

June 9, 2011

**Via Online Submission**

Mr. David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

Re: COMMENTS OF THE COALITION OF PHYSICAL ENERGY COMPANIES – **Swap Data Recordkeeping and Reporting Requirements: Pre-enactment and Transition Swaps**, RIN No. 3038-AD48

Dear Mr. Stawick:

On April 25, 2011, the Commodity Futures Trading Commission ("CFTC" or "the Commission") published in the Federal Register a Notice of Proposed Rulemaking entitled "Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps" ("Reporting NOPR").<sup>1</sup> The Coalition of Physical Energy Companies ("COPE")<sup>2</sup> hereby offers the following comments on the Reporting NOPR.

The members of COPE are physical energy companies in the business of producing, processing, and merchandizing energy commodities at retail and wholesale. COPE members utilize swaps to hedge the commercial risk of their physical businesses.

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<sup>1</sup> *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps*, 76 Fed. Reg. 22833 (Apr. 25, 2011).

<sup>2</sup> The members of COPE are: Apache Corporation; El Paso Corporation; Iberdrola Renewables, Inc.; Kinder Morgan; MarkWest Energy Partners, L.P.; Noble Energy, Inc.; NRG Energy, Inc.; Shell Energy North America (US), L.P.; SouthStar Energy Services LLC; and Targa Resources, Inc.

As physical energy companies whose focus is on their energy businesses, COPE members' concern regarding the Reporting NOPR is geared towards ensuring that the complexity and compliance burden on non-financial entities is limited to the degree possible. COPE appreciates the Commission's stated intent to limit the burden on non-Swap-Dealer / Major Swap Participant ("SD/MSP") entities and its recognition that their trade capture systems are limited to those needed to support their business needs, not the level of reporting anticipated to be required of SD/MSPs.<sup>3</sup> While portions of the proposed rule are acceptable to COPE, due to largely vague or overbroad requirements, other aspects of the Reporting NOPR require clarification or revision to ensure they are not unnecessarily burdensome on non-SD/MSPs.

### **Minimum Primary Economic Terms**

As a general matter, the Commission has attempted to require that only transaction data typically recorded for commercial purposes by swap counterparties be included in the Minimum Primary Economic Terms for the affected categories of swaps set forth in the Appendix to proposed Part 46.<sup>4</sup> The data elements included in the "Other Commodity Swaps" table reflects the commercially relevant terms typically retained by swap counterparties.<sup>5</sup> However, depending on the magnitude of an entity's swap trading, some counterparties may not retain all of this proposed data in the ordinary course of business. COPE believes that to the degree this data is a component of a non-SD/MSP's trade capture system, it should be retained and reported as proposed by the Commission. If a given entity's reporting and recordkeeping requirements were limited to a retention of this data and a one-time report of the terms proposed in the Appendix (or the subset retained in the ordinary course of business), COPE would have no issues with the Reporting NOPR's requirements.

### **Bifurcated Time Periods**

The Commission has bifurcated its requirements for reporting and recordkeeping for pre-enactment and transition swaps. For swaps that are terminated prior to the compliance date of the Commission's generally applicable reporting and recordkeeping rules under Part 45 of the Commission's regulations,<sup>6</sup> the requirements of Part 46 will apply.<sup>7</sup> For such swaps that continue beyond the compliance date of the Commission's generally applicable reporting and recordkeeping rules under Part 45, the requirements of Part 45 will apply after the compliance date.<sup>8</sup> COPE believes this is a reasonable approach.

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<sup>3</sup> See, e.g., Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574 (Dec. 8, 2010).

<sup>4</sup> Reporting NOPR at 22846.

<sup>5</sup> *Id.* at 22847.

<sup>6</sup> See note 3, *infra*.

<sup>7</sup> Reporting NOPR at 22837.

<sup>8</sup> *Id.*

COPE notes that it has filed comments with regard to the proposed requirements of Part 45 seeking, *inter alia*, that daily valuation data and other daily filings not be required of end-users.<sup>9</sup>

The Commission has also proposed to bifurcate the applicability of its Part 46 rules into pre-and post-April 25, 2011 (the date the Reporting NOPR was published in the Federal Register) requirements.<sup>10</sup> COPE believes that this artificial breakpoint is an unreasonable date to establish for hard and fast compliance obligations, as end-users are not generally avid readers of the Federal Register. COPE requests that the Commission use that date as a guideline and that no compliance actions with respect to non-SD/MSPs for data retention discrepancies be taken based upon such date.

