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Sent: Monday, September 20, 2010 3:28 PM
To: OTCDefinitions <OTCDefinitions@CFTC.gov>
Cc: secretary <secretary@CFTC.gov>
Subject: Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act - Definition of Swap Dealer
Attach: CFTC ANOPR Comments - Definition of Swap Dealer_(32447595)_ (8).pdf

Via Electronic Delivery

Dear Secretary Stawick:

On behalf of the Working Group of Commercial Energy Firms (the "Working Group"), Hunton & Williams LLP hereby submits this letter in response to the request for comments set forth in the advanced notice of proposed rulemaking published in the *Federal Register* on August 20, 2010, addressing the definition of "Swap Dealer" adopted in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial and residential consumers. Members of the Working Group include energy producers, marketers and utilities. The Working Group considers and responds to requests for public comment regarding legislative and regulatory developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

The Working Group appreciates the opportunity to submit these comments and looks forward to working with the Commodity Futures Trading Commission and Securities and Exchange Commission to further define and clarify this definition as part of the formal rulemaking process implementing Title VII of the Act.

If you have any questions, or if the Working Group may be of further assistance, please do not hesitate to contact me directly at the number listed below.

– Respectfully submitted,

R. Michael Sweeney, Jr.

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September 20, 2010

David A. Stawick, Secretary
Commodity Futures Trading Commission
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Washington, DC 20581

VIA ELECTRONIC MAIL

Re: *Definitions and Required Rulemakings Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act - Definition of Swap Dealer*

Dear Secretary Stawick:

I. INTRODUCTION.

On behalf of the Working Group of Commercial Energy Firms (the “Working Group”), Hunton & Williams LLP respectfully submits this letter in response to the Advanced Notice of Proposed Rulemaking jointly issued by the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”) (collectively, the “Commissions”) published in the *Federal Register* on August 20, 2010, concerning the further definition of certain key terms (specifically “Swap,” “Security-Based Swap,” “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” “Eligible Contract Participant,” and “Security-Based Swap Agreement”).¹

The Working Group is a diverse group of Commercial Firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial and residential consumers. Members of the Working Group are energy producers, marketers and utilities. The Working Group considers and responds to requests for public comment regarding legislative and regulatory developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

The comments herein specifically address the definition of Swap Dealer set forth in new Section 1a(49) of the Commodity Exchange Act (“CEA”) as adopted in Title VII,

¹ Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 75 Fed. Reg. 51,429 (Aug. 20, 2010) (“ANOPR”).

Subtitle A, Section 721(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”). The Working Group appreciates the opportunity to submit these comments in response to the ANOPR and looks forward to working with the Commissions to further define the term Swap Dealer as part of the formal rulemaking process for implementing this and other key definitions contained in Title VII.

II. COMMENTS OF THE WORKING GROUP OF COMMERCIAL ENERGY FIRMS.

A. Further Definition of Swap Dealer Must Be Faithful to the Intent of Congress and the New Regulatory Framework Adopted in Title VII.

Section 721(a) of the Act amends the CEA to adopt the definition of Swap Dealer in new CEA Section 1a(49). The definition of Swap Dealer is a critical element of the new framework for the regulation of Swaps in over-the-counter (“OTC”) markets. Specifically, along with the definition of Major Swap Participant, the definition of Swap Dealer is one of the “gateways” through which the Commissions may exercise the new and expanded regulatory oversight authority granted to them under Title VII. The Working Group respectfully submits that the successful implementation of a new framework for the regulation of Swaps is tied, in large part, directly to the Commissions’ ability to further define and apply Swap Dealer in a fashion that is faithful to the intent of Congress and consistent with the requirements and structure of Title VII.

The Commissions should resist the urge to take an overly expansive view when further defining Swap Dealer. If interpreted too broadly, this definition would effectively capture virtually any entity that regularly transacts Swaps. For example, when read in conjunction with the definition of Swap set forth in new CEA Section 1a(47), the Working Group is concerned that the definition of Swap Dealer may cover commercial firms and end-users (collectively, “Commercial Firms”)² that primarily transact Swaps to hedge underlying physical commodity portfolios, assets, or positions. The designation of Commercial Firms engaged in hedging transactions as Swap Dealers would not be faithful to the intent of Congress, nor would it be consistent with the framework adopted in Title VII of the Act for the regulation of Swaps transacted in OTC markets.

