

(2) the product was not prohibited by the Commodity Exchange Act [7 U.S.C. 1 et seq.] and not regulated by the Commodity Futures Trading Commission as a contract of sale of a commodity for future delivery (or an option on such a contract) or an option on a commodity, on or before December 5, 2000.

(Pub. L. 106-554, §1(a)(5) [title IV, §403], Dec. 21, 2000, 114 Stat. 2763, 2763A-458.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in text, is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 1 of this title and Tables.

CODIFICATION

Section was enacted as part of the Legal Certainty for Bank Products Act of 2000, and also as part of the Commodity Futures Modernization Act of 2000, and not as part of the Commodity Exchange Act which comprises this chapter.

§ 27b. Exclusion of certain identified banking products offered by banks after December 5, 2000

No provision of the Commodity Exchange Act [7 U.S.C. 1 et seq.] shall apply to, and the Commodity Futures Trading Commission shall not exercise regulatory authority with respect to, an identified banking product which had not been commonly offered, entered into, or provided in the United States by any bank on or before December 5, 2000, under applicable banking law if—

(1) the product has no payment indexed to the value, level, or rate of, and does not provide for the delivery of, any commodity (as defined in section 1a(4) of the Commodity Exchange Act [7 U.S.C. 1a(4)]); or

(2) the product or commodity is otherwise excluded from the Commodity Exchange Act [7 U.S.C. 1 et seq.].

(Pub. L. 106-554, §1(a)(5) [title IV, §404], Dec. 21, 2000, 114 Stat. 2763, 2763A-459.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in text, is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 1 of this title and Tables.

CODIFICATION

Section was enacted as part of the Legal Certainty for Bank Products Act of 2000, and also as part of the Commodity Futures Modernization Act of 2000, and not as part of the Commodity Exchange Act which comprises this chapter.

§ 27c. Exclusion of certain other identified banking products

(a) In general

No provision of the Commodity Exchange Act [7 U.S.C. 1 et seq.] shall apply to, and the Commodity Futures Trading Commission shall not exercise regulatory authority with respect to, a banking product if the product is a hybrid instrument that is predominantly a banking product under the predominance test set forth in subsection (b) of this section.

(b) Predominance test

A hybrid instrument shall be considered to be predominantly a banking product for purposes of this section if—

(1) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument substantially contemporaneously with delivery of the hybrid instrument;

(2) the purchaser or holder of the hybrid instrument is not required to make under the terms of the instrument, or any arrangement referred to in the instrument, any payment to the issuer in addition to the purchase price referred to in paragraph (1), whether as margin, settlement payment, or otherwise during the life of the hybrid instrument or at maturity;

(3) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and

(4) the hybrid instrument is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the Commodity Exchange Act [7 U.S.C. 1 et seq.].

(c) Mark-to-market margining requirement

For purposes of subsection (b)(3) of this title, mark-to-market margining requirements shall not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt instrument to secure the repayment obligations of the issuer under the secured debt instrument.

(Pub. L. 106-554, §1(a)(5) [title IV, §405], Dec. 21, 2000, 114 Stat. 2763, 2763A-459.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsecs. (a) and (b)(4), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 1 of this title and Tables.

CODIFICATION

Section was enacted as part of the Legal Certainty for Bank Products Act of 2000, and also as part of the Commodity Futures Modernization Act of 2000, and not as part of the Commodity Exchange Act which comprises this chapter.

§ 27d. Administration of the predominance test

(a) In general

No provision of the Commodity Exchange Act [7 U.S.C. 1 et seq.] shall apply to, and the Commodity Futures Trading Commission shall not regulate, a hybrid instrument, unless the Commission determines, by or under a rule issued in accordance with this section, that—

(1) the action is necessary and appropriate in the public interest;

(2) the action is consistent with the Commodity Exchange Act [7 U.S.C. 1 et seq.] and the purposes of the Commodity Exchange Act; and

(3) the hybrid instrument is not predominantly a banking product under the predominance test set forth in section 27c(b) of this title.

(b) Consultation

Before commencing a rulemaking or making a determination pursuant to a rule issued under

sections 27 to 27f of this title, the Commodity Futures Trading Commission shall consult with and seek the concurrence of the Board of Governors of the Federal Reserve System concerning—

- (1) the nature of the hybrid instrument; and
- (2) the history, purpose, extent, and appropriateness of the regulation of the hybrid instrument under the Commodity Exchange Act [7 U.S.C. 1 et seq.] and under appropriate banking laws.

