

February 7, 2011

Via Online Submission

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

Re: COMMENTS OF COALITION OF PHYSICAL ENERGY COMPANIES
Swap Data Recordkeeping and Reporting Requirements, RIN Number 3038-
AD19

Dear Mr. Stawick:

By notice of proposed rulemaking published in the Federal Register on December 8, 2010,¹ the Commodity Futures Trading Commission ("CFTC" or the "Commission") proposed regulations to implement certain sections of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")² regarding the collection and maintenance of data related to swap transactions. Specifically, Section 729 of Dodd-Frank added a new Section 4r to the Commodity Exchange Act ("CEA") addressing reporting and recordkeeping requirements for swaps that are not cleared through a Derivatives Clearing Organization ("DCO").³ This section requires all uncleared swaps to be reported to a Swap Data Repository ("SDR"), or to the Commission if no repository will accept the swap.⁴

¹ Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574 (Dec. 8, 2010) ("Reporting and Recordkeeping NOPR" or "NOPR").

² Public law No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank").

³ Dodd-Frank § 729 (as codified at 7 U.S.C. § 4r *et seq.*).

⁴ *Id.* at § 4r(a)(1).

The Coalition of Physical Energy Companies ("COPE")⁵ understands that Dodd-Frank has mandated that all uncleared swaps⁶ be reported to an SDR or to the Commission. COPE is offering comments specifically regarding the reporting of swaps pursuant to the NOPR's proposed regulations that are entered into between non-Swap Dealer, non-Major Swap Participant entities that are entitled to opt out of the clearing of swaps pursuant to the Commission's proposed regulations governing the so-called "end-user exception to mandatory clearing of swaps."⁷ Unlike the Notice of Proposed Rulemaking issued by the Commission on December 7, 2010 regarding Real-Time Public Reporting of Swap Transaction Data⁸, COPE agrees that uncleared swaps that are executed between end-users can and should be reported. However, COPE requests that the Commission implement a reporting regime that is less burdensome and more realistic than the proposal in the Reporting and Recordkeeping NOPR.

The NOPR contains a reporting hierarchy under which end-users must report transactions only if they are between two end-users, with a waterfall starting with Designated Contract Markets ("DCM"), Derivatives Clearing Organizations ("DCO") and Swap Execution Facilities ("SEF") and working through Swap Dealers ("SD") and Major Swap Participants ("MSP") before finally requiring end-users to report where there are no SD or MSP counterparties to the swap.⁹ Thus, end-users would only be required to report end-user to end-user uncleared swaps. COPE supports this hierarchy of reporting obligations, but believes that the NOPR as currently structured places an undue burden on end-users when reporting is required of them.

Timing of Reporting

End-users maintain trading capabilities and associated information technology sufficient to meet their commercial needs. This ranges from a limited treasury-based staff working with spreadsheets, to more developed trading desks with a trade capture system that records the commercial terms necessary to conduct business. For uncleared swaps, these

⁵ The members of the Coalition of Physical Energy Companies are: Apache Corporation; Competitive Power Ventures, Inc.; El Paso Corporation; Iberdrola Renewables, Inc.; MarkWest Energy Partners, L.P.; Noble Energy, Inc.; Shell Energy North America (US), L.P.; and SouthStar Energy Services LLC.

⁶ COPE notes that the Commission has not yet proposed a regulatory definition of the term "swap" to be used in its implementation of Dodd-Frank. For the purposes of these comments, COPE will use the term "swap" to mean a financially settling agreement where parties owe each other cash payments based upon a fixed or floating price multiplied by a notional amount, with the "in the money" party receiving a net payment from its counterparty.

⁷ See End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80747 (Dec. 23, 2010).

⁸ 75 Fed. Reg. 76140 (Dec. 7, 2010).

⁹ See NOPR at 76600, 76604 (proposed regulations §§ 45.3, 45.5).

recorded commercial terms are typically limited to the following: product, counterparty, pricing, term, and any unique commercial term determined on a case-by-case basis. Uncleared, non-exchange traded swaps are recorded on trade ledgers and entered in the firm's trade capture system at the end of the trading day. Thus, non-exchange traded positions are entered and reconciled on no more than a daily basis. Among the COPE members, we understand this type of structure and timing to be generally representative of the end-user community.

The Commission has proposed that "a swap for which neither execution nor verification of primary economic terms occurs electronically [be reported] within a time after execution of the swap to be determined by the Commission prior to promulgation of its final data reporting regulations."¹⁰ Since the end-user/end-user uncleared swaps that COPE members must report will likely fall into this category, COPE agrees with the CFTC's recognition that "a significant amount of manual intervention"¹¹ will be required. However, given the data requirements proposed in the NOPR, which are well beyond those currently captured by end-users, the 24-hour period suggested by the Commission will likely be too short for reporting end-user/end-user uncleared swaps. Further, COPE requests that any newly proposed reporting timing be made available for comment before being implemented as affected parties should be afforded an opportunity to be heard before becoming subject to heretofore unannounced requirements.

As the Commission is considering the appropriate timing and structure for a reporting regime, it should do so in a systematic way. Creating a swap data reporting regime without creating the database (in this case the SDR) to which the data will be reported is putting the cart before the horse. The Commission should design the desired end product, and then work backwards through the reporting process (including needed data and timing) before designing specific reporting rules. COPE suggests the Commission convene a process similar to the North American Energy Standards Board ("NAESB") process used by the Federal Energy Regulatory Commission ("FERC") where, working with the American National Standards Institute ("ANSI"), a clear workable process for reporting swap data would result in clear reporting standards that can be realistically implemented, including the timing of reporting of uncleared end-user/end-user swaps.