### **Recordkeeping**

For swaps that terminated prior to April 25, 2011, the Commission requires that a counterparty retain "the information and documents relating to the terms of the transaction" that were in the possession of the entity as of October 14, 2010 (Pre-Enactment Swaps) or December 17, 2010 (Transition Swaps).<sup>11</sup> As stated by the Commission, "[s]uch information may be retained in the format in which it existed on or after [October 14 or December 17, 2010], or in such other format as the counterparty chooses to retain it[;] [The rule] does not require the counterparty to create or retain records of information not in its possession on or after [October 14 or December 17, 2010] or to alter the format, i.e., the method by which the information is organized and stored."<sup>12</sup>

To the degree that the information and documents relating to the terms of the transaction is the data set forth in the Appendix to Part 46 for Other Commodity Swaps, COPE believes this is a reasonable requirement.<sup>13</sup> If the intended required information and documents exceed this data and extend into an undefined and amorphous scope of records that "relate" to the terms of the transaction, COPE believes that the requirement is overbroad and too vague to be adhered to with any confidence by a counterparty. As such, COPE requests the Commission make clear that the affected data is that set forth on the Appendix.

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<sup>9</sup> Comments of COPE – Swap Data Recordkeeping and Reporting Requirements at p 5 (February 7, 2011)

<sup>10</sup> Reporting NOPR at 22843 (proposed §§ 46.2(a), (b)).

<sup>11</sup> *Id.* at 22843 (proposed § 46.2(b)).

<sup>12</sup> *Id.* at 22844 (proposed § 46.2(b)).

<sup>13</sup> COPE is generally supportive of the minimum primary economic terms set forth in the Appendix; however, as previously noted in the Comments of COPE – Commodity Options and Agricultural Swaps (April 4, 2011), physically-settling options are not swaps under the Dodd-Frank definition, and therefore the contract type "option" should not be set forth among the primary economic terms that might be reported pursuant to the Reporting NOPR.

For swaps in effect as of April 25, 2011, the Commission proposes that a counterparty retain: data specified for a given type of swap in the Appendix; a confirmation if one was generated (together with all records of the conformation); any related master agreement (and any modification or amendment); and any affected credit support agreement (and any modification or amendment).<sup>14</sup>

Like the pre-April 25, 2011 data, COPE believes this is a reasonable requirement if the data intended to be retained is specific. For example, a counterparty can comply with a requirement to retain a confirmation, but the amorphous requirement to retain "records of all terms of [the] confirmation"<sup>15</sup> is too vague for compliance. Similarly, the effective master agreement and credit support agreement can be retained, but a counterparty can have no confidence it can meet the amendment/modification requirement, as it is not limited in time or relevance.<sup>16</sup> As such, COPE requests that the Commission limit the required data to the data specified in the Appendix, a confirmation if one exists, and the effective master agreement and credit support documentation.

The Commission proposes that required data be retained for five years from the date of termination of the swap and be retrievable within three business days of a request by the Commission.<sup>17</sup> While COPE believes these requirements are more burdensome than necessary, if the data set required to be retained is limited as set forth above, COPE has no objections to these time periods.

## Reporting

The Commission proposes that only one counterparty be required to report each swap ("Reporting Counterparty").<sup>18</sup> The reporting hierarchy is proposed to be such that non-SD/MSPs will only be the Reporting Counterparty if they have transacted with another end-user.<sup>19</sup> COPE supports this approach to the selection of the Reporting Counterparty.

For pre-enactment and transition swaps terminated prior to April 25, 2011, the Reporting Counterparty must report "information relating to the terms of the transaction" as was in the Reporting Counterparty's possession as of October 14, (Pre-enactment Swaps) or December 19, (Transition Swaps) 2010.<sup>20</sup>

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<sup>14</sup> Reporting NOPR at 22843 (proposed § 46.2(a)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* ("Any master agreement governing the swap, and any modification or amendment thereof.")

