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PRIVILEGED AND CONFIDENTIAL
ATTORNEY/CLIENT WORK PRODUCT

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

VIA ELECTRONIC MAIL

Re: *Rulemaking on the Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant*

Dear Secretary Stawick:

On behalf of the Working Group of Commercial Energy Firms (the "Working Group"), Hunton & Williams LLP respectfully submits this letter in response to the Commodity Futures Trading Commission's (the "Commission") request for comment concerning the Commission's Notice of Proposed Rulemaking on *Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant* (the "Proposed Rule").[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.

[1] *Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant*, 75 Fed. Reg. 70,881 (Nov. 19, 2010).

I. COMMENTS OF THE WORKING GROUP.

A. GENERAL.

1. NEED FOR COMPREHENSIVE, PRINCIPLES-BASED APPROACH.

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") vests the Commission with new and expanded authority to regulate a wide array of participants in swap markets. These market participants will have a significant burden to develop measures to assure compliance with both substantive and procedural requirements under the Commission's new regulations set forth under the Act. Such regulations are the subject of several key proposed rulemakings, including the instant one.

The Commission has an established history of effective principles-based regulation. The Working Group believes that the Commission should follow that approach in drafting rules concerning the duties of chief compliance officers. A principles-based paradigm would establish specific goals and codes of conduct to which market participants must adhere. However, under such an approach, market participants will be largely free to determine the best method to satisfy such requirements given their particular facts and circumstance.

The Commission's proposed rules implementing compliance and regulatory risk management requirements, including the Proposed Rules, should promote a culture of compliance within a commercial firm. The Commission's rules should allow firms the flexibility to design compliance programs under which commercial firms strive to comply with regulations and regulatory violations are an exception to a commercial firm's normal course of business.[2] Effective compliance policies should encourage self-governing and self-reporting. Compliance policies that encourage compliance officers to educate the workforce, receive internal reports and conduct inquiries with appropriate internal review and notification to management will promote a culture of compliance within a firm, its governing body, owners and regulators. Put simply, an effective compliance program would encourage a trader to seek the assistance of a compliance officer and allow the firm to address issues effectively before they become larger, more serious regulatory or statutory violations.

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[2] An effective program minimizes violations and strongly encourages internal identification of potential compliance issues as they arise. Given the extraordinarily complex web of regulatory requirements to which many participants in regulated markets are subject, government agencies generally recognize that the mere existence of a violation does not in and of itself mean that a company failed to take the steps necessary to implement an effective system of compliance.

The Proposed Rules should be revised to afford firms greater discretion in determining the job description and responsibilities of a chief compliance officer. Firms are in the best position to design the position given the unique nature of their business. Many firms that may come within the definitions of "swap dealer" or "major swap participant" already have robust compliance and risk management programs in place, including chief compliance officers and other compliance personnel.[3] New regulations promulgated by the Commission under the Act should not cause firms to add entirely new compliance or risk management infrastructure.[4]

2. STANDARDIZATION IN REPORTS TO BE DELIVERED TO COMMISSION.

Where filing of reports with the Commission is required, the Working Group respectfully suggests that the Commission provide a standard form of report and guidance as to how such report needs to be completed. Standardized reporting requirements mutually benefit the Commission and market participants. For the Commission, they facilitate the efficient review and evaluation of what might be thousands of reports. For market participants, they provide necessary guidance on how to prepare reports, which will inform certain aspects of compliance programs.[5]

It should be noted that a standardized set of reporting criteria still leaves a large amount of discretion to individual firms. Each firm must evaluate what data is responsive to the report's requirements. Firms also must make determinations as to what disclosure is material and what information must be included to make disclosures not misleading.

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[3] Certain firms, for example, already have compliance and risk departments to address current rules and regulations of the Commission. Other firms have compliance and risk units as brokers or dealers under the Securities Exchange Act of 1934, as amended (the "'34 Act"), while other companies have robust compliance measures as they are regulated by banking authorities, insurance authorities, FERC, state agencies, and, in the electric industry, the North American Electric Reliability Corporation. Public reporting companies under the '34 Act have additional compliance measures in place to remain compliant with the Sarbanes-Oxley Act.

