

November 15, 2010

Via Electronic Mail: peswapreport@cftc.gov

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

**Re: Interim Final Rule for Reporting Pre-Enactment Swap Transactions
(RIN 3038-AD24)**

Dear Mr. Stawick:

On October 14, 2010, the U.S. Commodity Futures Trading Commission (the “Commission” or “CFTC”) issued an Interim Final Rule for Reporting Pre-Enactment Swap Transactions and a related interpretive note regarding document retention (collectively, the “Interim Final Rule”) in the Federal Register,¹ as required under Section 723 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).² Although the Interim Final Rule became effective on the day it was issued, the Commission invited interested persons to submit comments on all aspects of the reporting rule and interpretive note on or before November 15, 2010.

Hess Corporation, on behalf of itself and its affiliates (collectively “Hess”), hereby submits comments on the Interim Final Rule.

I. Description of Hess and its Interest in the Interim Final Rule

Headquartered in New York, Hess is a fully integrated energy company engaged in the exploration for and the development, production, purchase, transportation and sale of crude oil and natural gas, and the manufacturing, purchase, transportation, and marketing of refined petroleum, natural gas, and electricity. Hess is listed on the New York Stock Exchange.

Hess has subsidiaries involved in exploration and production operations located in the United States, United Kingdom, Norway, Denmark, Equatorial Guinea, Algeria, Malaysia,

¹ *Interim Final Rule for Reporting Pre-Enactment Swap Transactions*, 75 Fed. Reg. 63,080 (Oct. 14, 2010).

² Pub. L. No. 111-203 (2010) (to be codified as an amendment to the Commodity Exchange Act (“CEA”) in 7 U.S.C. ch. 1).

Thailand, Russia, Gabon, Azerbaijan, Indonesia, Libya and Egypt. In addition, Hess's international portfolio has recently grown to include new licenses in Australia, Egypt, Ghana, Norway, Ireland, Russia, Brazil and Peru.

Hess is a leading independent gasoline convenience store retailer on the East Coast with more than one thousand locations. Hess's Energy Marketing division markets refined oil products, natural gas and electricity to a vast array of utilities and other industrial and commercial customers located from the Ohio Valley to the East Coast. Hess often enters into derivatives contracts to manage the fixed price risk associated with this activity. In addition, Hess operates a network of strategically located petroleum storage terminals that support its marketing operations. Through subsidiaries and joint venture agreements, Hess also operates a fluid catalytic cracking unit in Port Reading, New Jersey, and the Hovensa Refinery in the U.S. Virgin Islands.

II. The Interim Final Rule

The Interim Final Rule requires, among other things, counterparties to swap transactions entered into before July 21, 2010 whose terms had not expired as of that date ("Pre-Enactment Swaps") to report to the Commission, on request, any information related to such transactions. The Commission explained that, "[s]uch summary data may include a description of a swap dealer's counterparties or the total number of pre-enactment swap transactions entered into by the dealer and some measure of the frequency and duration of those contracts."³

In addition, the Interim Final Rule requires all swap counterparties who *may* be subject to a future reporting obligation "to retain in its existing format all information and documents, to the extent and in such form as they presently exist, relating to the terms" of swaps that have not expired as of July 21, 2010.⁴ The Interim Final Rule directs swap counterparties to retain:

- Any information necessary to identify and value the transaction;
- The date and time of execution;
- Information related to the price of the transaction;
- Whether the transaction was accepted for clearing and if so, the identity of the clearing organization;
- Any modification(s) to the transaction; and

³ 75 Fed. Reg. at 63,082. The Interim Final Rule also requires swap counterparties to report to a registered swap data repository or the Commission "by the compliance date established in the reporting rules required under Section 2(h)(5) of the Commodity Exchange Act, or within 60 days after a swap data repository becomes registered with the Commission and commences operations. . . whichever occurs first" a copy of the transaction confirmation, and the time, if available, that the transaction was executed. *Id.* at 63,084-085. Hess's comments are not addressed to this provision of the Interim Final Rule.

⁴ *Id.* at 63,083.

- The final confirmation of the transaction.⁵

Notably, unlike the general reporting and recordkeeping requirement that will be established under Section 4r(a)(1) of the Commodity Exchange Act and that applies only to swaps that are *not* accepted for clearing, the Interim Final Rule and permanent reporting rule for Pre-Enactment Swaps appears to apply to *all* swaps, whether or not they are cleared.

III. Comments to the Interim Final Rule

A. The Commission Should Recognize all Key Terms in the Dodd-Frank Act that are Relevant to the Interim Final Rule, but that are not as yet Defined

The Interim Final Rule contains specific requirements, including requirements as to which transactions must be reported (*i.e.*, all pre-enactment “swaps”) and which counterparties must report the transactions to a swap data repository or the CFTC (*i.e.*, generally “swap dealers” or “major swap participants”). However, key terms that are necessary to understand and to comply with these requirements are not defined:

Definition of Swap. Until the Commission defines what constitutes a “swap”, counterparties lack clarity about whether particular transactions will be treated as swaps (subject to the reporting requirement) or forward contracts (excluded from the reporting requirement).

Definitions of Swap Dealer and Major Swap Participant. Until the Commission determines which counterparties will be classified as swap dealers, major swap participants, or end users, market participants will not know which party will ultimately be required to report the swap transaction data and whether such data should be reported to a swap data repository or to the Commission.

