

February 22, 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
Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major
Swap Participant," "Major Security-Based Swap Participant" and "Eligible
Contract Participant," RIN No. 3038-AD06

Dear Mr. Stawick:

On December 21, 2010, the Commodity Futures Trading Commission ("CFTC" or the "Commission") issued a Notice of Proposed Rulemaking concerning "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Dealer,' and 'Eligible Contract Participant.'"¹ The Definitions NOPR establishes some of the fundamental building blocks of the regulatory implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").² Swap Dealers and Major Swap Participants will be new, CFTC-regulated entities which, with Swap Execution Facilities, will form the core of regulated commodity swaps entities.

As participants in physical energy markets that largely use swaps to hedge commercial risk, the Coalition of Physical Energy Companies ("COPE")³ hereby provides

¹ Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80174 (Dec. 21, 2010) ("Definitions NOPR" or "NOPR").

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

³ The members of the Coalition of Physical Energy Companies are: Apache Corporation; Competitive Power Ventures, Inc.; El Paso Corporation; Iberdrola Renewables, Inc.; MarkWest

comments to the Commission's proposed definitions of Swap Dealer and Major Swap Participant (including the related definition of the phrase "Hedging or Mitigating Commercial Risk").

As a threshold matter, COPE believes the overall intent of the Definitions NOPR is generally appropriate. However, in some cases, the regulatory text proposed by the Commission is extremely vague and, as drafted, could very well capture entities that should not be included within the definitions. The vague nature of the regulatory text is particularly acute with respect to the definition of the term "Swap Dealer," where the NOPR largely proposes to codify the statutory language in new Commission rules with minimal clarifying language.

In addition to the vague regulatory text defining the term "Swap Dealer," the *de minimis* exception proposed by the Commission is so limited as to be virtually without meaningful application. When the magnitude of the over-the-counter swaps market is considered, the thresholds proposed by the Commission are well below any reasonable *de minimis* threshold. COPE believes that the exception should be determined in proportion to the market. That way, limited dealing activity will be permitted, but any such activity above a truly *de minimis* level will be captured.

An entity's characterization as either a Swap Dealer or Major Swap Participant has enormous significance. A Swap Dealer or Major Swap Participant will, *inter alia*, be pervasively regulated by the Commission, owe particular duties to its counterparties, and hold a specified place in the swap reporting hierarchy. There should be no ambiguity as to whether an entity is a Swap Dealer or Major Swap Participant.

Accordingly, COPE requests that the Commission promulgate regulations that, standing alone, will be adequate for market participants to determine their regulatory status.

Swap Dealer

As proposed, the Commission's regulatory definition of Swap Dealer is vague and ambiguous. The regulatory text describing a Swap Dealer does not provide the clarity that market participants require to clearly determine their status. While the preamble of the NOPR provides guidance as to the intended meaning of the regulatory text, it is, as courts have observed,⁴ not in the nature of law but rather in the nature of legislative history. As

Energy Partners, L.P.; Noble Energy, Inc.; Shell Energy North America (US), L.P.; and SouthStar Energy Services LLC.

⁴ The courts have made clear the primacy of regulatory text over regulatory preambles or other text. As stated by the D.C. Circuit "[I]t is the language of the regulatory text, and not the preamble, that controls." *Nat'l Wildlife Fed'n v. E.P.A.*, 286 F.3d 554, 570 (D.C. Cir. 2002), *supplemented sub nom. In re Kagan*, 351 F.3d 1157 (D.C. Cir. 2003).

The preamble of an agency's rule is akin to the preamble or legislative history of a statute. *Id.* at 569. The Supreme Court has made clear that "the preamble is not part of the act, and cannot

such, it is the regulation, not the preamble, that matters. The Commission is duty-bound to provide clarity and specificity *in its regulations* sufficient for persons to know if they are regulated entities with all of the attendant obligations.

