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**Sent:** Friday, September 17, 2010 2:38 PM  
**To:** dfdefinitions <dfdefinitions@CFTC.gov>  
**Subject:** World Fuel Services Corporation / Comment Letter on Dodd-Frank Act  
Definitions of Swap and Swap Dealer  
**Attach:** DT CFTC Comment Letter to Mr Stawick.pdf

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Dear Secretary Stawick:

Attached please find the comments of World Fuel Services Corporation in response to the CFTC's and SEC's request for comments set forth in Federal Register Release No. 34-62717. Please feel free to contact us with regard to any questions you may have.

Best regards,

Herbert Thornhill  
Vice President and Associate General Counsel  
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September 17, 2010

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

Re: Comments on Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Mr. Stawick:

World Fuel Services Corporation ("World Fuel Services") submits this letter in response to the Commodity Futures Trading Commission's (the "Commission") Notice and Request for Public Comment as published in the Federal Register on August 20, 2010 (the "Notice and Request").<sup>1</sup>

World Fuel Services is an independent marketer of physical marine, aviation and ground transportation fuels and a provider of fuel hedging services throughout the world. Through a significant portion of its core business, World Fuel Services enters into over-the-counter ("OTC") derivatives transactions with "eligible contract participants"<sup>2</sup> outside of trading facilities and clears OTC derivatives transactions on electronic trading facilities, all for the purpose of mitigating the commodity price risk associated with its physical fuel inventories and the businesses of its customers. In this context, World Fuel Services' core business includes: (i) managing physical inventories of fuel such as waterborne cargoes, pipeline shipments and in-tank stocks; (ii) providing our physical fuel customers with hedging products; and (iii) providing OTC derivatives to our customers for their own risk management purposes.

In further defining the key definitions specified in the Notice and Request, we respectfully submit that the Commission should follow the intent of Congress as expressed in Senator Christopher Dodd's and Senator Blanche Lincoln's letter, dated June 30, 2010 (the "Dodd-Lincoln Letter"), to House Representatives Barney Frank and Colin Peterson explaining,

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<sup>1</sup> See 75 F.R. 51429.

<sup>2</sup> Section 1a(12) of the Commodity Exchange Act.

among other things, Congress's intent underlying various provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Reform Act").

## A. Definition of Swap

### 1. Exclusion from the Definition of Swap

The definition of the term "swap"<sup>3</sup> in the Reform Act contains an exclusion for "any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled" (such exclusion, the "Forward-Swap Exclusion"). We note that the Commodity Exchange Act contains a similar exclusion from the definition of "future delivery"<sup>4</sup> which states that the term "future delivery" does not include any sale of any cash commodity for deferred shipment or delivery (such exclusion, the "Forward-Futures Exclusion"). The Dodd-Lincoln Letter makes clear that, although the language of the Forward-Swap Exclusion is not identical to the language of the Forward-Futures Exclusion, it is the intent of Congress that the exclusions be interpreted consistently with each other. The Dodd-Lincoln Letter states:

"In implementing the derivatives title, Congress encourages the CFTC to clarify through rulemaking that the exclusion from the definition of swap for 'any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled' *is intended to be consistent with the forward contract exclusion that is currently in the Commodity Exchange Act and the CFTC's established policy and orders on this subject...*" [emphasis added]

Prior to the adoption of the Commodity Futures Modernization Act of 2000, the Commission's policy with respect to the Forward-Futures Exclusion was expressed in, *inter alia*, (i) a statutory interpretation<sup>5</sup> (the "Statutory Interpretation") of the applicability of the Forward-Futures Exclusion to certain commercial transactions and (ii) an order providing exemptive relief for certain Energy Contracts<sup>6</sup> pursuant to the Commission's exemptive authority under Section 4(c) of the Commodity Exchange Act (the "Exemptive Order", together with the Statutory Interpretation, the "Prior Releases").

In the Statutory Interpretation, the Commission concluded that transactions which are entered into between commercial participants in connection with their business, which create specific delivery obligations that impose substantial economic risks of a commercial nature to such participants, but which may involve, in certain circumstances, string or chain deliveries, are

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<sup>3</sup> Section 721(a)(21) of the Reform Act.

<sup>4</sup> Section 1a(19) of the Commodity Exchange Act.

<sup>5</sup> See Statutory Interpretation Concerning Forward Contracts, 55 F.R. 39188 (September 25, 1990).

