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

**VIA ELECTRONIC SUBMISSION**

RE: *Proposed Order on Effective Date for Swap Regulation*

Dear Secretary Stawick:

**I. INTRODUCTION.**

On behalf of the Working Group of Commercial Energy Firms (the “Working Group”), Hunton & Williams LLP hereby submits these comments in response to the request for public comment set forth in the Commodity Futures Trading Commission’s (the “CFTC” or “Commission”) Notice of Proposed Order, *Effective Date for Swap Regulation* (the “Proposed Order”), published in the *Federal Register* on June 17, 2011,<sup>1</sup> which proposes to grant, pursuant to Section 4(c) of the Commodity Exchange Act (“CEA”) temporary relief to various requirements of the CEA that apply or may apply to certain agreements, contracts, and transactions.

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

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<sup>1</sup> *Effective Date for Swap Regulation*, Notice of Proposed Order, 76 Fed. Reg. 35,372 (June 17, 2011) (“Proposed Order”).

## **II. COMMENTS OF THE WORKING GROUP OF COMMERCIAL ENERGY FIRMS.**

The Working Group appreciates the Commission's efforts to provide greater clarity and certainty to the swap markets regarding the applicability of various statutory and regulatory requirements in advance of the July 16, 2011 effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").<sup>2</sup> The Working Group and several of its members individually have actively addressed the issue of the effective date through several comment letters and petitions to the Commission and are generally supportive of the Proposed Order. Accordingly, the comments provided herein below are limited in nature and address the following two major concerns: (i) the ability of the Commission to grant exemptive relief broader than the authority utilized in the Proposed Order; and (ii) the Commission's proposed approach for granting exemptive relief from certain self-effectuating provisions of Title VII of the Act.

### **A. THE COMMISSION HAS BROAD STATUTORY AUTHORITY TO GRANT TEMPORARY EXEMPTIVE RELIEF UNDER THE ACT AND THE CEA.**

#### **1. The Working Group Supports the American Bar Association's General Arguments on the Broad Scope of Authority Available to the CFTC to Provide Exemptive Relief.**

The Working Group generally supports the comments submitted by the Derivatives and Futures Law Committee of the Section of Business Law of the American Bar Association ("ABA").<sup>3</sup> Specifically, the Working Group supports the ABA's assertion that, pursuant to Section 754<sup>4</sup> and 712(f)<sup>5</sup> of the Act and CEA Section 4(c), Congress (i) intended to ensure that

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<sup>2</sup> Pub. L. 111-203, 124 Stat. 1376 (2010).

<sup>3</sup> See *Comments of the Derivatives and Futures Law Committee of the Business Section of the American Bar Association, Proposed Order on Effective Date for Swap Regulation*, June 30, 2011 ("ABA Comment Letter").

<sup>4</sup> Section 754 of the Dodd-Frank Act states:

Unless otherwise provided in this title, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.

<sup>5</sup> Section 712(f) states:

Beginning on the date of enactment of this Act and notwithstanding the effective date of any provision of this Act, the Commodity Futures Trading Commission and the Securities and Exchange Commission may, in order to prepare for the effective dates of the provisions of this Act—

- (1) promulgate rules, regulations, or orders permitted or required by this Act;
- (2) conduct studies and prepare reports and recommendations required by this Act;
- (3) register persons under the provisions of this Act; and

the provisions of Title VII of the Act do not become effective until all necessary rulemakings are completed and (ii) expressly provided the Commission with the authority to temporarily grant relief from the application of all material terms of Subtitle A of Title VII of the Act beyond the July 16, 2011 effective date until all final rules necessary to implement Title VII are in place.<sup>6</sup>

Additionally, the Working Group supports the ABA's position that Section 754 of the Act should be read to cover all provisions of Title VII for which a rulemaking is required.<sup>7</sup> Importantly, provisions that include terms that require further definition, such as "swap," "swap dealer," "major swap participant," and "eligible contract participant" (Category 2 items), cannot be interpreted, nor the obligations imposed by them ascertained with certainty, until final rules implementing these definitions are issued by the Commission. As such, it is not necessary to distinguish between Category 1 and Category 2 provisions, as Category 2 provisions include terms that require a rulemaking and can therefore be identified themselves as provisions requiring a rulemaking. Accordingly, both Category 1 and Category 2 provisions should be combined into one category and such category should (i) be outside the scope of the Proposed Order, and (ii) not become effective until both the definitional rulemaking and the substantive rulemaking for the relevant provision become effective.<sup>8</sup>

