June 3, 2011

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

RE: RIN No. 3038-AD00—Comments on Proposed Rulemaking Regarding Process for Review of Swaps for Mandatory Clearing, 75 Fed. Reg. 67,277 (Nov. 2, 2010)

The National Corn Growers Association ("NCGA") and the Natural Gas Supply Association ("NGSA") submit the following comments in response to the Notice of Proposed Rulemaking, Process for Review of Swaps for Mandatory Clearing, 75 Fed. Reg. 67,277 (Nov. 2, 2010) (the "NPRM") recently 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").

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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 limit the hedging tools available to corn producers and to impede what is and has been a healthy, competitive, and resilient natural gas market, NCGA and NGSA played an active role in the shaping of the Act during its passage and wish to continue this role in ensuring the Act's successful implementation.

COMMENTS

I. TO PROVIDE REGULATORY CERTAINTY REQUIRED FOR LONG-TERM INVESTMENT IN PHYSICAL INFRASTRUCTURE, THE COMMISSION SHOULD INCLUDE RULE PROVISIONS ACKNOWLEDGING THAT SWAPS THAT ARE ILLIQUID BY VIRTUE OF THEIR LONG TERMS SHOULD NOT BE SUBJECT TO MANDATORY CLEARING.

While the Commission's proposed rule focuses on the *processes* for reviewing whether particular swaps or groups of swaps should be required to be cleared, the Commission should take this opportunity to provide regulatory certainty to market participants regarding application of the Act's *review criteria* to long-term swaps, such as those used to hedge the risk of long-term investments in physical infrastructure. Specifically, the Commission should acknowledge in its final rule that swaps that are not liquid over their full terms should not be required to be cleared because such swaps do not meet the Act's requirement of "trading liquidity" for swaps to be subject to the mandatory clearing requirement. In particular, the Commission should acknowledge that it will not require illiquid long-term swaps to be "split up" into various components in order to extract one or more clearable components, since the Act provides no authority for such a requirement. By making these acknowledgments in the final rule, the Commission will provide important regulatory certainty to businesses that depend on the use of such swaps to hedge risk associated with their long term investments in physical infrastructure.

Congress recognized in the Dodd-Frank Act's mandatory clearing provisions that swaps that are, by nature, customized, such as those that are illiquid by virtue of their long terms, should not be subject to mandatory clearing:

> [C]learing may not be suitable for every transaction or every counterparty. End users who hedge their risks may find it challenging to use standard derivative contracts to exactly match up their risks with counterparties willing to purchase

> their specific exposures. Standardized derivative contracts may not be suitable for every transaction.[1]

For this reason, Congress identified a number of criteria in section 2(h)(2)(D)(ii) of the CEA for determining whether a swap is sufficiently standardized to be suitable for mandatory clearing or essentially customized and thus not suitable for mandatory clearing. One central criterion identified in section 2(h)(2)(D)(ii)(I) for this determination is "trading liquidity," *i.e.*, the existence of a market or markets in which a particular swap or group of swaps can be bought or sold with relative ease. Congress recognized that required clearing of illiquid swaps would be inefficient and harmful to the market for such swaps and thus identified trading liquidity as a criterion that must be applied in a review of whether or not a swap or group of swaps should be required to be cleared.

Where swaps are illiquid by virtue of their long terms, even greater reason exists to not subject them to mandatory clearing. Such swaps are particularly important to physical commodity-based industries in supporting long-term investments in physical infrastructure, such as production and pipeline capacity in the natural gas industry. Such industries are key to the country's economic growth and prosperity and were not responsible for the financial crisis that led to the passage of the Dodd-Frank Act. Because of the important role long-term swaps play in such industries and because of the Act's explicit recognition of trading liquidity as a requirement for mandatory clearing, these illiquid long-term swaps must not be subjected to mandatory clearing and the associated capital and margin requirements that would otherwise threaten to tie up working capital from beneficial investment:

> It is imperative that the regulators do not unnecessarily divert working capital from our economy into margin accounts, in a way that would discourage hedging by end users or impair economic growth . . . . Congress recognized that imposing the clearing and exchange trading requirement on commercial end-users could raise transaction costs where there is a substantial public interest in keeping such costs low (*i.e.*, to provide consumers with stable, low prices, promote investment, and create jobs.)[2]

To provide the market certainty required for such beneficial investment in physical infrastructure, the Commission should explicitly acknowledge in its proposed rule that swaps that are illiquid by virtue of their long terms will not be subject to mandatory clearing. In particular, the Commission should acknowledge that a swap must be liquid over its whole term to be required to be cleared and that the Commission will not require long-term swaps to be "split up" into various components in order to extract a clearable swap or swaps from an otherwise unclearable swap. No statutory authority exists for such a requirement, and such a requirement would unnecessarily add to transaction costs and create transactional uncertainty among market participants.

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[1] Letter from Sen. Christopher Dodd and Sen. Blanche Lincoln to Rep. Barney Frank and Rep. Colin Peterson 2 (June 30, 2010).
[2] *Id.* at 1-2.

II. THE COMMISSION SHOULD CLARIFY THAT ANY DETERMINATION THAT A SWAP IS REQUIRED TO BE CLEARED WILL BE GIVEN PROSPECTIVE APPLICATION ONLY.

Finally, one other clarification the Commission should include in its final rule is an acknowledgment that, after the Act's mandatory clearing provisions go into effect, a determination that a swap is required to be cleared will not apply retroactively to swaps that are open as of the date of such determination. The Act itself indicates that the clearing requirement should only apply prospectively. *See* CEA § 2(h)(1)(A) ("It shall be unlawful for any person *to engage* in a swap unless that person submits such swap for clearing . . . if the swap is required to be cleared.") (emphasis added); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) ("Retroactivity is not favored in the law. . . . [A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). Retroactive application would impose substantial undue logistical burdens and transactional costs on market participants by requiring them to reexamine their portfolios each time a new determination is made and then arrange with counterparties to have affected swaps transferred for clearing. Therefore, a determination by the Commission that a swap is required to be cleared should only be applied to swaps that are executed after the applicable determination is made.

CONCLUSION

The Dodd-Frank Act requires that illiquid swaps, including swaps that are illiquid by virtue of their long terms, shall not be subject to mandatory clearing. By acknowledging this in its final rule, the Commission will ensure consistent application of the swap review criteria, thereby providing valuable market certainty that will promote beneficial investment in physical infrastructure in the natural gas and other physical commodity-based industries. The Commission should also clarify in the final rule that any determination that a swap is required to be cleared will, consistent with the Act, be applied only to swaps that are executed after the applicable determination is made.

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

Sincerely,

National Corn Growers Association
Natural Gas Supply Association