The Commission proposes to identify Swap Dealers by the certain "distinguishing characteristics" it has discerned they possess. Those Swap Dealer characteristics include:

- "Dealers tend to accommodate demand for swaps and security-based swaps from other parties;
- Dealers are generally available to enter into swaps or security-based swaps to facilitate other parties' interest in entering into those instruments;
- Dealers tend not to request that other parties propose the terms of swaps or security-based swaps; rather, dealers tend to enter into those instruments on their own standard terms or on terms they arrange in response to other parties' interest; and
- Dealers tend to be able to arrange customized terms for swaps or security-based swaps upon request, or to create new types of swaps or security-based swaps at the dealer's own initiative."⁵

In applying these standards, the Commission observed that it can "most efficiently achieve the purposes underlying Title VII of the Dodd-Frank Act—to reduce risk and to enhance operational standards and fair dealing in the swap markets—by focusing their attention on those persons whose function is to serve as the points of connection in those markets."⁶ The Commission has also observed that a Swap Dealer is a person that functions as a "point of connection" to swap markets as its "regular business." As stated by the Commission:

We believe that persons who enter into swaps as a part of a "regular business" are those persons whose function is to accommodate demand for swaps from other parties and enter into swaps in response to interest expressed by other parties. Conversely, persons who do not fulfill this function should not be

enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous." *Yazoo R.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889). Thus, like a statutory preamble, a regulatory preamble can add context and contribute to "a general understanding" of a regulation, but a preamble is "not an operative part" of a regulation, nor can the language of a preamble "enlarge or confer powers on administrative agencies or officers." See *Nat'l Wildlife Fed'n.*, 286 F.3d at 569 (quoting *Ass'n of American R.Rs. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (internal quotations omitted)). Where, as is the case here, the operative parts of a regulation are unambiguous, it would be in error to view the rule's preamble as controlling, modifying or expanding the meaning of the regulatory text. See *Costle*, 562 F.2d at 1316.

⁵ NOPR at 80176.

⁶ *Id.* at 80177.

deemed to enter into swaps as part of a "regular business" and are not likely to be swap dealers.⁷

As proposed by the Commission, the above criteria and "tendencies" will be used in an interpretive approach to determine whether or not an entity is a Swap Dealer.⁸ As stated by the Commission, if a person "tends to engage" in the above activities, it is "likely" that person is a Swap dealer and "[p]ersons that rarely engage in such activities are less likely to be deemed swap dealers."⁹ The NOPR seeks comment on this interpretive approach for identifying whether or not a person is a swap dealer.¹⁰

As a general matter, COPE believes the Commission has generally characterized a "dealer" correctly. A dealer holds itself out to the market as a point of connection to those needing to access the market. It is in a regular business of swaps, as opposed to the underlying physical business, for which swaps are used to hedge risk. It looks to earn a profit by entering into a swap with a counterparty that is hedging its commercial risk and, in turn, lays that risk off to the market while making a margin on the spread between the trades. Simply stated, dealers are in the regular business of being a point of connection to the market for others that need access to the market to hedge risk. The Commission appears to agree with this characterization of a "dealer."

While COPE believes the Commission has properly characterized a dealer in the NOPR preamble, COPE strongly believes that the "interpretative approach"¹¹ proposed in the NOPR should not be adopted. An entity's regulatory characterization as a Swap Dealer has enormous significance. As stated above, a Swap Dealer will, *inter alia*, be pervasively regulated by the Commission, owe particular duties to its counterparties, and hold a specified place in the swap reporting hierarchy. There should be no ambiguity as to whether or not an entity is a Swap Dealer. No Talmudic interpretation process should be required. That is a luxury Dodd-Frank does not provide.

Conversely, an entity should be able to apply its business activities to the regulatory definition of Swap Dealer and clearly understand its regulatory status. While certain characteristics identified by the Commission in the NOPR properly apply to a Swap Dealer, amorphous language relating to "tendencies" and "likelihoods" must be rejected in favor of clear, unambiguous regulations.

The material elements of the Swap Dealer definition must, to the degree possible, be in the regulations – not the regulatory preamble. Regulations have the force of law; preambles do not. Set forth below is COPE's proposed Swap Dealer definition expressed as

⁷ *Id.*

⁸ *See id.*

⁹ *Id.*

¹⁰ *See id.*

¹¹ *Id.*

regulatory text. The revised regulation is largely based on the Commission's analysis in the NOPR and prior definitions. If the Commission is true to the statements it has made in the NOPR and elsewhere, it should have no trouble adopting COPE's proposed regulatory text.

COPE recommends the Commission adopt the following regulatory text:

(ppp) Swap Dealer.