**2. The Commission Should Use its Authority under CEA Section 4(c) and Section 712(f) of the Act to Provide Temporary Relief for All Entities Transacting or Operating under the Existing Provisions of CEA Section 2.**

In combination with its exemptive authority under CEA Section 4(c), the CFTC should use the broad grant of exemptive authority under Section 712(f) of the Act to provide blanket, temporary relief for entities transacting subject to existing CEA Sections 2(d) (excluded derivative transactions), 2(e) (excluded electronic trading facilities), 2(g) (excluded swap transactions), and 2(h) (exempt commodity transactions). More specifically, the Working Group recommends that the CFTC use its exemptive authority under CEA Section 4(c) and Section 712(f) of the Act to revise the existing language of Part 35 of the Commission's regulations to

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(4) exempt persons, agreements, contracts, or transactions from provisions of this Act, under the terms contained in this Act,

provided, however, that no action by the Commodity Futures Trading Commission or the Securities and Exchange Commission described in paragraphs (1) through (4) shall become effective prior to the effective date applicable to such action under the provisions of this Act.

<sup>6</sup> See ABA Comment Letter at 2-6.

<sup>7</sup> See ABA Comment Letter at 2-3.

<sup>8</sup> Notably, the Securities and Exchange Commission (the "SEC") did not provide exemptive relief for provisions identified by the Commission as "Category 2," determining that such provisions require a rulemaking and pursuant to Section 774 of the Act would not go into effect until the later of the July 16, 2011 Effective Date or not less than 60 days after publication of the final rule. See *Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for new Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps*, Exemptive Order, 76 Fed. Reg. 36,287 (June 22, 2011). The Working Group strongly encourages the Commission to follow the interpretation taken by the SEC and find that Category 2 provisions require a rulemaking and are therefore covered under Section 754 of the Act.

exempt the transactions covered by, and entities operating pursuant to, these sections.<sup>9</sup> Doing so will (i) unequivocally clarify the scope of the exemptive relief being provided by the Commission, and (ii) provide the highest degree of legal and regulatory certainty by making clear that entities transacting under, or operating pursuant to, these provisions are covered by Part 35 of the Commission's regulations.

Such certainty is essential as landmark derivatives reform legislation will become effective, but the final rules and regulations required to implement and enforce such legislation will not be final (i) as of the July 16, 2011 effective date. The Working Group submits that the adoption of its recommendation will help ensure a smooth and efficient transition to a new regulatory framework, thereby minimizing disruptions to the swap markets and unwarranted costs on market participants.

**3. At a Minimum, the Commission Should Use the Authority Granted to it under Section 723(c)(1)-(2).**

Should the Commission decline the Working Group's recommendation to use the exemptive authority provided under CEA Section 4(c) and Section 712(f) of the Act to amend Part 35 of the Commission's regulations to provide the appropriate blanket relief, the Working Group recommends that at a minimum, the Commission use its authority under Section 723(c)(1)-(2) to provide grandfather relief to all persons who transact, operate, or otherwise rely on CEA Section 2(h) (as in existence prior to the enactment of the Act) as well as all transactions subject to this provision, for a six-month period commencing on July 16, 2011.<sup>10</sup> On September 16, 2010, the Commission issued a notice stating that it was committed if deemed necessary to use its available exemptive authority under Section 723(c)(1)-(2) to provide blanket grandfather relief to the exempt commodity markets.<sup>11</sup> Members of the Working Group timely filed individual petitions for grandfather relief pursuant to Section 723(c)(1).