Specifically, the regulatory framework adopted in Title VII is based upon the existence of, at minimum, three distinct classes of market participants: (i) Swap Dealers, (ii) Major Swap Participants, and (iii) Commercial Firms. The Commissions must further define Swap Dealer in a manner that gives meaning and effect to each distinct class of market

² For purposes of these comments, the term “Commercial Firms” means those entities, including end-users, whose primary commercial activity involves the manufacturing, merchandising, production, processing or delivery of physical commodities to entities and who transact in Swap markets primarily to hedge risks associated with their commercial operations and delivery obligations, which are based upon underlying physical commodity portfolios, assets, or positions. The term “Commercial Firms” does not include financial entities, such as hedge funds and other financial institutions.

participant identified above. In order to accomplish this objective, the definition of Swap Dealer should be mutually exclusive of the definition of Major Swap Participant and the concept of a Commercial Firm.³

Furthermore, an overly expansive definition of Swap Dealer would undermine the exemption for “non-financial entities” from mandatory centralized clearing requirements set forth in new CEA Section 2(h)(7). This exemption was closely considered, and strongly debated, by Congress during the legislative process that led to the enactment of Title VII of the Act. By including this express exception in new CEA Section 2(h)(7), Congress did not intend for the Commission to render it meaningless by broadly defining Swap Dealer (or, for that matter, the definition of Major Swap Participant).

Finally, any rules or regulations implementing the definition of Swap Dealer must include a clear methodology that will allow market participants to determine whether they, or the counterparties with whom they transact, fall within this definition. This clarity and guidance is vital to ensuring the legal certainty and stability necessary to facilitate an orderly transition to new regulation under Title VII and avoid disruptions to Swap markets.

B. GENERAL COMMENTS ADDRESSING THE DEFINITION OF SWAP DEALER.

1. New CEA Sections 1a(49)(A)(ii) & 1a(49)(A)(iv).

The second prong of the definition of Swap Dealer set forth in new CEA Section 1a(49)(A)(ii) provides that a Swap Dealer is “*any person who makes a market in swaps.*” (Emphasis added). The fourth prong of the Swap Dealer definition set forth in new Section CEA 1a(49)(A)(iv) also references the concept of “market making” when it states, in relevant part, that a Swap Dealer is “*any person who engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps.*” (Emphasis added).

The Working Group is concerned that the “market making” language in new CEA Sections 1a(49)(A)(ii) and 1a(49)(A)(iv) is susceptible to overly broad and potentially conflicting interpretations. In order to avoid this result, the Commissions should develop interpretative guidance that clarifies the meaning and scope of this language. Such guidance should clearly recognize that the activity of “market making” is an incident of dealing activity in Swap markets.

³ In enacting Title VII, Congress created a regulatory framework that provides an equivalent degree of oversight and regulation for entities that are Swap Dealers and for those that are Major Swap Participants. Importantly, the creation of separate definitions for these entities reflects a clear recognition by Congress that Swap Dealers and Major Swap Participants perform distinctly different functions in Swap markets. Furthermore, Title VII by implication recognizes that other market participants, such as Commercial Firms, play their own unique role in Swap markets and do not require the same degree of regulatory oversight as Swap Dealers or Major Swap Participants.

Consistent with the CFTC's glossary definition of "Market Maker," "dealing activity" generally occurs when a party acts as an intermediary for others to access a market.⁴ A hallmark of dealing activity is that a party's business is to continuously stand ready, willing, and able to take either side of a transaction and trade with its customers in accordance with a "bid/ask" spread on its own account. In fact, the CFTC's definition of "Market Maker" connotes this "obligation" to buy or sell. In general, a dealer seeks to remain neutral to price movements with respect to the Swap at issue, as well as the underlying commodity. Dealers, in large part, profit from intermediation fees and ancillary services to their dealing activity (e.g., providing investment advice), not from realizing changes in the value of the Swaps transacted or the underlying commodities.

In contrast, a Commercial Firm, on occasion, may take either side of a Swap transaction. However, this behavior is distinct from dealing activity as it is predominantly driven by the Commercial Firm's underlying commercial business operations, including specific customer-related obligations in physical markets. Given this direct nexus to the Commercial Firm's primary business operations in physical markets, such activity does not constitute "market making" and is not incident to dealing activity in Swap markets.

