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

VIA ELECTRONIC MAIL

Re: *Interim Final Rule For Reporting Certain Post-Enactment Swap Transactions*, RIN 3038-AD29

Dear Secretary Stawick:

I. INTRODUCTION.

On behalf of the Working Group of Commercial Energy Firms (the "Working Group"), Hunton & Williams LLP respectfully submits these comments to the "Interim Final Rule for the Reporting of Post-enactment Swap Transactions" ("*Interim Final Rule*") issued by the Commodity Futures Trading Commission ("CFTC" or the "Commission") pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") and published in the *Federal Register* on December 17, 2010.[1]

Section 723 of the Act requires the CFTC to adopt rules for the reporting of "transition" swaps – that is, swaps entered into on or after the date of enactment of the Act and prior to the effective date of swap data recordkeeping and reporting rules implementing new Section 2(h)(5)(B) of the Commodity Exchange Act ("CEA") ("Post-enactment Swaps") – to a registered swap data repository ("SDR") or to the Commission. Pursuant to this mandate, on December 17, 2010, the CFTC issued an *Interim Final Rule* requiring specified counterparties to Post-enactment Swaps to report certain information related to such transactions to a registered SDR or to the CFTC by either (i) 90 days following the July 15, 2011 effective date of the Act, or (ii) such other time as the Commission may prescribe.

[1] *See Interim Final Rule for Reporting Certain Post-enactment Swap Transactions*, 75 Fed. Reg. 78,892 (Dec. 17, 2010).

II. EXECUTIVE SUMMARY.

The *Interim Final Rule* adopts new Section 44.03 of the Commission regulations, which sets forth the specific reporting obligations of identified counterparties to Post-enactment Swaps.[2] In addition, new Section 44.03 contains an Interpretive Note advising that certain counterparties that may be required to report Post-enactment Swaps to an SDR or the CFTC will need to preserve information pertaining to these transactions.

Section III.A., below, addresses concerns that issuance of the *Interim Final Rule* in advance of a final rule further defining the term "swap" creates legal and regulatory uncertainty regarding the universe of swap transactions that are subject to the reporting and recordkeeping requirements of new Section 44.03. The Working Group respectfully requests the CFTC to clarify that market participants should rely only on applicable provisions of the CEA, CFTC regulations, and related guidance in effect on the day before the date of the Act's enactment for purposes of identifying transactions subject to the reporting and recordkeeping requirements of new Section 44.03.

Section III.B., below, suggests that final transaction confirmations, related master agreements and any amendments or modifications thereto are sufficient to fulfill the recordkeeping requirements of new Section 44.03(a). Collectively, these documents identify all of the key commercial terms of a transaction and provide the information necessary for the CFTC to evaluate a transaction and otherwise perform its statutory obligation to oversee swap markets. Such an outcome would eliminate much uncertainty and is consistent with the CFTC's representation that the *Interim Final Rule* "does not require any counterparty to a transition swap transaction to create new records, and permits records to be retained in their existing format."[3]

Section III.C., below, requests that the CFTC amend the *Interim Final Rule*, or through a stand-alone issuance, publish guidance to ensure effective compliance with these requirements. In the absence of such guidance, the Working Group requests that the Commission provide safe harbor protection from possible enforcement actions for failing to (i) properly identify and report Post-enactment Swaps, or (ii) retain records for such transactions, as required by Section 44.03.

Section III.D., below, requests the Commission to apply the *Interim Final Rule* to those swap transactions entered into on or after the effective date of the *Interim Final Rule*, rather than applying the *Interim Final Rule* retroactively to swap transactions entered into since the date of the Act's enactment.

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[2] 17 C.F.R. § 44.03.

[3] *Interim Final Rule* at 78,894.

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

The Working Group welcomes the opportunity to submit comments in this proceeding and looks forward to working with the CFTC as it develops a final rule addressing the reporting and recordkeeping requirements applicable to Post-enactment Swaps.

A. ISSUANCE OF THE INTERIM FINAL RULE IN ADVANCE OF REGULATIONS FURTHER DEFINING THE TERM "SWAP" CREATES LEGAL AND REGULATORY UNCERTAINTY AND INCREASES COMPLIANCE RISK.