Further, the Proposed Order states that Section 712(f) of the Act gives the Commission authority to "promulgate rules, regulations, or orders permitted" by the Act and "exempt persons, agreements, contracts, or transactions from the provisions of the Act, under the terms contained in this Act," in order to prepare for the effective dates of the provisions of Title VII." Thus, the Commission may rely on Section 712(f) as well as Section 723(c)(1)-(2) to exempt persons relying on CEA Sections 2(h)(1)-(2) in carrying out their bilateral exempt commodity transactions, for up to a one year period, following the effective date. As such, to provide legal and regulatory certainty during the transition period, the Working Group strongly recommends

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<sup>9</sup> The Working Group supports the arguments proffered by the ABA to ensure that the proposed modifications to Part 35 preserve exemptions for exempt commodities. ABA Comment Letter at 12.

<sup>10</sup> See The Commercial Alliance, *Request for Action on Petitions Filed under Section 723(c) of Dodd-Frank*, (June 3, 2011) (joint submission of the Working Group and Commodity Markets Council); Working Group of Commercial Energy Firms, *Petitions under Section 723(c) of Dodd-Frank* (Aug. 26, 2010).

<sup>11</sup> See *Notice Regarding the Treatment of Petitions Seeking Grandfather Relief for Trading Activity Done in Reliance upon Section 2(h)(1)-(2) of the Commodity Exchange Act*, 75 Fed. Reg. 56,512, 56,513 (Sept. 16, 2010) (stating that grandfather relief would not be limited only to persons that filed a petition pursuant to Section 723(c)(1) of the Act).

that the Commission exercise such exemptive authority. At the very least, the Commission should use its authority under Section 723(c)(1)-(2) to provide specific relief for options on exempt commodities.<sup>12</sup>

If, however, the Commission is not inclined to use its Section 723(c)(1)-(2) authority in this manner, then it should clarify that current Part 35 as revised by the Proposed Order extends to options on exempt commodities.”<sup>13</sup> Clarifying Part 35 in this manner is consistent with existing definitions of a “swap” under the U.S. Bankruptcy Code<sup>14</sup> and the definition of a “swap” set forth in new CEA Section 1a(47)(A), as adopted in the Act. As such, the Working Group suggests that the Commission amend Part 35.1(b) as follows:

(1) Swap agreement means:

(i) An agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other

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<sup>12</sup> The Working Group supports the arguments regarding this issue as set forth in the ABA Comment Letter. See ABA Comment Letter at Part E. The Working Group further supports arguments set forth in the ABA Comment Letter that, in addition to the exemptive authority set forth in CEA Section 4(c) and Sections 712(f) and 723(c)(1)-(2) of the Dodd-Frank Act, the Commission may also rely on its existing regulations set forth in CFTC Rule 32 and its plenary statutory authority to regulate commodity options under CEA Section 4c(b) (which is unaltered by the enactment of the Dodd-Frank Act) to grant the relief requested above. See ABA Comment Letter at 10-11.

<sup>13</sup> Under current CFTC Part 35.1(b)-

(1) Swap agreement means:

(i) An agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other similar agreement (including any option to enter into any of the foregoing);

(ii) Any combination of the foregoing; or

(iii) A master agreement for any of the foregoing together with all supplements thereto.

<sup>14</sup> See 11 U.S.C. § 101(53B). This provision states that the term “swap agreement”—

(A) means—

(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is—

....

(VII) a commodity index or a commodity swap, option, future, or forward agreement.

similar agreement (including **any option, or** any option to enter into any of the foregoing) . . . .<sup>15</sup>

4. **The CFTC May Also Use its Authority under Section 712(f) of the Act to Provide Temporary Relief to those Category 2 Provisions that May Not Qualify for Exemption under CEA Section 4(c).**<sup>16</sup>

The Proposed Order states:

The Commission's authority to provide exemptive relief under CEA section 4(c), as amended by section 721(d) of the Dodd-Frank Act, may not extend to certain Category 2 provisions of the Dodd-Frank Act and the CEA. These provisions include: new CEA section 4s(l), 7 U.S.C. 6s(l) (providing for *swap dealer* segregation requirements with respect to uncleared swaps); . . . and new CEA section 4s(k), 7 U.S.C. 6s(k) (providing for the duties and designation of a chief compliance officer for *swap dealers* and *major swap participants*). As such, these provisions will take effect on July 16, 2011, and may not be subject to the exemptive relief noted above granted by the Commission.<sup>17</sup>

