



HUNTON & WILLIAMS LLP  
1900 K STREET, N.W.  
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500  
FAX 202 • 778 • 2201

R. MICHAEL SWEENEY, JR.  
MARK W. MENEZES  
DAVID T. MCINDOE

FILE NO: 76142.2

February 7, 2011

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

**VIA ELECTRONIC SUBMISSION**

**Re: Swap Data Recordkeeping and Reporting Requirements, Notice of Proposed Rulemaking, RIN 3038-AD19**

Dear Secretary Stawick:

**I. INTRODUCTION.**

On behalf of the Working Group of Commercial Energy Firms (the “Working Group”), Hunton & Williams LLP submits the following in response to the request for public comment set forth in the Notice of Proposed Rulemaking, *Swap Data Recordkeeping and Reporting Requirements* (the “Proposed Rule”) issued by the Commodity Futures Trading Commission (“CFTC” or “Commission”) and published in the *Federal Register* on December 8, 2010,<sup>1</sup> proposing to implement swap data recordkeeping and reporting requirements for swap data repositories (“SDRs”), derivatives clearing organizations (“DCOs”), designated contract markets (“DCMs”), swap execution facilities (“SEFs”), swap dealers (“SDs”), major swap participants (“MSPs”), and swap counterparties who are neither SDs nor MSPs.

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 customers, 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.

Commercial energy firms, such as those in the Working Group, generally use the swap markets as an adjunct to their commercial activities. Historically, they have not been viewed as

---

<sup>1</sup> *Swap Data Recordkeeping and Reporting Requirements*, Notice of Proposed Rulemaking, 75 Fed. Reg. 76,574 (Dec. 8, 2010) [hereinafter Proposed Rule].

Swap Dealers. Members of the Working Group believe that, in principle, they should not fall within the definition of Swap Dealer under the Act or the Commission's regulations. However, at the present time, the Commission has not finalized the regulatory definition of Swap Dealer. The Working Group will comment in the rulemaking proceeding further defining the term Swap Dealer<sup>2</sup> as the Commission's outstanding proposal is vague in certain material respects. Given this uncertainty, commercial energy firms do not know whether or not they will fall within the definition of Swap Dealer and become subject to certain requirements contained in this and other CFTC proposals applicable to Swap Dealers. Members of the Working Group are therefore compelled to comment on such proposals in light of that possibility. In this letter, the Working Group refers to "Non-bank Swap Dealers," if, in fact, there are any, as commercial entities that are not affiliated with banks. These commercial entities have not been traditionally viewed by the CFTC or the swap markets as Swap Dealers, but are nevertheless potentially within the scope of the Swap Dealer definition adopted as final by the Commission for all or part of their activities.

## II. EXECUTIVE SUMMARY.

The Working Group strongly supports the goals of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("the Act")<sup>3</sup> to enhance transparency and reduce systemic risk in the swap markets. The Working Group appreciates the opportunity to provide comments on the Commission's Proposed Rule to help facilitate the expeditious implementation of effective and efficient reporting rules. To that end, in implementing its Proposed Rule, the Working Group respectfully suggests that the Commission adopt the following recommendations:

**1. Phase In Reporting Obligations.** The Working Group strongly recommends that the Commission adopt a phased-in approach in implementing its reporting rules pursuant to this Proposed Rule, the Noticed of Proposed Rulemaking, *Real-Time Public Reporting of Swap Transaction Data* ("Proposed Real-Time Reporting Rule"),<sup>4</sup> and Notice of Proposed Rulemaking, *Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants* ("Proposed Daily Trading Records Rule").<sup>5</sup> Such approach should consider and reflect the different characteristics of swap products, swap markets, and market participants. Indeed, certain market participants, such as commercial energy firms, do not have robust, internal information technology ("IT") systems in place that are designed to comply with these new recordkeeping and reporting rules. As a result, complying

---

<sup>2</sup> See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant," Joint Proposed Rulemaking, 75 Fed. Reg. 80,174 (Dec. 21, 2010) (hereinafter Definitions NOPR).

<sup>3</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

<sup>4</sup> *Real-Time Public Reporting of Swap Transaction Data*, Notice of Proposed Rulemaking, 75 Fed. Reg. 76,140 (Dec. 7, 2010).

<sup>5</sup> *Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants*, Notice of Proposed Rulemaking, 75 Fed. Reg. 76,666 (Dec. 9, 2010).

with these new reporting rules will be very onerous, if not impossible, for such participants. To that end, and as more thoroughly discussed under Part III.A., the Working Group proposes the Commission phase-in reporting obligations according to the following:

- Phase 1: Swaps executed on-facility and cleared swaps executed off-facility
- Phase 2: Standardized, uncleared swaps executed off-facility
- Phase 3: Non-standardized, bespoke swaps executed off-facility and not cleared.

**2. Harmonize the Proposed Rule and Proposed Real-Time Reporting Rule.** The Working Group submits that a reporting counterparty fulfills its reporting obligations relating to the reporting of primary economic terms data under this Proposed Rule by reporting in real-time any swap transaction and pricing data on uncleared swaps executed off-facility. In other words, because the reporting Proposed Rules require duplicative reports, the Working Group strongly recommends that the Commission harmonize such Proposed Rules and develop a single set of reporting obligations, wherein data fields required under the Proposed Real-Time Reporting Rule would replace the primary economic terms as described under this Proposed Rule.

