March 11, 2011

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

<u>VIA ELECTRONIC MAIL</u>

Re: Rulemaking under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act-- *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant*," "Major Security-Based Swap Dealer" and "Eligible Contract Participant", RIN No. 3038-AD06; *Commodity Options and Agricultural Swaps*, RIN No. 3038-AD21; and *Position Limits for Derivatives*, RIN Nos. 3038-AD15 and 3038-AD16.

Dear Secretary Stawick:

In response to recent requests for public comment on the administrative process for issuing final rules implementing Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),[1] NextEra Energy Resources, LLC, ("NextEra") respectfully submits this letter to the Commodity Futures Trading Commission (the "Commission") to offer suggestions and a "road-map" with respect to how the Commission might proceed.

I. Interest of NextEra

NextEra owns electricity generation assets in 26 states and Canada. NextEra has actively participated in the numerous proposed rulemaking proceedings promulgated by the Commission as part of the Edison Electric Institute ("EEI"), the International Energy Credit Association ("IECA") and the Working Group of Commercial Energy Firms (the "Working Group").[2]

[1] Remarks, American Bar Association, Committee on Derivatives and Futures Law, Chairman Gary Gensler, available at http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-67.html; O'Malia, Scott D, *So Many Regulations, So Little Time*, The Wall Street Journal, February 28, 2011, available at: http://online.wsj.com/article/SB10001424052748704150604576166310816248454.html

[2] EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 95 percent of the ultimate customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members. IECA is the leading global organization focused on credit-related issues in the energy industry. The IECA and its members have wide and deep experience in developing improved metrics, documentation, and tools to assess, manage, and mitigate credit risk. Its members come from more than 500 companies, representing every facet

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NextEra has also submitted comments on its own behalf in the Commission's proposed rulemaking on the definition of "Swap Dealer." As explained therein, NextEra does not believe that its swap-related activities fall within the Commission's definition of "Swap Dealer." Nonetheless, given that the broad definition proposed by the Commission could encompass some of NextEra's non-hedging swap-related activities, coupled with the uncertainty surrounding key definitions necessary to determine and understand the Commission's proposed regulatory framework, NextEra has a substantial interest in the Commission's Dodd-Frank Act rulemaking process.

II. Background

The Commission is engaged in a historic task, erecting an entirely new regime for the regulation of derivatives. This regulatory scheme is not an evolution in the nature of Commission regulation, but a complete break from the past. The derivatives market is important to the financial and economic health of the Nation and it is vital that the Commission's rules that will govern this important market be not only sound but also stable, meaning they are not vulnerable to being overturned by the courts for being arbitrary and capricious and they do not create a cloud of regulatory uncertainty for market participants. It is important that the Commission succeed in its task, or else this important market will be damaged, resulting in the exit of some market participants, reduced liquidity, and higher prices.

Congress has given the Commission the Herculean task of assembling a regulatory regime for regulating swaps in one year. Notwithstanding the efforts of the Commission to meet this ambitious deadline, it is now apparent that this task has proven far more complex and time-consuming than anticipated by Congress. Accordingly, NextEra offers the Commission its suggestions on a road-map setting forth a logical and reasonable method to issue the remaining required rulemakings and sequence the issuance of the Dodd-Frank Act final rules. Moreover, NextEra explains why its proposed course of action is fully consistent with decades of well-settled administrative case law. Indeed, absent a change in course, the Commission may well have some of its final rules vacated or remanded by the courts, an outcome that benefits no one -- not the Commission, not market participants, and not the public who will be impacted by changes in the energy markets. In this vein, NextEra also recommends that the Commission adopt procedural rules governing the process for seeking clarification or reconsideration of the final rules it issues and thus provide an orderly process for review. Institution of such a process could greatly reduce the number of final rules that are subject to judicial review. This process will further ensure that the Commission's final rules are consistent with the President's recent executive order that requires agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs and in choosing among alternative regulatory

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of the energy complex from producers and processors to generators, transporters and end-users. The Working Group of Commercial Energy Firms 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 others, including industrial, commercial and residential consumers.

approaches, those approaches that maximize net benefits.[3] We believe our suggestions will help insure the regulatory certainty that market participants, Congress and the Commission all desire and will best promote the public interest.

