

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  
Real-Time Public Reporting of Swap Transaction Data, RIN Number 3038-  
AD08

Dear Mr. Stawick:

By notice of proposed rulemaking published in the Federal Register on December 7, 2010,<sup>1</sup> the Commodity Futures Trading Commission ("CFTC" or the "Commission") proposed regulations to implement Section 727 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").<sup>2</sup> Section 727, Public Reporting of Swap Transaction Data, amends Section 2(a) of the Commodity Exchange Act ("CEA") and relates to the "real-time public reporting" of swap data, "including price and volume, as soon as technologically practicable after the time at which the swap transaction has been executed."<sup>3</sup> Only standardized swaps which are capable of clearing are required to be reported under this

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<sup>1</sup> Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76140 (Dec. 7, 2010) ("Real-Time Reporting NOPR" or "NOPR").

<sup>2</sup> Public Law No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank").

<sup>3</sup> Dodd-Frank § 727 (as codified at 7 U.S.C. § 2(a)(13)(A)). § 727, new § 2(a)(13)(C)(iii) of the CEA, states that data subject to real-time reporting includes data with respect to swaps that are not cleared and which are reported under subsection 2(h)(6) of the CEA as amended by Dodd-Frank. However, new § 2(h)(6) (as amended by § 723 of Dodd-Frank) refers to swaps that were entered in to either before the enactment of Dodd-Frank, or after the enactment of Dodd-Frank but before the effectiveness of final reporting rules. As these swaps will have been entered into prior to the effectiveness of the real-time reporting rules, they cannot contribute to price discovery or real-time transparency. Thus, such swaps should not be subject to real-time reporting requirements.

section of Dodd-Frank, and the identity of the parties to a swap must not be identified when such data is made publically available.<sup>4</sup>

The Coalition of Physical Energy ("COPE")<sup>5</sup> understands that Dodd-Frank has mandated these rules and fully supports transparency in the swaps markets. However, as end-users of swaps,<sup>6</sup> COPE respectfully requests that the CFTC not implement this rule in a manner that will place undue burdens on end-users such as the COPE members.

### **Comments**

Swaps entered in to between end-users (i.e. non-Swap Dealer, non-Major Swap Participant, non-financial entities that can take advantage of the Commission's proposed exception to mandatory clearing) should be excluded from real-time reporting. Failing that, end-user/end-user swaps should be subject to a more limited data set to be reported the business day after trade execution using a standardized template.

In COPE's understanding, the purpose of Section 727 and the Real-Time Reporting NOPR is to, *on a real-time basis*, convey standardized swap data to some centralized location (a Swap Data Repository or "SDR") which, in turn, can make aggregated data public in a manner that would be of value to those transacting in swaps markets. Given the magnitude of the overall swaps markets and their dynamic nature, it will be a significant task to select and package together all relevant swaps; transmit the relevant data to the SDR or SDRs; repackage the data received; and disseminate it to the public before it becomes stale.

As proposed, the NOPR will impose significant burdens on end-users. For the reasons set forth below, COPE respectfully requests changes to the proposed regulations before any final rules are promulgated.

As end-users, COPE members' basic purpose for entering into swaps is to mitigate or hedge their commercial risk. COPE appreciates the additional transparency this NOPR may provide, although the current market structure provides significant real-time trading

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<sup>4</sup> See NOPR at 76141.

<sup>5</sup> 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.

<sup>6</sup> For purposes of these comments, the members of COPE assume that each will be entitled to take advantage of the Commission's proposed "end-user exception to mandatory clearing of swaps" pursuant to the proposed rulemaking published at 75 Fed. Reg. 80747 (Dec. 23, 2010). 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.

transparency from trading venues such as the New York Mercantile Exchange ("NYMEX") and the Intercontinental Exchange ("ICE").

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.<sup>7</sup> End-users would only be required to report end-user to end-user off-facility swaps. COPE supports the hierarchy but believes that end-users should be omitted from the requirements of the NOPR.

