



July 1, 2011

VIA ELECTRONIC AND HAND DELIVERY

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

Re: Proposed Order on Effective Date for Swap Regulation

Dear Mr. Stawick:

I. INTRODUCTION

BG Americas & Global LNG (“BGA”) respectfully submits these comments in response to the request for public comment regarding the Commodity Futures Trading Commission’s (the “CFTC” or “Commission”) *Notice of Proposed Order for Effective Date of Swap Regulation*, which was published in the *Federal Register* on June 17, 2011.¹ The comments submitted by BGA in the above-referenced proceeding address specific aspects of the Notice of Proposed Order, as well as the sequencing of final rules issued by the Commission implementing Subtitle A of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”).²

BGA is a business unit of the BG Group plc (“BG Group”), a global natural gas company based in the United Kingdom and a major producer and supplier of natural gas in the United States. BGA is responsible for all of BG Group’s operations in North and South America, the Caribbean, the company’s global marine operations and its global liquefied natural gas (“LNG”) operations.

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

² Pub. L. 111–203, 124 Stat. 1376 (2010).



BG Group owns natural gas producing assets in Louisiana and Texas known as the Haynesville Shale and in Pennsylvania and West Virginia known as the Marcellus Shale. BG Group is one of the largest suppliers of LNG to the U.S. and owns import capacity rights at Southern Union Company's Lake Charles, Louisiana ("Lake Charles") and El Paso Corporation's Elba Island, Georgia import terminals. BG Group also has an interest in associated liquids that are extracted from imported LNG at the Lake Charles LNG import terminal. BG Group's subsidiary, BG Energy Merchants, LLC ("BGEM"), is a major marketer of natural gas and electricity throughout the U.S., natural gas liquids in the isolated market between Texas and Mississippi, and oil produced by BG Group in offshore Brazil to worldwide markets. BGEM regularly engages in swaps to hedge the commercial risk associated with BG Group's production and marketing activities relating to its natural gas, liquids and oil businesses.

II. COMMENTS OF BG AMERICAS & GLOBAL LNG

BGA appreciates the Commission's efforts to provide guidance and grant temporary relief from certain provisions of the Dodd-Frank Act that would otherwise become effective on July 16, 2011. Such guidance is essential as the Commission and swap market participants move into a truly unprecedented regulatory environment, wherein the statutory provisions of landmark derivatives reform legislation will become effective, but major rulemakings implementing such legislation will not be finalized or become effective for some period of time thereafter. In order to avoid the uncertainty and potentially significant, adverse disruptive impacts that such a regulatory "gap" could have on the efficient operation of swap markets, BGA believes that the Commission should issue its final order in this proceeding as much in advance of July 16, 2011 as possible.

As set forth herein, BGA's comments generally address those areas where additional clarification of the intended scope of relief is needed and where the Commission should provide greater relief than proposed. In addition, BGA addresses one critical consideration addressed on multiple occasions publicly by the Commission and clearly relevant to, but not addressed in detail by, the Notice of Proposed Order—a clear path forward for the sequencing of final rules and regulations issued by the Commission.³

³ Where relevant, BGA expresses its support for relevant comments being filed with the Commission concurrently herewith or previously filed with the Commission addressing the implementation of the Dodd-Frank Act.



A. THE NOTICE OF PROPOSED ORDER SHOULD PROVIDE FURTHER GUIDANCE ON THE SEQUENCING OF FINAL RULES FOR SWAP REGULATION.

BGA appreciates that the Notice of Proposed Order acknowledges the phase-in and implementation of final rules to implement the Dodd-Frank Act.⁴ However, BGA believes that further guidance regarding the Commission's plans for sequencing the implementation of such final rules is warranted at this critical time.⁵ A considered discussion generally outlining the proposed steps for implementing final rules in the final rule issued in this proceeding will greatly assist the transition of BGA and many other market participants to the new framework for regulation under the Dodd-Frank Act.

In relevant part, the Commission should clarify that it will not release final rules implementing the Dodd-Frank Act before such rules, taken in related subject matter groups, are fully developed. Consistent with comments of other commercial market participants, BGA believes that the market place is far better served if the Commission considers all of the final rules in a comprehensive and organized fashion, which will ensure consistency in terms and overall design across the rules.⁶

To that end, BGA respectfully requests that the Commission address the sequencing of final rules in a separate proceeding and provide public notice and a sufficient period for public comment. As outlined below, BGA recommends the following general steps for sequencing of final rules implementing the Dodd-Frank Act:

1. Issue the final rule further defining the term "swap;"⁷

⁴ Notice of Proposed Order at 35,375.

⁵ BGA intends to supplement this comment letter and more thoroughly discuss its recommendation for the sequencing of Commission final rules in a separate letter addressing only this issue.