[4] As the Commission's cost-estimates reflect incremental costs, the Commission appears to be assuming that firms will already leverage existing compliance and risk measures.

[5] The Commission has followed this practice with respect to several of its forms, such as Forms 01, 40, 102, 103A and 103B.

B. SCOPE OF CHIEF COMPLIANCE OFFICER'S RESPONSIBILITY.

1. THE PROPOSED SCOPE OF A CHIEF COMPLIANCE OFFICER'S RESPONSIBILITY IS UNNECESSARILY BROAD.

Under the Proposed Rules, though a chief compliance officer must consult and report to a firm's governing body or the senior officer of the company in fulfilling his or her duties, the responsibility for an entity's compliance rests with the chief compliance officer.[6] This authority is in contrast with traditional compliance practice, where compliance officers typically provide an advisory and monitoring function, and where compliance responsibility is borne by business units, their managers, and ultimately by governing bodies. As currently framed, the Proposed Rules appear to transfer the burden of regulatory compliance from the business unit to the chief compliance officer.

The Commission acknowledges that "the chief compliance officer can only ensure the registrant's compliance to the full capacity of an individual person, and the duties of the chief compliance officer do not elevate the position above the governing body, or otherwise contradict basic and well-established tenets of law regarding the allocation of responsibility within a business association."[7] However, a literal reading of the Proposed Rules might support a different conclusion. For example, the Proposed Rules set a level of seniority for the compliance officer. The Proposed Rules also impose duties on chief compliance officers, such as the duty to ensure compliance, that are traditionally reserved for the entity (or, in certain cases, senior officers and the governing body). Moreover, the Proposed Rules places an affirmative duty on a chief compliance officer to report any "non-compliance issues" to the Commission, while at the same time, the chief compliance officer has duties to report to management and, for some companies, the governing body. Thus, management and governing bodies will no longer have the ultimate responsibility to make reasonable business judgments about compliance issues, such as whether an event is a violation, the severity of the event and the selection of actions a firm might take in response to a compliance issue.[8] Moreover, if there is a legitimate disagreement over whether a compliance issue is material enough to merit reporting among management, the governing body and the chief compliance officer and the chief compliance officer deems an issue material enough to report while the governing body does not,

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[6] Proposed CFTC Rule 3.3(d)(3). The Working Group notes that are two "section (d)s" in Proposed CFTC Rule 3.3. This citation is to the first.

[7] *Proposed Rules* at 70,883.

[8] Proposed CFTC Rule 3.3(d)(6). The Working Group notes that are two "section (d)s" in Proposed CFTC Rule 3.3. This citation is to the second.

the Proposed Rules require a chief compliance officer to supersede the decision of the governing body and report the issue. Ultimately, these overlapping duties override traditional notions of "voluntary reporting" by a firm.

A commercial firm's compliance and risk personnel should play an advisory function and have cooperative relationships with firm management and trading personnel. Effective regulation should promote these relationships and not create adversarial relationships or mistrust.[9] The Working Group respectfully requests that the Commission restate the Proposed Rules to clarify that the appropriate role of a chief compliance officer should be that of an advisor to management, and not an independent inspector general that operates outside the traditional reporting structure within a corporate entity.

In addition to contradicting the "basic and well-established tenets of law regarding the allocation of responsibility within a business association" recognized by the Commission, the Proposed Rules create a strong disincentive for qualified personnel to take the role of chief compliance officer in a swap dealer, major swap participant or FCM. The wide-reaching responsibility and the accompanying liability do not exist at similar organizations that offer comparable professional opportunities and are not subject to the Proposed Rules. It is quite possible that swap dealers, major swap participants and FCMs will be faced with a shortage of qualified candidates willing to take on the role of chief compliance officer given the Proposed Rules.

