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July 22, 2011

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

Re: “Further Definition of ‘Swap,’ ‘Security-Based Swap,’ and ‘Security-Based Swap Agreement’; Mixed Swaps; and Security-Based Swap Agreement Recordkeeping,” 76 *Fed. Reg.* 29818, RIN 3038-AD46 (May 23, 2011)

Dear Mr. Stawick:

The Petroleum Marketers Association of America and the New England Fuel Institute appreciate the opportunity to submit this letter to the Commodity Futures Trading Commission (“CFTC” or “Commission”) in response to the Notice of Proposed Rulemaking (“NOPR”) on the “Further Definition of ‘Swap,’ ‘Security-based Swap,’ and ‘Security-based Swap Agreement’; Mixed Swaps; and Security-based Swap Agreement Recordkeeping” (“proposed rule”).

## **I. Introduction**

The Petroleum Marketers Association of America (“PMAA”) is a national federation of 48 state and regional trade associations representing over 8,000 independent petroleum marketing companies. These companies own 60,000 convenience store/gasoline stations and supply motor fuels, including gasoline and diesel fuel, to an additional 40,000 stores. PMAA members also sell at retail 90 percent of the home heating oil consumed in the United States.

Joining PMAA in these comments is the New England Fuel Institute (“NEFI”). NEFI is a member of PMAA and an independent trade association representing approximately 1,200 home heating businesses including heating oil, kerosene and propane dealers and related services companies, most of which are small, multi-generational family owned- and operated-businesses. Many PMAA and NEFI members also market lubricants, jet fuels and racing fuels, as well as renewable fuels such as biofuels and other alternative energy products.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act” or “Act”), the Commission is required to further define certain terms.<sup>1</sup> The terms the Commission seeks to clarify under this rulemaking and for which we submit comments include the definition of “Swap,” “Security-based Swap,” “Security-based Swap Agreement,”

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<sup>1</sup>Pub.L.111-203, §721

and “Mixed Swaps” (“definitions”). We support the proposed rule and we commend the Commission and its staff for its diligent work in this regard.

As the CFTC works to complete a final rule on this and other rules as required by the Dodd-Frank Act, it is important that Commissioners and their staffs acknowledge the important need to minimize regulatory compliance, reporting or cost burdens on motor fuel and heating fuel retailers, wholesalers, suppliers, jobbers, terminals and bulk storage companies. These companies are not financial entities, swap dealers or major swap participants as contemplated by the Congressional authors of the Act.<sup>2</sup>

Similarly, most of the contracts, agreements and transactions these businesses engage in with each other or with their customers should be excluded under the definitions in the proposed rule. Failing to do so could inadvertently capture or adversely affect our members (or the residential, commercial, industrial or municipal customers they serve) under the new swaps regulatory regime and create unanticipated and unwarranted burdens on these entities. This is an outcome we are confident the Commission and its staff intend to avoid.

## II. General Exclusions for Forward Contracts

Under the proposed rule, the Commission excludes from the definitions “forward contracts” or “any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled”.<sup>3</sup> It further interprets the forward contracts definition in order to bring the exclusion into harmony with the “make or take delivery” litmus test under the Brent Interpretation.<sup>4</sup> This definition of forward contracts would apply to many contracts, agreements and transactions that many PMAA and NEFI members make in the daily course of their business. Therefore, PMAA and NEFI strongly support the Commission’s exclusion for forward contracts.

In response to a question posed by the Commission, in order to fully apply the exclusion to these businesses, we would urge against establishing a minimum contract size in order for a transaction in a non-financial commodity to qualify for the exclusion under the Brent Interpretation.<sup>5</sup> This appears, at least on a superficial basis, to contradict the intent of the Act and the proposed rule, which is to avoid inadvertently capturing small, systemically insignificant businesses and end-users in the new Dodd-Frank regulatory regime.

Further, we ask the Commission to contemplate the exclusion of petroleum fuel and gas storage contracts and agreements between *bona fide* commercial market participants, or entities other than financial entities. Such contracts are vital to the commercial integrity of our industry. However the structure of such contracts may not always necessitate a delivery agreement or

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<sup>2</sup> Dear Colleague letter from Senators Dodd and Lincoln to Representatives Frank and Peterson, June 30, 2010: “In implementing the Swap Dealer and Major Swap Participant provisions, Congress expects the regulators to maintain thorough rulemaking that the definition[s]... not capture companies simply because they use swaps to hedge risks in their ordinary course of business.”

<sup>3</sup> 76 *Fed.Reg.* 29827

<sup>4</sup> *Ibid.*, 29828-29829

<sup>5</sup> NOPR, Question 27 (76 *Fed.Reg.* 29831)

obligation and, on occasion, such contracts terminate not with the delivery or transfer of stored product but rather the ultimate consumption of it. This exclusion should include residential fuel storage contracts, such as residential propane tank storage contracts or agreements.

### **III. Application of the Exclusion for Environmental Commodities**

The proposed rule asks, “Should the forward contract exclusion from the swaps definition apply to environmental commodities such as emission allowances, carbon offsets/credits, or renewable energy certificates?”<sup>6</sup> Given that many PMAA and NEFI members are directly or indirectly affected by current or future federal policy designed to reduce greenhouse gas emissions or dependence on fossil fuels, it is important for us to briefly respond with some suggestions that may provide some useful guidance to the Commission.