⁶ As a general matter, BGA supports the general approach for sequencing final rules proposed in a white paper publicly filed with the Commission in March 2011 by the Working Group of Commercial Energy Firms ("Working Group"). See Working Group of Commercial Energy Firms, *Sequencing of Release of Final Rules under the Dodd-Frank Act* (Mar. 23, 2011) ("WGCEF Sequencing Comments").

⁷ For many market participants, the scope of the definition of "swap" will be a substantial factor in the determination of whether they are a "swap dealer" or "major swap participant." For example, without knowing which derivatives will be included in the definition of "swap," market participants will be unable to perform the tests necessary to determine whether they are a major swap participant. Waiting to finalize and issue the final rule further defining this critical term later in the implementation process will introduce significant uncertainty into the swap markets. See WGCEF Sequencing Comments at 7.



2. Commence a comprehensive study to collect data regarding the four major categories of “swaps” that will be subject to Commission oversight to (i) determine the size of the market for each major category of swap, (ii) identify the various market participants from different industry sectors in each market, and (iii) determine how participants in each market (a) interrelate and (b) transact with each other.⁸
3. Concurrently with step 2, issue the final rule further defining the terms “swap dealer,” “major swap participant”, and “eligible contract participant;”
4. Adopt a transitional framework for the implementation of federal speculative position limits based on existing (i) Commission regulations for position limits for agricultural products; (ii) rules and requirements developed and enforced by designated contract markets for futures and options contracts in exempt commodities; and (iii) rules and requirements developed and implemented by exempt commercial markets for designated “significant price discovery contracts.”
 - Once the comprehensive study of swap markets is completed and if supported by empirical data, commence a rulemaking implementing the framework for federal speculative position limits for physical commodities in the Dodd-Frank Act.

⁸ In addition to quantifying the universe of products that will be subject to Commission jurisdiction for each major category as “swaps,” the Commission must also identify the diverse number of market participants that will be subject to its regulatory oversight. See WGCEF Sequencing Comments at 4. For example, market participants that fall within the final definitions of “swap dealer” and “major swap participant” will not be the same or even similar. *Id.* Some will have large swap portfolios and a substantial market share. *Id.* These entities are likely to be subject to prudential regulation by financial regulators and present unique risks to the U.S. financial system. *Id.* In contrast, many entities that might come within the definitions of “swap dealer” and “major swap participant,” have never been subject to prudential regulation by a financial regulator. *Id.* In particular, many commercial energy firms, such as BGEM, still do not know if they are, and do not anticipate being, a “swap dealer.” *Id.* However, if they are deemed as such, this will be the first time many of them will be subject to prudential regulation, and consequently, coming into compliance will be a costly, time consuming process. *Id.*



5. Issue final rules for the registration of “swap dealers” and “major swap participants;”⁹
6. Issue final rules for governance and internal business conduct standards applicable to “swap dealers” and “major swap participants;”¹⁰
7. Issue final rules governing transactions between “swap dealers” and “major swap participants” and their respective swap counterparties;¹¹ and
8. Issue final rules applicable to all other market participants that are not subject to Commission oversight as a “swap dealer” or “major swap participant.”

B. NOTICE OF PROPOSED ORDER

1. BGA SUPPORTS CERTAIN POSITIONS ADVOCATED BY THE AMERICAN BAR ASSOCIATION REGARDING THE SCOPE OF RELIEF PROVIDED BY, AND NEED FOR CLARIFICATION OF, THE NOTICE OF PROPOSED ORDER

BGA supports, in part, the comments being filed concurrently herewith by the Derivatives and Futures Law Committee of the Section of Business Law of the American Bar Association (“ABA”).¹² Specifically, BGA generally supports the arguments in the ABA Comment Letter that Sections 712(f) and 754 of the Dodd-Frank Act and Section 4(c) of the Commodity Exchange Act (“CEA”) provide broader authority to fashion temporary relief from implementation of the Dodd-Frank Act than that contemplated by

⁹ Even after the definitions of “swap dealer” and “major swap participant” are finalized, some market participants still might not have a clear understanding if they are covered by the definitions and will need to seek guidance from the Commission as to their status or attributes of their businesses. As such, a reasonable period of 90-120 days between the issuance of these definitional rules and the effective date for the related registration rules should be permitted by the Commission.

¹⁰ “Swap dealers” and “major swap participants” should have a reasonable period of time to organize and develop their systems and personnel to comply with regulations that do not entail counterparty interface. See WGCEF Sequencing Comments at 6.

¹¹ Only after “swap dealers” and “major swap participants” have their corporate structures, systems, policies and procedures in place should the Commission’s rules governing transactions with counterparties become effective. See WGCEF Sequencing Comments at 6.