As a starting point, the Commissions should interpret the "market making" concepts included in new CEA Sections 1a(49)(A)(ii) and 1a(49)(A)(iv) in a manner that is generally consistent with the CFTC's own glossary definition of "Market Maker." This may be accomplished by the development of enumerated criteria that identifies different activities that constitute "market making" in Swap markets, *i.e.*, a person who has an obligation to buy when there is an excess of sell orders and to sell when there is an excess of buy orders.

The Commissions should not, however, treat "market making" activity as the sole measure of whether an entity engaged in such activity is a Swap Dealer. An occasional two-way trade made by a market participant, when offered for legitimate commercial purposes, such as to briefly test a market for price discovery purposes or as an adjunct to an underlying

⁴ The CFTC's online glossary, titled a "A Guide to the Language of the Futures Industry," sets forth the Commission's own definition of the term "Market Maker." As highlighted below, the CFTC views a market maker as an entity that has an obligation to buy or sell when there is an excess of sell or buy orders (as the case may be):

[P]rofessional securities dealer or person with trading privileges on an exchange *who has an obligation to buy when there is an excess of sell orders and to sell when there is an excess of buy orders.* By maintaining an offering price sufficiently higher than their buying price, these firms are compensated for the risk involved in allowing their inventory of securities to act as a buffer against temporary order imbalances. In the futures industry, this term is sometimes loosely used to refer to a floor trader or local who, in speculating for his own account, provides a market for commercial users of the market. Occasionally a futures exchange will compensate a person with exchange trading privileges to take on the obligations of a market maker to enhance liquidity in a newly listed or lightly traded futures contract. (Emphasis added).

physical business, does not constitute the type of “continuous, ready, willing and able” trading activity that is a key indicia of a “professional” market maker.

2. New CEA Section 1a(49)(A)(iii).

The third prong of the definition of Swap Dealer set forth in new CEA Section 1a(49)(A)(iii) provides that a Swap Dealer is “*any person who regularly enters into swaps with counterparties as an ordinary course of business for its own account.*” (Emphasis added).

New CEA Section 1a(49)(A)(iii) appears to be a carry over of the broadly worded definition of “dealer” set forth in Section 3(a)(5)(A) of the Securities Exchange Act of 1934 (“1934 Act”).⁵ In relevant part, Section 3(a)(5) of the 1934 Act defines the term “dealer” as “any person that is engaged in the business of buying and selling securities for its own account through a broker or otherwise.”

The Working Group is concerned that, if read in isolation, new CEA Section 1a(49)(A)(iii) could be read to capture virtually *any* participant transacting Swaps, regardless of whether that entity is actually a dealer, a Major Swap Participant, a Commercial Firm, or other market participant that buys and sells Swaps. Such an expansive interpretation of this provision would, among other things, effectively strip the definition of Major Swap Participant and the concept of a Commercial Firm of any meaning or significance, a result clearly not intended by Congress.⁶ Furthermore, as discussed in Section II.A., such an interpretation would undermine and effectively render meaningless the exception applicable to “non-financial entities” from the mandatory clearing requirements in new CEA Section 2(h)(7).

⁵ See 15 U.S.C. § 78c(a)(5).

⁶ See *Consumers Union of the United States v. Sawhill*, 512 F.2d 1112, 1126 (Temp. Emer. Ct. App. 1975) (emphasizing that “Congress will not be presumed to have done a useless, ineffective, or absurd thing.”).

New CEA Section 1a(49)(A)(iii) is only made rational if read in conjunction with the general exception set forth in new CEA Section 1a(49)(C), which is drafted in an equally broad manner. In relevant part, new CEA Section 1a(49)(C) states that the definition of Swap Dealer does not include “a person that enters into swaps for that person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.”⁷ To avoid an overly expansive interpretation of Swap Dealer, new CEA Section 1a(49)(C) should apply to entities whose regular course of business involves something other than the business of transacting Swaps. For example, an entity that is a producer, processor, merchandiser, or marketer of a physical commodity that transacts in Swap markets to mitigate commercial risk or other enterprise-related risks should fall within the exception established in new CEA Section 1a(49)(C) and, therefore, be exempt from the definition of Swap Dealer.

a. SEC Interpretive Guidance Distinguishing Dealers and Traders Provides a Useful Starting Point for Further Defining Swap Dealer.