III. The Commission Should Conclude the Proposed Rulemaking Process in an Orderly Fashion and Allow for Additional Comment on Existing Proposed Rules

NextEra recommends as a first step that the Commission issue the remaining proposed rules that are expressly required by the Dodd-Frank Act. Specifically, the Commission must issue the proposed rule defining "Swap" and the proposed rule on the Capital and Margin requirements.[4] This seems to be the direction that that Commission is headed, but issuing further proposed rules is only part of this initial first step.

Under the Administrative Procedure Act ("APA"), an agency must provide notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved."[5] An agency must also "fairly appraise interested" persons of the nature of its rulemaking.[6] By issuing core substantive proposed rules before the proposed definitional rules, there is a serious risk that a court will find the Commission's core substantive proposed rules did not fairly apprise interested persons of the nature of its rulemaking, since the universe of interested persons is dictated by the definitions themselves. This is especially true where the comment period for substantive rules closed before definitional proposed rules are even issued, which has occurred under the Commission's current process. The only judicial remedy for this sort of notice defect is vacatuer of a final rule. However, this kind of notice problem could be remedied by the Commission issuing remaining key definitional proposed rules and reopening the closed comment periods for any of those definitional or substantive rules that are dependent upon these key definitions.[7]

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[3] Exec. Order No. 13563, 76 Fed. Reg. 3821 (January 18, 2011) (the "Executive Order"). NextEra acknowledges, that as an independent agency, the Commission is not subject to the Executive Order. However, the NextEra encourages the Commission to adhere to President Obama's intent.

[4] The Commission can still issue some final rules in the interim that are not related to or dependent on these other open rulemakings.

[5] 5 U.S.C. § 553(b)(3)(2011).

[6] *American Iron & Steel Institute v. EPA*, 568 F.2d 284, 293 (3rd Cir. 1977).

[7] It may not be necessary to reopen the comment period on all the Dodd-Frank Act rulemakings, as some are not related to or dependent on the definitional rulemakings.

Accordingly, in light of the above, the Commission should hold open the comment period for the (1) Commodity Options and Agricultural Swaps; (2) Position Limits for Derivatives; (3) Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants; and (4) Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants proposed rulemakings beyond the current comment due dates. Moreover, the Commission should re-open the comment periods for certain key proposed rules, e.g., the registration and governance standards that are applicable to Swap Dealers and Major Swap Participants (such as duties of a Swap Dealer, internal and external business conduct standards and chief compliance officer). By doing so, an entity should be able to (a) evaluate and determine whether its activities will render it a Swap Dealer under the proposed rulemakings, (b) assess the costs associated with the Swap Dealer classification under the proposed rulemakings and (c) decide whether or not it will elect to incur such costs or amend its behavior to avoid the same as the rules have been proposed. At the conclusion of this process, the Commission can then consider these comments, as well as the attendant costs, and begin the final rule sequencing process as outlined below.

IV. Proposed Dodd-Frank Act Final Rule Sequencing

A. Sequencing Allows the Commission to Engage in Reasoned Decisionmaking

NextEra fully supports the Commission sequentially issuing the final rules implementing the Dodd-Frank Act in a logical and orderly manner. Doing so is a win-win for everyone. The market place is far better served if the Commission considers all of the final rules in a comprehensively organized and logical fashion. Where one rule builds on and relies on another rule, it would be best for the rules to be issued sequentially. For example, a definitional rule should precede a core substantive rule that relies on its definitions. Not all of the rules required under Title VII of the Dodd-Frank Act are equally important and equally urgent. Therefore, NextEra respectfully suggests that the Commission adopt a sequencing of the final rules that reflects a prioritization and recognizes the relationship among certain rules. In short, we recommend the Commission issue definitional rules first, then proceed to the core substantive rules, and then turn to non-core and ancillary rules. Proceeding in this manner will promote consistency in concepts, terms and the overall design across the rules.