**3. Require SEFs and DCMs to Report and Verify Any Data on Swaps Executed On-Facility.** Pursuant to the Proposed Real-Time Reporting Rule, the SEF or DCM is required to report in real-time any swap transaction and pricing data that is executed on-facility. Therefore, in possessing all of the relevant data necessary to report and verify the primary economic terms of the swap, the SEF or DCM will be in the best position to report such data. As such, the Working Group strongly recommends that any final rule adopted by the Commission require only the SEF or DCM to report and verify the primary economic terms data of any swap executed on-facility. Indeed, such requirement serves the objectives of the January 18, 2011 Executive Order,<sup>6</sup> which include, among other things, implementing regulations that impose the least burden on society.

**4. Require DCOs to Report Data on Cleared Swaps.** The Working Group respectfully recommends that the Commission require only the DCO to (i) report and verify in real-time the primary economic terms data on cleared swaps traded off-facility, and (ii) report state and valuation data on any cleared swap. Because all terms and conditions of cleared swaps are subject to the rules of the DCO, and the DCO provides independent valuation data to facilitate daily settlement of gains and losses on cleared swaps to the counterparty through its futures commission merchant (“FCM”), the DCO is in the best position to report all such data. Stated differently, it is more efficient to require the party with all the relevant data, in the case of cleared swaps, the DCO, to report such data.

**5. Require Reports of *Quarterly* Snapshots of State and Valuation Data for Uncleared Swaps.** In short, the proposal to require daily reports of state and valuation data is

---

<sup>6</sup> *Improving Regulation and Regulatory Review*, Exec. Order No. 13,563 (Jan. 18, 2011).

overly burdensome and excessive, particularly to commercial energy firms, end-users, and market participants that currently are not subject to the Commission's regulations and do not have the IT systems or business processes in place that are required to comply with these new reporting rules. Accordingly, the Working Group respectfully recommends that, alternatively, the Commission require quarterly, rather than daily, snapshots of state and valuation data.

### **III. GENERAL COMMENTS OF THE WORKING GROUP.**

#### **A. IMPLEMENTATION SCHEDULE AND ADOPTING A PHASED-IN APPROACH.**

The Commission requests specific comment on the appropriate approach for the implementation of its swap data reporting requirements. Specifically, it requests comment on the benefits and drawbacks of a phased-in approach. The Working Group strongly supports a phased-in approach for purposes of implementing the Proposed Rule, Proposed Real-Time Reporting Rule, and Proposed Daily Trading Records Rule.

##### **1. The Commission Should Not Commence Implementation of the Real-Time Reporting Obligations Until All Reporting Criteria Have Been Established and Tested.**

The Working Group supports an effective implementation process, but only to the extent that efficiency and the ability to minimize costs are not sacrificed. As such, the Working Group requests the Commission to utilize the broad discretion afforded by Congress in the Act to implement a reasonable timeframe, providing market participants as much time as possible and taking into consideration the different characteristics of swap products, swap markets, and market participants.<sup>7</sup> To this end, the Working Group recommends the phased-in implementation plan outlined in Part III.A.2, below. However, as a threshold matter, the phasing in of real-time reporting obligations on market participants should not commence until the Commission has assured that:

- All of the data elements necessary to implementation are finalized and defined by the Commission;
- SDRs have been formed and registered and have the tested capability, and proven back-up capabilities, to accept swap data for public dissemination;

---

<sup>7</sup> Congress affords the Commission broad discretion to implement the real-time reporting provisions of the Act. Specifically, new CEA Section 2(a)(13)(B) authorizes the Commission to "make swap transaction and pricing data available to the public in such form and *at such times* as the Commission determines appropriate to enhance price discovery" (emphasis added).

- the CFTC has interface capability, and proven back-up capabilities, with SDRs and third party service providers, as new CEA Section 21(c)(4)(A) requires SDRs to provide direct electronic access to the Commission;<sup>8</sup>
- SDRs have published a reporting format and related requirements for standardized (i) data fields, (ii) data elements, and (iii) product descriptions; and
- All of the standards for Unique Swap Identifiers (“USI”), Unique Counterparty Identifiers (“UCI”), and Unique Product Identifiers (“UPI”) are established.

Moreover, implementation timing should not commence until a technology base is established and following a testing period with SDRs and third party service providers, as applicable. Implementation before satisfaction of the requirements described above would be unworkable due the many technology-related obstacles that must be addressed. The consequences of pushing forward with insufficiently tested systems and processes could prove disastrous – requiring significant time and resources for multiple parties, including the Commission, to remedy, plus potentially requiring the re-submission of data on millions of transactions.

Prior experience of implementing new reporting and information technology systems demonstrates the need for Commission guidance. For example, in September 2003, the Public Utility Commission of Texas (“PUCT”) ordered ERCOT to develop a nodal wholesale market design, which affected many business processes and systems, including: a day-ahead market, reliability unit commitment, real-time or security constrained economic dispatch, and congestion revenue rights. The implementation of such consisted of unexpected complexities, multiple delays, and increased costs.<sup>9</sup> Therefore, because market participants will face substantially more uncertainty and exorbitant costs in attempting to comply with the Commission’s reporting rules, the Working Group suggests that implementation of such should be an iterative process wherein the Commission and market participants can engage in active dialogue to address their specific concerns. To that end, the Working Group suggests that the Commission host open meetings or technical conferences with market participants to facilitate the implementation of its reporting regime and compliance with such. Doing so will be particularly important in providing guidance and reducing costs to commercial energy firms, market participants, and end users who have not traditionally been regulated by the CFTC but will be tasked with the responsibility of complying with these new reporting rules.