The Commission solicits comments in the Proposed Rules as to whether a majority vote of the board of directors[10] should be necessary to remove a chief compliance officer. While this requirement might be appropriate for some firms, it may not be appropriate or even practical for other firms. The Working Group believes that the Commission should require that firms adopt measures to assure independence of a chief compliance officer, but leave the design of such measures to each firm.

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9 *See*, John S. Moot: Compliance Programs, Penalty Mitigation and the FERC, 29 Energy Law Journal 547 (2008); Donald C. Langevoort, Monitoring: The Behavioral Economics of Corporate Compliance with Law, 2002 COLUM. BUS. L. REV. 71 (2002); Kimberly D. Krawiec, Corporate Decisionmaking: Organizational Misconduct: Beyond the Principal-Agent Model, 32 FLA. ST. L. REV. 571 (2005); and Jennifer Arlen and Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U.L. REV. 687 (1997).

10 We note that "board of directors" and "governing body" are both used in the instant release and other releases. The Commission might use one term consistently.

2. CHIEF COMPLIANCE OFFICERS FACILITATE COMPLIANCE, BUT DO NOT ENSURE COMPLIANCE.

Proposed Rule 3.3(d)(3) identifies the duties of a chief compliance officer as including "ensuring compliance by the … swap dealer, or major swap participant with … all applicable laws, rules and regulations…" The Working Group, consistent with its view of a chief compliance officer as an advisor to its firm, believes that chief compliance officers (and all compliance personnel), among other things, serve to make sure necessary compliance policies exist and are monitored. This view is a reasonable interpretation of the statutory requirement to "ensure compliance" and the Commission should not adopt a literal interpretation of this language and impose an impossible task on chief compliance officers. The Commission should affirmatively state this principle. Moreover, the Proposed Rules should be redrafted to avoid suggestions that an incidence of noncompliance by a firm might constitute or evidence a failure by a chief compliance officer to meet its statutory and regulatory responsibilities.

3. SCOPE OF PROPOSED RULES LIMITED TO SWAP ACTIVITIES.

The Working Group also requests that the Commission clarify that any requirements imposed by the Proposed Rules are limited to a swap dealer's or major swap participant's swaps activities. In particular, the responsibilities imposed on a chief compliance officer by the Proposed Rules should only apply to a chief compliance officer's oversight of swaps activities. In addition, the scope of the annual compliance report required by the Proposed Rules, which is discussed more fully in Section II.C. below, should be expressly limited to activities over which the Commission has jurisdiction.[11]

4. PROPOSED INTERNAL REPORTING STRUCTURE REQUIRES CLARIFICATION.

The Commission requests comments as to (i) "whether it would be more appropriate for a chief compliance officer to report to the senior officer or the board of directors" and (ii) "whether the proposed rules allow for sufficient flexibility with regard to a registrant's business structure."[12] Given the high degree of variety and complexity in the corporate structures of many commercial energy firms, the Commission should permit regulated firms to have the flexibility

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[11] Any information supplied to the Commission regarding activities and entities outside the Commission's jurisdiction in connection with a compliance report should only be required in order to provide an accurate accounting of compliance performance. The Commission should expressly state that the provision of such information does not grant the Commission jurisdiction over any non-swaps or futures-related activities or entities.

[12] *Proposed Rules* at 70,882.

to determine and implement reporting structures that work best for an individual firm to meet the Commission's requirements and the requirements of other regulators.

Flexibility in determining internal structures is necessary so that firms can implement compliance programs that both meet the Commission's and other regulators' requirements and that take account of the unique facts of the particular firm. For example, a commercial energy firm might have a FCM and a swap dealer within the same corporate family. The same individual should be permitted to serve as chief compliance officer for both entities (as well as other non-swaps or futures entities) and report to an appropriate senior officer or director in both entities or a senior officer or director located in an affiliated entity that controls both entities.