Indeed, there is another potential APA notice issue facing the Commission as it moves to adopt final rules. An agency may issue final rules that do not exactly coincide with proposed rules so long as the final rules are the "logical outgrowth" of the proposed rules.[8] The purpose of

[8] *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991). A final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commenters with "their first occasion to offer new and different criticisms which the agency might find convincing." *See United Steelworkers of America v. Marshall,* 647 F.2d 1189, 1225 (D.C.Cir.1980) (quoting *BASF Wyandotte Corp. v. Costle,* 598 F.2d 637, 642 (1st Cir.1979)), *cert. denied,* 453 U.S. 913 (1981)).

this requirement is (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.[9] The Commission has received a great many comments on its proposed rules. It is possible that these comments suggest alternative approaches the Commission might take that are in some respects superior to a proposed rule, but different enough from the proposed rule that the alternative would not be considered to be a "logical outgrowth" of the Commission's proposed rule.[10] In that case, the Commission must either (a) refrain from adopting this better alternative; (b) issue a supplemental proposed rule seeking comment on the alternative approach;[11] or (c) adopt the alternative approach, notwithstanding the notice problems. Given these choices, the best outcome is for the Commission to select the second course of action. Without question, when the record of a rulemaking warrants a change in a proposed rule an agency has a duty to differ from the proposed rule.[12] The only reason to adopt the first approach is devotion to the statutory deadlines in the Dodd-Frank Act, since issuing a supplemental proposed rule would trigger a new round of notice and comment. But when considering the Commission is poised to issue rules that could govern the derivatives markets for many years, if not decades, that additional time seems warranted if a truly better approach presents itself in comments. The third approach poses considerable risk, since in the event a court concludes a final rule was not a logical outgrowth of a proposed rule the only remedy would be vacateur, resulting in further regulatory uncertainty in the energy markets.

Furthermore, sequencing the final rules will likely result in higher quality final rules. The difficulty in writing high quality rules is not widely understood outside government, but sequencing the final rules will better allow the Commission to dedicate necessary staff resources to drafting high quality final rules. The substance of the final rules should also reflect an appreciation of the limits on the Commission's staff resources as well as the limitations on the

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[9] *Small Refiner Lead Phase-Down Task Force v. EPA,* 705 F.2d 506, 547 (D.C.Cir.1983).

[10] Failure to issue a new proposed rule will result in the final rule, or a portion thereof, being vacated by the court. *See, e.g. International Union, et al., v. MSHA*, 407 F.3d 1250 (D.C. Cir 2005)(court vacating portion of final rule for failure to be a "logical outgrowth" of proposed rule). The comments of other interested persons do not satisfy an agency's obligation to provide notice. See *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985).

[11] Other agencies have issued supplemental proposed rules to avoid notice problems when adopting proposals advanced in comments that were not within the scope of an original proposed rule. See, e.g., Blanket Authorization Under FPA Section 203, 73 Fed. Reg. 11,003 (Feb. 29, 2008)(Order No. 708), order on reh'g, 73 Fed. Reg. 43,066 (July 24, 2008) (Order No. 708-A), order on reh'g, 74 Fed. 25,410 (May 28, 2009) (Order No. 708-B), Pipeline Posting Requirements under Section 23 of the Natural Gas Act, FERC Stats. & Regs. ¶ 31,283 (Nov. 20, 2008) (Order No. 720), order on reh'g, FERC Stats. & Regs. ¶ 31,302 (Jan. 21, 2010) (Order No. 720-A), order on reh'g, FERC Stats. & Regs. ¶ 31,314 (Jul. 21, 2010) ("Order No. 720-B")

[12] *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1981).

resources of those who will have to comply with the rules if such rules are implemented in a compressed timeframe.

