energy API

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Submitted Electronically

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

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

Dear Mr. Stawick:

The American Petroleum Institute ("API") submits these comments in response to the notice of proposed rulemaking ("NOPR") issued by the Commodity Futures Trading Commission (the "Commission") concerning real-time reporting of swap transaction data under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1]

API is a national trade association representing more than 450 oil and natural gas companies. API's members transact in physical and financial, exchange-traded, and over-the-counter markets primarily to hedge or mitigate commercial risks associated with their core business of delivering energy to wholesale and retail consumers. Associated with the hedging of physical exposures, API members enter into swap transactions to offset credit risks and to facilitate physical transactions. API members range from the largest major oil company to the smallest of independents. They are producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. Because API members rely on the integrity of markets under the Commission's jurisdiction, we appreciate the opportunity to comment.

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[1] Pub. L. No. 111-203, 124 Stat. 1376 (2010). The proposed rules are set forth in Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76,140 (proposed Dec. 7, 2010) (to be codified at 17 C.F.R. pt. 43). On May 4, 2011, the Commission reopened the comment period for this proposed rulemaking. *See* Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 25,274 (May 4, 2011).

I. Introduction

API supports the Commission's commitment to transparency and efficient price discovery in the markets on which API members rely to hedge risk. API also understands that Dodd-Frank and the proposed rules related to real-time reporting contemplate that the majority of cleared swaps will be reported by the derivatives clearing organizations, swap dealers, or major swap participants. However, API is concerned about the effects of rigid real-time reporting requirements on all swaps, even those that are uncleared or do not involve either a swap dealer or major swap participant. Like other end users, API members are concerned that the significant costs of requiring real-time reporting of the small number of uncleared, end-user-to-end-user swaps far outweighs any price discovery benefit.

API believes that Dodd-Frank gives the Commission sufficient flexibility to balance the concerns of end users against the goal of price transparency. Accordingly, API urges the Commission to consider the following changes to the proposed rules:

- Except for certain transition swaps, Dodd-Frank does not require real-time reporting of swaps that are not cleared or required to be cleared, and the Commission should not impose such a requirement.
- With respect to end users and uncleared swaps, the costs of real-time reporting outweigh the benefits.
- If the Commission insists on real-time reporting, it should clarify that:
    - End users may report swap data on the next business day following execution, and
    - There will be a standard form for reporting data that will consist of no more information than end users currently collect in the ordinary course of business.

II. Dodd-Frank Does Not Require Real-Time Reporting of Bespoke, Uncleared Swaps

Although Dodd-Frank contemplates reporting of all swaps,[2] it does not require all swaps to be reported in real-time. Rather, in imposing real-time reporting requirements, Dodd-Frank distinguishes between cleared and uncleared swaps. Section 727 of Dodd-Frank authorizes the Commission to require real-time public reporting of (1) swaps subject to

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[2] *See* 156 Cong. Rec. S5920 (daily ed. July 15, 2010) (statement of Sen. Lincoln) ("The major components of the derivatives title include: 100 percent reporting of swaps and security-based swaps . . . .").

mandatory clearing (including swaps excepted under the end-user clearing exception); (2) swaps not subject to mandatory clearing but nevertheless cleared; (3) uncleared swaps reported to a swap data repository under Section 2(h)(6) of the Commodity Exchange Act ("CEA"), which in turn prescribes "transition rules" for swaps entered into before enactment and before application of the clearing requirement; and (4) swaps determined to be required to be cleared, but not cleared.[3] Nothing in Section 727 authorizes real-time reporting of bespoke swaps entered into after Dodd-Frank is effective that are not required to be cleared. These swaps must be reported, but not in real time.[4] API therefore disagrees with the Commission's view that "the four categories described in Section 2(a)(13)(C) of the CEA cover all swaps and, therefore, the real-time reporting requirements apply to all swaps."[5] Reporting obligations attach to all swaps, but *real-time* reporting obligations generally attach only to those swaps that are subject to the mandatory clearing requirement or are voluntarily submitted for clearing.

III. End Users Should Not Be Required to Report Uncleared Swaps in Real Time Because the Costs to End Users Far Outweigh Any Regulatory Benefit

Dodd-Frank's distinction between reporting of cleared and uncleared swaps reflects Congress's determination that the costs and benefits of real-time reporting are different for uncleared swaps and end users. The purpose of real-time public reporting is "to enhance price discovery."[6] As other commenters have observed, the price discovery benefits of reporting uncleared swaps are questionable. Unlike for cleared transactions, the price of uncleared transactions often reflects assessments of counterparty credit risk. Thus, the price of uncleared transactions is unlikely to provide useful information, because the market will not be able to interpret the price absent information compromising the counterparties' confidentiality.