- (1) In general. The term "*swap dealer*" means any person who:
 - (i) Holds itself out as a dealer in swaps;
 - (ii) Makes a market in swaps;
 - (iii) Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or
 - (iv) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in swaps.
 - (a) "Dealer" shall mean a person that acts as a market maker in swaps.
 - (b) "Makes a market" or "market maker" means standing ready to offer to buy or sell a swap at all times.
- (2) *Exception.* The term "*swap dealer*" does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.
 - (i) "Regular Business" shall mean a person's business activity in which, as its primary function, such person accommodates demand for swaps from other persons by entering into swaps in response to interest or inquires by such other persons.
 - (a) "Accommodates Demand" shall mean entering into swaps to satisfy a market-created requirement for swaps.
 - (b) "Interest or Inquiries" shall mean a request by another person to enter into a swap for the purpose of satisfying such person's business purpose.
 - (ii) Any swap entered into by a person for the purpose of hedging or mitigating such person's commercial risk as defined in Section 1.3 (tt) shall not be considered a part of a Regular Business.
 - (iii) Any swap entered into by a person for the purpose of benefiting from future market price changes affecting the value of the swap shall not be considered part of a Regular Business.
 - (iv) Entering into exchange-traded cleared swaps shall not be considered a part of a Regular Business for purposes of this provision.
- (3) *Scope.* A person who is a swap dealer shall be deemed to be a swap dealer with respect to each swap it enters into, regardless of the category of the swap or the person's

activities in connection with the swap. However, if a person makes an application to limit its designation as a swap dealer to specified categories of swaps or specified activities of the person in connection with swaps, the Commission shall determine whether the person's designation as a swap dealer shall be so limited. A person may make such application to limit its designation at the same time as, or at a later time subsequent to, the person's initial registration as a swap dealer.

As noted above, the language proposed by COPE is largely not of its own construction; it is the Commission's construction. COPE has made a concerted effort to, where possible, import the Commission's own language into the regulation.

COPE has taken the definition of "Dealer" from the glossary published by the Commission ("Dealer" shall mean a person "that acts as a market maker in swaps").¹² COPE has taken the definition of Market Maker by paraphrasing the Commission's glossary definition of a person "who has an obligation to buy when there is an excess of sell orders and to sell when there is an excess of buy orders" ("Makes a market" or "market maker" means standing ready to offer to buy or sell a swap at all times").¹³ COPE believes these definitions were created by the Commission to objectively define these terms. They are unambiguous and provide meaning to the regulatory text.

COPE has defined "Regular Business" in a manner that it believes to be completely consistent with the fundamental elements of the regular business of a swap dealer. Whenever possible, COPE has used language developed by the Commission. Thus, Regular Business is: "a person's business activity in which, as its primary function, such person accommodates demand for swaps from other persons by entering into swaps in response to interest or inquires by such other persons."¹⁴ "Accommodating Demand" is entering into swaps to satisfy a market-created requirement for swaps.¹⁵ "Interest or Inquiries" in this context is a request by another person to enter into a swap for the purpose of satisfying such person's business purpose. This language is true to the Commission's intentions as expressed in the Definitions NOPR.

COPE has further clarified "Regular Business" by stating things which it is not. If Regular Business is accommodating demand for swaps from other persons by entering into swaps in response to interest or inquires by such other persons, it is not: (1) hedging or mitigating commercial risk of a person's business; (2) entering into a swap based upon a person's market view to benefit from price changes in commodity markets; or (3) entering into exchange-traded cleared swaps.

¹² *CFTC Glossary, A Guide to the Language of the Futures Industry*, 17 (visited Feb. 18, 2011), <http://www.cftc.gov/ucm/groups/public/@educationcenter/documents/file/cftcglossary.pdf> ("CTFC Glossary").

¹³ *Id.* at 37.

¹⁴ *See* NOPR at 80177.

¹⁵ *See id.*

Hedging or mitigating the commercial risk of a person's business is not accommodating demand in response to inquires from others. Rather, it is entering into swaps on a person's own initiative for the purpose of risk management. It is not dealing.

Entering into a swap based upon a person's market view to benefit from price changes in commodity markets is not accommodating demand in response to inquires from others. Rather, it is entering into swaps at a person's own initiative for the purpose of speculating based upon a view of future market prices. Again, it is not dealing.