---

<sup>8</sup> Pursuant to Proposed Rule § 45.8, where no SDR is available to accept swap data, such data must be reported to the Commission “at a time and in a form and manner determined by the Commission.” The Working Group recommends that the form of such data be the same as that which would have been reported to the SDR if one were available. Indeed, requiring two different forms based on the recipient of such data will prove costly and burdensome.

<sup>9</sup> See, e.g., Elizabeth Souder, *ERCOT's New Nodal System for Electricity Grid Expected to Save Texas Consumers Billions*, THE DALLAS MORNING NEWS, Nov. 30, 2010 (“Installing the [ERCOT] nodal system has taken longer (seven years) and cost twice as much (\$660 million) as expected.”).

## 2. **Proposed Framework for Phasing In Reporting Requirements.**

The Working Group submits for the Commission's consideration the phased-in implementation plan as set forth below. This approach is (i) consistent with, and in furtherance of, the policy objective in Title VII to bring transparency to swap markets, and (ii) intended to facilitate an effective, efficient, and orderly process for implementing the new industry-wide reporting requirements adopted in the Proposed Rule, Proposed Real-Time Reporting Rule, and Proposed Daily Trading Records Rule.

### i. **Phase I - Swaps Executed On-Facility through DCMs and SEFs and Swaps Executed Off-Facility but Cleared through a DCO.**

The first phase of this proposed framework should cover all swaps executed on-facility and all swaps executed off-facility but subsequently cleared through a DCO. Swaps executed on-facility and over-the-counter ("OTC") swaps that are cleared through a DCO constitute the vast majority of the aggregate trading activity in swap markets. DCMs, SEFs and DCOs are uniquely situated to begin reporting swap transaction data in a relatively short timeframe and would likely incur limited costs to report such information compared to costs incurred by various classes of market participants. Finally, by commencing the phase-in of reporting requirements with DCMs, SEFs, and DCOs, the Commission will have access to significant amounts of swap data that is reflective of a large portion of trading activity, thus achieving the market oversight objectives of the Act.

The Working Group recommends that Phase I commence 3 to 6 months after the threshold criteria identified in Part III.A.1, above, have been met.

### ii. **Phase II - Standardized Swaps Executed Off-Facility and Not Cleared.**

The second phase should apply to all designated reporting parties for standardized swaps executed off-facility. This phase would include Swap Dealers.<sup>10</sup> Other than Non-bank Swap Dealers which would only be included in the later stages of Phase II implementation.<sup>11</sup>

Due the nature of their other business activities in financial markets, Swap Dealers other than Non-bank Swap Dealers often house significant IT divisions within their organizational

---

<sup>10</sup> See new CEA Section 1a(49).

<sup>11</sup> As described in Part I, above, the Working Group refers to "Non-bank Swap Dealers" as those commercial entities that are not affiliated with banks, have not been traditionally viewed as Swap Dealers, but are nevertheless within the scope of the Swap Dealer definition adopted as final by the Commission for all or part of their activities. The Working Group believes that Congress did not intend for commercial entities to be classified as Swap Dealers; however, the Working Group provides these comments because of the apparent breadth of the proposed definition of Swap Dealer. See generally Definitions NOPR, *supra* note 2. Accordingly, the Working Group feels compelled to comment on these reporting rules in case certain commercial entities are ultimately deemed Swap Dealers.

structure. These divisions are supported by large, internal staffs from senior management down to mid-and back-office personnel with budgets of significant financial resources. Given the scale of their existing capabilities and resources, those Swap Dealers are better-positioned to develop and deploy the systems and software necessary to comply with real-time reporting before the reporting of Non-bank Swap Dealers and end-users, whose experience, staffing, and supporting resources, while appropriate for these firms' underlying businesses, have yet to be developed or deployed sufficiently to comply with the reporting obligations of the scale and complexity created and required by the proposed rules.<sup>12</sup>

In light of the foregoing, the Working Group submits that, to the extent the Commission deems it appropriate, Non-bank Swap Dealers should be permitted to comply with the real-time reporting requirements, as well as the reporting requirements set forth in the Proposed Rule, Proposed Real-Time Reporting Rule, and Proposed Daily Trading Records Rule after other Swap Dealers. At a minimum, however, the Commission should clarify, that, with respect to transactions between Non-bank Swap Dealers and other Swap Dealers, the latter would be the responsible party for purposes of reporting.<sup>13</sup>

The Working Group recommends that Phase II commence 6 to 12 months after the threshold criteria identified in Part III.A.1, above, have been met.