As explained by the Commission, the issuance of this *Interim Final Rule* is not required by the Act.[4] The Working Group is therefore concerned that issuance of the *Interim Final Rule* in advance of a final rule further defining the term "swap" unnecessarily creates legal and regulatory uncertainty regarding the universe of swap transactions that are subject to the reporting and recordkeeping requirements of new Section 44.03.[5] Until such time that final rules further defining the term swap, as adopted in new CEA Section 1a(47), become effective, the Working Group requests that the CFTC issue guidance that market participants may rely upon to help identify existing transactions that are subject to the new reporting and recordkeeping requirements.

Without clear guidance regarding the scope and application of the *Interim Final Rule*, participants in certain over-the-counter ("OTC") derivatives markets, notably energy markets, must make good faith determinations as to whether certain transactions are reportable as Post-enactment Swaps.[6] In the absence of such guidance or, alternatively, the creation of a safe harbor for good faith attempts to comply with the requirements of new Section 44.03, the uncertainty created by the Commission's issuance of this *Interim Final Rule* unnecessarily exposes participants in energy markets, among others, to increased non-compliance risk for failing to either (i) properly identify and report Post-enactment Swaps, or (ii) retain records for such transactions, as required by new Section 44.03(a).

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[4] *Id*. at 78,893 (explaining that "Section 4r did not mandate an interim final rulemaking addressing reporting provisions for transition swap transactions entered into on or after the date of enactment of the Dodd-Frank Act and prior to the effective date of the swap data reporting rule to implement the provisions of Section 2(h)(5)(B).").

[5] On September 20, 2010, the Working Group submitted comments in response to the Advance Notice of Proposed Rulemaking ("ANOPR") issued by the Commissions addressing further definition of the term swap set forth in new CEA Section 1a(47). *See 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).

[6] The Working Group recognizes the definition of "swap agreement" set forth in Section 35.1(b)(1) of the CFTC's regulations, 17 C.F.R. § 35.1(b)(1). This definition focuses primarily on swap agreements covering excluded and other financial commodities. By its terms, it does not cover the plethora of swap agreements transacted in energy markets.

1. The Existing Provisions of the CEA and CFTC Regulatory Requirements Should Apply for Purposes of Identifying Post-Enactment Swaps Subject to the Interim Final Rule.

Although the *Interim Final Rule* became effective immediately upon issuance, the statutory definition of swap set forth in new CEA Section 1a(47) does not become effective until 360 days from the date of enactment of the Act, *i.e.*, July 15, 2011. Section 712(d) of the Act requires the CFTC and the Securities and Exchange Commission to undertake a joint rulemaking specifically for the purpose of further defining the term swap. The issuance of such a final rule is not required until 360 days from the Act's date of enactment.

Given the pendency of this joint rulemaking and the Congressionally stated need for further definition of the term swap, the Working Group respectfully requests that the CFTC clarify that market participants should rely only on applicable provisions of the CEA, CFTC regulations, and related guidance in effect on the day before the date of the Act's enactment for purposes of identifying transactions subject to the reporting and recordkeeping requirements of new Section 44.03.

2. Existing CFTC Guidance Interpreting the Forward Contract Exclusion Should Continue to Apply.

The CFTC and Congress have previously recognized both the importance and unique characteristics of certain forwards and options transactions, particularly as these transactions relate to energy commodities.[7] Such energy transactions have generally been excluded from regulation pursuant to various interpretations of the well-established forward contract exclusion in CEA Section 1a(19).[8] The *Interim Final Rule*, however, is silent regarding whether forward contracts are outside of the scope of new Section 44.03.

Given the transitional regulatory environment in which the *Interim Final Rule* has been issued, this silence creates uncertainty and unnecessarily heightens non-compliance risks faced by market participants making good faith attempts to comply with new Section 44.03. As such, the Working Group requests the CFTC to clarify that: (1) existing guidance interpreting the forward contract exclusion in the CEA continues to apply; and (2) certain transactions taking place in physical markets, *i.e.*, post-enactment, unexpired (i) physical delivery forwards, (ii) physical delivery options on energy commodities, and (iii) embedded options in physical

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[7] *See* Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39,188-92 (Sept. 25, 1990), reprinted at [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,925. Energy markets are unique in that they are inextricably intertwined with a physical market structure which provides the capability for market participants to make and take delivery of a transaction's underlying commodity. ANOPR Comments at 3-4. Various forms of transactions are routinely executed in physical energy markets, including physical delivery forwards and physical delivery options on energy commodities. These transactions are critical for energy companies and consumers of energy commodities to make or take physical delivery of energy commodities and to manage various commodity risks. *Id.*