Dodd-Frank recognizes that speculating is not dealing by creating the category of Major Swap Participant, which is defined, in part, as a person who is (1) not a Swap Dealer and (2) holds a substantial position in swaps net of those held for hedging or mitigating commercial risk.¹⁶ If speculating were dealing, there would be no Major Swap Participants because they would all be Swap Dealers.

Entering into exchange-traded cleared swaps is not acting as a "point of connection to the swap market"¹⁷ or "in response to inquiries from others."¹⁸ It is merely trading on an exchange with the clearinghouse as the counterparty. In such a case, the person does not know who is on the other side of the trade. Such a transaction is identical to trading a futures contract on a Designated Contract Market. No one has suggested the act of trading futures should make a person a regulated entity, and the same should be true of exchange-traded cleared swaps.

Therefore, COPE believes the Commission should revise the regulatory text for the definition of Swap Dealer as proposed above. Entities that transact in swaps must know if they are Swap Dealers. That knowledge must come, to the degree possible, from the definition codified in regulations. Given the significance of Swap Dealer status, it cannot be ambiguous or loosely based in tendencies or likelihoods contained in a non-binding regulatory preamble.

***De Minimis* Exception**

COPE believes that the *de minimis* exception to a person's categorization as a Swap Dealer should be measured by the level of Regular Business activity it does. COPE believes the terms "swap dealing" and "Regular Business," as used in this context, are the same. Further, COPE does not believe the number of counterparties or swaps entered into in a 12-month period is a useful or meaningful measure of magnitude to determine whether the activity is *de minimis*. The only meaningful measure proposed by the Commission is notional value.

¹⁶ See Dodd-Frank § 721 (as codified at 7 U.S.C. § 1a(33)).

¹⁷ See NOPR at 80177.

¹⁸ See *id.*

It is possible that a person may enter into multiple swaps and have multiple counterparties but still engage in activities that do not "amount to a hill of beans" in the market. If the gross notional value of the total swaps position is insignificant, then the Regular Business is *de minimis*. If the gross notional value of the total swaps position is above an insignificant amount, it is not *de minimis*. Accordingly, COPE proposes to delete the number of counterparties and number or swaps criteria and measure a *de minimis* level by gross notional value alone.¹⁹

The amount of gross notional value that exceeds an insignificant level is admittedly a matter of judgment. However, COPE believes a \$100 million figure out of a market with a gross notional value estimated to be approximately \$300 trillion²⁰ is clearly too low. Consistent with the Commission's total market structure approach, and to align the threshold with the overall market, COPE recommends a figure of 0.001% (one-thousandth of one percent) of the market, or \$3 billion of a \$300 trillion market.²¹ COPE believes one-thousandth of one percent is *de minimis* by anyone's measure. By using a percentage of the gross notional average annual value of the swap market for the previous calendar year, the Commission's regulations will not become frozen in time but will still appropriately measure a *de minimis* value.

Accordingly, COPE recommends the following regulatory text:

(4) *De minimis exception.* A person shall not be deemed to be a swap dealer as a result of ~~swap dealing~~ Regular Business activity involving counterparties, that meets ~~each of~~ the following conditions:

(i) The swap positions connected with those activities into which the person enters over the course of the immediately preceding 12 months have an aggregate gross notional amount of no more than ~~\$100 million, and have an~~ one-thousandth of one percent (.001%) of the aggregate gross notional amount of ~~no more than \$25 million with the overall swaps market.~~ With regard to swaps in which the counterparty is a "special entity" (as that term is defined in Section 4s(h)(2)(C) of the Commodity Exchange Act), the amount shall be one-ten thousandth of one percent (.0001%) of the overall swaps market. For purposes of this paragraph, if the stated notional amount of a swap is leveraged or enhanced by the structure of the swap, the calculation shall be based on the effective notional amount of the swap rather than on the stated notional amount.

¹⁹ For energy commodities it may be preferable to use a notional quantity of product such as MWH (power) or MMBtu (gas) to avoid price volatility impacting Swap Dealer status from week to week.

²⁰ See Testimony of Chairman Gary Gensler Before the House Committee on Agriculture (February 10, 2011) (noting that based upon figures compiled by the Office of the Comptroller of the Currency, the largest 25 bank holding companies currently have \$277 trillion notional amount of swaps).