Unlike physical commodities (such as energy), environmental commodities lack a *per se* physically deliverable or tangible existence. However, while environmental commodities are not physical in nature they are also not financial in nature. Rather, like physical commodities, environmental commodities can be “financialized” by creating futures, options and swaps based on the underlying commodity contract. These questions pose understandable obstacles to the Commission as it seeks to clarify with legal certainty the treatment of such contracts and determine whether or not relevant exclusions to the definitions apply. But in doing so, the Commission must recognize that the term “environmental commodity” is not a catch-all term. Every contract or transaction that is “environmental” in nature or the subject of an obligation under federal or state environmental regulation may not warrant the same treatment.

Currently, there is no federal policy, rule or regulation that would directly subject our members to mandated greenhouse-gas or “carbon” caps. Our associations oppose such policies. Many of our members are affected, however, by renewable fuel blending mandates, such as the Environmental Protection Agency (“EPA”) Renewable Fuel Standard (“RFS”). Under the existing RFS program, the EPA is required under the Energy Independence and Security Act of 2007 to mandate that petroleum-based transportation fuel sold in the United States contain a minimum volume of renewable fuel.<sup>7</sup> For the purposes of the mandate, the EPA created a tracking system for monitoring biofuel produced that attaches a Renewable Identification Numbers (“RIN”) to each gallon.<sup>8</sup>

In creating this system, the EPA has created a new market for RINs. RINs basically function as a renewable fuel credit-based market, wherein RINs may be purchased or sold as a company’s business or compliance demands require. Biofuel producers with excess RINs, for example, may sell them to companies that require more RINS, with the value of the RIN being affected by the current volumetric mandate, and relative RIN demand and market availability. Many NEFI and PMAA members buy, sell or trade RINs, or are otherwise affected by the biofuel blending mandates of the RFS and the overall policy goals of reduced emissions, fossil fuel consumption and dependence on foreign oil, and the incentivizing of American biofuel production.

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<sup>6</sup> NOPR, Question 32 (76 *Fed.Reg.* 29832)

<sup>7</sup> Pub.L.110-140, §202

<sup>8</sup> 40 CFT 80, Subpart M

Therefore, it is important that the CFTC exempt environmental commodities from the proposed rule as it relates to the EPA's RFS program, the RINs market or businesses that buy, sell or trade RINs. PMAA and NEFI adamantly oppose any CFTC rule to inadvertently capture or unduly burden contracts, agreements or transactions associated with the production or ultimate sale of RINs just as we caution the same for energy commodities utilized by motor fuel and heating fuel businesses.

#### **IV. Consumer and Commercial Agreements, Contracts and Transactions**

We also strongly agree with the Commission's decision to issue an exclusion from definitions and the swaps regulatory regime in general for consumer "agreements, contracts or transactions to purchase products or services at a fixed price or a capped or collared price, at a future date or over a certain time period (such as agreements to purchase home heating fuel)."<sup>9</sup> In the industry for deliverable home heating fuels, such contracts, agreements, or transactions are common practice when homeowners seek to lock-in or fixed price for, or on occasion make pre-payments for, fuel that will be required to heat their home. It would be unreasonable to include such agreements in the CFTC's regulatory purview.

The commission should also exclude pricing agreements made between the home heating oil industry and state and municipal governments that are associated with the delivery of product to households eligible for fuel assistance under the federal and state low income home energy assistance program (LIHEAP), such as margin-over-rack or discount-off-retail programs. The CFTC should also consider excluding such agreements made independently between home heating fuel dealers and non-profits, community service programs, homeless shelters, hospitals and other public service oriented enterprises.

We strongly support the list of "characteristics and factors" the CFTC intends to use as listed in the proposed rule in the event that there is doubt as to whether or not a certain type of agreement, contract or transaction is to be considered a swap.<sup>10</sup>

#### **V. Conclusion**

PMAA and NEFI support the Commission's efforts in promulgating these rules as crucial steps toward effective oversight of the commodity markets and implementation of new rules and regulations under the Dodd-Frank Act. We support the proposed rule and we commend the Commission for its diligence in making sure that our members are not inadvertently captured or burdened by this and other proposed rules.

However, we also feel compelled to urge that the Commission to structure, and implement and enforce, a final rule that is mindful of its desire not to inadvertently provide exclusions or "loopholes" that would allow certain market participants (e.g., financial entities, swap dealers and major swap participants) to evade regulation or to exclude contracts,

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<sup>9</sup> 76 *Fed.Reg.* 29832

<sup>10</sup> *Ibid.*, 29833

agreements and transactions that are speculative in nature, that are linked to futures, options or swaps that affect price discovery, contribute to extreme market volatility or speculation, or are done with the intent to manipulate or defraud.

We would be happy to discuss the above comments in detail or answer any questions the Commissioners or their staff may have. Please feel free to contact PMAA Vice President Sherri Stone at (703) 351-8000 or NEFI Vice President for Government Affairs Jim Collura at (202) 584-0160. Thank you in advance for your consideration and for the opportunity to comment on the proposed rules.

Respectfully submitted,



Dan Gilligan  
President, PMAA



Michael C. Trunzo  
President & CEO, NEFI

cc: The Honorable Gary Gensler, Chairman, Commodity Futures Trading Commission  
The Honorable Michael Dunn, Commissioner, Commodity Futures Trading Commission  
The Honorable Jill Sommers, Commissioner, Commodity Futures Trading Commission  
The Honorable Bart Chilton, Commissioner, Commodity Futures Trading Commission  
The Honorable Scott O'Malia, Commissioner, Commodity Futures Trading Commission  
The Honorable Lisa Jackson, Administrator, Environmental Protection Agency  
The Honorable Frank Lucas, Chairman and Collin Peterson, Ranking Member,  
U.S. House of Representatives Committee on Agriculture  
The Honorable Debbie Stabenow, Chairman and Pat Roberts, Ranking Member,  
U.S. Senate Committee on Agriculture, Nutrition & Forestry