Yet the Working Group submits that until a final rule is issued by the Commission implementing the definitions of "swap dealer" and "major swap participant," swap market participants will not know whether they (i) must register any part of their swap trading activities with the Commission, or (ii) would be subject to various self-effectuating statutory provisions applicable to "swap dealers" and "major swap participants," including new CEA Sections 4s(l) and 4s(k). Although the Commission published a draft no-action letter on its website stating that Commission staff would not recommend enforcement action against any person that failed to

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<sup>15</sup> Consistent with its comments in other pending rulemakings, the Working Group prefers the Commission to use the exemptive authority available to it under Sections 712(f) and 723(c) to provide temporary relief for physical exempt commodities. This approach is consistent with the pre-Act view that physical options in exempt commodities are not swaps. See Working Group of Commercial Energy Firms, *Comments on Notice of Proposed Rulemaking on Commodity Options and Agricultural Swaps* (April 4, 2011).

<sup>16</sup> While the Working Group believes that Category 2 provisions should be identified as Category 1 provisions and therefore not subject to the exemptive relief of the Proposed Order, it presents in the alternative this argument should the Commission decline to adopt the Working Group's interpretation and recommendations regarding Category 2 items.

<sup>17</sup> Proposed Order at n.15 (emphasis added).

comply with these new provisions of the CEA,<sup>18</sup> the Working Group believes that the Commission should use the broad exemptive authority available to it under Section 712(f) of the Act to provide temporary relief from the requirements of new CEA Sections 4s(l) and 4s(k). By using its exemptive authority under Section 712(f), the Commission will provide a greater degree of certainty than the proposed no-action letter that market participants are not at risk of an enforcement action for failing to comply with new CEA Sections 4s(l) and 4s(k) prior to knowing their regulatory status under the Act.

Accordingly, given that the Commission has used its discretion to issue proposed rules implementing these statutory provisions,<sup>19</sup> the final order issued in this proceeding should unambiguously clarify that market participants are not required to comply with these requirements until final rules (i) further defining the definition of swap dealer and major swap participant *and* (ii) implementing new CEA Sections 4s(l) and 4s(k) become effective.

**B. THE WORKING GROUP SUPPORTS THE ABA'S COMMENT LETTER REQUESTING THAT THE COMMISSION CLARIFY THE APPLICATION OF THE TERM "ELIGIBLE CONTRACT PARTICIPANT" DURING THE PERIOD OF EXEMPTION.**

The Proposed Order proposes to temporarily “exempt persons and entities from the provisions of the CEA, as added or amended by the Dodd-Frank Act, that reference one or more of the terms regarding entities or instruments subject to further definition under sections 712(d) and 721(c) of the Dodd-Frank Act, including the term[ ] ‘eligible contract participant.’”<sup>20</sup> The Working Group supports the request in the ABA Comment Letter that the Commission confirm that the term “eligible contract participant” (“ECP”) does not take effect even in the absence of exemptive relief, as it expressly requires further definition through a rulemaking pursuant to Section 721(c) of the Act.<sup>21</sup>

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<sup>18</sup> The draft no-action letter is available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/noaction061411.pdf>. The Working Group believes that certain Category 4 provisions, the provisions set forth in new CEA Sections 4c(a)(5) and 4c(a)(6) dealing with anti-disruptive practices authority, should similarly be included in any no-action letter issued by Commission staff. Indeed, the Proposed Order states that, “[t]o the extent that the Commission has issued proposed rulemakings to implement any Category 4 provisions, any requirements or guidance in such rulemakings will not become effective until the effective date of a final rulemaking.” See Proposed Order at n.13. Therefore, because the Commission has issued an Advanced Notice of Proposed Rulemaking and a Proposed Interpretive Order (analogous to a proposed rulemaking), the Working Group submits that (i) the provisions set forth in new CEA Sections 4c(a)(5)-(6) should not become effective until the effective date of a final rulemaking or final interpretive order implementing such provisions, and (ii) market participants should not be subject to any enforcement action for failing to comply with such provisions.