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 a spreadsheet, to a more developed trading desk with a trade capture system that records the commercial terms necessary to conduct business. For standardized swaps, this typically is limited to: product, counterparty, pricing, notional quantity per settlement period, and term. 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 inputted and reconciled on a daily basis, if not even less frequently. COPE understands this type of structure and timing to be representative of the end-user community.

The NOPR indicates that, in the event of an end-user/end-user transaction, the parties would need to determine which one of them would report.<sup>8</sup> Thus, if such reporting were to occur, a further element of negotiation would need to be conducted, presumably including the back office personnel who would do the reporting.

Therefore, without significant, expensive, and disruptive changes to current practices, the technologically feasible reporting time for an end-user/end-user transaction would be sometime the following business day.

For example, suppose End-user A traded a standardized swap with End-user B at 9 AM EST on Friday, and the captured commercial terms were recorded in each firm's internal systems at 5 PM EST Friday. The parties determined, through additional negotiation, that End-user B would be the reporting entity at 5:30 PM EST on Friday. If End-user B's back office staff validated and confirmed its data for transmittal on Monday at 9:30 AM EST, the captured data would not be practically reportable until well after 24 hours after the trade was executed.<sup>9</sup>

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<sup>7</sup> See NOPR at 76172.

<sup>8</sup> *Id.* at 76172 (proposed § 43.3(a)(3)(v)).

<sup>9</sup> The Commission itself has recognized that this timing is reasonable. In its Swap Data Recordkeeping and Reporting Requirements NOPR, the Commission stated that non-electronically

Further, the data set captured for commercial purposes is a smaller and more discrete data set than sought by the Commission in the NOPR.<sup>10</sup> Thus, under current practices, the data required by the NOPR would need to be further distilled from the transaction (to the extent possible) by back office staff and prepared for reporting. This would cause a further delay.

Accordingly, as can be seen from the foregoing, the earliest time it is feasible that data can be technologically conveyed to an SDR without a complete revamp of current end-user practices, as understood and practiced by COPE members, is sometime the next business day following a transaction. At this point in time, the swap data captured by end-users is not real-time data; it is stale data for price discovery purposes. Unless COPE misunderstands the purpose of Section 727 and the Real-Time Reporting NOPR, receipt of this data at this time would not only be of little or no use, but it also would be disruptive to any systematic approach to disseminating actual real-time data. Simply put, the submission of end-users' current swap data as captured in the course of business would only flood the SDRs with a hodgepodge of after-the-fact data that cannot be put to a useful purpose. This would place a serious burden on the end-users and the SDRs, and the purposes outlined in the NOPR would be no better served.

The Commission specifically recognized in the NOPR that SDs and MSPs are more likely than end-users to have the infrastructure and resources needed for quick reporting of swap transaction information.<sup>11</sup> The Commission stated that it recognizes that "non-financial end-users . . . may not have the technology readily available to report swap transaction and pricing data for the purposes of the real-time reporting requirements."<sup>12</sup> As further recognized by the Commission, the number of end-user/end-user swap transactions qualifying for real-time reporting is expected to be *de minimis*.<sup>13</sup> In contrast, there will be a high volume of standardized trade information flowing in a timely manner out of the information systems of Commission registrants (*i.e.* DCOs, SEFs, SDs and MSPs). The data

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verified swaps (such as end-user to end-user swaps) will require "a significant amount of manual intervention" for reporting and that a 24 hour reporting period was reasonable. *See* Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574 at 76583 (Dec. 8, 2010) ("Recordkeeping and Reporting NOPR").

<sup>10</sup> Included among the Contract Types listed in the NOPR are "forwards." *See* NOPR at 76178. Forwards are physical commodity transactions. They are not financially settling agreements and thus not "swaps" as described in note 6 above and defined in Dodd-Frank. *See* Dodd-Frank § 721(a)(21) (as codified at 7 U.S.C. § 47(B)(ii)). As such, this data item and any other non-swap data item must be removed from this rule.