**iii. Phase III - Non-Standardized, Bespoke Swaps Executed Off-Facility and Not Cleared.**

The final phase would be applicable to all bespoke, non-standardized swaps executed in private OTC markets rather than on-facility. By definition, non-standardized transactions executed in private OTC swap markets that are designed to address bespoke risk are unique to the counterparties involved. The terms of these transactions do not perform any specific price discovery function that would provide any meaningful benefit to swap markets. Moreover, the Working Group believes that there are relatively few such swaps involving energy commodities. Given that the real-time reporting and subsequent public dissemination of information related to such transactions will provide little value, the Working Group asserts that there is no immediate need for the Commission to require the reporting of this information. As such, the real-time reporting of non-standardized swaps executed off-facility should not be required, if at all, until Phases I and II have been implemented.

---

<sup>12</sup> Numerous transactions executed in OTC markets typically include a Swap Dealer as at least one of the counterparties. Thus, Swap Dealers will be subject to the real-time reporting obligations in the second phase of the implementation of the proposed rules. These reports will help the Commission achieve the objectives of the Act. Namely, given the existing IT resources of these entities, this approach will permit the Commission to expeditiously obtain a significant amount of organized, real-time market data, thereby enhancing the Commission's ability to bring greater transparency and price discovery to swap markets.

<sup>13</sup> With respect to off-facility transactions between end-users, the obligation to report such transactions in real-time would commence during Phase II of the Working Group's proposed implementation plan, but at some point after Non-bank Swap Dealers.

The Working Group recommends that Phase III commence, if at all, 12 to 15 months after the threshold criteria identified in Part III.A.1, above, have been met.

**B. A REPORTING COUNTERPARTY MEETS ITS INITIAL REQUIREMENT TO REPORT PRIMARY ECONOMIC TERMS UNDER THE PROPOSED RULE BY REPORTING SWAP TRANSACTION AND PRICING DATA IN REAL-TIME.**

To enhance transparency and price discovery, the Proposed Real-Time Reporting Rule requires the reporting of certain swap transaction and pricing data.<sup>14</sup> Similarly, in this Proposed Rule, the Commission requires that the primary economic terms of a swap be reported to reflect the creation stage of the swap.<sup>15</sup> The Working Group supports the Commission's goal in fulfilling the objectives of the Act to "ensure that complete data concerning swaps is maintained in SDRs and available to regulators."<sup>16</sup> However, the Working Group submits that the Commission should harmonize the Proposed Rule and the Proposed Real-Time Reporting Rule and develop a single set of reporting obligations, wherein data fields required under the Proposed Real-Time Reporting Rule would replace the primary economic terms as described and required under this Proposed Rule. Doing so not only will accomplish the goals of the Act to promote price discovery and transparency to swap markets and to the Commission for such transactions, but will also reduce duplication between the Proposed Rules and compliance costs for those seeking to comply with such. Indeed, in accordance with the January 18, 2011 Executive Order, the benefits of any regulation should justify the costs.

**C. THE SEF OR DCM SHOULD BE THE ONLY PARTY TO REPORT AND VERIFY PRIMARY ECONOMIC TERMS DATA ON SWAPS EXECUTED ON A SEF OR DCM.**

Pursuant to Section 43.3 of the Proposed Real-Time Reporting Rule, a reporting party meets its obligation to report in real-time the swap transaction and pricing data simply by executing such reportable swap transaction on the swap market (*i.e.*, any registered SEF or DCM). By extension, the Working Group submits that in executing a reportable swap transaction on the swap market, and therein satisfying its obligation to report such data in real-time, it should not then be required to verify the primary economic terms data. Indeed, the SEF or DCM has all of the relevant transaction and pricing data and therefore should be required to report and verify any primary economic terms data. Further, the Act requires SDRs to "confirm with both counterparties to the swap the accuracy of the data that was submitted."<sup>17</sup> Yet, because the SEF or DCM will verify the primary economic terms data with both counterparties before reporting to the SDR, such requirement is effectively met. Therefore, the Commission should require only the SEF or DCM to report and verify primary economic terms data for reportable swap transactions, as this attains the objectives of the January 18 Executive Order, which

---

<sup>14</sup> See Real-Time Reporting Proposed Rule, *supra* note 4, at 76,172 (citing § 43.3(a)).

<sup>15</sup> See Proposed Rule, *supra* note 1, at 76,600 (citing § 45.3(a)).

<sup>16</sup> Proposed Rule, *supra* note 1, at 76,580.

<sup>17</sup> See new CEA Section 21(c)(2), enacted by Section 728 of the Act.



include, among others, implementing regulations that are cost effective and impose the least burden on society.

**D. DCO REPORTING DUTIES.**

**1. The DCO Should Be Required to Report and Verify Primary Economic Terms Data on Cleared Swaps Traded Off-Facility.**

The Proposed Rule requires that, with respect to cleared swap transactions that are not executed on a SEF or DCM, the reporting counterparty report all primary economic terms data promptly after verifying such data.<sup>18</sup> The Working Group believes that the DCO is in a better position to fulfill this reporting obligation, as it will possess all the relevant data to fulfill such obligation. Indeed, in instances where clearing is a condition of the swap transaction, execution technically will not occur until the trade is accepted for clearing, thereby eliminating any time lag between execution of the swap and clearing. Further, the Working Group submits that this is consistent with the legislative intent of the Act and the January 18 Executive Order to lessen the burdens on end users. Accordingly, the Working Group respectfully recommends that the Commission require the DCO to report and verify in real-time the primary economic terms data.