B. Proposed Rule Sequencing

- Step 1: Issue the Definitional Rules

As with all other regulatory regimes, the starting point is to determine who and what is being regulated. The Dodd-Frank Act sets forth myriad requirements and obligations that apply to "Swaps", "Swap Dealers", "Major Swap Participants" and non-financial entities. The Dodd-Frank Act included definitions of these terms but also recognized these definitions were incomplete and afforded the Commission discretion on how to further define these key terms, by directing the Commission to issue final rules providing final definitions. Therefore, as a threshold matter, entities need certainty as to which category they may belong-- Swap Dealer, Major Swap Participant, or non-financial entity. At the same time the Commission must define what a "Swap" is and what it is not, as this is the foundation upon which all of Title VII of the Dodd-Frank Act rests upon. Concurrent with the issuance of the final rules defining "Swap", "Swap Dealer", "Major Swap Participant" and other key definitional terms the Commission can also make the rules prohibiting anti-disruptive trading practices and market manipulation effective.[13]

- Step 2: Issue the Registration, Governance, Business Standards Requirements and Capital and Margin Rules

Once entities know that they are Swap Dealers or Major Swap Participants, they will know that they are required to register and must adopt certain governance requirements. These entities also need to adopt and implement the required business conduct standards. The Commission should also finalize the registration and governance requirements for Derivatives Clearing Organizations ("DCO"), Designated Contract Markets, Swap Data Repositories, and Swap Execution Facilities, as it will be extremely difficult to clear and report swaps without these entities in place and functioning. The Commission will also need to issue the final rule for Capital and Margin as it will be instrumental in determining whether an entity wants to conform to being a Swap Dealer or exit such business.

[13] NextEra would encourage the Commission to also define or further define, as applicable, other terms in the Dodd-Frank Act that are essential for implementation, such as "Eligible Contract Participant."

- Step 3: Issue the Clearing Requirements Rules

Once the necessary structure is in place, the Commission can issue the final rules that will permit swaps to be cleared. Included within this step would be the final rules governing the end-user exception. The Commission might also issue the final rules governing position limits to the extent found necessary to ensure the orderly process for clearing swaps. NextEra further recommends that the Commission initially not require all swaps to be cleared. Certain swaps almost by definition cannot be cleared and should therefore be exempted from the mandatory clearing requirement. We believe that the Dodd-Frank Act recognizes and provides for this outcome.[14] After exempting such swaps from the clearing requirement, the Commission should stage the application of the rule – first to those contracts that are currently offered for clearing, significant price discovery contracts and new swaps offered by facilities. This will allow the Commission to revise the new rules to the extent required as the Commission and the market place gain experience with clearing swaps. Subsequently, the Commission could then assess the types of swaps subject to clearing and the operation of its clearing rules. For example, the Commission could hold a technical conference a year after the effective date of rules governing clearing to explore such issues.

- Step 4: Issue the Reporting and Record-Keeping Standards

With the regulatory regime now largely in place, the Commission can issue Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, Reporting Certain Post-Enactment Swap Transactions, Swap Data Recordkeeping and Reporting Requirements, and Real-Time Public Reporting of Swap Transaction Data.

- Step 5: Issue Ancillary Rules and Necessary Discretionary Rules

The final rules that the Commission should issue are those that are not expressly required under the Dodd-Frank Act and are thereby elective.[15] In addition to distracting the Commission from its more important goal of issuing the final rules required by the Dodd-Frank Act, it is not known at this time whether these elective rules are even necessary. NextEra submits that as the swaps markets continue to evolve under the effects of the Dodd-Frank Act and the Commission

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[14] New Section 2(h)(2)(D)(ii) of the Commodity Exchange Act requires the Commission to consider a number of factors when determining whether a swap should be subject to mandatory clearing, including "the existence of significant notional exposures, trading liquidity and adequate pricing data."