<sup>19</sup> See e.g., *Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy*, Notice of Proposed Rulemaking, 75 Fed. Reg. 75,432 (Dec. 3, 2010); *Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant*, Notice of Proposed Rulemaking, 75 Fed. Reg. 70,881 (Nov. 19, 2010).

<sup>20</sup> See Proposed Order at 35,374.

<sup>21</sup> See ABA Comment Letter at 8. The Working Group also supports the request in the ABA Comment Letter for the Commission to exercise its authority under CEA Section 4(c)(3)(K) to clarify that the “appropriate persons”

**C. THE COMMISSION SHOULD PUBLICLY ANNOUNCE WHETHER IT WILL EXTEND THE TEMPORARY EXEMPTIVE RELIEF PROVIDED BY THE PROPOSED ORDER NOT LATER THAN NOVEMBER 1, 2011.**

The Working Group respectfully requests that the final order issued in this proceeding identify a date not later than November 1, 2011, on which the Commission will publicly announce whether any further temporary relief regarding the effective date of swap regulation as contemplated in the Proposed Order is necessary.<sup>22</sup> Significantly, the Commission recognized in its Proposed Order that, should the Proposed Order expire on December 31, 2011, such expiration will not affect the Commission's ability to provide further relief to avoid undue disruption or costs to market participants.<sup>23</sup> Establishing such a date would provide the swap markets regulatory certainty, thereby permitting market participants to adjust their compliance efforts accordingly.<sup>24</sup>

**D. APPROPRIATE EFFECTIVE DATES OF SWAP REGULATION.**

The Working Group appreciates that the Proposed Order acknowledges the importance of the phase-in and implementation of final rules implementing the Act and reiterates the Commission's intent to avoid unduly disrupting existing practices during any transition period.<sup>25</sup> Accordingly, the Working Group recommends that the proposed regulations governing the registration requirements and duties of "swap dealers" and "major swap participants" become effective after a reasonable period of time after (i) the effective date of regulations regarding the definitions of "swap dealer" and "major swap participant," and (ii) the effective date of the regulations regarding the definition of "swap."<sup>26</sup>

Market participants must know their status with respect to such definitions before determining their need to comply with the ultimate regulations based on those contained in the proposed rules. Specifically, after the definition of "swap dealer" is finalized, market

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who qualify for exemptive relief under the Proposed Order include individuals whose total assets exceed \$10 million and persons relying on the "line of business" exemption to engage in swaps without ECP status. *See* ABA Comment Letter at Part D.

<sup>22</sup> *See* Commissioner Jill E. Sommers, Opening Statement, Open Meeting to Consider Effective Dates of Provisions in the Dodd-Frank Act (June 14, 2011) ("The current approach, along with its expiration less than 6 months after July 16<sup>th</sup>, is not ideal. If we are intent on allowing this relief to expire on December 31<sup>st</sup>, we should commit now to a Commission meeting on Tuesday November 1<sup>st</sup> to propose whatever continuing relief is necessary so that we do not again rush to provide market certainty at the very last minute").

<sup>23</sup> Proposed Order at 35,375.

<sup>24</sup> In addition, the Working Group believes that the Commission cannot simply extend such temporary exemptive relief. Rather, the Commission will need to reexamine the regulatory framework at that time, taking into consideration any new final rulemakings that may have been adopted by the Commission during the period of transitional relief and determine the relief appropriate for the swap markets at that time. Further, the Commission's determination should be issued and noticed for public comment.

<sup>25</sup> *See* Proposed Order at 35,375.

<sup>26</sup> *See* Working Group of Commercial Energy Firm Comment Letter, *Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants*, at Part I.F (Jan. 24, 2011).



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participants must: (1) determine whether all or any component of their businesses engage in swap dealing; and (2) terminate any activities or restructure if they choose not to become fully registered as swap dealers, including, potentially, incorporating new entities and novating parts of their businesses over. As such, the Commission should provide for such extended transition period to permit market participants sufficient time to develop technologies to support the various information gathering, processing and reporting requirements that will be required under the new regulatory framework.

### **III. CONCLUSION.**

The Working Group appreciates this opportunity to comment and respectfully requests that the Commission consider the comments set forth herein as it develops a final rule in this proceeding. If you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ R. Michael Sweeney, Jr.

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