¹² 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”).



the Notice of Proposed Order.¹³

Further, as noted in the ABA Comment Letter, it appears that the Commission intends that the Dodd-Frank Act's amendments to the definition of "eligible contract participant" ("ECP") would not go into effect on July 16, 2011.¹⁴ The Notice of 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.'"¹⁵

BGA supports the request in the ABA Comment Letter that the Commission confirm in the final order issued in this proceeding that the term "ECP," which expressly requires further definition through a rulemaking pursuant to Section 721(c) of the Dodd-Frank Act, does not take effect even in the absence of exemptive relief.¹⁶ BGA 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" who qualify for exemptive relief under the Notice of 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.¹⁷

2. **TO PROVIDE MAXIMUM CERTAINTY POSSIBLE, THE COMMISSION SHOULD EXERCISE ALL AUTHORITY AVAILABLE UNDER THE DODD-FRANK ACT TO AVOID GAPS IN THE REGULATION OF SWAPS AND OPTIONS IN EXEMPT COMMODITIES**

Physical commodities (other than agricultural commodities), such as energy and metals, currently qualify as "exempt commodities," as defined in CEA Section 1a(14). CEA Section 2(h)(1)-(2) currently exempts from all of the provisions of the CEA, except for the anti-fraud and anti-manipulation provisions, bilateral exempt commodity transactions entered into between ECPs. Although the Dodd-Frank Act would repeal

¹³ See ABA Comment Letter at 2-6. BGA further addresses the scope of relief afforded the Commission under the Dodd-Frank Act in Parts III.B.2 & 3, below.

¹⁴ ABA Comment Letter at 8.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 9.



these provisions, Section 723(c)(1) of the Dodd-Frank Act allows market participants transacting exempt commodities to petition the Commission within 60 days of enactment of the Dodd-Frank Act to continue operating subject to CEA Section 2(h), as this provision was in effect prior to the enactment of the Dodd-Frank Act, for not longer than a one-year period.¹⁸ BGA filed a petition for such relief.

On September 16, 2010, the Commission issued a notice stating that it would not provide grandfather relief under CEA Sections 2(h)(1)-(2) to petitioners transacting bilateral exempt commodity transactions as it was impossible to know, at that time, whether such relief would be necessary.¹⁹ However, the notice states that if the Commission “later determines that Dodd-Frank Act-required regulations might pose particular difficulties . . . the Commission is committed to use its available exemptive authorities to address such a situation.”²⁰ Furthermore, the notice stated that any relief provided by the Commission would “not be limited to persons who may wish to file a petition.”²¹

The Notice of Proposed Order makes clear that Section 712(f) of the Dodd-Frank Act gives the Commission authority to “promulgate rules, regulations, or orders permitted” by the Dodd-Frank 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.” As discussed above, Section 723(c)(1)-(2) provides the Commission with exemptive authority over CEA Sections 2(h)(1)-(2). Therefore, 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.

In order to provide maximum certainty during the transition period, BGA suggests that the Commission use its authority under Section 723(c)(2) to provide blanket relief to all persons who transact, operate, or otherwise rely on CEA Section 2(h)(1)-(2) (as in

¹⁸ The statutory deadline under Section 723(c)(1) for submitting petitions seeking grandfathered status under CEA Section 2(h) was September 20, 2010.

¹⁹ *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*, Notice, 75 Fed. Reg. 56,512 (Sept. 16, 2010).

²⁰ *Id.* at 56,513.

²¹ *Id.*



existence prior to the enactment of the Dodd-Frank Act) as well as all transactions subject to this provision. At a minimum, the Commission should provide specific, targeted relief for options on exempt commodities under Section 723(c)(2).²²

If, however, the Commission is not inclined to use its Section 723(c)(2) authority in this manner, then it should clarify that current Part 35, as revised by the Notice of Proposed Order, extends to options on exempt commodities as well as “swap agreements.”²³ BGA is concerned that the Part 35 definition of “swap agreement” is not explicitly clear that it is intended to include options on exempt commodities, even though both existing law and market practice treat options on exempt commodities as such. Clarifying Part 35 in this manner is consistent with existing definition of “swap agreement” under the U.S. Bankruptcy Code²⁴ as well as the definition of a “swap” proposed in the Dodd-Frank Act.²⁵

²² BGA 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.

²³ 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.

²⁴ 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.