To mitigate the risks associated with this uncertainty, the Commission should explicitly acknowledge all of the key terms in the Dodd-Frank Act that are relevant to interpreting and complying with the Interim Final Rule, but that are not as yet defined. In particular, the Commission should recognize that until the key terms in the Dodd-Frank Act are defined, a swap counterparty can make only a good faith effort, based on its reasonable assumptions, to comply with the reporting and record retention requirements in the Interim Final Rule.

B. The Commission Should Establish a Safe Harbor for Swap Counterparties who Make a Good Faith Effort to Retain and to Preserve the Information and Documents Described in the Interim Final Rule

The Commission should provide that, to the extent the reporting and record retention requirements in the Interim Final Rule depend on certain key terms (*e.g.*, the definition of

⁵ *Id.* at 63,085.

“swap” and “swap dealer”) that have not yet been defined, swap counterparties who make a good faith effort to comply with their regulatory obligations will be subject to a safe harbor with respect to these requirements until such key terms have been defined. The Commission also should provide that the Interim Final Rule and safe harbor will be interpreted pragmatically and consistent with the purpose of the Dodd-Frank Act and analogous Commission precedent. For example, the Commission’s interpretation of the Interim Final Rule should recognize that, consistent with the distinctions made between swap dealers, major swap participants and end users in the Dodd-Frank Act, swap counterparties document transactions differently and differ significantly in their relative capacities to document and record transaction information. Accordingly, *all* swap counterparties, independent of any relative documentation standards or practices, that make a good faith effort to comply with the Interim Final Rule should fall within a safe harbor.

C. The Commission Should Harmonize the Preservation Requirement in the Interim Final Rule with Existing Document Preservation Rules

The Commission should clarify that swap counterparties are required only to retain and to preserve information and documents sufficient to identify and value a swap transaction. The Commission should not require swap counterparties to retain and to preserve documents that contain duplicative information or documents that merely reference a swap transaction. Additionally, the Commission should specify that the requirement for swap counterparties to report the summary data described in the Interim Final Rule applies only to the extent and in such form as such information already exists. Swap counterparties, including swap dealers, should not be required to create new records or reports or to populate summary reports, particularly before there is certainty as to which transactions are “swaps” and which market participants are “swap dealers.”⁶

In addition, the Commission should only require swap counterparties to retain and to preserve information and documents relating to the terms of swap transactions at the time they are entered into or materially amended, not on a continuous basis (*i.e.*, the Interim Final Rule should not require the retention of all daily valuations, marks, etc.). Requiring swap counterparties to maintain *all* information and documents that relate to an unexpired transaction, regardless of when the information or document is created, would be burdensome for market participants, and of questionable value to the Commission.

Hess respectfully suggests that Swap counterparties that retain and preserve information and documents in a manner that is consistent with Part 1.35 of the Commission’s regulations should fall within the requested safe harbor. Rule 1.35, entitled “Records of cash commodity, futures, and options transactions,”⁷ requires, in pertinent part, that members of contract markets “keep full, complete, and systematic records, together with all pertinent data and memoranda, of

⁶ *Id.* at 63,082.

⁷ 17 C.F.R. § 1.35 (2010).

all transactions relating to its business of dealing in commodity futures, commodity options, and cash commodities.”⁸ Rule 1.35 does not explicitly define the term “records” of all transactions. However, it guides members of contract markets to preserve “all documents on which trade information is originally recorded,” referring to such documents as “original source documents.”⁹ Documents which simply reference a transaction, but that are not “original source documents” for the transaction, and documents which are duplicative of other required records do not need to be retained and preserved under Rule 1.35.¹⁰ Hess suggests that an effective safe harbor established under the Interim Final Rule would follow a similar approach.

D. The Commission Should Clarify that it will Interpret both the Interim Final Rule and the Permanent Reporting Requirements Consistently

The Commission should clarify that it will interpret both the Interim Final Rule and the permanent reporting requirements for swaps consistently, particularly with respect to the clearing exemption for pre-enactment date and pre-effective date swaps under Section 2(h)(6) of the CEA. In particular, the Commission should provide that swap counterparties who make a good faith effort to comply with the reporting and record retention requirements in the Interim Final Rule will also qualify for the exemption from mandatory clearing for pre-enactment date and pre-effective date swaps.¹¹ A consistent interpretation will promote compliance with the interim and permanent swap reporting rules and the Commission’s interpretive note regarding document retention.

IV. Conclusion

Hess appreciates the opportunity to provide the Commission with its perspective on the Interim Final Rule. Hess welcomes the opportunity to discuss these issues further with the Commission and its Staff.

Please contact us at (202) 756-8000 if you have any questions regarding Hess’s comments.

⁸ *Id.*

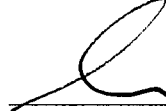
⁹ *Id.*

¹⁰ *Gilbert v. Lind-Waldock & Company*, Comm. Fut. L. Rep. ¶ 26,720 (CCH) (CFTC Jun. 17, 1996), 1996 CFTC WL 332929, at *9, CFTC Docket No. 91-R194 (Jun. 17, 1996); *see also In the Matter of Lincolnwood Commodities, Inc. of California*, Comm. Fut. L. Rep. (CCH) ¶ 21,147 (CFTC Dec. 15, 1980), 1980 CFTC LEXIS 310, at *140-141, CFTC Docket No. 78-48 (Dec. 15, 1980) (holding that Rule 1.35 does not require the retention or production of computer printouts containing “statistical market information”).

¹¹ CEA § 2(h)(5)-(6).

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Respectfully submitted,



Anthony M. Mansfield
Jonathan H. Flynn
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Counsel for Hess Corporation