Further, the universe of swaps that must be reported by end users is likely to be small. Dodd-Frank contemplates that most swaps will be reported by derivatives clearing organizations, swap dealers, and major swap participants.[7] These entities must therefore have the technological infrastructure and personnel to make real-time reports of swap transaction data. End users, on the other hand, will have to report uncleared swaps with other end users.[8] These transactions are likely to be complex, bespoke transactions with price risks unique to the

[3] Dodd-Frank § 727 (CEA § 2a(13)(C)).

[4] *See id.* § 729 (CEA § 4r(a)).

[5] NOPR, 75 Fed. Reg. at 76,141.

[6] Dodd-Frank § 727 (CEA § 2(a)(13)(B)) ("The purpose of this section is to authorize the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.").

[7] *See id.* § 729 (CEA § 4r(a)(3)).

[8] *See id.* (CEA § 4r(a)(3)(C)).

counterparties and therefore are unlikely to provide significant additional price discovery benefits.

Although the benefits of real-time reporting of uncleared swaps are uncertain, the costs would be substantial. End users typically lack the technology or staff necessary to make real-time reports to various swap data repositories. To comply with the Commission's real-time reporting requirements, end users will be forced to make substantial investments in new technology and new staff not justified by any price discovery benefit. Absent further explanation of the need for real-time reporting of uncleared, end-user transactions, the Commission should not impose new costs that are neither mandated by Dodd-Frank nor justified by regulatory benefits.

In light of the substantial costs and speculative benefits, API urges the Commission to clarify that the real-time reporting requirement will not apply to uncleared swaps that must be reported by end users.

IV. If the Commission Proceeds with Real-Time Reporting for End Users, It Should Require Next Day Reporting Based on a Standard Form

If the Commission does propose to require real-time reporting of uncleared swaps by end users, it should still seek to avoid unwarranted costs. As many market participants observed in comments already submitted concerning this rulemaking, end users should be able to report on the next business day following execution of the swap. API joins these market participants in urging the Commission to consider the reality of how these transactions occur in the marketplace, and to clarify that any real-time reporting requirement will be satisfied by next day reports by end users.

API members, like other market participants, often do not have data available for reporting until the next business day. Particularly for end-user-to-end-user transactions, many API members manually enter transactions into deal capture systems at the end of the day. Further, confirmations of transactions may not be received until the next day. Market participants should not be required to report the terms of the trade before those terms have been finalized.

Further, to avoid unnecessary burdens on end users, the Commission should develop standardized templates that end users could employ to satisfy their reporting obligation. These reports should not include more data than end users currently collect with respect to uncleared swaps in the normal course of their business. For example, API believes that a form consisting of product, counterparty, pricing, notional quantity, and term would be consistent with current recordkeeping practices. Ultimately, API believes that end users should not be forced to incur additional costs in developing new protocols or in connecting to divergent reporting systems to fulfill their new obligations. Especially for transactions between end users, API believes there will be little benefit to offset the significant cost of requiring immediate reporting of transaction information.

V. Conclusion

For the reasons described in these comments, API is concerned that proposed real-time reporting rules will impose significant burdens on end users, who will have to undertake significant expenditures in technology and staff to comply with a real-time obligation. This result will raise the costs of derivative transactions to end users. And, in the case of API members, these new expenses will ultimately result in higher energy costs for American consumers.

Dodd-Frank does not compel such a result. To the contrary, Dodd-Frank distinguishes between uncleared, bespoke, end-user swaps and cleared swaps in imposing real-time reporting obligations. The Commission should do the same. The additional price discovery benefit of real-time data is not as significant in the context of uncleared swaps, and the costs to end users are too high. If the Commission does retain a real-time reporting requirement for end users, it should nevertheless avoid unwarranted costs by requiring next day reports that could be satisfied by a user-friendly, standard form.

API appreciates the opportunity to provide these comments. We would be pleased to provide additional information regarding our views on the proposed rule, and would welcome the opportunity to work with the Commission.

Sincerely yours,

Kyle B. Isakower
Vice President
Regulatory and Economic Policy
American Petroleum Institute

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