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

VIA ELECTRONIC MAIL

Re: *Definitions and Required Rulemakings Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act - Definition of Futures Commission Merchant, Floor Broker, and Floor Trader*

Dear Secretary Stawick:

On behalf of the Working Group of Commercial Energy Firms (the "Working Group"), Hunton & Williams LLP hereby submits this letter concerning the definitions of "Futures Commission Merchant," "Floor Broker," and "Floor Trader" under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").

The Working Group 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. Members of the Working Group include energy producers, marketers and utilities. The Working Group considers and responds to requests for public comment regarding legislative and regulatory developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

The Working Group appreciates the opportunity to submit these comments and looks forward to working with the Commodity Futures Trading Commission (the "Commission" or "CFTC") to further clarify the definitions of Futures Commission Merchant, Floor Broker, and Floor Trader as part of the formal rulemaking process for implementing Title VII.

I. COMMENTS OF THE WORKING GROUP OF COMMERCIAL ENERGY FIRMS.

A. FURTHER DEFINITION OF "FUTURES COMMISSION MERCHANT."

1. Commercial Firms that Accept Collateral from Counterparties on a Limited Basis Should Not Fall Within the Definition of "Futures Commission Merchant."

The definition of Futures Commission Merchant ("FCM") in new CEA Section 1a(28) should be further defined by the Commission so as to avoid capturing entities not intended by Congress to be regulated as an FCM. For example, new Section 1a(28) could be broadly interpreted as covering commercial firms, including derivatives end users and other non-intermediary traders, that transact Swaps in private over-the-counter ("OTC") markets simply because they accept collateral as margin from their counterparties on a limited basis.

The Working Group respectfully requests that the Commission refrain from taking an expansive interpretation of the definition of FCM. Rather, when applied to Swap markets, new CEA Section 1a(28) should only cover an entity (i) whose predominate business activity is soliciting or accepting orders for Swaps, and (ii) who clearly functions in an intermediary capacity between a customer and a Swap Execution Facility ("SEF") or a clearinghouse that actually executes or clears Swap transactions.

Commercial firms transact in Swap markets with counterparties on a principal-to-principal basis. They do not, as a general matter, transact for the benefit of, or provide services to, customers and thus do not act as intermediaries. Title VII expressly contemplates the intermediary role of FCMs. For instance, Section 724(a) of the Act requires any person that accepts collateral in connection with a Swap cleared by a derivatives clearing organization to register as an FCM. Importantly, however, Section 724(c) clearly acknowledges the principal-to-principal nature of uncleared Swaps and does not require a person who accepts collateral in connection with such Swaps to register as an FCM.

Moreover, unlike FCMs in futures markets, commercial firms typically are not members of an exchange or a clearinghouse. When commercial firms transact on a principal-to-principal basis and agree to centrally clear a trade, each counterparty to that transaction is responsible for satisfying its own initial and variation margin requirements directly with the clearinghouse. The counterparties to such transactions do not accept and hold collateral on behalf of the other for purposes of satisfying their counterparty's margin requirements with the clearinghouse. Because neither counterparty accepts collateral from the other as margin for posting to the clearinghouse, they do not owe any fiduciary obligation to the other and, as a result, should not fall within the definition of an FCM.

In private OTC markets for Swaps, credit support arrangements that govern principal-to-principal transactions involving commercial counterparties are generally highly negotiated.

Although collateral may be posted directly to the other counterparty when certain credit thresholds and exposures are reached, such collateral is generally held in escrow by an unaffiliated third party. In those limited instances in which a counterparty directly holds collateral posted to it, the underlying master trading agreement and related transaction documentation specifies the legal rights and obligations of the parties with regard to such collateral. Even under this scenario, the counterparties do not take an intermediary role or owe the other any fiduciary obligation and, therefore, should not fall within the definition of an FCM.

If the Commission adopts an overly expansive definition of an FCM, commercial firms and other non-intermediary traders would be subject to the registration, reporting and capital requirements applicable to FCMs. In light of the foregoing, the imposition of such requirements on commercial firms, including derivatives end-users, and other traders that accept margin on a limited, non-clearing related basis is unnecessary and will disrupt the efficient operation of Swap markets, particularly energy markets, by having a chilling effect on liquidity.

