February 16, 2011

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

RE: RIN No. 3038-AD10—Comments on Proposed Rulemaking Regarding the End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747 (Dec. 23, 2010)

The National Corn Growers Association ("NCGA") and the Natural Gas Supply Association ("NGSA") (collectively, "Associations") submit the following comments in response to the Notice of Proposed Rulemaking, End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747 (Dec. 23, 2010) (the "NPRM") issued by the U.S. Commodity Futures Trading Commission (the "Commission"). References made herein to the Commodity Exchange Act (the "CEA") refer to that statute as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act" or the "Act").

Questions and correspondence regarding this submission should be directed to --

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Founded in 1957, NCGA is the largest trade organization in the United States representing 35,000 dues-paying corn farmers nationwide and the interests of more than 300,000 growers who contribute through corn checkoff programs in their states. NCGA and its 48 affiliated state associations and checkoff organizations work together to create and increase opportunities for their members and their industry.

Established in 1965, NGSA represents integrated and independent companies that produce and market approximately 40 percent of the natural gas consumed in the United States. NGSA encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers.

Because of the potential for the Dodd-Frank Act to unnecessarily impede what is and has been a well-functioning and resilient natural gas market, NCGA and NGSA played an active role in the shaping of the Dodd-Frank Act during its passage and wish to continue this role in ensuring the Act's successful implementation.

With respect to the NPRM, NCGA and NGSA believe that the Commission has proposed a workable method whereby qualifying swap market participants can elect to use the end-user exception to the Dodd-Frank Act's mandatory clearing requirements. However, the Associations believe that three relatively minor modifications or clarifications to the proposed rule are required to make it conform to the requirements of the Dodd-Frank Act.

I. The Commission Should Clarify That Reporting Counterparties Are Authorized to Rely on the Written Representations of Electing Counterparties with respect to an Election.

The Commission should clarify that a counterparty reporting the information required under section 39.6(b) of the proposed rule (a "reporting counterparty") is authorized to rely on the written representations of the counterparty making the election not to clear (the "electing counterparty") with respect to the information required under the proposed rule. It is only reasonable that each party be individually responsible for the accuracy of information provided, or caused to be provided, regarding itself for purposed of compliance with the proposed rule. In particular, given the customized nature of end-users' hedging transactions, the reporting counterparty should be authorized to rely on, and should have no duty to substantiate, an electing counterparty's representation that it is using a particular swap to hedge or mitigate commercial risk. Such a responsibility would add significant costs to swap transactions and would be an inefficient allocation of responsibility under the proposed rule. Therefore, the Commission should clarify that a reporting counterparty is authorized to rely on the written representations of an electing counterparty with respect to its election not to clear.

II. The Commission Should Clarify that the Financial Obligation Notice Requirement Can Be Satisfied By Providing Notice of How an Electing Counterparty Generally Meets the Financial Obligations Associated with Its *Portfolio* of Noncleared Swaps.

The Commission should clarify that CEA § 2(h)(7)(A)(iii)'s requirement of providing notice of how an electing counterparty "generally meets its financial obligations associated with entering into noncleared swaps" (the "Financial Obligation Notice" requirement) can be satisfied by providing notice regarding how the electing counterparty generally meets such obligations with respect to its *portfolio* of swaps. As written, the proposed rule suggests that the Financial Obligation Notice must identify how the electing counterparty expects to meet financial obligations associated with each particular swap as it is reported. For an end user that enters into swaps with multiple counterparties under multiple different master agreements or other arrangements, such a particularized reporting requirement would pose an unreasonable administrative burden and would contravene the explicit language of the authorizing statute.

Section 2(h)(7)(A)(iii) of the CEA requires that the reporting counterparty provide notice regarding how the electing counterparty "generally" meets its financial obligations associated with entering into noncleared "swaps." Thus, the statute envisions that the notification be "general" and that it relate to "swaps"—plural, not singular. As such, notification regarding how an electing counterparty generally meets the financial obligations associated with its *portfolio* of swaps satisfies the Financial Obligation Notice requirement as outlined in the statute. To implement the requirement in this way, the Commission should simply modify the language of its proposed rule to mirror exactly what Congress provided in the statute—namely, the words "expects to meet" and "swap" in section 39.6(b)(5) of the proposed rule should be replaced with the words "meets" and "swaps," respectively.

III. The Commission Should Clarify that Board Approval of an Electing Counterparty's Decision Not to Clear Swaps Can be Given on a "Blanket" Basis.

With respect to CEA § 2(j)'s board approval requirement for issuers of securities,[1] the Commission should clarify that board approval of an electing counterparty's decision not to clear a swap does not have to be obtained on an individual, swap-by-swap basis but rather can be obtained on a "blanket" basis, for all swaps or for certain categories or classes of swaps, as the board sees fit. Section 39.6(b)(6)(ii) of the Commission's proposed rule provides that "[w]hen an electing counterparty elects to use the exception," the reporting party must report "[w]hether an appropriate committee of the [electing counterparty's] board . . . has reviewed and approved the decision not to clear *the swap*." As written, this could be taken to mean that an appropriate committee of an electing counterparty's board of directors must review and approve each individual swap elected not to be cleared. Such a requirement would cause significant operational and administrative burdens to an entity that enters into numerous non-cleared swaps,

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[1] Under Section 2(j) of the CEA, this requirement applies only to an electing counterparty that is "an issuer of securities that are registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or that is required to file reports pursuant to section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o)."

particularly in the case of transactions with short terms, where arranging for board or committee approval would cause prohibitive delay.

More importantly, such a requirement would contravene the explicit language of section 2(j) of the CEA, which envisions review and approval of an electing counterparty's "decision to enter into swaps that are subject to such exemptions." Importantly, the statute speaks of a "decision" in the singular tense with respect to "swaps" in the plural tense. Thus, it is clear that Congress envisioned a process whereby an appropriate committee of the board could provide blanket approval with respect to a decision to enter into multiple noncleared swaps. Although footnote 18 of the NPRM could be interpreted as allowing such blanket approval,[2] the footnote is ambiguous and the relevant distinction is not reflected in the text of the Commission's proposed rule. Thus, to provide necessary clarity to the rule and ensure that it reflects the statutory mandate, the rule should be revised by replacing the words "the decision not to clear the swap" in section 39.6(b)(6)(ii) with the words "the decision not to clear such swaps."

IV. Conclusion

The Commission has proposed a workable rule to implement the Dodd Frank Act's end-user exception provisions. However, certain modifications or clarifications, as requested herein, are necessary for the Commission's proposed rule to remain consistent with the statute's express language and Congress's intent.

NCGA and NGSA appreciate the opportunity to provide these comments. Should you require further information, please do not hesitate to contact the undersigned.

Sincerely,

National Corn Growers Association
Natural Gas Supply Association

[2] "For example, a board resolution or an amendment to a board committee's charter could expressly authorize such committee to review and approve decisions of the electing person not to clear the swap being reported. In turn, such board committee could adopt policies and procedures to review and approve decisions not to clear swaps, on a periodic basis or subject to other conditions determined to be satisfactory to the board committee." NPRM at 80,750 n. 18.