**2. The DCO Should Be the Only Reporting Party of State and Valuation Data on Cleared Swaps.**

With respect to cleared swaps, the Proposed Rule requires the reporting counterparty to report all required state data, and both the DCO and the reporting counterparty to report all valuation data in their possession.<sup>19</sup> Because all terms and conditions of cleared swaps are subject to the rules of the DCO, and the DCO provides independent valuation data to facilitate daily settlement of gains and losses on cleared swaps to the counterparty through its futures commission merchant (“FCM”), the DCO is in the best position to report state and valuation data. In other words, the Working Group submits that it is more efficient to require the DCO to report state data since it will have all such information. In addition, the costs in requiring duplicate reports of valuation data outweigh any benefit of such duplicative reporting. Consequently, the Working Group respectfully suggests that the Commission require only the DCO to report state and valuation data relating to any swap it clears. This suggested alternative is consistent with the January 18 Executive Order, as it serves the Commission’s regulatory objectives to provide transparency and oversight to the swap markets and is tailored to impose the least burden on society.<sup>20</sup>

If the Commission ultimately chooses to require parties other than the DCO to report data related to cleared swaps, an alternative mechanism will need to be implemented for determining

---

<sup>18</sup> See Proposed Rule, *supra* note 1, at 76,600-01 (citing § 45.3(a)(1)(iii)(A); 45.3(a)(2)(iii)(A)).

<sup>19</sup> See Proposed Rule, *supra* note 1, at 76,601 (citing § 45.3(b)(2)(i)(A)(2)-(3)); § 45.3(b)(2)(ii)(A)(2)-(3); § 45.3(b)(2)(i)(A)(1); § 45.3(b)(2)(ii)(A)(1)).

<sup>20</sup> See Section 1(b) of the Executive Order, *supra* note 6.

the appropriate reporting party. In many cases, particularly with respect to on-facility trades, neither party to a cleared swap knows the identity of the other party. Thus, the mechanism for determining the reporting counterparty pursuant to the Proposed Rule will be impossible to apply.

**E. THE COMMISSION SHOULD REQUIRE REPORTS OF QUARTERLY SNAPSHOTS OF STATE AND VALUATION DATA FOR UNCLEARED SWAPS.**

The Working Group believes that daily reporting of state and valuation data for commodity swaps is excessive and submits that less frequent reporting of such data will provide the Commission with timely and relevant data to fulfill its regulatory mission. To ensure timely and accurate daily reports of state and valuation data, market participants will be compelled to make substantial modifications to their existing systems and related business processes. Moreover, should daily reporting be required, the Commission will be inundated with an excessive amount of data and may be required to make substantial investments in systems and analytical capability to assess and act appropriately on this data. Consequently, the Working Group respectfully recommends that the Commission require state and valuation data to be reported in the same manner and format as required under the Commission's current proposal for state and valuation data, but require quarterly, rather than daily, snapshots of state and valuation data. The Working Group submits that state and valuation data will not substantially change in the course of three months, and the Commission maintains the ability to seek, if so inclined, further information from market participants relating to any swap transaction, thereby preserving transparency in the markets. Should it become apparent that more frequent broad-based data is needed, the Working Group suggests that the reporting of state and valuation data first transition into monthly snapshot reports of such, followed by weekly reports, if deemed necessary by the Commission. Such transition would cause far less disruption to existing systems and business processes.

**F. THE COMMISSION SHOULD NOT REQUIRE SEPARATE REPORTS OF CONFIRMATION DATA.**

The Working Group submits that there is little value in reporting confirmation data in addition to reporting primary economic terms data in accordance with the Proposed Real-Time Reporting Rule and quarterly snapshots of state and valuation data as described under Part III.E, above. Requiring duplicative reports of data will compel market participants to effect costly and unnecessary changes to their existing systems and business processes. The Working Group believes that such an approach will do little to increase transparency or further the Commission's regulatory mission. Furthermore, to the extent that parties discover any discrepancy relating to the primary economic terms of a swap in the course of finalizing a confirmation, any resulting change will be reported and publicly disseminated in accordance with the Proposed Real-Time Reporting Rule. Finally, notwithstanding the elimination of the requirement to report confirmation data, the Commission's ability to seek further information relating to any swap transaction is still preserved. As such, the Working Group respectfully recommends that the Commission refrain from adopting any final rule that would require the reporting of confirmation data.

To the extent the Commission requires duplicative reporting of confirmation data, the Working Group supports the Proposed Rule requiring DCOs to report the confirmation data on cleared swaps.<sup>21</sup> With respect to uncleared swaps executed on a SEF or DCM, the Working Group believes the reporting counterparty should not be required to report the confirmation data. Rather, the Working Group respectfully recommends that the Commission require the SEF or DCM to report any confirmation data. Indeed, as discussed in Part III.C, above, SEFs and DCMs are required to provide the initial reports of primary economic terms data and therefore possess all of the relevant data necessary to be included in the reporting of the confirmation data.

With respect to OTC uncleared swaps, the Working Group recognizes that the reporting counterparty will be the only market participant to possess the relevant data to report the primary economic terms and confirmation data. Yet the Working Group notes that, in many instances, with respect to bespoke swap transactions, confirmation may be obtained only after several days, weeks, or even months. Consequently, the Working Group respectfully suggests that any final rule requiring the reporting of confirmation data should not impose stringent timelines and should reflect that, under certain circumstances, complying with timelines is impossible. Thus, the Working Group supports a phased-in approach, wherein the deadline for reporting confirmation data directly correlates with the time of confirmation.