²¹ In the event the Commission does not continue to base a *de minimis* level on the total overall market, the Commission should provide its revised concept for comment.

~~(ii) — The person has not entered into swaps in connection with those activities with more than 15 counterparties, other than swap dealers, over the course of the immediately preceding 12 months. In determining the number of counterparties, all counterparties that are members of a single group of persons under common control shall be considered to be a single counterparty.~~

~~(iii) — The person has not entered into more than 20 swaps in connection with those activities over the course of the immediately preceding 12 months. For purposes of this paragraph, each transaction entered into under a master agreement for swaps shall constitute a distinct swap, but entering into an amendment of an existing swap in which the counterparty to such swap remains the same and the item underlying such swap remains substantially the same shall not constitute entering into a swap.~~

Major Swap Participant

In contrast to the definition of Swap Dealer, the Commission has defined Major Swap Participant with enough specificity for market participants to understand their regulatory status. The reason that the proposed regulatory text works for Major Swap Participant is that the Commission is proposing to clearly define "hedging or mitigating commercial risk" and "substantial position" as used to define the term.

As noted by the Commission, Major Swap Participant status is premised on the "market impacts and risks" of an entity's swaps position.²² In other words, a Major Swap Participant's position not entered into for the purpose of hedging commercial risk must be of a magnitude sufficient to affect the US financial system.²³

Further, since a Major Swap Participant is by definition not a Swap Dealer,²⁴ its activities must be different from the "regular business" of dealing identified by the Commission. That is, if a person engages in a regular business of dealing in swaps at a level of magnitude sufficient to affect the US financial system, that person will be a Swap Dealer.

Since swaps used to hedge or mitigate commercial risk are excluded in the determination of Major Swap Participant, and a Major Swap Participant is not a Swap Dealer, COPE believes a Major Swap Participant is an entity that speculates in swaps at a level large enough such that its default could impact the US financial system.

Substantial Position

The Commission has proposed to define "substantial position" with particularity.²⁵ The definition is summarized as "\$2 billion in daily average current uncollateralized

²² NOPR at 80185.

²³ *See id.*

²⁴ Dodd-Frank § 721 (as codified at 7 U.S.C. § 1a.(33)(A)).

²⁵ *See* NOPR at 80186.

exposure plus aggregate potential outward exposure in the applicable major swap category."²⁶ COPE believes the regulatory text defining "substantial position" clearly sets forth a measure that can be calculated and is tied to a magnitude that could impact the US financial system if there was a default. The only suggestion COPE offers on this definition is that, as a general matter, fixing a dollar amount in a regulation risks the regulation becoming "frozen." COPE proposes the Commission include an annual escalator tracking any inflation in the value of the US Dollar.

Hedging or Mitigating Commercial Risk

In the NOPR, the Commission states that: (1) it intends to employ the same interpretation of the definition of hedging or mitigating commercial risk for both the determination of Major Swap Participant status and the end-user exemption from clearing;²⁷ (2) it has proposed regulatory text which provides for a large scope of activities that properly constitute hedging commercial risk;²⁸ and (3) it has recognized that "whether a position hedges or mitigates commercial risk should be determined by the facts and circumstances at the time the swap is entered into, and should take into account the person's overall hedging and risk management strategies."²⁹

COPE agrees with the Commission that there must be only one interpretation of the definition of hedging or mitigating commercial risk regardless of whether it is used to define Major Swap Participant or the end-user exception from clearing.³⁰ The concept is identical. The use of different interpretations cannot be intellectually justified and would only lead to confusion.

COPE believes that the regulatory text proposed by the Commission captures the concept of hedging commercial risk well. Effectively, it captures risk mitigation in a commercial enterprise that stems from potential value changes associated with: producing, manufacturing, or merchandising; liabilities incurred in the ordinary course of business; services provided or purchased in the ordinary course of business; assets, services, inputs, products, or commodities owned, produced, manufactured, possessed, merchandised, leased, or sold in the ordinary course of business; currency exchange or interest rate changes impacting a person's business; or any position that qualifies for a bona fide hedge exemption from position limits or for hedge accounting under FASB Topic 815.³¹ The scope of

²⁶ *Id.* at 80193.