²⁵ Although the Commission could effectively do this in a variety of ways, BGA recommends that Part 35.1(b) be amended as follows:



3. **THE COMMISSION MAY ALSO USE ITS EXEMPTIVE AUTHORITY UNDER THE DODD-FRANK ACT TO PROVIDE TEMPORARY RELIEF FOR CERTAIN SELF-EFFECTUATING PROVISIONS THAT MAY NOT QUALIFY FOR EXEMPTION UNDER CEA SECTION 4(C)**

In addition to CEA Section 4(c), BGA respectfully requests that the Commission use the broad authority granted to it under Section 712(f) of the Dodd-Frank Act to provide exemptive relief for two self-effectuating provisions of the Dodd-Frank Act specifically applicable to “swap dealers” and “major swap participants” that may not qualify for temporary relief as Category 2 items.²⁶ Specifically, the Notice of Proposed Order raises doubt whether new CEA Sections 4s(l) (collateral segregation requirements for uncleared swaps) and 4s(k) (duties and designation of a chief compliance officer) may be subject to exemptive relief under CEA Section 4(c).²⁷

(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, or any option to enter into any of the foregoing)

²⁶ BGA supports the arguments in the ABA Comment Letter noting that it does not appear to be necessary to distinguish between Category 1 and Category 2 provisions, as all of the provisions in each category are appropriately identified as being subject to mandatory required rulemakings. ABA Comment Letter at 2-3. Accordingly, similar to Category 1, all provisions falling within Category 2 should be (i) outside the scope of the Notice of Proposed Order, and (ii) should not become effective until such time that final rules are issued implementing the definitions of “swap dealer” and “major swap participant” and the substantive provisions of Category 2 required rulemakings.

²⁷ Specifically, the Notice of Proposed Order states in relevant part:



On June 28, 2011, the Commission posted a draft no-action letter on its website which, in relevant part, is intended to provide comfort to market participants that the Commission staff will not recommend enforcement action against any person that fails to comply with these newly enacted provisions of the CEA.²⁸ BGA appreciates Commission staff's efforts and assistance to provide such comfort, and to issue the draft no-action letter in advance of the comment deadline for this proceeding.

The determination of whether a market participant must comply with the requirements of new CEA Sections 4s(l) and 4s(k) turns directly on whether that market participant is a "swap dealer" or "major swap participant." Until a final rule is issued by the Commission further defining these terms, the vast majority of swap market participants will not know whether they must register any part of their swap trading activities as a "swap dealer" or "major swap participant" and, thus, would be subject to new CEA Sections 4s(l) and 4s(k).

In light of the foregoing, and notwithstanding the comfort provided by the no-action letter, the Commission should use its broad grant of exemptive authority under Section 712(f) of the Dodd-Frank Act to provide temporary relief from the requirements of new CEA Sections 4s(l) and 4s(k). BGA believes that the use of the exemptive authority under Section 712(f) will provide a greater degree of certainty than the proposed no-action letter that market participants are not at risk of enforcement action for failing to comply with new CEA Sections 4s(l) and 4s(k) prior to knowing their formal

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. The Commission staff has informed the Commission that it is separately considering whether to issue a no-action letter in which the staff would state that it would not recommend that the Commission commence an enforcement action against markets or market participants for failure to comply with the above-referenced provisions over a similar time period.

Notice of Proposed Order at n.15 (emphasis added).

²⁸ The draft no-action letter can be viewed on the Commission's website using the following link: <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/noaction061411.pdf>.



regulatory status under the Dodd-Frank Act.

Finally, given that the Commission has used its discretion to issue proposed rules implementing new Sections 4s(l) and 4s(k),²⁹ 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 these provisions.

4. THE COMMISSION SHOULD IDENTIFY A SPECIFIC DATE SUFFICIENTLY IN ADVANCE OF DECEMBER 31, 2011 TO FORMALLY ANNOUNCE WHETHER THE EXTENSION OF THE TEMPORARY RELIEF GRANTED BY THE NOTICE OF PROPOSED ORDER IS REQUIRED

BGA appreciates the Commission’s commitment to avoid any undue disruption to, and to minimize costs imposed upon, market participants during the transition period to swap regulation. Importantly, the Commission has acknowledged that, should the Notice of Proposed Order expire on December 31, 2011, such expiration will not affect the Commission’s ability to provide further relief.³⁰ In light of the foregoing, BGA respectfully submits that the final order issued in this proceeding should identify a date sufficiently in advance of December 31, 2011, on which the Commission shall publicly announce whether any further temporary relief regarding the effective date of swap regulation as contemplated in the Notice of Proposed Order is warranted.

²⁹ 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. 75432 (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).

³⁰ Notice of Proposed Order at 35,375.



III. CONCLUSION

BGA appreciates this opportunity to comment and respectfully requests that the Commission consider the comments set forth herein as it develops a final order in this proceeding.

Respectfully submitted,

/s/ Lisa Yoho
Lisa Yoho
Director, Regulatory Affairs

Matt Schatzman
Senior Vice President, Energy Marketing

BG Americas & Global LNG

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