**G. ASSET CLASS CLASSIFICATION SHOULD BE CONSISTENT ACROSS ALL PROPOSED RULES.**

The Working Group suggests that reporting requirements should parallel the “class classification” system set forth in other portions of the Commission’s proposed rules, namely, the Joint Proposed Rule, *Further Definition of “Swap Dealer”* . . . .<sup>22</sup> The Working Group submits that the commodities markets will not be served if different reporting regimes exist within a single market. In addition, an entity that is classified as a Swap Dealer or MSP for specific asset classes should be required to report swaps only within those specific asset classes.

**H. TRANSACTIONS BETWEEN AFFILIATES SHOULD NOT BE CONSIDERED REPORTABLE SWAP TRANSACTIONS.**

Transactions with or between affiliates should not be required to be reported under the *Proposed Swap Data Recordkeeping and Reporting Requirements Rule*.<sup>23</sup> In particular, inter-affiliate transactions, which represent intra-corporate allocations of risk, are not appropriate for reporting under the Proposed Rule. Reporting of inter-affiliate transactions will not provide any

---

<sup>21</sup> See Proposed Rule, *supra* note 1, at 76,600 (citing § 45.3(a)(1)(i)(B), (a)(1)(iii)(B), (a)(2)(i)(B), (a)(2)(iii)(B)).

<sup>22</sup> See *supra* note 2.

<sup>23</sup> The Working Group submits that, if the Commission determines that data about transactions between affiliates is essential to perform its oversight and enforcement duties, it has the authority to request specific information from individual companies as necessary.

transparency benefits to swap markets, nor would doing so assist the Commission in addressing systemic risk concerns. Information about transactions among affiliates, especially valuation data, would be of little value, if any, to persons outside the parent company, and reporting of such transactions would create an unnecessary burden.

In addition, the Working Group respectfully submits that transactions between affiliates that are organized under the laws of a foreign nation, and that are not located in the U.S., need not be reported if the transactions are not executed on a CFTC-jurisdictional DCM or SEF, or do not otherwise involve U.S. commodities markets. Pursuant to new CEA Section 2(i), the requirements of Title VII of the Act do not apply to activities outside the U.S. unless those activities “have a direct and significant connection with activities in, or effect on, commerce of the [U.S.],” or contravene rules or regulations the Commission may promulgate to prevent evasion. Although the Commission must determine what activities meet this criterion, the Working Group submits that the transactions between foreign affiliates described above do not have a direct and significant connection with activities in, or effect on, U.S. commerce.

#### **I. DATA RETENTION REQUIREMENTS ARE OVERLY BURDENSOME.**

The Proposed Rule, and particularly the recordkeeping and data retention requirements set forth under Section 45.2, must not only recognize the characteristics of swap markets generally, but should include sufficient flexibility to accommodate the unique characteristics of participants transacting in such markets. In this regard, Section 45.2 of the Proposed Rule appears to be specifically designed for entities that primarily transact swaps in financial markets. In contrast, the application of such data retention requirements to certain participants, such as commercial energy firms transacting in the energy swap markets, is not appropriate, as these entities do not have the types of internal IT systems that are required to comply with these new reporting rules. In contrast, the IT systems owned and operated by such commercial energy firms are designed to support trading activity associated with commercial energy firms’ underlying, primary physical business operations. Given the nature of their underlying physical commodity businesses, commercial energy firms are not currently set up to retain data in the nature, manner, and form as set forth in the Proposed Rule.

Moreover, the Commission should recognize that even Swap Dealers may not be equipped to retain certain data as required under the Proposed Rule. For example, Swap Dealers may find it difficult, if not impossible, to identify and pull instant messages and voice recordings on a transaction-by-transaction basis. The Working Group is currently unaware of any IT system that provides segregated, unified files containing all swap transaction information, including pre-transaction and post-transaction data, by deal and counterparty. Even if such technology exists, the Working Group does not believe that it would be possible to identify much, if any, of the pre-execution data because traders engage in ongoing dialogue with any number of counterparties over an extended period of time and do not necessarily initiate communications with counterparties specific to any single trade or prospective trade. Consequently, assuming it were possible, determining which specific pre-execution conversations or documents ultimately led to the execution of a particular swap, and thereafter assigning each particular communication to a

segregated, unified file for that particular swap transaction, would be very costly and time consuming.

Accordingly, before adopting the proposed data retention requirements, the Commission should further evaluate the actual costs, availability of technology, and ability of market participants to deploy the technology required to comply with such requirements. The Working Group respectfully submits that the costs and burdens associated with requiring market participants to comply with this data retention requirement clearly outweigh any demonstrable benefit to swap markets. To facilitate the cost-effective implementation of Title VII as required by the January 18 Executive Order, the Proposed Rule should be revised to (i) reflect the unique operational characteristics and abilities of different participants in swap markets for physical commodities; and (ii) recognize that (a) the technology necessary to comply with this rule may not exist, and (b) any benefit to swap markets associated with implementing such technology, when available, do not justify the costs imposed on market participants.

