

November 15, 2012

Ms. Sauntia Warfield, Assistant Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

**VIA ELECTRONIC MAIL**

Re: *Comments on CFTC's Notice: "Agency Information Collection Activities; Proposed Collection, Comment Request: Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping: Book-out Agreement Confirmation"*

Dear Ms. Warfield:

**I. INTRODUCTION.**

On behalf of the Commercial Energy Working Group (the "**Working Group**"), Sutherland Asbill & Brennan LLP ("Sutherland") hereby submits this letter in response to the Commodity Futures Trading Commission's ("**CFTC**" or "**Commission**") notice requesting comment on its recordkeeping requirements provided in the final rule further defining the term "swap" ("**Final Rule**").<sup>1</sup> Specifically, on August 16, 2012, the Commission published in the *Federal Register* a Notice soliciting public comment on the Final Rule's requirement that oral book-out agreements be followed in a commercially reasonable timeframe by a written or electronic confirmation.<sup>2</sup> The Working Group appreciates the opportunity to provide the comments set forth herein below and respectfully requests the Commission's consideration of these comments.

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 comment regarding regulatory and legislative developments with respect to the

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<sup>1</sup> See *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Recordkeeping*, Final Rule, 77 Fed. Reg. 48,208 (Aug. 13, 2012) ("Final Rule").

<sup>2</sup> *Agency Information Collection Activities; Proposed Collection, Comment Request: Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping: Book-out Agreement Confirmation*, Notice, 77 Fed. Reg. 49,428 (Aug. 16, 2012) ("Notice").

trading of energy commodities, including derivatives and other contracts that reference energy commodities.

## II. COMMENTS OF THE WORKING GROUP.

### A. CFTC's Treatment of Booked-Out Transactions under Brent.

In the Final Rule, the CFTC confirmed that the safe harbor provided under the Brent Interpretation<sup>3</sup> will apply to transactions in all non-financial commodities if such transactions were entered into by “*commercial market participants.*”<sup>4</sup> More specifically, it clarified that even if a book-out extinguished a party's delivery obligation, the initial contract (between commercial participants) would remain a forward contract under the Brent Interpretation if:

- (i) The book-outs were separate, individually negotiated, new agreements;
- (ii) There was no obligation or pre-agreed arrangement to enter into the book-outs;
- (iii) The book-outs were not provided for by the terms of the contracts as initially entered; and
- (iv) Any party in the distribution chain that provided for the opportunity to book-out was nevertheless entitled to require delivery of the commodity, as required under the contracts.<sup>5</sup>

Additionally, in the case of an oral agreement to book-out, the Final Rule requires that such agreement be followed in a commercially reasonable time by a written or electronic confirmation.<sup>6</sup>

### B. Written or Electronic Confirmations are Burdensome and Impractical.

Energy markets, including those in wholesale electricity, natural gas, oil and refined products, frequently engage in “net scheduling” or “schedule compressions.” Under these practices, often without the knowledge of the counterparties, third-party schedulers or operators will cancel the counterparties' delivery obligations and direct them to a non-contracting party for operational or scheduling convenience. For example, a string of trades may exist wherein Party

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<sup>3</sup> See *Statutory Interpretation Concerning Forward Transactions*, Statutory Interpretation, 55 Fed. Reg. 39,188 (Sept. 25, 1990) (the “Brent Interpretation” or “Brent”).

<sup>4</sup> *Final Rule* at 48,228-29 (requiring that these contracts must be “between commercial participants in connection with their business, which create specific delivery obligations that impose substantial economic risks of a commercial nature to these participants, but which may involve, in certain circumstances, string or chain deliveries of the type described above....”)

<sup>5</sup> *Id.*

<sup>6</sup> *Final Rule* at 48,230.

A sells to Party B, who then sells to Party C, who then sells to Party D, and the respective pairs settle their trades resulting in delivery from A to D.

Transactions in these markets may be compressed very frequently and at a rapid pace. Thus, requiring written or electronic confirmation for every contract that is net scheduled or compressed would be very burdensome to market participants and would cause disruption to an industry practice that is critical to maintaining the efficiencies of energy markets. The Working Group believes that the important distinction for purposes of the forward contract exclusion should be the existence of a subsequent, separately negotiated agreement to effectuate a book-out or schedule compression, regardless if it be orally or in writing. As such, the Working Group strongly recommends that the Commission clarify that contracts that are orally booked-out or net scheduled will still qualify for the Brent safe harbor even if they are not memorialized in a written or electronic confirmation.

### **C. Sufficiency of the Confirmation.**

The Final Rule does not provide specific criteria for the required written or electronic confirmation under the Brent Interpretation. Thus, should the Commission decline to adopt the Working Group's recommendation stated above and require a written or electronic confirmation for every contract that is booked-out or net scheduled, the Working Group submits that a simple e-mail or instant message exchange by schedulers, or a settlement statement confirming a schedule compression, is sufficient, especially given the frequency and rapidity of schedule compressions. That is, as long as a communication by the counterparties memorializes general acknowledgment of a book-out or schedule compression after execution of the initial trade, such trade should fall within the Brent safe harbor.

### **III. CONCLUSION.**

The Working Group supports appropriate regulation that brings transparency and stability to the swap markets worldwide. The Working Group appreciates this opportunity to provide comments on the Final Rule's recordkeeping requirements and respectfully requests the Commission's consideration of the comments set forth herein.

If you have any questions, please contact the undersigned.

Respectfully submitted,

*/s/ R. Michael Sweeney, Jr.*  
R. Michael Sweeney, Jr.  
Meghan R. Gruebner

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Working Group*