(c) Objection to Commission regulation

(1) Filing of petition for review

The Board of Governors of the Federal Reserve System may obtain review of any rule or determination referred to in subsection (a) of this section in the United States Court of Appeals for the District of Columbia Circuit by filing in the court, not later than 60 days after the date of publication of the rule or determination, a written petition requesting that the rule or determination be set aside. Any proceeding to challenge any such rule or determination shall be expedited by the court.

(2) Transmittal of petition and record

A copy of a petition described in paragraph (1) shall be transmitted as soon as possible by the Clerk of the court to an officer or employee of the Commodity Futures Trading Commission designated for that purpose. Upon receipt of the petition, the Commission shall file with the court the rule or determination under review and any documents referred to therein, and any other relevant materials prescribed by the court.

(3) Exclusive jurisdiction

On the date of the filing of a petition under paragraph (1), the court shall have jurisdiction, which shall become exclusive on the filing of the materials set forth in paragraph (2), to affirm and enforce or to set aside the rule or determination at issue.

(4) Standard of review

The court shall determine to affirm and enforce or set aside a rule or determination of the Commodity Futures Trading Commission under this section, based on the determination of the court as to whether—

- (A) the subject product is predominantly a banking product; and
- (B) making the provision or provisions of the Commodity Exchange Act [7 U.S.C. 1 et seq.] at issue applicable to the subject instrument is appropriate in light of the history, purpose, and extent of regulation under such Act, sections 27 to 27f of this title, and under the appropriate banking laws, giving deference neither to the views of the Commodity Futures Trading Commission nor the Board of Governors of the Federal Reserve System.

(5) Judicial stay

The filing of a petition by the Board pursuant to paragraph (1) shall operate as a judicial stay, until the date on which the determination of the court is final (including any appeal of the determination).

(6) Other authority to challenge

Any aggrieved party may seek judicial review pursuant to section 6(c) of the Commodity Exchange Act [7 U.S.C. 9, 15] of a determination or rulemaking by the Commodity Futures Trading Commission under this section.

(Pub. L. 106-554, §1(a)(5) [title IV, §406], Dec. 21, 2000, 114 Stat. 2763, 2763A-459.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsecs. (a), (b)(2), and (c)(4)(B), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 1 of this title and Tables.

CODIFICATION

Section was enacted as part of the Legal Certainty for Bank Products Act of 2000, and also as part of the Commodity Futures Modernization Act of 2000, and not as part of the Commodity Exchange Act which comprises this chapter.

§ 27e. Exclusion of covered swap agreements

No provision of the Commodity Exchange Act [7 U.S.C. 1 et seq.] (other than section 5b of such Act [7 U.S.C. 7a-1] with respect to the clearing of covered swap agreements) shall apply to, and the Commodity Futures Trading Commission shall not exercise regulatory authority with respect to, a covered swap agreement offered, entered into, or provided by a bank.

(Pub. L. 106-554, §1(a)(5) [title IV, §407], Dec. 21, 2000, 114 Stat. 2763, 2763A-461.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in text, is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 1 of this title and Tables.

CODIFICATION

Section was enacted as part of the Legal Certainty for Bank Products Act of 2000, and also as part of the Commodity Futures Modernization Act of 2000, and not as part of the Commodity Exchange Act which comprises this chapter.

§ 27f. Contract enforcement

(a) Hybrid instruments

No hybrid instrument shall be void, voidable, or unenforceable, and no party to a hybrid instrument shall be entitled to rescind, or recover any payment made with respect to, a hybrid instrument under any provision of Federal or State law, based solely on the failure of the hybrid instrument to satisfy the predominance test set forth in section 27c(b) of this title or to comply with the terms or conditions of an exemption or exclusion from any provision of the Commodity Exchange Act [7 U.S.C. 1 et seq.] or any regulation of the Commodity Futures Trading Commission.

(b) Covered swap agreements

No covered swap agreement shall be void, voidable, or unenforceable, and no party to a covered swap agreement shall be entitled to rescind, or recover any payment made with re-