2. <u>The Definitions of "Futures Commission Merchant" and "Swap Dealer" Should Be Mutually Exclusive</u>.

Further, the definition of an FCM should be interpreted by the Commission in a manner that is mutually exclusive of the definition of "Swap Dealer" set forth in new CEA Section 1a(49). FCMs and Swap Dealers play distinct roles in Swap markets. Although each entity is an intermediary and acts on behalf of customers, intermediation activities by FCMs are oriented specifically towards the technical aspects of trade execution and satisfying clearing requirements applicable to their customers. In contrast, Swap Dealers are actual, active participants in Swap markets. Further, Swap Dealers are entities that engage in usual and necessary activity that is normal and incidental to dealing activity, such as quoting a market in or publishing quotes for Swaps, trading Swaps for the benefit of unaffiliated third parties, or providing services that market professionals or the public look to for liquidity.

The Working Group recognizes that a single entity could engage in activities that require its registration as both a Swap Dealer and an FCM. The Commission should deem these entities as being separate and distinct for definitional purposes. Doing so explicitly recognizes that not all Swap Dealers will accept margin for clearing and not all FCMs will engage in any dealer-related activities. Such an approach is consistent with the Congressional intent underlying the framework adopted in Title VII of the Act for purposes of regulating Swaps transacted in OTC markets.

B. INTERPRETATIONAL SUPPORT FOR DEFINITION OF "FLOOR BROKER" AND "FLOOR TRADER."

The definitions of Floor Broker and Floor Trader set forth in new CEA Sections 1a(22) and 1a(23), respectively, include the phrase "*or other place provided by a contract market for the meeting of persons similarly engaged . . . .*" (Emphasis added).

In order to provide market participants with the regulatory certainty necessary for effective compliance, the Commission should clarify that the intended meaning of the term "contract market" is consistent with the definition set forth in Part 1.3(h) of the Commission's Regulations.[1] Specifically, the Commission should clarify that the reference to "contract market," in new CEA Sections 1a(22) and 1a(23) is a Designated Contract Market ("DCM") and not an SEF. Such an interpretation is consistent with existing Commission guidance interpreting the term Floor Trader and Floor Broker.

The terms Floor Trader and Floor Broker do not appear to have any operative meaning in the context of Swap markets. The activities of a Floor Trader and Floor Broker are clearly tied to the unique operational aspects of a DCM. Specifically, the definitional guidance posted on the CFTC's website defines "Floor Trader" as "[a] person with exchange trading privileges who executes his own trades by being personally present in the pit or ring for futures trading." The term "Floor Broker" is defined in the glossary as "[a] person with exchange trading privileges who, in any pit, ring, post, or other place provided by an exchange for the meeting of persons similarly engaged, executes for another person any orders for the purchase or sale of any commodity for future delivery."

Swap markets are structured in a distinctly different manner than futures markets and the role of a trader and broker is not analogous to the role played by a Floor Trader or Floor Broker in futures markets. Other than exempt commercial markets, where transactions are executed on a principal-to-principal basis, Swaps are not transacted in a central, standardized market place. Rather, transactions are executed in private markets. The actual traders are the counterparties themselves (whether a commercial firm, including derivatives end-users, or other trader, Swap Dealer or Major Swap Participant). Brokers in Swap markets merely match willing buyers and sellers and do not perform an execution function analogous to a Floor Broker.

Given that the starting point for the regulation of Swaps transacted in OTC markets will be based, in large part (if not in its entirety), on existing market structures, the Commission should initially interpret the term "contract market" as used in new CEA Sections 1a(22) and 1a(23) as referring to a DCM, not an SEF. Should SEFs continue to evolve at an unforeseen pace and manner, the Commission has ample statutory authority to revise their interpretation of these provisions as necessary and appropriate at that time.

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[1] 17 C.F.R. § 1.3(h) (2010).

II. CONCLUSION.

The Working Group appreciates this opportunity to comment, and requests that the Commission consider these comments when developing proposed rules or regulations further defining the terms Futures Commission Merchant, Floor Broker, and Floor Trader. The Working Group looks forward to offering its views in response to the notice of proposed rulemaking addressing these definitions.

Respectfully,

/s/ R. Michael Sweeney, Jr.

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