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Via e-mail at DFArulemakings@cftc.gov

**The Honorable Gary Gensler, Chairman**
**The Honorable Michael Dunn, Commissioner**
**The Honorable Jill E. Sommers, Commissioner**
**The Honorable Bart Chilton, Commissioner**
**The Honorable Scott D. O'Malia, Commissioner**
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Dodd-Frank Implementation

Dear Chairman Gensler and Commissioners:

The Coalition of Physical Energy Companies ("COPE")[1] hereby responds to the Commission's request for industry comment concerning the sequencing and pace of the Commodity Futures Trading Commission's ("CFTC" or the "Commission") rulemaking process relating to the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[2] COPE appreciates the significant scope of tasks and the amount of effort required of the Commission and its staff to propose and finalize Dodd-Frank rulemakings. Without minimizing the effort undertaken so far, COPE would like to offer the following observations about the CFTC process from the vantage point of physical energy company end-users of swaps.

As a general matter, COPE is concerned: that the rulemaking process will not result in a cohesive and comprehensive regulatory scheme; that costs to COPE members and similarly situated

[1] The members of the Coalition of Physical Energy Companies are: Apache Corporation; Competitive Power Ventures, Inc.; El Paso Corporation; Iberdrola Renewables, Inc.; MarkWest Energy Partners, L.P.; Noble Energy, Inc.; Shell Energy North America (US), L.P.; and SouthStar Energy Services LLC.

[2] Public Law No. 111-203, 124 Stat. 1376 (2010).

entities will be needlessly increased; and, that aspects of the process do not follow a logical sequence. COPE believes the Commission can and should step back at this juncture and take steps to refine its process to address these concerns.

**The Regulatory Process Should Result in a Single Comprehensive Set of Regulations**

The Commission should insure that the regulations promulgated in the rulemaking process result in a comprehensive and cohesive regulatory scheme. From its review of the proposed rulemakings released to date and its observation of the Commission's process, COPE is concerned that, rather than a single regulatory scheme, the Commission may produce multiple discrete regulatory schemes to implement Dodd-Frank. The rulemaking process appears to be siloed, with the thirty odd teams each working more or less in isolation from others as they produce proposed rules. COPE's impression is the product of meetings with individual teams, observation of public Commission meetings, and its review of individual proposed rules.

COPE understands there are "only so many hours in a day" and the Commission needs to move the ball forward. However, as the Commission begins to work towards final rules, it is imperative that all of the pieces of the puzzle fit together. This is true for both the Commission and the industry. COPE is concerned that its ability to comply with a *set of rules* will be impacted by rules that do not jibe together, causing confusion and expense. Individual company confusion will only be compounded by confusion in a market that is attempting to absorb this major change. If the pieces do not fit together seamlessly, the market will be negatively impacted with increased costs and reduced liquidity.

**The Regulatory Process Should Avoid Raising Direct & Indirect Costs When Possible**

COPE requests that the Commission carefully review any rules it intends to implement to minimize the direct and indirect costs on end-users. COPE's impression is that the implementation of Dodd-Frank rules in a manner that limits the cost burden on end-users has not been a high priority. The cost burdens will result from both the direct compliance costs of end-users, and the costs incurred by both new and established regulated entities to comply with other regulatory burdens.

For example, to satisfy their compliance obligations under current proposals, end-users will need to expend significant amounts for both information technology and compliance personnel. They will be required to track extensive data and create reports regarding positions and individual swaps purely for regulatory purposes, in addition to the much more limited set of data required by commercial needs today. In addition, beyond the compliance infrastructure costs, end-users will need to supplement their existing compliance staffs to make certain that all of the above-mentioned activities, as well as other Dodd-Frank implementation requirements, are satisfied on an on-going basis by their firms. This is not a trivial amount of costs.[3]

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[3] These costs do not take into account any end-user margin requirement, "hair cutting" of collateral values or indirect costs imposed by capital regulation of end-users' counterparties.

In addition to these direct costs, under current CFTC proposals, there will be significant indirect costs imposed by end-users' counterparties such as swap dealers. COPE expects the current set of regulatory proposals to significantly increase the cost of doing business for swap dealers in virtually every aspect of their operations. COPE also expects all of those costs to be passed through in charges to end-users in future transactions. The increased costs and regulatory requirements may cause some swap dealers to leave the market (particularity non-banks), and some hedgers may cease their hedging programs. The result of such departures from the market will be reduced liquidity and increased counterparty concentration in large banks.

The ultimate level of costs and liquidity reductions resulting from the CFTC's regulatory implementation of Dodd-Frank depends largely upon the extent to which the existing proposals are implemented in a cost sensitive, comprehensive and integrated manner, undertaken with an eye towards market impacts. The Commission can mitigate these costs and reductions in liquidity by considering these potential burdens and taking them into serious account in crafting final rules based on its existing proposals.