A commercial energy firm may have a separate enterprise-wide compliance or risk management unit that is charged with compliance responsibility for a swap dealer, major swap participant or FCM as well as other affiliates. In such cases, a company might have several compliance officers who support a broad array of compliance activities imposed by a variety of regulators, including the Commission. These officers often report to a head of compliance, who in turn reports to the board or senior officer of a parent company. This reporting structure is consistent with the terms of the Act. Further, such a structure provides the independence that has been identified as an indicia of successful compliance programs.[13]

Still in other cases, the appropriate senior officer for the purposes of chief compliance officer reporting, may be an officer of a parent or affiliate of such entity or a more senior member of an independent risk management or compliance unit. The Commission should clarify the Proposed Rules so they are flexible enough to allow firms to structure a chief compliance officer's responsibilities and internal reporting requirements to allow a chief compliance officer to oversee affiliated swap dealers, major swap participants and FCMs, and to report to a senior officer within a corporate family that the firm deems appropriate.

The Working Group also respectfully requests that the Commission clarify that, while a firm's governing body or senior officer has certain non-delegable authority over a chief compliance officer, the fact that a chief compliance officer is required to report to a governing body or a senior officer does not prohibit a swap dealer, major swap participant, or FCM from placing a chief compliance officer under the direction of other corporate officers, as may be appropriate. Such clarification is necessary to ensure that, as discussed in the previous section, a chief compliance officer is not a de-facto internal inspector general and is an important and functioning member of management.

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13 *See infra* at Footnote 9.

A chief compliance officer for a commercial energy firm is more effective if he or she has day-to-day contact with managers of business units who are ultimately responsible for trading decisions and access to the information necessary to evaluate trading activities. Since commercial energy firms often have a primary business other than trading swaps, these managers may be several levels removed from the senior officer or the governing body. However, given their expertise and proximity to trading operations, such a manager might be the proper primary reporting contact for a chief compliance officer. It is likely that executive management and the governing body, while responsible for all of the firm's business, may rely on middle-tier managers to monitor and be responsible for compliance with regulatory requirements. Such middle-tier managers might be tasked with discerning which issues must be elevated to higher management levels or ultimately the governing body. As long as commercial firms can demonstrate that their internal process provides a chief compliance officer with the ability to properly elevate issues to senior management, firms should have discretion to select the management level at which the chief compliance officer must report.

5. EXISTING INDEPENDENT AUDIT FUNCTIONS ALREADY ADDRESS CONFLICTS OF INTEREST.

The Commission requests comments as to whether it is "necessary to adopt rules to address the potential conflict of interest between and among compliance interests, commercial interests, and ownership interests of a futures commission merchant, swap dealer, and major swap participant."[14] Many market participants, including commercial energy firms, have existing compliance programs that address these concerns. For example, the independent audit requirements imposed by Sarbanes Oxley likely already address the potential conflicts of interest referred to by the Commission.[15] As noted in Section III.A.2., the Working Group respectfully requests that the Commission, where possible, leverage existing compliance infrastructure. In light of existing safeguards that likely address the Commission's concerns, the Working Group believes that additional rules addressing the potential conflicts of interest discussed in the Proposed Rules are unnecessary.

6. QUALIFICATIONS FOR CHIEF COMPLIANCE OFFICERS.

The Commission should not set standards for qualification of individuals as chief compliance officers. Corporate compliance officers have different professional backgrounds and there is no reason to believe that qualified chief compliance officers cannot have varied

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14 *Proposed Rules* at 70,882.

15 *See* 15 U.S.C. §78j-1

backgrounds. Accordingly, firms should be given the latitude to set qualifications that are appropriate to their businesses, so long as such persons can reasonably be expected to fulfill the requirements of a chief compliance officer under the CEA and the Commission's regulations. No officer or employee of a firm, other than one who is disqualified under Sections 8a(2)-(3) of the CEA, should be automatically prohibited from acting as a chief compliance officer.