[15] These rules would include the Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, Removing Any Reference to or Reliance on Credit Ratings in Commission Regulations; Proposing Alternatives to the Use of Credit Ratings, Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants.

gains experience in these markets it will become apparent what additional rules should be promulgated. The Commission should not risk inhibiting the orderly formation of the new swaps markets based on speculation or on its surmise as to what rules might be needed above and beyond clear congressional intent.

C. Timeframe for Sequencing

NextEra is not sure that anyone is in a perfect position to recommend firm timeframes for when each of the suggested steps above should be done or how much time should be given after the rules are finalized before implementation is required. The rulemaking process is iterative, and the timeframes will become known as the process unfolds. Nonetheless, NextEra believes that the Commission may be able to implement some of the key necessary rules within one year of the effective date of the Dodd-Frank Act, i.e., by July 2012. This one-year implementation process is fully consistent with the Dodd-Frank Act, as Congress has given the Commission the authority to grant market participants a one-year exemption from the new rules for bilateral exempt commodity transactions.[16] NextEra recommends that the Commission issue a final rule prior to July 15, 2011 granting a one year blanket exemption for those entities which engage in bilateral exempt commodity transactions.[17]

V. The Commission's Rulemakings Must Be the Product of Reasoned Decisionmaking and Therefore the Commission Has Flexibility in the Timing and Sequencing of Final Rules Implementing the Dodd-Frank Act

As various members of the Commission have often stated, the blistering pace at which the Commission is issuing proposed rules is all aimed at one goal--meeting the one-year deadline in the Dodd-Frank Act for establishing a comprehensive regime for regulation of swaps.[18] Yet, meeting the statutory deadlines in the Dodd-Frank Act by itself provides no assurance that the Commission's final rules are not arbitrary and capricious and will withstand judicial review. That will depend entirely on an assessment by a reviewing court as to whether the agency took care to engage in reasoned decisionmaking and make decisions rooted in the record that reflect sound economic theory.

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[16] *See* Dodd-Frank Act, Section 723(c)(1). NextEra filed a petition with the Commission requesting this exemption.

[17] The Commission has left open this possibility in its Notice acting on the exemption petitions. *See Notice Regarding the Treatment of Petitions Seeking Grandfather Relief for Trading Activity Done in Reliance Upon Section 2(h)(1)-(2) of the Commodity Exchange Act*, 75 Fed. Reg. 56513 (September 16, 2010).

[18] It bears mention that the Commission has already missed several of the statutory deadlines in the Dodd-Frank Act, including setting position limits and entering into the Memorandums of Understanding with the Federal Energy Regulatory Commission.

The fundamental duty of a federal agency under the APA is to engage in reasoned decisionmaking. If a statutory schedule established by Congress does not allow an agency to engage in reasoned decisionmaking, the agency has a duty to issue rules and regulations on a different schedule.[19] The Commission need not feel compelled to rush to meet the statutory deadlines for implementing the complex new regulatory regime Congress has tasked it with, but rather should move in a more deliberate manner that ensures the regulations it promulgates are not arbitrary and capricious, allows a consideration of the relevant factors, and articulates a "rational connection between the facts found and the choice made."[20]

As a legal matter, there is ample case law, more specifically discussed below, that supports an agency missing a statutory deadline for a rulemaking or failing to take other required action mandated by statute for a considerable length of time without repercussion. This is particularly true when an agency is engaged in complex rulemakings, faced with the challenge of limited agency resources, and needs to act with due diligence, which fairly characterizes the situation confronted by the Commission. In recent years there are numerous instances where federal agencies have missed statutory deadlines for promulgating rules without any adverse consequences.