COPE therefore urges the Commission to elevate the cost impact of the regulations implementing Dodd-Frank to a higher priority in the process. COPE acknowledges that the introduction of a new regulatory program will necessarily impose costs. Nevertheless, the manner in which the regulation is designed and imposed can limit the cost impact.

**The Sequencing of Proposals To Date, Coupled With Open Issues, Raises Concerns**

The Commission has, in general, diligently embarked on the arduous process of Dodd-Frank implementation in an open and direct manner. However, it should come as no surprise to the Commission that market participants are concerned that important aspects of the process that would be reasonably anticipated to have been addressed at the outset or required by Congress to be resolved by set deadlines have yet to occur. The longer these important matters remain open, many lacking even proposals, the more concerned affected market participants will be.

Specifically, COPE asks the Commission to issue a proposed rule further defining the term "Swap" as used in Dodd-Frank and its implementing regulations. Regarding such a definition, COPE members request clarity that a "Swap" is a transaction that, when entered into, is designed to settle financially. As this definition should not present much challenge or controversy, COPE is alarmed by the inability of the Commission to offer a proposed definition together with the other key definitions.[4] COPE is also concerned about the Commission's lack of a proposal on Non-Bank Capital and Margin issues, as well as the ambiguity as to the entities that will be categorized as "Non-Banks."[5] COPE had understood previously that this proposal was

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[4] *See* 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).

[5] *See* Dodd-Frank at § 731 (new proposed § 4s(e)(1)(B) of the Commodity Exchange Act, "Swap Dealers and Major Swap Participants That Are Not Banks").

anticipated to be issued in mid-January. Finally, COPE is concerned that the Commission did not enter into a Memorandum of Understanding ("MOU") with the Federal Energy Regulatory Commission ("FERC") as required by Dodd-Frank.[6] The fact that there is no MOU coupled with FERC staff's letter filed with the Commission in response to the Commission's proposed regulations implementing the Dodd-Frank End-User Exception to Mandatory Clearing[7] heightens concerns of potentially duplicative and costly regulation.

COPE is concerned that the Commission is on a path to produce a flurry of proposals, several of which may require supplemental comments to prior proposed rules in an attempt to meet a mid-July deadline. COPE requests that the Commission issue the lagging proposals but take the time to permit comment and thoughtful review thereof. At this point in the process, COPE does not see how a mid-July deadline for any rule can be met given the fact that comment on the definition of "Swap" might not be due until early June at the earliest.

**Implementation Timing Should Provide For Efficient and Effective Compliance**

Chairman Gensler has stated that the Commission would like comments from the public relating to the timing for the implementation of proposed rules.[8] Commissioner O'Malia has similarly stated, in a February 26, 2011 op-ed in the Wall Street Journal, that the Commission would like comments from the public on the order, timing and substance of the CFTC's proposed rules. COPE appreciates the Chairman's and the Commission's interest in establishing appropriate implementation timing. Since the most efficient manner of establishing a compliance and associated training program to implement Dodd-Frank will be on a programmatic basis, COPE requests that the Commission afford a meaningful period after the finalization of its suite of rulemakings before actual compliance will be required. This way the industry (including software vendors) can efficiently work to put in place comprehensive Dodd-Frank compliance programs. Further, to best effectuate integration among the most significant rulemakings, the Commission should also issue an overarching programmatic policy document for the purpose of providing clarity on the integration of the related rules.[9] Accordingly, COPE requests the Commission delay the compliance date of its rules until at least six months after the last substantive interrelated rule is made final.

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[6] *See* Dodd-Frank at § 720.

[7] End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80747 (Dec. 23, 2010).

[8] *See* Testimony of Chairman Gary Gensler before the House Committee on Agriculture, February 10, 2011.

[9] For example, final definitional rules, roles and responsibilities of swap dealers/major swap participants, reporting rules, swap data repository rules, and swap execution facility rules, among others, should be comprehensively integrated by a Commission policy document.

**Conclusion**

COPE respectfully requests that the Commission oversee its rulemaking process to: carefully create a comprehensive and coherent set of rules; limit direct and indirect cost impacts; and put all relevant aspects of the proposed regulations "on the table" to permit the process to better accommodate all elements and to create a thoughtful and non-disruptive outcome for all concerned. In addition, the Commission should allow market participants sufficient time to make the significant changes and investments necessary to comply with the full set of new rules by setting appropriate deadlines to complement efficient Dodd-Frank compliance programs.

Respectfully submitted,

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cc: COPE Members