C. REQUIRED COMPLIANCE REPORT.

1. CONCERNS REGARDING REQUIRED INFORMATION.

The Working Group respectfully requests that the Commission revisit the content and approach of the annual compliance report set forth in the Proposed Rules under the authority granted in new CEA Section 4s(k)(3). The current reporting criteria in the Proposed Rules is more expansive than the requirements found under new CEA Section 4s(k)(3). The Working Group suggests that the annual compliance report be limited to (i) a description of a swap dealer or major swap participant's existing compliance policies, procedures and infrastructure; (ii) a summary of any material changes made to such policies, procedures and infrastructure during the previous year; and (iii) a summary of any material violations of compliance policies during the previous year and procedures and any steps taken to rectify such violations.

As currently constructed, the annual compliance report would inhibit a firm's ability to engender a culture of compliance. The information required to be reported to the Commission would necessarily place a chief compliance office in conflict with the interests of the firm and management. The Proposed Rules require the annual report to contain, among other things, a description of the deficiencies in the resources dedicated to compliance, a discussion of areas for compliance improvement, recommendations for changes or improvements to the compliance program and resources devoted to compliance, as well as a discussion of any non-compliance issues identified and the corresponding action taken.[16] The report would require a chief compliance officer to identify a firm's potential compliance short comings and report them to the Commission in a document that is likely available to the public (see paragraph below for a discussion of confidentiality). Such a requirement would materially hinder a chief compliance officer's ability to function as an integral member of the management team and might create an adversarial and dysfunctional relationship between compliance staff and business units, severely limiting compliance staff's ability to perform their job.

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[16] Proposed CFTC Rule 3.3(d). The Working Group notes that are two "section (d)s" in Proposed CFTC Rule 3.3. This citation is to the second.

The requirements as to the content of the annual compliance report would inhibit the free flow of views within a company, as any views expressed would potentially end up in a report to the government. As with the reporting of "violations" by a chief compliance officer, reporting "deficiencies" would substitute for the governing board's judgment, the chief compliance officer's view of appropriate resources, areas for improvement and similar matters. So, for example, the chief compliance officer and the management might have differing views as to whether the firm has adequate resources, the chief compliance officer would be in a position to supersede management's judgment or he or she would be forced to file a report that contradicts his or her view.

In addition, the Proposed Rules do not limit the contents of the annual report to (a) material regulations applicable to the firm, and (b) material information with respect to such regulation. The report must, among other things, contain the following information:

> (2) Review each applicable requirement under the Act and Commission regulations, and with respect to each:
>
> > (i) identify the policies and procedures that ensure compliance with the requirement under the Act and Commission regulations;
> >
> > (ii) provide an assessment as to the effectiveness of these policies and procedures; and
> >
> > (iii) discuss areas for improvement, and recommend potential or prospective changes or improvements to its compliance program and resources devoted to compliance.[17]

The above language requires a chief compliance officer to identify each applicable requirement under the Act and Commission regulations. This is a daunting task as arguably nearly each and every provision of the Act and Commission regulation might apply to a firm, and certain provisions are ministerial in nature or only apply under certain conditions which might not be present at any time. The Working Group respectfully requests that the scope of applicable statutory and regulatory provisions be subject to a materiality qualifier.

The above language also requires that, for each and every statutory or regulatory requirement that may apply to a firm, that such firm have developed policies and procedures to address such requirement. Without any limitation as to materiality, each firm is required the design and implement a policy for each statutory or regulatory requirement, even those that are ministerial, that apply conditionally or pertain to events and circumstances that are highly unlikely to occur.

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[17] Proposed CFTC Rule 3.3 (d) (2).

The Commission has also not placed a materiality limitation on the other information required to be included in the report. Thus, to be responsive, a firm must include information regarding even the most trivial matters. For example, a firm might believe an aspect of compliance would be improved by moving a weekly meeting from Monday to Tuesday. Under the Proposed Rules, such a recommendation would be included in the annual report. Accordingly, the Proposed Rules place a substantial reporting burden on any entity wishing to be compliant. The required report will be unnecessarily exhaustive, and, given the likely length of the report and level of detail required, without a materiality limitation, the report will be of limited use to the Commission and costly for firms to produce.