As many have observed, the statutory schedule for rulemakings in the Dodd-Frank Act is not ideal to say the least. The Commission has been encouraged to issue its final rules in a sequence different than that envisioned by Congress, a sequence that is more rational and more workable.[21] If the Commission declines to do so, it may subject itself to arguments that it is arbitrary and capricious to issue proposed or final rules that apply to "Swap Dealers""Major Swap Participants" before defining those terms.[22] Just as case law suggests the Commission is not bound by the statutory deadlines in the Dodd-Frank Act, the agency has discretion to issue its

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[19] *See, e.g., Chlorine Chemistry Council v. EPA*, 206 F.3d 1286 (D.C. Cir. 2000)(court vacating agency rule issued to meet statutory deadline prior to obtaining evidence relied upon for rule).

[20] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (internal cites omitted).

[21] *See* Comments of Working Group of Commercial Energy Firms on Rulemakings for Swap Execution Facilities under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act at 5 (Nov. 19, 2010)(suggesting open comment period for all rules promulgated under Section VII); Letter from American Bankers Association, *et al*., re: Comment Periods and Implementation of New Derivatives Regulations at 2 (Dec. 6, 2010)(recommending comment periods for rules be extended to match deadlines for proposed rules subsequently defining terms); Letter from Reps. Spencer Bachus (R-AL) and Frank Lucas (R-OK) at 3 (Dec. 16, 2010)(encouraging Commission "to carefully deliberate and take the time necessary to ensure that implementation of the Act's major overhaul of the derivatives market is done correctly the first time.").

[22] The Commission has issued over 30 proposed rules pursuant to Title VII of the Dodd-Frank Act while still not issuing the proposed rule defining "Swap."

rules on a different schedule than provided for in the Act. For example, the Commission has discretion to finalize the definitions of key terms before issuing major final rules.

Assuming that the Commission were not to issue regulations in accordance with the statutory deadlines contained in the Dodd-Frank Act, if someone or some entity were to complain that the rulemakings are being unduly delayed then the remedy they would have to seek would be an action for a writ of mandamus to force the agency to act. The legal basis for a party seeking a writ of mandamus would be to "compel agency action unlawfully withheld or unreasonably delayed" pursuant to the APA.[23] In the context of a claim of unreasonable delay (the relevant factor for a rulemaking), the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus. *See Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). In *TRAC*, the court set forth a multi-part standard for when the writ should issue:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed'." 750 F.2d at 80.

With respect to the second factor, the court has further held that even when an agency has not met a statutory mandate, the court still needs to balance the TRAC factors to determine whether the agency unreasonably delayed its required action.[24] In other words, simply missing the statutory deadline for issuing a final rule does not result in an unreasonable delay and hence a violation of the APA that gives rise to a remedy. Applying these factors in TRAC, the court declined to order the agency to act, noting that it has "no basis for reordering agency priorities" and observing that doing so would interfere with the agency's resource allocation process.[25]

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[23] 5 U.S.C. § 706(1) (2011).

[24] *In re Barr Laboratories, Inc*., 930 F.2d 72, 74 (D.C. Cir. 1991).

[25] *Id*. at 76. The issue of limited resources, as well as other agency prudential concerns, was further considered when examining whether a delay is unreasonable in *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003)([a delay] cannot be considered in the abstract, by reference to some

Given the complexity of the task facing the Commission with implementation of the Dodd-Frank Act and the limited resources available to the agency, the case law strongly supports the proposition that the Commission should focus on getting the rules right rather than rigid adherence to statutory deadlines.[26]

Moreover, the other *TRAC* factors weigh in favor of a Commission delay in issuing effective rules: (1) the rules are in the sphere of economic regulations and there is no human health or welfare at stake; (2) certain of the rules, or the Commission's existing obligations, will have a higher or competing priority than other statutory rulemakings; (3) there are no interests prejudiced by a relatively brief delay; and (4) there certainly is no impropriety on the part of the Commission in completing the rules, if, despite its extraordinary efforts, it simply cannot do as much as Congress has asked it do in such a short time, while discharging its duty to engage in reasoned decisionmaking.[27] In this case the Commission is unlikely to invoke the ire of a court for engaging in deliberate and reasoned rulemaking, one that reworks the regulatory structure of all the swap markets at the same time involving multiple prudential regulators in addition to the Commission.