²⁷ *Id.* at 80194 ("[T]he Commissions intend to interpret the phrase 'hedging or mitigating commercial risk' with respect to the participant definitions in the same manner as the phrase 'hedging or mitigating commercial risk' in the exception from the mandatory clearing requirement.").

²⁸ *See id.* at 80217.

²⁹ *Id.* at 80195.

³⁰ *See id.* at 80194.

³¹ *Id.* at 80215.

activities identified by the Commission is consistent with COPE members' use of swaps to mitigate or hedge their commercial risk.

The proposed regulation also states that a position "in the nature of speculation, investment or trading" will not be considered hedging commercial risk.³² COPE has no quarrel with the concept this language is attempting to cover. That is, speculating is not hedging.³³ COPE recommends, however, that the word "trading" be eliminated from the litany. Trading is the action of entering into a swap (a "trade"). "Speculating" or "investing" are, as stated by the Commission, acts designed "to take an outright view on the direction of the market," and "to obtain an appreciation in value of the swap position," respectively.³⁴ Inclusion of the word "trading" in the litany implies it is a covered item in addition to "speculation" and "investment." As made clear in footnote 128, the Commission means the same thing by both "speculation" and "trading." As such, "trading" should be deleted.

Affiliate Transactions Must Be Disregarded in Swap Dealer and Major Swap Participant Determinations

When considering a swap transaction in the context of the definitions addressed herein, it is important to exclude intra-corporate transactions in which a market-facing affiliate is acting on behalf of an operating affiliate that is hedging its risk. This type of internal transaction is not a market transaction, but, rather, it is merely undertaken for efficiency purposes within a corporate organization. Of course, such intra-corporate transactions had no role in causing the problems that led to the financial crisis and the enactment of Dodd-Frank. It should not be considered in any determination of whether an entity is a Swap Dealer or a Major Swap Participant.

The statutory text of Dodd-Frank supports the concept that inter-affiliate transactions should be disregarded. Section 723 of Dodd-Frank expressly provides that an affiliate of an end-user that is entitled to claim the exception from clearing provided by § 2(h)(7)(A) of the Commodity Exchange Act ("CEA")³⁵ as amended by § 723 may claim that same exception based on its affiliate's end-user status.³⁶ A finance affiliate of an entity entitled to the end-user exception from clearing may claim that same exception if it is acting on behalf of its end-user affiliate to hedge or mitigate commercial risk (provided that the affiliate is not itself a Swap Dealer or Major Swap Participant or other financial entity).³⁷ As Dodd-Frank recognizes that inter-affiliate transactions where an affiliate is acting on behalf of an affiliate to hedge or mitigate commercial risk with swaps should not implicate regulation designed to address market issues, the Commission's definitions of Swap Dealer and Major Swap

³² *Id.*

³³ *Id.* at 80195, footnote 128.

³⁴ *Id.*

³⁵ Public Law No. 74-765, 49 Stat. 149 (1936).

³⁶ Dodd-Frank § 723 (as codified at § 2(h)(7)(D)).

³⁷ *Id.*

Mr. David A. Stawick

February 22, 2011

Page 12

Participant must also recognize that inter-affiliate transactions should not trigger any regulatory consequences.

Therefore, affiliate transactions should be disregarded in the determination of whether a swap is a part of a Regular Business; should not be considered in the calculation of the *de minimis* exception; and should not be included in the determination of a Substantial Position. Accordingly, COPE proposes the following regulatory text to address the affiliate issue:

(1) Swaps entered into among Affiliates shall not be considered to be a part of a Regular Business for purposes of §§ 1.3(ppp)(2) and 1.3(ppp)(4).

(2) Swaps entered into among Affiliates shall not be included in the calculation of a Substantial Position for the purposes of § 1.3(sss).

Conclusion

The Commission should issue final rules regarding the definitions of Swap Dealer and Major Swap Participant in accordance with the comments made above. It is critically important that these definitions, and the information needed to effectively apply them, are fully provided in the final regulations, not regulatory preamble. In addition, there should be no need for an “interpretative approach” to be employed to understand the applicability of the definitions. A person should be able to read the definition and understand its regulatory status.

Respectfully,

/s/ David M. Perlman

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