<sup>17</sup> *Id.* at 22844 (proposed § 46.2 (c) and (d)).

<sup>18</sup> *Id.* at 22843.

<sup>19</sup> Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574 (Dec. 8, 2010) (proposed § 45.5).

<sup>20</sup> Reporting NOPR at 22845 (proposed § 46.3(b)).

As noted above, if "information relating to the terms of the transaction" means the information specified in the Appendix, COPE has no objections. However, if this ambiguous phrase requires more data, COPE requests the Commission to restrict it to Appendix data.

For pre-enactment and transition swaps in effect on or after April 25, 2011, the Reporting Counterparty must provide an initial data report of: confirmation terms if recorded in an automated system or, if not, the data set forth in the Appendix.<sup>21</sup> Together with such data, the Reporting Counterparty must include the Unique Counterparty Identifier established by the Commission, as well as internal counterparty, transaction, and master agreement identifiers.<sup>22</sup>

The Reporting NOPR requires that the Reporting Party obtain and include a Unique Counterparty Identifier such that it can report post-April 25, 2011 swaps on the compliance date.<sup>23</sup> The Commission provides the non-reporting counterparty 180 days to obtain a Unique Counterparty Identifier.<sup>24</sup> The reason provided for the 180 day period is that the Commission "understands that the majority of non-reporting counterparties are likely to be non-SD/MSP counterparties[;] [w]hile SDs and MSPs are likely to have infrastructure in place that can incorporate and track Unique Counterparty Identifiers, non-SD/MSP counterparties could need to acquire new automated systems or undertake modifications of existing systems in order to incorporate identifiers."<sup>25</sup> Thus, the Commission has inconsistently proposed that the Reporting Party, which may be a non-SD/MSP, include a Unique Counterparty Identifier while at the same time providing a 180 day period from the compliance date for a non-Reporting Party (which may also be a non-SD/MSP) to obtain and integrate a Unique Counterparty Identifier.

COPE agrees with the Commission that non-SD/MSPs will need to be afforded the time to carefully and systematically take the steps needed to comply with the Commission's new regime. The 180 day post-compliance date period proposed in the NOPR is a reasonable time for this aspect of compliance to occur. However, this needed time should not be eliminated for the rare instance when a non-SD/MSP will be a Reporting Counterparty. The Commission should defer reporting for 180 days after the compliance date for swaps between non-SD/MSPs or permit the initial report to be amended in 180 days to place all non-SD/MSPs on the same compliance schedule, whether or not they are required to report a given swap.

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<sup>21</sup> *Id.* at 22844 (proposed § 46.3(a)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 22838.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

## **Reporting Technology**

The Commission proposes to require each Reporting Counterparty to "use the facilities, methods, or data standards provided or required by the swap data repository to which [the] counterparty reports the data."<sup>26</sup> COPE does not disagree with this requirement. However, what is missing from the Reporting NOPR is an obligation on the part of the swap data repository to develop and offer the most user-friendly, least burdensome processes available to facilitate such reporting. Since it appears that there may only be one swap data repository for an asset class, coupled with mandatory reporting, it is incumbent on the Commission to ensure that such reporting will not be burdensome on end-users. COPE is concerned that the swap data repository will be oriented to much more technologically sophisticated entities than most end-users and will not offer a simplified reporting portal. The Commission must not permit such an outcome.

The foregoing is a particularly important aspect of Dodd-Frank Implementation for non-SD/MSPs. As such entities are not in the "swaps business," it is critical that the Commission provide them a vehicle for compliance that is the least burdensome and most user friendly available. These firms understand their need to be compliant but seek to do so in a manner that does not distract from their "real" businesses.

## **Conclusion**

COPE believes that, in general, the Commission has proposed a workable construct for recordkeeping and reporting of pre-enactment and transition swaps. If the Commission removes the ambiguity discussed above and limits the requirements for non-SD/MSPs, COPE believes the Reporting NOPR will effectively serve to implement Dodd-Frank.

Respectfully submitted,

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cc: COPE Members

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<sup>26</sup> *Id.* at 22846 (proposed § 46.9).