There are many examples where agencies have not met the required statutory deadlines for issuing rules. The U.S. Environmental Protection Agency missed over 60 percent of the statutory deadlines imposed by the Clean Air Act Amendments of 1990 (91 of 145 statutory guidelines), many by several years.[28] The Department of Energy missed every one of the 34 statutory deadlines for setting energy efficiency standards for various consumer products and industrial equipment categories pursuant to the Energy Policy and Conservation Act

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number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part…upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency).

[26] This does not mean that the *TRAC* test is insurmountable, as the test was met in two cases where an agency failed to issue required rules; however, in these cases the statutory deadlines were missed by many years. *See In re Bluewater Network*, 234 F.3d 1305 (D.C. Cir. 2000)(Coast Guard failed to issue regulations required under Oil Pollution Act more than 8 years after statutory deadline and the court directed the agency to promptly undertake the required rulemaking); *In re United Mineworkers of America International Union*, 190 F.3d 545 (D.C. Cir. 1999)(Mine Safety and Health Administration failed to issue final rule more than 7 years after statutory deadline and court required agency to keep court informed of its efforts to finalize the rule).

[27] The district court has also applied the *TRAC* test in cases where an agency has withheld action on an adjudicative matter, with differing outcomes, but in all cases delays that were multiple years. *See Liberty Fund, Inc. v. Chao*, 394 F.Supp.2d 105 (D.D.C. 2005)(court declined to order Department of Labor to act on visa work permit applications pending for 2-4 years); *Sandoz, Inc. v. Leavitt*, 427 F.Supp.2d 29 (D.D.C. 2006)(ordering FDA to act on drug application pending for more than 2 years where statute requires action in 180 days).

[28] *See* GAO Report, *Clean Air Rulemaking --Tracking System Would Help Measure Progress of Streamlining Initiatives*, March 1995, GAO/RCED-95-70.

Amendments, including in some cases by more than 10 years.[29] The delays in the cases mentioned above entailed timeframes that will be far beyond anything that might be needed by the Commission to allow for reasoned decision making in Commission implementation of the Dodd-Frank Act. Unlike these other agencies, the Commission is fully engaged in the rulemaking process, it just needs more time than Congress allowed to get the rules right and the Commission should take the time to get the rules right.

VI. The Commission Should Promulgate Procedural Rules to Govern Reconsideration and/or Clarification of the Final Rules Implementing the Dodd-Frank Act

It is our understanding that the Commission's Dodd-Frank Act rulemaking process will not include a process for seeking reconsideration or clarification of the final rules (no process currently exists in the Commission's regulations). Unlike the Federal Power Act, Natural Gas Act and other federal statutes that confer authority on regulatory agencies, the Commodity Exchange Act does not have a rehearing requirement with respect to these types of rules and the Dodd-Frank Act did not provide for such a requirement. Thus, the final rules could be considered by some entities to be final agency action and subject to judicial review.

Yet, when the Commission's final rules would be subject to judicial review is also a matter of uncertainty, as the courts require that a party exhaust its legal remedies before seeking judicial review.[30] Exhaustion concerns apply with particular force when the action under review involves exercise of an agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise.[31] The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.[32] Thus, the courts have indicated that a party should seek reconsideration before an agency even

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[29] *See* GAO Report, *Energy Efficiency—Long-standing Problems with DOE's Program for Setting Efficiency Standards Continue to Result in Foregone Energy Savings*, January 1997, GAO-07-42.