In order to give meaning and effect to the broadly worded definition of “dealer” and the general exception to this definition set forth in Section 3(a)(5) of the 1934 Act, the SEC has developed interpretative guidance known as the “Dealer/Trader Distinction.” The Dealer/Trader Distinction provides a mechanism for distinguishing dealers (*e.g.*, entities which buy and sell securities as part of a regular business) from traders (*e.g.*, entities which buy and sell securities for investment and not as part of a regular business).⁸

In relevant part, the SEC’s Dealer/Trader Distinction makes clear that the characteristics of a “trader” tend to overlap with certain characteristics of a “dealer.” Although a “dealer” must meet the characteristics of a “trader,” a “trader” may or may not meet all of the characteristics of a “dealer.”⁹ A key distinction made by the Dealer/Trader Distinction is that a “dealer” holds itself out to the market as a “dealer” or “market maker.” In

⁷ This language is virtually identical to the general exception to the definition of “dealer” set forth in Section 3(a)(5)(B) of the 1934 Act. Specifically, Section 3(a)(5)(B) states that “[t]he term ‘dealer’ does not include a person that buys or sells securities for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.”

⁸ See *Definition of Terms in Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934*, Final Rule, SEC Release No. 34-47364 (Mar. 2003); *Definition of Terms in Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934*, Proposed Rule, SEC Release No. 34-46745 (Dec. 2002).

⁹ For example, a trader proactively enters a Swap trade to either hedge or speculate based on the underlying needs of its business or a forward view of the market. In contrast, a dealer will typically enter a trade reactively, taking the opposite side of a transaction with a Commercial Firm as a service to that customer. The dealer will typically “flatten” the position incurred in the transaction with the customer via an offsetting swaps or futures transaction, and therefore, in contrast to a trader, is indifferent as to whether or not the initial trade with its customer resulted in a long or short position for the dealer.

the securities context, a “dealer” buys or sells securities from unaffiliated third parties, rather than solely for its own trading objectives and profit. Moreover, as a market maker, a “dealer” is ready, willing, and able to take either side of a securities transaction and will engage in activities to make a market in a security.

In contrast, the Dealer/Trader Distinction recognizes that a securities “trader” does not have inventory for sale to customers, and will not enter into either side of a transaction, but will instead make a profit on swings in market prices.¹⁰ Additionally, a “trader” does not handle others’ money or securities, does not make a market, and does not furnish dealer-type services, *i.e.*, rendering investment advice, extending or arranging for credit, or lending securities.¹¹ To help implement the interpretive guidance set forth in the Dealer/Trader Distinction, the SEC has developed specific criteria to assist in identifying “dealers.”

b. Guidance Adopted by the Commissions Distinguishing Dealers from Traders and End-Users Must Reflect the Unique Characteristics of Energy Swap Markets.

The SEC’s Dealer/Trader Distinction highlights the benefits that similarly structured interpretive guidance could provide in Swap markets by helping to give meaning and effect to the definition of Swap Dealer as set forth in new CEA Section 1a(49)(A)(iii) and the general exception in new CEA Section 1a(49)(C). Specifically, such interpretative guidance should focus on the distinction between the roles that Swap Dealers and traders (*i.e.*, Commercial Firms and others) play in Swap markets. In developing such guidance, however, the Commissions must recognize that Swaps are different from securities in two critical ways:

- A Swap is not an asset, but a bilateral, executory contract with a specific ongoing relationship and obligations between the parties; and
- Unlike securities, Swaps are often used to hedge commercial risk associated with underlying physical commodities.

¹⁰ See also John Elting, ENERGY FUTURES: TRADING OPPORTUNITIES, 3rd Edition, PennWell at 290-291 (2000).

¹¹ *Id.* (citing L. Loss & J. Seligman, Securities Regulation, §§ 8-A-2 and 8-A-3 n.115 and 143 (3d ed. 2001)).