<sup>11</sup> *See* NOPR at 76146.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

flow from the registrants will more than serve the transparency purpose of Section 727.<sup>14</sup> That being said, there is no reason to place the significant, expensive, and disruptive reporting burden on the limited number of end-user/end-user trades (particularly in light of the fact that these trades will be reported under the regulations proposed in the Reporting and Recordkeeping NOPR).

In sum, COPE requests that end-user/end-user trades not be required to be real-time reported. COPE understands that Section 727 indicates that standardized swaps should be subject to real time reporting, but believes that the CFTC has the discretion to implement this provision in a way that meets its intent without creating expensive and disruptive impacts that do not further the cause.<sup>15</sup>

If the Commission does not agree to so limit end-user/end-user swap transaction reporting, it must recognize the practical limitations of what is technologically feasible for end-users and only require real-time reporting to occur no earlier than the next business day. Further, as indicated above, COPE members, like other end-users, represent a diverse community of physical energy companies with different hedging needs and frequencies which result in different information technology capabilities.

As the data submissions will require some sort of standardization so that they can be processed, COPE believes that the information technology burden should not fall upon the end-user community to develop bespoke data processes to process and submit data. Rather, it is incumbent upon the CFTC to take the lead and provide a submission template to end-users. That template should not require data that is not captured today for commercial purposes (*i.e.*, for standardized swaps: product, counterparty, pricing, notional quantity per settlement period, and term).

Creating a data reporting regime without creating the database 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

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<sup>14</sup> See Dodd-Frank § 727 (as codified at 7 U.S.C. § 2(a)(13)(B)) ("The purpose of this section is to authorize 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).

<sup>15</sup> See, e.g., *Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979) (holding that categorical exemptions may be permissible as an exercise of agency power, where the law itself does not "concern itself with trifling matters"); *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961) (internal citations omitted) ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed . . . whenever decision[s] as to the meaning or reach of a statute has involved reconciling conflicting policies . . ."); *Am. Trucking Associations, Inc. v. I.C.C.*, 697 F.2d 1146, 1148 (D.C. Cir. 1983) (noting that Congress may intend that an agency subordinate "rigid legalities to the overall purpose of" a given legislative provision).

and timing) before designing input reporting rules. As the process is not clear to COPE, it is challenging to provide meaningful comment.

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, through the conduct of an American National Standards Institute ("ANSI") process, a clear workable process could result in implementable reporting standards.

The Commission states its belief that "technology solutions may develop, such as web portals and other Internet-based interfaces, which will aide reporting parties in complying with the requirements proposed," and that "the total number of end-user to end-user swaps will be small and thus the costs imposed on end-users will likely be small relative to the total number of swaps."<sup>16</sup>

It is no comfort to COPE members that the CFTC believes that web portals may be developed which will aide in relieving their burden. If the Commission is confident of this outcome, it should waive end user/end user transaction reporting requirements under the NOPR unless and until such portals are in existence. That would remove the wasted information technology costs end-users would have to bear to be compliant while awaiting their development. Further, the fact that the "cost imposed on end-users will likely be small relative to the total number of swaps"<sup>17</sup> is also of no comfort, as these are real costs which do not appear to be justified by the limited benefit.

### **Conclusion**

COPE requests that the Commission exclude end-user/end-user trades from real-time reporting under the NOPR in recognition of the following: (a) the technological feasibility of reporting and data capture of such swap transactions is such that end-users' transactions cannot be reported in a timely manner sufficient to meet the goals of the NOPR; (b) end-user/end-user trades are expected to be a *de minimis* amount of standardized swap trades whose absence will not negatively impact the transparent reporting of standardized trades by Commission registrants; and (c) the burden on end-users to engage in such real-time reporting does not justify the limited value of the data. In the event the Commission requires reporting of end-user/end-user trades pursuant to the NOPR, it should make such reporting as "user friendly" as possible by providing end-users a template for data submission that contains only those requirements reflecting data currently recorded by end-users and require submission no sooner than the next business day.

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<sup>16</sup> NOPR at 76146.

<sup>17</sup> *Id.*

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Respectfully,

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cc: COPE Members