The Working Group notes that Section 4s(k)(3) of the CEA requires that the annual compliance report contain a description of a code of ethics and that Proposed CFTC Rule 3.1(g) includes a code of ethics in the definition of "compliance policies."[18] However, there does not appear to be an explicit requirement under the Act or the Proposed Rules for entities to adopt a code of ethics. The Working Group requests that the Commission clarify that the Proposed Rules do not impose a requirement to adopt a code of ethics (a requirement beyond that contained in the Act) but instead provides for a description of a code of ethics, to the extent a company has one.

2. CONFIDENTIALITY CONCERNS.

Given that it is likely that the annual report mandated under the Proposed Rules will not be considered confidential information protected from Freedom of Information Act requests, the Working Group is concerned that certain of the required information fields might expose swap dealers, major swap participants and FCMs to legal and reputational risk if made public.[19] Moreover, the report may force firms to make disclosure prior to having remedial actions agreed with regulators and put into effect. Worse still, the public disclosure of information might grant valuable insight to a firm's competitors. If the Commission does not elect to alter the required contents of the annual compliance report, then the Working Group requests that the Commission take steps to ensure that the information contained in such reports remains confidential.

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[18] Specifically, Proposed CFTC Rule 3.1(g) states: "compliance policies means all policies, procedures, codes, safeguards, rules, programs, and internal controls required to be adopted or established by a registrant pursuant to the Act and Commission regulations, including a code of ethics."

[19] The information contained in the annual report does not appear to fit within the of types of confidential information listed in CFTC Rule 145.5.

3. CLARIFICATION OF CERTIFICATION REQUIREMENT.

The Proposed Rules require a chief compliance officer to certify "under penalty of law" that any required annual report submitted to the Commission is "accurate and complete."[20] The Working Group requests that the Commission, similar to the actions taken by the SEC with regards to equivalent requirements contained in Sarbanes Oxley,[21] provide guidance to market participants as to the proper form of certification required under the Proposed Rules. This guidance should also clarify what deviations from the form may be properly made under the certification. In addition, the Working Group requests that the Commission clarify what information and reports from subordinates that a chief compliance officer is permitted to rely upon when making the required certification.

The Commission should recognize that the criminal liability that could attach for improper submission of the required report will have a deterrent effect. Individuals that are competent to serve as chief compliance officers might not accept the position so as to avoid the risk of criminal liability should a certification be defective. The difficulty presented to firms in finding qualified persons willing to serve in such positions is expected to result in increased costs for firms.

4. RECORD KEEPING REQUIREMENT FOR REPORT.

The Proposed Rules unnecessarily require that firms keep all materials relating to the preparation of a compliance report to a standard that facilitates the Commission's reconstruction of how such report is prepared. This requirement is counterproductive. To prepare a thorough compliance report, chief compliance officers should have access to all necessary information. Materiality decisions are made in the process of fashioning a report. However, if audit standards might call into question the discretion of the chief compliance officer, the Commission will have codified a natural incentive for a chief compliance officer to (a) report everything, even if not material, thus obscuring the focus from material items, or (b) make only limited inquiries so as to avoid having to make materiality determinations.

The record keeping requirement will not promote any compliance policy other then facilitating regulatory enforcement actions. It will not promote reporting, facilitate the advisory role of a compliance officer or otherwise promote a culture of compliance. To this end, it is

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[20] *Proposed Rules* at 70,883.

[21] *See* 17 C.F.R. § 229.601(b)(31)(i).

uncertain whether the limited benefits of this record keeping requirement outweigh the costs that are sure to be incurred.

The Working Group supports a retention standard whereby chief compliance officers maintain supporting material that is germane to the topics address in the annual compliance report. However, to the extent that the chief compliance officer determines information is immaterial, the officer should be permitted to not retain such information.

5. NO PRIVATE RIGHT OF ACTION FOR COMPLIANCE STATEMENT.

In the absence of the required annual report being confidential, the Commission should clarify in the Proposed Rules that no private right of action exists for misstatements and inaccurate content included in the compliance report.