[8] *See* CEA Section 1a(19), 7 U.S.C. § 1a(19) and 17 C.F.R. § 32.4, respectively.

delivery forwards,[9] are not Post-enactment Swaps and, therefore, are not subject to the reporting and recordkeeping requirements in new Section 44.03.[10]

B. RECORDKEEPING REQUIREMENTS SHOULD BE LIMITED TO TRADE DATA CURRENTLY RETAINED IN THE ORDINARY COURSE OF BUSINESS.

1. Records Kept in the Ordinary Course of Business.

The Working Group appreciates that the *Interim Final Rule* makes clear that the reporting obligations outlined in new Section 44.03 will only "implicate swap transaction information and data that counterparties normally retain as sound business practice" and "does not require any counterparty to a transition swap transaction to create new records, and permits records to be retained in their existing format."[11] Despite this caveat in the *Interim Final Rule* that parties are not required to create or retain new records with respect to swap transactions, the Interpretive Note, as applied to bilateral transactions in OTC markets, covers data that is not currently kept by market participants in the normal course of business, particularly by commercial firms and other entities that are not registered with the CFTC.

For example, as a matter of standard industry practice, commercial firms and other non-registrants do not retain information relating to the "time of execution of the transaction." Transaction confirmations for swaps specify a "trade date" or "effective date" rather than "time of execution" to serve as a point of reference for the origination of each trade.

The imposition of new requirements mandating that counterparties to Post-enactment Swaps identify and retain the "time of execution" information, if available, would impose a significant and costly burden on market participants.[12] While information exchanged between counterparties, brokers, exchanges, and other intermediaries may include certain time stamps, market participants generally view this information as ancillary in nature and do not seek to identify a specific "time of execution" for any particular trade or capture such time stamps in their systems of record. Given that "time of execution" data is not retained in the normal course

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[9] Physical delivery transactions in the energy markets, whether forward transactions or options to deliver a physical commodity, by structure and design, are distinct from OTC derivatives transactions in securities, interest rates or other financial markets.

[10] The Working Group incorporates by reference comments submitted to the CFTC on November 15, 2010, in response to the Commission's Interim Final Rule for Reporting Pre-enactment Swaps. *See* Interim Final Rule for Reporting Pre-Enactment Swap Transactions, 75 Fed. Reg. 63,080 (Oct. 14, 2010) ("*Pre-Enactment Swap Rule*"). In particular, the Working Group's arguments at pp. 6-9 of those comments provide support as to why certain transactions taking place in physical markets should not be subject to the Pre-enactment Swap recordkeeping and reporting obligations, *i.e.*, pre-enactment, unexpired (i) physical delivery forwards, (ii) physical delivery options on energy commodities, and (iii) embedded options in physical delivery forwards. Those arguments are applicable to this proceeding and are incorporated herein with respect to why similar post-enactment transactions should not be subject to the Post-enactment Swap recordkeeping and reporting obligations.

[11] *Interim Final Rule* at 78,893, 78,894.

[12] Generally speaking, "time of execution" information is not typically available given the nature of these off-exchange, individually negotiated transactions.

of business and is not always available, it is unlikely that the counterparties to a Post-enactment Swap would have a consistent view of the actual time of execution for a transaction (if they have the information at all).

2. Information "Relating To" Swap Transactions Should Not Include Data Not Normally Covered by Existing Record Retention Policies.

The Interpretive Note to new Section 44.03(a) requires that counterparties separately identify and retain information "relating to" the terms of a swap transaction. In addition, new Section 44.03(a)(2) requires entities subject to the *Interim Final Rule* to "[r]eport to the Commission on request . . . *any information relating to the swap transaction*."[13] As used in these provisions, both the term "relating to" and the phrase "any information relating to" are ambiguous and overbroad, thus creating uncertainty regarding what information must be retained and ultimately reported. In this light, the Working Group requests the CFTC to clarify that the recordkeeping requirements addressed in the Interpretive Note and new Section 44.03(a)(2) do not create an expectation or otherwise require that parties to Post-enactment Swaps create or retain data not normally covered by its existing record retention policies and practices.[14]