<sup>6</sup> See Exemption for Certain Contracts Involving Energy Products, 58 F.R. 21286 (April 20, 1993). In the Exemptive Order, the Commission defined "Energy Contracts" as contracts for the purchase and sale of crude oil, condensates, natural gas, natural gas liquids, or their derivatives which are used primarily as an energy source which, by their terms, impose binding delivery obligations on the parties. See 58 FR 21286, 21293 (April 20, 1993).

within the scope of the Section 2(a)(1) exclusion, even if the parties extinguish their delivery obligations through book-outs, close-outs, or by-passes which may result in cash payment of the differences between the parties involved.<sup>7</sup>

In the Exemptive Order, the Commission, responding to the energy industry's concerns regarding the Forward-Futures Exclusion and recognizing that Energy Contracts "expose counterparties to the substantial economic risk of a commercial cash market transaction in which delivery is required pursuant to the terms of the contract", implemented a broad exemption from Commodity Exchange Act regulation for Energy Contracts that:

- (i) are entered into between entities covered by the Exemptive Order<sup>8</sup>, having at initiation of the contract a reasonable basis to believe that its counterparty is also within the terms of the Exemptive Order;
- (ii) are bilateral contracts entered into by and between two parties acting as principals, the material economic terms of which are subject to individual negotiation by the parties; and
- (iii) impose binding obligations on the parties to make and receive delivery of the underlying commodity or commodities with no right of either party to effect a cash settlement of their obligations without the consent of the other party (except pursuant to a bona fide termination right), provided, however, that the parties may enter into a subsequent book out, book transfer, or other such contract which provides for settlement of the obligation in a manner other than by physical delivery of the commodity specified in the contract.<sup>9</sup>

It is imperative to the proper functioning of the commodities markets that the Commission, through its rule-making authority, clarify that the Forward-Swap Exclusion for energy and other commodities will be interpreted in a manner consistent with the Forward-Futures Exclusion and the Commission's long established policy and orders related thereto, including the Prior Releases.

In addition, just as the Commission recognized in the Statutory Interpretation that a variety of new transactions "had evolved in the commercial segments of the economy"<sup>10</sup>, the

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<sup>7</sup> See Statutory Interpretation Concerning Forward Contracts, 55 F.R. 39188 (September 25, 1990).

<sup>8</sup> The entities covered by Exemptive Order include, among others, business entities having a net worth exceeding \$1,000,000 or total assets exceeding \$5,000,000 that (a) incur risks, in addition to price risk, related to the underlying physical commodities; (b) have a demonstrable capacity or ability, directly or through separate bona fide contractual arrangements, to make or take delivery under the terms of the Energy Contracts; (c) are not prohibited by law or regulation from entering into such Energy Contracts; and (4) are not formed solely for the specific purpose of constituting an eligible entity pursuant to the Exemptive Order. See 58 F.R. 21286, 21294 (April 20, 1993).

<sup>9</sup> See Exemption for Certain Contracts Involving Energy Products, 58 F.R. 21286, 21294 (April 20, 1993).

<sup>10</sup> See Statutory Interpretation Concerning Forward Contracts, 55 F.R. 39188 (September 25, 1990) ("Despite the breadth of the amendments to the Act it has passed since 1922, Congress has not addressed the reach of the Section 2(a)(1) exclusion in the context of today's commercial environment, including with regard to the concept of what constitutes delivery for purposes of the exclusion. Against this background, since 1974 and with increasing frequency, there have evolved in the commercial segments of the economy a diverse

Commission should recognize that the commodities markets have evolved since the Prior Releases were issued. For example, we note that, in addition to netting, offset, exchange and book-outs which are permitted under the Prior Releases, many standard industry agreements now recognize the payment of liquidated damages as an alternative to the delivery of the underlying commodity. We assume new practices have also developed in other commercial markets.<sup>11</sup>

The Commission should therefore clarify that commercial transactions reflecting these new commercial market practices qualify for the Forward-Swap Exclusion as well as for the Forward-Futures Exclusion. By doing so, the Commission will provide the certainty necessary for the proper functioning of the commercial commodities markets which are so crucial to the U.S. economy.

The overall purpose of the Reform Act is to reduce systemic risk. We note that, historically, the commodities markets have not presented the type of risk that the Reform Act is intended to address. Even major defaults within the commodities markets have not disrupted the functioning of the commodities markets. Nor have any such defaults threatened the financial stability of the United States or led to the types of government bail-outs that the Reform Act is intended to prevent. Accordingly, adopting a robust Forward-Swap Exclusion, as contemplated by the Dodd-Lincoln Letter, will not in any way contravene the underlying purposes of the Reform Act.