**J. MARKET PARTICIPANTS SHOULD BE PERMITTED TO CHOOSE THE SDR.**

Although the Working Group agrees that all of the swap creation and continuation data for a given transaction should be reported to the same SDRs or third party service providers, the Working Group strongly recommends that the CFTC should not implement regulations that would require market participants to use a specific SDR for reporting all transactions. The Working Group believes that market participants should be permitted to choose their SDRs. Such choice will encourage competition among SDRs and prevent the fees charged by the SDRs from becoming unreasonably high. Finally, the Working Group respectfully requests that the Commission mandate that all SDRs provide their services in a consistent, non-discriminatory and equitable manner.

**IV. RESPONSES TO SPECIFIC REQUESTS FOR COMMENTS.**

The Working Group respectfully requests the Commission fully consider the critical policy issues and principles addressed above with respect to swap data recordkeeping and reporting requirements. Once these overarching concerns have been addressed, the Working Group recommends the Commission to then solicit further input from various segments of the swap markets to develop consensus on the many technical issues raised by the Commission's specific requests for comment (*i.e.*, specific data fields and technical specifications). Doing so will ensure that the technical details fit within the larger scope of the Commission's recordkeeping and reporting regime.

Nevertheless, the Working Group provides the following responses to certain questions set forth in the Proposed Rule.

**A. RECORDKEEPING REQUIREMENTS.**

Issue No. 1: “Whether records should be required to be kept by DCOs, DCMs, SEFs, SDs, MSPs, and non-SD/MSP counterparties for ten years following final termination of a swap rather than five years.”

Response: The Working Group believes that a five-year retention period is adequate, as the cost of retention is directly related to the length of time required for retention. From a regulatory compliance and enforcement standpoint, the Working Group respectfully submits that there is no benefit in retaining data for more than five years following the termination of a swap.

Issue No. 2: “The requirement that records be accessible in real time for the periods required in the proposed regulation.”

Response: The Working Group seeks guidance and clarification as to the meaning of the term “accessible in real time.” In defining this term, the Working Group respectfully suggests that the Commission consider the costs and timing constraints market participants will face in meeting any such obligation. Importantly, the Commission should recognize that the ability of market participants to pull and produce a document internally varies from their ability to produce it externally. As such, the Commission should confirm that “accessible in real time” necessitates that records be accessible internally in real-time rather than accessible by the Commission in real-time, and permit market participants to retain their current methods of searching and retrieving communications related to trades. At a minimum, the Working Group respectfully recommends that market participants be given at least until the close of business the following day to comply with this requirement, as market participants do not have personnel working twenty-four hours a day, seven days a week.

Issue No. 3: “Whether the Commission should adopt a phase-in approach to recordkeeping requirements for non-SD/MSP counterparties.”

Response: The Working Group supports the adoption of a phase-in approach to recordkeeping requirements for non-SD/MSP counterparties as discussed in Part III.A, above.

Issue No. 4: “Whether SDRs should be required to keep swap data in archival storage in perpetuity, or whether a limited term in years should be required, and, if so, what archival storage period should be required.”

Response: The Working Group believes that retention requirements should be consistent across all market participants. As stated under Issue No. 1, above, from a compliance and enforcement perspective, there is no apparent benefit in requiring data to be retained by any market participant for more than five years, or for one market participant to retain the same data for a period longer than that of another market participant. Costs to retain data in perpetuity are unquantifiable. The Working Group respectfully recommends that the Commission require all market participants to retain records and data for a period of no more than five years.

**B. SWAP DATA REPORTING.**

Issue No. 5: “Whether any of the data fields in the Master Reference Generic Data Fields List should be included in one or more of the Tables of Required Minimum Primary Economic Terms Data for specific swap asset classes, or in the Minimum Valuation Data table.”

Response: The Working Group submits that no additional data fields should be required in the Tables.

Issue No. 6: “The appropriate deadline for reporting of required confirmation data in the case of a swap for which confirmation was done manually rather than electronically.”

Response: As discussed under Part III.F, above, the Working Group does not support the requirement for reporting confirmation data.

Issue No. 7: “What other measures of valuation of a swap should be required to be reported to an SDR?”

Response: The Working Group does not believe that the Commission should require other measures of valuation of a swap to be reported to an SDR.

Issue No. 8: “Should the Commission take the internal recordkeeping systems of SDs and MSPs into account as it does in the proposed regulation?”

Response: The Working Group supports the Commission’s consideration of the internal recordkeeping systems of SDs and MSPs. In so doing, the Commission will help reduce compliance costs and allow the internal recordkeeping systems to reflect the business needs of SDs and MSPs, which likely will be much different than the financial intermediaries the CFTC currently regulates. Further, the Commission will advance the goals and objectives set forth in the January 18, 2011 Executive Order, which requires the regulatory system to use the least burdensome tools for achieving regulatory ends.<sup>24</sup>

Issue No. 9: “Is the concept of primary economic terms data, as defined, inclusive enough to capture all of the primary economic terms of a swap upon execution?”

Response: The Working Group believes that the primary economic terms data, as defined, captures all of the relevant information relating to the primary economic terms of a swap upon execution, and submits that the data fields for primary economic terms should match those required by the Proposed Real-Time Reporting Rule.

---

<sup>24</sup> See Exec. Order, *supra* note 5, § 1.