Data Reported

A. Minimum Primary Economic Terms

As noted above, end-users typically only capture trade data that is of commercial value (*i.e.* product, counterparty, pricing, term, notional quantity per settlement period, and any unique commercial term determined on a case-by-case basis); many of the items set forth

¹⁰ *Id.* at 76582.

¹¹ *Id.* at 76583.

in the "Minimum Primary Economic Terms Data – Other Commodity Swaps"¹² is not currently captured by COPE members, and COPE believes this holds true for other end users. For example, execution timestamp, total quantity, and settlement method (cash or physical), among others items, are not routinely captured.

As uncleared end-user/end-user swaps are typically recorded on a trading ledger and entered into the system at the end of the day, there is no "execution timestamp," and no practical need for one. Once a swap is entered into, all that is necessary is the trade date for the purpose of the confirmation process. COPE members have no commercial need for an execution timestamp.

In general for COPE members, each swap will typically take the form of fixed-for-floating payment streams for a notional quantity for a defined settlement period. That settlement period may be a day, a week, a month, or some other predetermined period. The term of the swap may cover multiple settlement periods. Thus, a swap could cover 12 monthly settlement periods. While the total quantity is the aggregate of all of the settlement periods, that information is of no commercial value, and therefore limited resources are not expended for recording.

As noted above, COPE members understand swaps to be financially settling agreements. COPE also understands that under Dodd-Frank, only transactions intended to settle financially are defined as swaps.¹³ Accordingly, swaps are not, and should not be considered, agreements intended to be physically settled. Unless the Commission intends to broaden the definition beyond that found in Dodd-Frank, the data element of "settlement method" should be removed and not required under any final rule.

In sum, the Commission should limit the confirmation data reporting for end-users to that maintained under current data capture practices for commercial purposes. The Commission could use the ANSI process recommended above to indentify such a data set, with input from industry end-users. Any broader data set requirement will create an information technology burden on end-users solely for CFTC reporting, unrelated to data they require for their day-to-day business.

B. Life Cycle Data

The vast majority of swaps entered into by COPE members and other end-users are performed as executed until termination. From time to time, a swap may be modified, novated, or terminated early. The NOPR seeks to capture these Life Cycle changes by requiring reporting entities to provide Daily State Data on a daily basis.¹⁴ This approach will

¹² *Id.* at 76607.

¹³ 7 U.S.C. § 1a(47) (as modified by Dodd-Frank § 721).

¹⁴ *See* NOPR at 76577-76578.

only create a burden on end-users by requiring daily reports saying, essentially, "no change today." COPE recommends the Commission alter its approach to requirements for reporting life cycle changes by instead requiring such reports only when a change occurs. This way the Commission will capture the data it seeks and end-users can avoid an unneeded reporting burden.

C. Valuation Data

The Commission also proposes to require the reporting of valuation data on a daily basis to an SDR.¹⁵ COPE does not believe this data is needed to satisfy the reporting requirements of Section 729 of Dodd-Frank. In addition, COPE does not believe the Commission has justified this particular proposed provision. The valuation of a swap is either transparent from market data for standardized swaps in liquid markets, or based on business judgment for illiquid or non-standard swaps. In either case, the valuation data is not the swap itself, nor does it reflect its commercial terms. Section 729 of Dodd-Frank requires reporting of *swaps*;¹⁶ it does not require the reporting of ancillary proprietary business information of entities, such as end-users, who remain in many respects outside of the CFTC's jurisdiction, even under Dodd-Frank.¹⁷ Further, the limited justification for valuation data provided by the NOPR relates to the regulation of registrants and similar entities by the CFTC and prudential regulators. As such, there is no basis to require non-jurisdictional end-users to be subjected to the burden of filing proprietary information outside of swap data to satisfy an amorphous interest by the Commission with the regulation of Commission registrants. End-users should simply not be required to report valuation data.

Accordingly, the Commission should limit the confirmation data reporting for end-users to that data maintained in current data capture practices for commercial purposes. Any changes to that data should only be reported when they occur. No valuation data should be required to be filed by end-users. Finally, COPE reiterates its suggestion that the Commission use an ANSI-like process to identify the proper data set with input from industry stakeholders affected by these reporting requirements.

Conclusion

In implementing Section 729, the Commission should not impose unneeded burdens on end-users. The timing of the filing of the non-electronically verified transactions entered into by end-users should be carefully determined and based upon a thoughtful investigation and design of a data regime that is comprehensively structured and user-friendly to non-

¹⁵ See *id.* at 76584.

¹⁶ See Dodd-Frank § 729 (codified at 7 U.S.C. § 4r(a)(1)) ("Each swap that is not accepted for clearing . . . shall be reported . . .").

¹⁷ While Swap Dealers and Major Swap Participants are registrants subject to Commission oversight under Dodd-Frank, End-Users are not.

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registrants. COPE members will meet their reporting requirements, but expect the Commission to carefully design them to obtain the necessary data in the least burdensome manner possible.

In accordance with the above, only the commercial terms currently captured by end-users should be required. In no event should physically-settling commodity transactions be required to be reported, or daily filings indicating "no changes" be required. Further, end-users should not be required to file daily valuation data.

Respectfully submitted,

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cc: COPE Members