice and the opportunity to comment as required in the Administrative Procedure Act.⁷

⁴ <http://www.bloomberg.com/news/articles/2013-01-22/peregrine-s-wasendorf-stole-215-million-u-s-says>

⁵ See Congressional Research Report, [The MF Global Bankruptcy, Missing Customer Funds, and Proposals for Reform](#), August 1, 2013, at 2.

⁶ A future commission merchant (FCM) is an individual or organization which solicits or accepts orders to buy or sell futures contracts, options, swaps, or accept money or other assets from customers to support such orders.

⁷ See Congressional Research Service report, [The Federal Rulemaking Process: An Overview](#), June 17, 2013, at 5 for more information on the Administrative Procedure Act and the Federal Rulemaking Process.

- Creating a judicial review process similar to that of the SEC’s for rulemakings to ensure the two regulators charged with overseeing the derivatives markets have similar procedures in place to allow market participants to challenge Commission rules.
- Enhancing the CFTC staff procedures governing the issuance of staff letters and guidance to improve Commissioners’ oversight of the activities happening outside the official rulemaking process. The CFTC staff has long been allowed to issue exemptive, interpretive, or no-action letters to applicants clarifying how the CFTC Staff would apply (or often, suspend) statutory or regulatory requirements in certain instances. Traditionally, these instances have involved new or novel financial products or services, unique circumstances specific to small class of persons, or other temporary circumstances. According to the Committee, some letters issued by the CFTC staff since the enactment of Dodd-Frank have been issued with little notice to CFTC Commissioners and fallen outside of the appropriate use of such letters and been utilized in place of the APA rulemaking process.

Title III—End User Relief

Title III provides relief for end-users who have faced burdensome and unintended costs utilizing derivatives since the implementation of the Dodd-Frank Act. End-users are typically not commodity investors or speculators, and played little or no part in the 2008 financial crisis. Major economic sectors with end-users who utilize derivatives include: agricultural producers and processors, commodity producers and manufacturers, and utility and energy companies. The Title includes the following provisions:

- Dodd-Frank contained an impractical exemption from the clearing requirements for certain end-users. H.R. 2289 addresses this issue by amending the statute so that all firms who centralize their derivatives transactions through a “centralized treasury unit” (CTU) are able to utilize the clearing exemption the law provided. According to the Committee, requiring these transactions to be cleared imposes unnecessary costs on end-users who do not present a systemic risk to the financial system.⁸
- Removes the provision of the Commodity Exchange Act requiring foreign regulators to indemnify the CFTC against costs associated with the loss of data, while maintaining the requirement for written confidentiality agreements. Trusted foreign regulators often cannot be required to indemnify the CFTC as legal concept of indemnification does not exist within the tort law of all foreign jurisdictions.
- Codifies municipal utility companies’ cost-effective access to the customized, non-financial commodity swaps, to allow government-owned utilities to engage in swaps to hedge against risk.
- Amends to definition of “financial entity,” so that certain end-users are not inadvertently treated like financial institutions under the law.
- Specifies that end-users hedging in thinly-traded markets are provided adequate time between completing and reporting a transaction to protect their position. Non-financial end-users are often put at a disadvantage in the marketplace if they use contracts that trade so infrequently that other market participants can identify them through the new public reporting requirements.
- Reduces recordkeeping requirements for certain market participants who are solely managing their own money. This exempts grain elevators, farmers, agriculture counterparties, and commercial market participants from being subject to burdensome recordkeeping rules that require the recording of all forms of communication that may possibly lead to a trade.⁹

⁸ See [Coalition for Derivatives End-User letter](#) at 4.

⁹ See Committee on Agriculture [H.R. 2289 Summary](#)

- Specifies that contracts that contain an option to change the amount of a commodity delivered, but result in actual physical delivery of a commodity should not be regulated as swaps. This impacts utilities that use natural gas to produce electricity, in addition to millions of consumers who use natural gas to heat their homes.
- Specifies that swap dealers without a prudential regulator would be able to use workable capital requirement formulas. This ensures that non-bank swap dealers are not required to hold significantly more capital than their bank counterparts.
- Amends the CEA to clarify that the current swap dealer de minimis level of \$8 billion can only be reduced by Commission vote. Due to a new Commission rule, the de minimis exception from the swap dealer definition is set to be reduced by 60 percent (from \$8 billion to \$3 billion) on December 31, 2017.¹⁰ H.R. 2289 would allow the results of an ongoing study to inform the Commission’s action on the de minimis level.
- Makes a change to CFTC regulations to conform them to the Jumpstart Our Business Startups (JOBS) Act, enabling funds registered as Commodity Pools to solicit certain potential new investors.
- Protects the current definition of bona fide hedging as it relates to position limits, to enable end-users to better hedge against anticipated business risks. The Commission has proposed a substantial narrowing of the transactions exempted from its new position limit rulemaking, which will disrupt current business practices for agricultural producers and merchants.
- Requires the CFTC to create a plan for how to address the international nature of swaps trading and to determine how to share regulatory obligations over transactions that cross international boundaries. According to the Committee, the Commission still has not established a rule that defines who is subject to U.S. rules, who is not subject to U.S rules, and what to do when international rules conflict.¹¹

