

July 1, 2011

**Via online submission**

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

Re: COMMENTS OF THE COALITION OF PHYSICAL ENERGY COMPANIES -  
**Effective Date For Swap Regulation**

Dear Mr. Stawick:

On June 17, 2011, the Commodity Futures Trading Commission (the "CFTC" or the "Commission") published a notice of proposed order and request for comment entitled "Effective Date For Swap Regulation" (the "Proposed Order").<sup>1</sup> The Proposed Order states that it is intended to provide greater clarity to market participants regarding the applicability of various statutory and regulatory requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>2</sup> ("Dodd-Frank") following the general effective date of various of Dodd-Frank's Title VII provisions that do not specifically require a rulemaking, which date is July 16, 2011.<sup>3</sup> Specifically, the Proposed Order would grant, pursuant to the Commission's authority under Section 4(c) of the Commodity Exchange Act ("CEA"), temporary relief from many of the requirements of the CEA as amended by Dodd-Frank that may apply to swap agreements, contracts and transactions.<sup>4</sup> The Commission has requested comments on all aspects of the Proposed Order.

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<sup>1</sup> 76 Fed. Reg. 35372 (June 17, 2011).

<sup>2</sup> Public Law No. 111-203, 124 Stat. 1376 (2010).

<sup>3</sup> Proposed Order at 35372.

<sup>4</sup> *Id.*

The Coalition of Physical Energy Companies ("COPE")<sup>5</sup> is generally supportive of the Proposed Order and believes that the temporary relief proposed therein from many of the requirements of Dodd-Frank for swap transactions after July 16, 2011 is necessary in order to give market participants certainty that they may continue to transact swaps and can expect existing swap obligations to be honored while the Commission and other federal regulators continue to develop the regulatory architecture necessary to implement Dodd-Frank. COPE offers specific comments on the Proposed Order below to address some areas of continued ambiguity that remain in light of the Proposed Order, in an effort to ensure that the clarity needed by the marketplace is provided by the Commission.

The members of COPE are physical energy companies in the business of producing, processing, and merchandizing energy commodities at retail and wholesale. COPE members utilize swaps to hedge the commercial risk of their physical businesses.

**I. The Commission Should Issue the Proposed No Action Letter To Clarify The Applicability Of Dodd-Frank Provisions Cited In Footnote 15 Of The Proposed Order.**

The Proposed Order discusses certain self-effectuating provisions in Dodd-Frank that reference terms requiring further definition through a Commission rulemaking, and that therefore would be subject to the temporary exemption of the Proposed Order.<sup>6</sup> However, in footnote 15 the Commission states that its authority to provide this exemptive relief pursuant to Section 4(c) of the CEA "may not extend to certain" of these self-effectuating Dodd-Frank provisions that reference terms requiring further definition, including provisions relating to: (i) swap dealer segregation requirements with respect to uncleared swaps; (ii) registration requirements for Designated Clearing Organizations; and (iii) duties and designation requirements with respect to chief compliance officers for swap dealers and major swap participants.<sup>7</sup> COPE understands from communications with CFTC staff members that these provisions are considered to be in a grey area outside of the Commission's Section 4(c) exemptive authority, but also practically incapable of enforcement until necessary terms including "swap dealer" are fully defined in a final Commission rulemaking. COPE has also reviewed the proposed no-action letter from staff providing that staff would not recommend enforcement actions under these particular provisions of the CEA as amended by Dodd-Frank for a period of time that would be co-extensive to that covered by the blanket exemptive relief under the Proposed Order (the "Proposed No-Action Letter").<sup>8</sup>

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<sup>5</sup> The members of COPE are: Apache Corporation; El Paso Corporation; Iberdrola Renewables, Inc.; Kinder Morgan; MarkWest Energy Partners, L.P.; Noble Energy, Inc.; NRG Energy, Inc.; Shell Energy North America (US), L.P.; SouthStar Energy Services LLC; and Targa Resources Partners LP.

<sup>6</sup> Proposed Order at 35374.

<sup>7</sup> *Id.* at fn 15.

<sup>8</sup> Proposed No-Action Letter – Application of certain CEA provisions after July 16, 2011, available as of June 28, 2011 at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/noaction061411.pdf>, see also Proposed Order at 35374, fn 15.

COPE believes that the Commission must address the treatment of the Dodd-Frank provisions addressed in footnote 15 of the Proposed Order; market participants must not be left to wonder whether and how they can comply with these provisions after July 16, when compliance would require definitions of terms including "swap" and "swap dealer" that have yet to be finalized by the Commission. This is precisely the sort of market uncertainty that COPE understands the Commission to be interested in addressing in the Proposed Order; to leave this gaping hole in any certainty afforded by a final order would be counterproductive at best. COPE supports the approach embodied in the Proposed No-Action Letter and believes that it should be issued by the Commission of even date with its final exemptive order covering those provisions of Dodd-Frank that depend on the further definition of vital terms and that Commission staff believes are not covered by the exemptive relief offered by the final exemptive order. Such no-action relief, if contemporaneous with the issuance of a final exemptive order based on the Proposed Order, would help to close the gap in the Commission's proposed exemptions noted by footnote 15 of the Proposed Order and offer market participants the regulatory certainty they require to continue transaction and performing swap agreements on and after July 16.

**II. The Commission Should State Unambiguously That The Exemptive Relief Detailed In The Proposed Order Will Maintain The Market's Status Quo After July 16, 2011.**

COPE understands that, with the exception of certain Dodd-Frank amendments to the CEA for which relief is not being proposed (*e.g.*, certain anti-disruptive practices provisions, core principles for designated contract markets, and core principles for derivatives clearing organizations),<sup>9</sup> the Commission's intent behind the Proposed Order is to ensure that current practices in the swap markets over which the Commission has gained new authority will not be disrupted until the Commission affirmatively and systematically begins the transition to the new regulatory regime after July 16, 2011.<sup>10</sup> COPE therefore believes that the Commission should provide certainty to market participants that, in addition to being free from enforcement actions under those Dodd-Frank provisions covered by the exemptions of the Proposed Order, they will be able to count on the enforceability and performance obligations embodied in current and future swap transactions during the exemption period.

COPE is concerned that the language of the Proposed Order lacks such an affirmative statement that the *status quo* of swap markets in effect today will continue after July 16, and consequently swap counterparties could seize on the remaining ambiguity to attempt to unravel or otherwise escape obligations under existing and future transactions entered into before the full implementation of the new Dodd-Frank regulatory regime. The Commission should therefore take this opportunity to state unambiguously that, with the clearly defined exceptions of certain Dodd-Frank provisions, it intends to preserve the legal status quo for the swaps market unless and until it affirmatively and systematically makes changes; swaps entered into after July 16 will be equally enforceable as those made prior to that date.

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<sup>9</sup> *Id.* at 35374, fn 13.

<sup>10</sup> *Id.* at 35373.

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**Conclusion**

The Commission has recognized in the Proposed Order that market participants require guidance and certainty that despite the general Dodd-Frank effective date of July 16, 2011, current practices in the swap markets will not change as of that date due to the need for more time to finalize the regulations necessary to fully implement the new regulatory regime. COPE supports the Commission's effort to provide that certainty with the Proposed Order, and urges the Commission to take the steps outlined herein to close potential gaps in the certainty to be provided, in order to avoid potentially serious disruptions in the swap markets when many of Dodd-Frank's sweeping changes to the market landscape would otherwise take effect.

Respectfully submitted,

/s/ David M. Perlman \_\_\_\_\_

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cc: COPE Members