## 2. Commercial Options.

By its terms, the Reform Act's definition of "swap" includes commercial options on commodities. To reflect the intent of the Dodd-Lincoln Letter that the exclusions to the swap definition are to be consistent with prior Commission policies and orders, the Commission should provide that the exclusion for commercial options set forth in CFTC Regulation 32.4 is also an exclusion from the definition of "swap". This also would be in accord with the Commission's intent in adopting CFTC Regulation 32.4. In the Commission's Notice of Proposed Regulation of Commodity Options<sup>12</sup>, the Commission stated:

"The Commission previously indicated that no public interest would be served by regulatory provisions governing commercial commodity option transactions with certain

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variety of transactions involving commodities ... *These transactions, which are entered into between commercial counterparties in normal commercial channels, serve the same commercial functions as did those forward contracts which originally were the subject of the Section 2(a)(1) exclusion notwithstanding the fact that, in specific cases and as separately agreed to between the parties, the transactions may ultimately result in performance through the payment of cash as an alternative to actual physical transfer or delivery of the commodity.*" [emphasis added]

<sup>11</sup> For instance, the master agreements promulgated by the Edison Electric Institute (EEI) and the North American Energy Standards Board (NAESB) include liquidated damages provisions. We also note that many gas and power contracts permit the sale of product on an interruptible, non-firm, basis, meaning that the seller under the relevant contract may cease delivery under the contract for any reason. Moreover, the commercial markets now include intangible commodities such as renewable energy certificates, emissions allowances and similar instruments.

<sup>12</sup> See 41 F.R. 44560 (October 8, 1976).

users, producers or consumers and previously proposed a “trade option” exemption for such persons. The Commission has ... concluded that there is no substantial public interest to be served by requiring the registration of certain producers, processors, commercial users or merchants who engage exclusively in commercial type transactions.”<sup>13</sup>

We believe that this reasoning is as true today as it was when Regulation 32.4 was originally adopted. Regulating commercial commodity options as swaps under the Reform Act will serve no public interest and will unnecessarily hamper and restrict the functioning of the commercial markets in commodities. Accordingly, the Commission should clarify that Regulation 32.4 also excludes commercial options from the definition of “swap”.

## **B. Definition of Swap Dealer**

As drafted, the definition of “swap dealer”<sup>14</sup> in the Reform Act could be interpreted to include entities that should not be viewed, or regulated, as swap dealers. The definition of “swap dealer” includes “any person who regularly enters into swaps with counterparties as an ordinary course of business for its own account”. If read literally, the swap dealer definition could include virtually any person that enters into swaps in the ordinary course of business. However, by the use of the term “counterparties”, Congress was expressing its intent that the swap dealer definition not include persons entering into swaps as end-users to hedge commercial risk. In further defining the definition of swap dealer, the Commission should follow the intent of Congress with respect to end-users.

In addition, the Commission should construe the Reform Act’s *de minimis* exception to the swap dealer definition<sup>15</sup> in a manner that (i) excludes swaps entered into to hedge commercial risk and (ii) is substantial enough that a commercial market participant, such as World Fuel Services, will have some flexibility in offering swap products to its customers to assist such customers in hedging their commercial risk, while at the same time allowing such commercial market participant to hedge its own risk. As noted above, since the commercial commodities markets do not present the type of systemic risk the Reform Act is designed to reduce, the Commission’s enactment of an appropriate *de minimis* exception to the swap dealer definition will not contravene the purposes of the Reform Act. As the Dodd-Lincoln Letter states:

“These entities did not get us into this crisis and should not be punished for Wall Street’s excesses. That is why Congress provided regulators the authority to exempt these institutions. *This is also why we narrowed the scope of the Swap Dealer and Major Swap Participant definitions.* [Emphasis Added.]”

## **C. Use of Rulemaking Authority**

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<sup>13</sup> See 41 F.R. 44560, 44563 (October 8, 1976).

<sup>14</sup> See Section 721(a)(21) of the Reform Act.

<sup>15</sup> See Section 721(a)(21) of the Reform Act.

We ask the Commission to address the issues discussed herein pursuant to its rulemaking authority provided under the Reform Act. We believe that rule-making in these areas is the only means to provide the necessary certainty to industry participants given the Reform Act's elimination of the Commission's exemptive authority under Section 4(c) of the Commodity Exchange Act and the Commission's history of providing additional certainty outside of its statutory interpretations.<sup>16</sup>

If you have any questions with respect to the points raised in this letter please feel free to contact Herbert Thornhill of our Legal Department at (305) 428-8021. I thank the Commission for providing World Fuel Services with the opportunity to provide our thoughts with respect to the Commission's rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul H. Stebbins', written over a horizontal line.

Paul H. Stebbins  
Chairman and Chief Executive Officer

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<sup>16</sup> In the Exemptive Order the Commission noted: "In this regard, the Commission notes that the legal uncertainty which this exemptive order addresses was occasioned by the belief of some observers that some of the instruments at issue are indeed futures contracts. See, e.g., *Transnor (Bermuda) v. BP North America Petroleum*, 738 F. Supp. 1472 (S.D.N.Y. 1990). Thus, regardless of the Commission's position on the appropriate characterization for specific types of transactions, the status of some of these transactions under the Act appears likely to be subject to continued dispute, and this potential for uncertainty provides a sufficient basis for the exercise of exemptive authority as to these transactions." (See 55 F.R. 21286, 21289 (April 20, 1993)).