BACKGROUND

The Commodity Futures Trading Commission (CFTC) was created in 1974 by the Commodity Futures Trading Commission Act to regulate commodities futures and options markets. “Since passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), the CFTC’s jurisdiction has expanded significantly to include over-the-counter (OTC) derivatives, also called swaps.”¹² Due to the Dodd-Frank Act, participants in swaps markets must register with the CFTC.¹³ Newly-regulated swap market participants are subject to new business conduct standards contained in statute, which were promulgated as dozens of new CFTC rules.¹⁴ In the past five years, the CFTC has finalized approximately 50 rules to enforce the new law. In that time span, the CFTC has also issued 250 “no-action” letters, 42 exemptive letters and 42 statements of guidance, interpretation and advice in order to delay, revise, or exempt the application of these regulations upon various market participants.¹⁵

H.R. 2289 is designed to make a number of reforms to reduce the burden of new CFTC regulations so end-users can affordably manage business risks. According the bill sponsor, “This bill codifies new practices instituted by the CFTC and other market regulators to protect customer margin, it

¹⁰ See [CFTC document](#) for more information on the de minimis exception rule.

¹¹ See Committee on Agriculture [H.R. 2289 Summary](#) at 5.

¹² See Congressional Research Report, [The Commodity Futures Trading Commission: Background and Current Issues](#), June 24, 2013, at 1.

¹³ Id. at 1.

¹⁴ Id. at 1.

¹⁵ See Committee on Agriculture [H.R. 2289 Summary](#).

includes a strong cost-benefit analysis measure to produce better rules, and it provides relief for end-users from burdensome requirements currently in place. The derivatives market exists to help businesses manage their risk, and this bill will bring positive reforms to help these markets run efficiently and effectively for market participants, financial intermediaries, and end-users alike.”¹⁶

H.R. 2289 is very similar to [H.R. 4413](#), which passed the House on June 24, 2014 by a vote of [265 to 144](#). The Senate did not act on the House-passed bill in the 113th Congress.

H.R. 2289 also includes the following measures that passed the House with bipartisan support in the 113th Congress:

- [H.R. 742](#), the *Swap Data Repository and Clearinghouse Indemnification Act*, which passed the House on June 12, 2013, by a vote of [420 to 2](#).
- [H.R. 1038](#), the *Public Power Risk Management Act*, which passed the House on June 12, 2013, by a vote of [423 to 0](#).
- [H.R. 1256](#), the *Swap Jurisdiction Certainty Act*, which passed the House on June 12, 2013, by a vote of [301 to 124](#).
- [H.R. 5471](#), *To amend the Commodity Exchange Act and the Securities Exchange Act of 1934 to specify how clearing requirements apply to certain affiliate transactions*, passed by the House on December 2, 2014, by [voice vote](#).

COST

The Congressional Budget Office (CBO) [estimates](#) enacting H.R. 2289 would cost \$1.1 billion over the 2016 to 2020 period, assuming appropriation of the necessary amounts. CBO expects that enacting H.R. 2289 would affect direct spending; therefore, pay-as-you-go procedures apply. However, CBO estimates that those effects would not be significant. Enacting H.R. 2289 would not affect revenues.

AMENDMENTS

1. [Rep. Michael Conaway \(R-TX\)](#) – (Manager’s Amendment) The Amendment makes conforming and technical changes.
2. [Rep. Ruben Gallego \(D-AZ\)](#) – The Amendment expresses a sense of Congress that the Commodity Futures Trading Commission should take all appropriate actions to encourage applications for positions in the Office of the Chief Economist from members of minority groups, women, disabled persons, and veterans.
3. [Rep. Mark Takai \(D-HI\)](#) - The Amendment requires a report to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate summarizing any plans of action and milestones for any known information security vulnerability.
4. [Rep. Gwen Moore \(D-WI\)](#) – The Amendment narrows the scope of the provisions in the bill to ensure that only swap data, and not any other data, held by an SDR is required to be shared with other regulators. It also ensures that the language in the Securities Exchange Act and the Commodity Exchange Act mirror each other.
5. [Rep. Jackie Walorski \(R-IN\)](#) – The Amendment adds "Status of consultations with all U.S. market participants including major producers and consumers."

¹⁶ See Press Release, [“House Ag Committee Approves Bipartisan Legislation.”](#) May 14 2015

STAFF CONTACT

For questions or further information please contact [John Huston](#) with the House Republican Policy Committee by email or at 6-5539.