Although interpretative guidance developed by the Commissions addressing the distinction between Swap Dealers and traders/end-users must recognize the unique characteristics of Swap markets, the Working Group believes that the criteria adopted by the SEC under the Dealer/Trader Distinction provides an appropriate starting point.¹² Further, certain of the principle criteria used by the SEC under the Dealer/Trader Distinction are already embedded within the definition of Swap Dealer.¹³

Accordingly, the Working Group submits that the following proposed criteria, which are based in part on the SEC's Dealer/Trader Distinction criteria, may be used to identify entities whose involvement in certain activities as a predominant part of their business constitutes designation as a Swap Dealer under Title VII of the Act. Such criteria distinguishing Swap Dealers from Commercial Firms and other traders must include prongs (i), (ii) and (iv) of the definition of Swap Dealer set forth in new CEA Sections 1a(49)(A)(i), (ii), and (iv). These prongs address the primary indicia of dealer activity. In addition, the Commissions should include the following criteria:

- Performs an intermediary role in Swap markets by engaging in Swap transactions as principal with customers; rather than trading solely for its own hedging, investment, liquidity, or other permissible objective;
- Remains essentially neutral to price movements with respect to the Swap at issue, as well as the underlying commodity;
- Continuously quotes a two-sided market in or publishes two-sided quotes for Swaps and stands ready, willing, and able to take the opposite side of customer orders; and

¹² In no case should any transactions between corporate affiliates be considered "dealing activity" falling within the definition of Swap Dealer set forth in new CEA Section 1a(49)(A)(iii).

¹³ See new CEA Sections 1(a)(49)(A)(i), (ii), and (iv). The CFTC itself has recognized the clear distinction between dealing activities and trading activities. In 2009, the CFTC implemented disaggregated data in its Weekly Commitment of Traders ("COT") reports, which divided the category of "commercial" trades into two distinct groups, based upon how each group incurs risk in the market. The first group is the more traditional group of "producer/merchant/processor/user," who incur risk from transacting in the physical commodity. The CFTC classified the second group as "swap dealers," described as those who incur risk through dealing activities in the OTC derivatives market. See CFTC Disaggregated COT Explanatory Note 2009.

In July 2010, the CFTC, building on the 2009 "improvements to transparency" in the COT reports, developed the Traders in Financial Futures ("TFF") report. The TFF report separates large traders into four classifications, one of which is "Dealer/Intermediary." In describing the Dealer/Intermediary, the CFTC states that Dealer/Intermediaries "design and sell various financial assets to clients," and that they "tend to have matched books or offset their risks across markets and clients." Therefore, the same logic that the CFTC has applied to distinguish the underlying activities of swap dealers from the activities of other market participants to create the COT and TFF reports also should apply to its interpretation of the language in new CEA Section 1(a)(49)(A).

- Provides financially-related, ancillary dealer activities, such as rendering investment advice.

The Working Group respectfully submits that criteria distinguishing between Swap Dealers and Commercial Firms and other traders should not be strictly applied by the Commissions on a disjunctive basis. Rather, the Commissions should assess the “totality of the circumstances” when determining whether an entity engaged in some of these activities is, in fact, a Swap Dealer. In taking a totality of the circumstances approach, the primary criteria for the Commissions consideration should be prongs (i), (ii) and (iv) of the definition of Swap Dealer, followed by the other factors outlined above. Given the broad language of new CEA Section 1a(49)(A)(iii) and the general exception set forth in new CEA Section 1a(49)(C), this approach should help facilitate an appropriately scoped interpretation of the definition of Swap Dealer.

Finally, some Commercial Firms may engage in certain, limited activities that would fall within the indicia of “dealing” activity outlined above. As discussed in Section II.B.3., such activity is not, and should not be, prohibited by Title VII. Specifically, new CEA Section 1a(49)(D), titled “De Minimis Exception,” expressly contemplates that a trader may engage in a relatively small amount of customer-related dealing activity without falling into the definition of Swap Dealer. Given this important statutory exception, the proposed trader-focused criteria should be read and considered not only in conjunction with the general exception set forth in new CEA Section 1a(49)(C), but also in conjunction with the *de minimis* exception set forth in new CEA Section 1a(49)(D).

3. New CEA Section 1a(49)(D) - De Minimis Exception.

a. De Minimis Exception is Directed to Customer-Facing Transactions.