[30] *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)(exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.)

[31] *See McKart v. United States*, 395 U.S. 185, 194 (1969).

[32] *Supra*, note 30.

when the statute under which such authority is being undertaken lacks a reconsideration requirement.[33]

Accordingly, in light of the lack of an express requirement for rehearing in the Commodity Exchange Act and the prudential exhaustion requirement, the Commission should implement procedural rules prior to the issuance of the final rules to permit interested persons to seek reconsideration or clarification of the final rules and make doing so a requirement for persons seeking judicial review of the final rules. Doing so would result in advantages to both the Commission and the market place, as discussed below. Moreover, these procedural rules would fall under an APA exception to notice and comment rulemaking and could be adopted in an immediate final rule, causing no delay in the issuance of final rules under the Dodd-Frank Act.

A reconsideration requirement can limit the issues and arguments raised on judicial review to those presented to the Commission on reconsideration and can potentially limit the standing of entities seeking review to those who sought reconsideration. The opportunity for clarification is also an advantage, as it can resolve an issue that merely requires clarification without the need for resort to judicial review. A reconsideration requirement will further permit development of a more complete record for the Commission to demonstrate reasoned decisionmaking to the court. Finally, such a requirement would prevent an entity from seeking judicial review of final rules until the Commission acts on reconsideration. Reconsideration, therefore, focuses the Commission's attention on possible defects in final rules, and provides an opportunity to correct those flaws before judicial review. By further developing the record and providing a means to correct defects in final rules, allowing reconsideration will produce higher quality rules that have a greater chance of surviving judicial review and providing the regulatory stability that all market participants desire.

A reconsideration requirement also provides substantial benefits to market participants by reducing regulatory uncertainty regarding the final outcome of rules. Costs to comply with the new regulatory regime may also decrease, as a reconsideration requirement increases the likelihood that final rules will reflect reasoned decisionmaking and, conversely, reduces the likelihood that final rules will be vacated. Compliance may be far easier (and less costly) if the final rules are more clear and definitive than the rushed proposed rules have been. Lastly, a clarification requirement promotes efficiency as it eliminates the need to seek judicial review for minor issues or clarifications that can be remedied on clarification or reconsideration.

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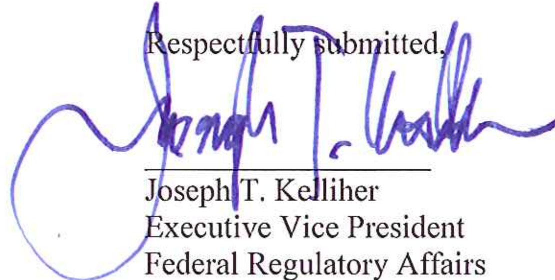
[33] *See e.g., Tesoro Refining and Marketing Co. v. FERC*, 552 F.3d 868, 872 (D.C. Cir. 2009)(court finding that petitioner failed to exhaust its administrative remedies and suggesting petitioner could have done so by requesting rehearing, notwithstanding lack of rehearing requirement in Interstate Commerce Act).

VII. Conclusion

NextEra supports tailored regulation that brings transparency and stability to the swap markets in the United States. We appreciate the balance the Commission must strike between effective regulation and not hindering the uncleared energy-based swap markets. In order to strike this balance, NextEra strongly recommends that the Commission (1) extend and re-open comment periods on core substantive rules until after the final definitional rules are issued; (2) adopt a sequenced order for implementing the final rules required under the Dodd-Frank Act; (3) issue supplemental proposed rules in areas where comments have raised superior alternative approaches that are not logical outgrowths of the Commission's proposed rules; and (4) adopt procedural rules to permit reconsideration and clarification of the final rules.

Please let me know if you have any questions or would like additional information.

Respectfully submitted,



Joseph T. Kelliher
Executive Vice President
Federal Regulatory Affairs

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Dan Berkovitz, General Counsel