D. PROPER EFFECTIVE DATE.

The Commission proposes implementing a delayed compliance date for the Proposed Rules and asks "how long it might take for a registrant to hire a chief compliance officer and how long it might take for the registrant to implement the required policies."[22] As a general proposition, the Working Group suggests that the Commission provide that, within a year from the effective date of a firm's registration as a swap dealer or major swap provider, that firm must hire or appoint a chief compliance officer.

The Working Group recognizes that the registration requirements for swap dealers and major swap participants would require that firm be able to certify as to compliance with all applicable Commission regulations at the time it registers as a swap dealer or major swap participant. However, given that many firms will need time to make a determination as to whether they are a swap dealer or major swap participant, possibly restructure and begin to simultaneously implement many policies and procedures under the Commission's new regulations, firms should be afforded some degree of timing flexibility to fulfill the requirement for an appointment of a chief compliance officer.

In general, the Working Group supports an extended transition period for firms that might be deemed a swap dealer or major swap participant, have not been prudentially regulated by a financial regulator and might require substantial corporate restructuring. This approach will allow firms to concentrate resources and attention to individual aspects of designing and implementing new risk management and compliance measures. It will also allow firms to spread

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[22] *Proposed Rules* at 70,884.

costs out over time. For some firms, the new risk management and compliance requirements under the Act and the Commission's rules might be incremental and minor. However, for commercial firms, even "minor" requirements could require substantial investment. An extended transition period for such firms will also allow time for the development of technologies to support the various information gathering, processing and reporting requirements under various new regulations proposed by the Commission.[23]

E. ESTIMATED COST.

Regulated entities will incur material costs in connection with their compliance with the Proposed Rules. The search for qualified individuals to serve as chief compliance officers will be burdensome. In addition, given the current scope of statutory and regulatory provisions that must be identified and for which a firm must develop policies and procedures, a firm will spend considerable resources to meet its obligations under the compliance report. Moreover, the preparation of the compliance report will be quite expensive because the scope of policies and procedures will be very broad.[24]

F. OPEN COMMENT PERIOD.

Given the complexity and interconnectedness of all of the rulemakings under Title VII of the Act, and given that the Act and the rules promulgated thereunder entirely restructure over-the-counter derivatives markets, the Working Group respectfully requests that the Commission hold open the comment period on all rules promulgated under Title VII of the Act until such time as each and every rule required to be promulgated has been proposed. Market participants will be able to consider the entire new market structure and the interconnection between all proposed rules when drafting comments on proposed rules. The resulting comprehensive comments will allow the Commission to better understand how their proposed rules will impact Swap markets.

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[23] The Working Group anticipates submitting recommendations for proper transition periods for swap dealers and major swap participants in a comment letter on the Proposed Rules for Registration of Swap Dealers and Major Swap Participants to be filed with the Commission on, or before, January 24, 2011.

[24] In the proposing release, the CFTC estimates that the total annual burden on respondents to prepare and furnish the annual report is 40 hours (5 hours for amended annual reports). The Working Group suggests that, if a policy and procedure must be developed for each and every applicable CEA provision and Commission regulation, and every such policy and procedure must be evaluated in preparing the annual compliance report, then the Commission's estimates are too small. Under this standard, the Working Group expects that two or more compliance professionals will spend at least two full working weeks to prepare and furnish the report. Thus, the Working Group suggests the *minimum* (not average) reporting burden, measured in hours, is 160 hours. This estimate is four times greater than the Commission's estimate.

II. CONCLUSION.

The Working Group supports tailored regulation that brings transparency and stability to the Swap markets in the United States. We appreciate the balance the Commission must strike between effective regulation and not hindering the uncleared energy-based Swap markets. The Working Group offers its advice and experience to assist the Commission in implementing the Act. Please let us know if you have any questions or would like additional information.

Respectfully submitted,

/s/ David T. McIndoe
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