Issue No. 10: “What is the appropriate time delay for reporting of confirmation terms by (1) SDs, (2) MSPs, and (3) non-SD/MSP counterparties? Should the time required differ according to these categories?”

Response: As discussed under Part III.F, above, the Working Group does not support the requirement for reporting confirmation data.

Issue No. 11: “Should back-office confirmation be an acceptable means of confirming a swap?”

Response: The Working Group supports back-office confirmation, which is considered an industry best practice.

Issue No. 12: “Should a phase-in approach be used for the time of reporting of confirmation by non-SD/MSP counterparties?”

Response: As discussed under Part III.F, above, the Working Group does not support the requirement for reporting confirmation data.

Issue No. 13: “The approach to data standards taken in the proposed regulation; the relative merits of leaving SDRs free to permit reporting via various facilities, methods, or data standards, provided that its requirements in this regard enable it to maintain swap data and transmit it to the Commission as the Commission requires; whether the Commission should require use of a single data standard (*e.g.*, FpML) by all reporting entities and counterparties and by all SDRs.”

Response: The Working Group submits that industry standard XML formats like FpML will enable faster implementation. In addition, the Working Group does not believe SDRs should be able to permit reporting via different facilities, methods, or data standards. In contrast, the Working Group supports a single, common standard for all data, which will reduce costs and opportunities for inaccuracy. To that end, the Working Group suggests that the Commission require registered SDRs to develop and adopt a uniform format.

Issue No. 14: “Merits of allowing third party facilitation of swap data reporting; appropriate types of third party facilitators and functions to be used for this purpose; and the automated systems and connectivity technology that may be required or should be used in this connection.”

Response: The use of third party facilitation may reduce the substantial costs of building and maintaining internal reporting capability. Thus, so long as accurate data is submitted in the required format on a timely basis, the Working Group recommends that the Commission refrain from regulating the technology systems market participants have, or will have, in place.

Issue No. 15: Should SDRs that accept data for any swap in a swap asset class be required to accept data for all swaps in that asset class?



Response: To the greatest extent practicable, SDRs should be willing and able to accept and accommodate all transaction data within an asset class. Because the Commission seeks to impose very burdensome and technical reporting requirements, the Working Group submits that reporting all transaction data may be a more efficient manner for a market participant seeking to comply with its reporting requirements and may facilitate its risk management. Therefore, the Working Group respectfully recommends that the CFTC clarify that, notwithstanding the Proposed Rule, a market participant, if it so desires, has the option to report where it is not required under the Proposed Rule any and all transaction data. Providing such optionality serves the Commission's goal in increasing transparency in the swap markets.

Issue No. 16: "The requirement that all entities and counterparties that report swap data to an SDR or to any other registered entity or swap counterparty must report any errors or omissions in the data they report, as soon as technologically practicable after discovery of any error or omission; the mechanism provided in the proposed regulation for reporting of errors or omissions discovered by a non-reporting swap counterparty, and whether any alternative methods for this purpose would be preferable; and the requirement for use of the same data format to report errors or omissions that was used to report the erroneous data in question."

Response: The Commission should refrain from requiring non-reporting swap counterparties to report errors or omissions in swap data. Rather, the Commission should permit non-reporting counterparties to volunteer any reports of errors or omissions and further provide a safe harbor for good-faith mistakes made in reporting such errors and omissions to the reporting counterparty. Additionally, by extension, the Working Group recommends that the Proposed Rule provide a safe harbor for the good-faith mistakes made by the reporting counterparty as a result of either its own good-faith mistake or the good-faith mistake of the non-reporting counterparty. Because the Working Group supports consistent reporting, it favors the requirement that the same data format be used in reporting errors or omissions.

### **C. UNIQUE IDENTIFIERS.**

Issue No. 17: "The required use of USIs and UCIs and the benefits that required use of USIs or UCIs would create."

Response: The Working Group supports strong, clear rules requiring the use of Unique Identifiers, which it believes will help facilitate consistent reporting. Nevertheless, the Working Group is concerned that state data may be required to be reported before a USI is assigned, and too many entities will have the authority to assign various identifiers. As such, the Working Group encourages USIs to be assigned at the beginning of a transaction and strongly suggests that data elements required for reporting be standardized to the greatest extent possible. The level of costly manual intervention required to fulfill reporting obligations will be minimized in direct proportion to the level of standardization that can be achieved.

Additionally, the Working Group supports clear rules providing the manner in which parties are to communicate among each other using these identifiers, and the process of changing

Unique Identifiers when there are changes in counterparty names, purchases, acquisitions, and deactivation. The Working Group therefore encourages the Commission to give high priority to the development of Unique Identifiers and use such development in driving the phase-in approach to implementing the Commission's reporting regulations.

V. **CONCLUSION.**

The Working Group supports tailored regulation that brings transparency and stability to the energy swap markets in the United States. The Working Group appreciates this opportunity to comment and respectfully requests that the Commission consider the comments set forth herein as it develops a final rule in this proceeding.

The Working Group expressly reserves the right to supplement these comments as deemed necessary and appropriate. If you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ R. Michael Sweeney, Jr.

R. Michael Sweeney, Jr.  
Mark W. Menezes  
David T. McIndoe

*Counsel for the Working Group of  
Commercial Energy Firms*