

October 15, 2012

David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Center  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581

**Re:** Agency Information Collection Activities; Proposed Collection, Comment Request: Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping: Book-out Agreement Confirmation, FR Doc No: 2012-20123

Dear Mr. Stawick:

This letter is submitted in response to the Commodity Futures Trading Commission’s (“CFTC’s”) request for comment on the agency’s proposed collection of information with regard to written or electronic confirmations of oral book-out agreements.

The CFTC’s Adopting Release regarding the definition of “swap” and related terms<sup>1</sup> declares that oral agreements to book-out forward positions (“oral book-out agreements”) are only subject to the Brent Interpretation<sup>2</sup> safe harbor if the agreements are followed up by a written or electronic confirmation within a commercially reasonable timeframe. The Adopting Release exempts from the swaps definition only market activity conducted between parties that operate transparently by reducing their oral agreements to writing or electronic form and disclosing them fully to regulators.

The CFTC’s approach is appropriately concerned with distinguishing between forward contracts, which are intended to end with physical delivery, and speculative market activity. Accordingly, to qualify as a forward exclusion from the swap definition, oral book-out agreements must be reduced to writing or electronic form as soon as commercially feasible and subsequently reported to regulators. This facilitates rigorous oversight by ensuring forward contracts are used for their intended purpose, and not to avoid swaps regulations. The rule also mitigates concerns with regard to dispute resolution<sup>3</sup> and verification of transactions.

Compared to the benefits of increased regulatory supervision and improved certainty between parties, the CFTC estimates that the costs of this provision will be minimal, and the benefit would far outweigh the costs to traders and the markets with regard to eliminating

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<sup>1</sup> 77 FR 48207, August 13, 2012 (“Product Definitions”).

<sup>2</sup> The Brent Interpretation allowed the exclusion of oral book-out agreements from futures market requirements only where the contract creates a binding delivery obligation, as in the parties’ regular course of business.

<sup>3</sup> This could include disputes between parties or between a market participant and regulators.

expensive dispute resolution over issues that would doubtless arise over agreement validity and over the true nature of the transactions if there is no written memorialization of oral book-out agreements.<sup>4</sup> Based on the information above, the CFTC's proposed collection of information has practical use and allows proper performance of the CFTC's functions.

Sincerely,

A handwritten signature in black ink that reads "I. Michael Greenberger". The signature is written in a cursive style with a large initial "I" and "M".

I. Michael Greenberger  
Law School Professor  
University of Maryland  
Francis King Carey School of Law  
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Baltimore, MD 21201  
410-706-3846

A handwritten signature in blue ink that reads "Brandy L. Bruyere". The signature is written in a cursive style with a large initial "B".

Brandy L. Bruyere, J.D.  
Law & Policy Analyst  
University of Maryland  
Center for Health and Homeland Security

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<sup>4</sup> The Commission estimates the average industry-wide annual costs of compliance at \$747,000.