Specifically, the Working Group suggests that final transaction confirmations, related master agreements, and any amendments or modifications thereto are sufficient to fulfill the requirements of Section 44.03(a). Collectively, these documents identify the key commercial terms of a transaction and provide the information necessary for the CFTC to evaluate a transaction and otherwise perform its statutory obligation to oversee swap markets. Such an outcome would eliminate much uncertainty and is consistent with the CFTC's representation that the *Interim Final Rule* "does not require any counterparty to a transition swap transaction to create new records, and permits records to be retained in their existing format."[15]

C. THE CFTC SHOULD ISSUE GUIDANCE FOR THE INTERIM FINAL RULE OR CREATE A SAFE HARBOR FOR GOOD FAITH COMPLIANCE EFFORTS.

The requirement to issue the *Interim Final Rule* in advance of final rules issued pursuant to Sections 712(d) and 721(c) of the Act further defining the term swap, together with the need for CFTC guidance discussed herein, creates legal and regulatory uncertainty regarding the scope and applicability of the recordkeeping requirements set forth in new Section 44.03. The

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[13] *Interim Final Rule* at 78,896 (new CFTC Rule 44.03(a)(2)) (emphasis added).

[14] The Working Group recognizes that the Interpretive Note to Section 44.03(a) parallels the Interpretive Note to Section 44.02(a) of the Commission's *Pre-Enactment Swap Rule*. However, there are key differences. Namely, the Interpretive Note to Section 44.03(a) requires counterparties to retain information regarding "volume" as well as information relevant to "payment for the transaction until the swap is terminated, reaches maturity or is novated." Neither volume nor payment are required to be retained pursuant to the Interpretive Note to Section 44.02(a). As such, the Working Group is concerned that this inconsistency establishes different recordkeeping requirements for Pre- and Post-enactment Swaps, potentially resulting in unnecessary additional compliance costs and burdens to market participants.

[15] *Interim Final Rule* at 78,894.

Working Group requests that the CFTC amend the *Interim Final Rule*, or through a stand-alone issuance, publish the requested guidance to ensure effective compliance with these requirements.

As the CFTC makes the transition to new regulation under Title VII of the Act, the dedication of limited agency resources on the development of such guidance will help market participants more effectively comply with the new reporting and recordkeeping requirements adopted by the *Interim Final Rule*. In the absence of such guidance, market participants making demonstrative, good faith efforts to comply with new Section 44.03(a) should be granted safe harbor protection from possible enforcement action for failing to (i) properly identify and report Post-enactment Swaps, or (ii) retain records for such transactions, as required by Section 44.03.

D. THE INTERIM FINAL RULE SHOULD NOT APPLY RETROACTIVELY TO SWAPS ENTERED INTO SINCE THE DATE OF ENACTMENT OF THE ACT.

The Commission defines, in part, Post-enactment Swaps subject to the *Interim Final Rule* as those swaps "entered into on or after the date of enactment of the Dodd-Frank Act (July 21, 2010)."[16] The Working Group, however, believes the *Interim Final Rule* should not apply retroactively to swap transactions entered into since the date of the Act's enactment, but rather should apply only to those swap transactions entered into on or after the effective date of the *Interim Final Rule, i.e.*, December 17, 2010. Doing so will relieve market participants from the additional costs and burdens of having to maintain this data, which would provide little value to the Commission given that this information will be stale for price transparency purposes.

IV. CONCLUSION.

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. The Working Group (i) supports tailored regulation that brings transparency and stability to the energy swap markets in the United States, and (ii) appreciates the balance the CFTC must strike between effective regulation and not hindering the swap markets for energy commodities. Accordingly, the Working Group respectfully requests that the CFTC consider its comments to the *Interim Final Rule* urging:

1. the issuance of guidance designed to facilitate effective compliance with the requirements of new Section 44.03 of the CFTC's regulations;

2. the continued application of the CEA and CFTC regulations, guidance and precedent, including the CFTC's interpretations of the forward contract exclusion (as in effect the day before the date of enactment of the Act) for purposes of identifying transactions that must be reported as Post-enactment Swaps;

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[16] *Id.* at 78,896 (new CFTC Rule 44.00(c)).

3. in the absence of requested guidance, the creation of safe harbor protection for market participants making demonstrable good faith efforts to comply with requirements of new Section 44.03; and

4. limited application of the *Interim Final Rule* to those swaps entered into on or after the effective date of the *Interim Final Rule*.

The Working Group expressly reserves the right to supplement these comments as deemed necessary and appropriate.

If you have any questions, or if we may be of further assistance, please contact the undersigned directly.

Respectfully submitted,

/s/ R. Michael Sweeney, Jr.
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