The Act exempts from the definition of Swap Dealer certain entities that engage in a *de minimis* quantity of Swap dealing. Specifically, new CEA Section 1a(49)(D) provides that:

[T]he Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt. (Emphasis added).

The express use of the term “customers” in new CEA Section 1a(49)(D) by Congress rather than “counterparties,” which is applied elsewhere in the definition of “Swap Dealer,” is significant and should be acknowledged as such by the Commissions. The use of this term highlights the intent of Congress to exclude from the definition of Swap Dealer those entities that engage in a limited percentage of customer-facing Swap transactions. However, a factor complicating the application of new CEA Section 1a(49)(D) is that Title VII does not contain

its own definition of the term “customer.” In order to address this legislative void, as part of the notice of proposed rulemaking (“NOPR”) to further define Swap Dealer, the Commissions should propose and solicit public comment seeking to define, clarify or otherwise give meaning to the term “customer” in the context of the *de minimis* exception.¹⁴

b. Proposed Criteria for *De Minimis* Exception.

Furthermore, in the NOPR addressing the definition of Swap Dealer, the Commissions should propose and solicit public comment on a methodology that will allow for the application of the *de minimis* exception set forth in new CEA Section 1a(49)(D) in a fair, rational, and effective manner. To this end, the Commissions should consider adopting a methodology that uses a workable mix of objective, quantitative factors and other subjective, qualitative factors that are focused specifically on such customer-facing transactions that take place in Swap markets. Such methodology must be capable of consistent application and be flexible enough to accommodate the different size, structure, and complexity of market participants’ derivatives trading operations, as well as recognizing the impacts of their underlying, primary commercial business operations.¹⁵

c. Application of the *De Minimis* Exception; Procedural Issues.

Use of the term “exempt” in the *de minimis* exception implies that prior CFTC action is required in order for a market participant to avail itself of the *de minimis* exception. Given the frequency and speed in which energy commodities are transacted in Swap markets, it would not be practical for the CFTC to grant exemptions on a case-by-case basis under new CEA Section 1a(49)(D). To ensure legal certainty and promote stability in such markets, the Working Group suggests the CFTC issue a blanket order for all entities that meet the established criteria promulgated by the CFTC. Doing so would not impede the CFTC’s ability to effectively enforce the definition of Swap Dealer to prevent parties from circumventing regulation as a Swap Dealer.

In the alternative, there should be, at a minimum, an expedited process by which firms can apply for the *de minimis* exception if they (a) are uncertain of their status under the published criteria or (b) have a reasonable basis for a *de minimis* exception that is not established under the published criteria.

¹⁴ The term “customer” should be defined in the context of Swap dealing activity and should exclude customers of an entity’s underlying, physical commodity business.

¹⁵ For example, to the extent that an entity’s “dealer” activity is clearly and closely related to its underlying, primary commercial business involving physical delivery of commodities, such dealing activity should be viewed by the Commissions as *de minimis* per se. Furthermore, in no case should any transactions between corporate affiliates be deemed “dealer activity” within the definition of Swap Dealer.

4. **CATEGORIZATION OF SWAP DEALERS BY SWAP TYPE, CLASS OR CATEGORY.**

The Act permits the Commissions to determine whether or not a trader is a Swap Dealer for one or more category of Swaps, but not others. The Working Group respectfully requests that the forthcoming NOPR on the definition of Swap Dealer specifically address and request public comment on how the definition of Swap Dealer will be practically applied to market participants that fall within this definition.

The categorization of Swap Dealers, whether by type, class or other category will profoundly impact the implementation of other key provisions in Title VII, such as mandatory capital and margin requirements. In addition, it will have direct operational, administrative and compliance impacts for market participants. Consequently, this issue should not be considered by the Commissions in a vacuum. Rather, the Commissions must identify and consider all possible broader policy, regulatory, and operational implications associated with the categorization of Swap Dealers. To effectively accomplish this objective, the Commissions should consider the categorization of Swap Dealers as it concurrently addresses the implementation of other key provisions of Title VII.

III. **CONCLUSION.**

The Working Group appreciates this opportunity to comment, and requests that the Commissions consider these comments as it develops proposed rules or regulations further defining the term Swap Dealer. The Working Group looks forward to offering its views in response to the NOPR.

Respectfully,

/s/ R. Michael Sweeney, Jr.

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