

February 15, 2013

Via Electronic Filing

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

Office of Information and Regulatory Affairs  
Office of Management and Budget  
Attention: Desk Officer for CFTC  
725 17th Street  
Washington, DC 20503

Re: Proposed Collection, Comment Request: Form TO, Annual Notice Filing for Counterparties to Unreported Trade Options

Dear Ms. Warfield:

By notice in the Federal Register published December 17, 2012,<sup>1</sup> the Commodity Futures Trading Commission (“CFTC” or the “Commission”) sought comment regarding the burden that will result from the filing of Form TO as established in the final and interim final rule governing commodity options (“Commodity Options Rule”).<sup>2</sup> The Coalition of Physical Energy Companies (“COPE”) hereby offers comments on the use of Form TO, as requested by the Commission. The members of COPE are physical energy companies in the business of producing, processing, and merchandizing energy commodities at retail and wholesale.<sup>3</sup> In addition to the instant comments, COPE has previously submitted comments on the proper scope of Form TO in its comments regarding the Commodity Options Rule.<sup>4</sup>

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<sup>1</sup> 77 Fed. Reg. 74647 (December 17, 2012).

<sup>2</sup> 77 Fed. Reg. 25329 (April 27, 2012); *see also* 17 C.F.R. § 32.3(b)(2) (2013).

<sup>3</sup> The members are: Apache Corporation; EP Energy LLC; Enterprise Products Partners, L.P.; Iberdrola Renewables, Inc.; Kinder Morgan; MarkWest Energy Partners, L.P.; Noble Energy, Inc.; NRG Energy, Inc.; Shell Energy North America (US), L.P.; SouthStar Energy Services LLC; and Targa Resources.

<sup>4</sup> COPE Comments regarding Interim Final Rule – Commodity Options, RIN No. 3038-AD62, at pp. 9-10 (June 26, 2012) (“COPE Commodity Options Comments”).

The Commission created Form TO to limit the reporting burden on entities that are not CFTC registrants or financial entities (“End Users”), but that still may be required to report trade option transactions pursuant to the Commission’s rules. Unfortunately, due to the scope of transaction types that may be characterized as trade options, and the scope of the Commission’s swap reporting rules under Part 45, the ability to use Form TO is likely to be circumscribed to a relatively small subset of End Users. It is COPE’s view that the Commission should ensure that all End Users are permitted to use Form TO to report trade options to which they are a party.

In the COPE Commodity Options Comments, COPE stated:

The Commission has proposed a “Form TO” to limit the reporting burden for physical firms with respect to transactions that qualify as trade options under the Commodity Options Rule. Form TO is only available to entities that have not reported any swaps during the prior twelve months.

COPE appreciates the Commission’s attempt to limit the reporting requirements of physical firms that are not otherwise subject to swap reporting obligations pursuant to the Commission’s regulations implementing Dodd-Frank. However, COPE believes that the Commission has set the threshold for the ability to use Form TO too high. This is particularly true since the Commission has required the reporting of inter-affiliate swaps pursuant to Part 45 of its regulations.

For many COPE members, swap reporting under Part 45 is most likely to be triggered by the need to report inter-affiliate swaps, since no dealer or exchange will be present in these transactions to pick up the reporting burden. This, in turn, would eliminate the ability of such entities to report on Form TO as set forth in the Interim Final Rule. While COPE continues to believe that inter-affiliate swaps should not be subject to mandatory reporting, such reporting is less burdensome as there is no need to negotiate with a counterparty as to which entity will be the reporting entity or address any third party concerns. However, as proposed by the Commission, the mere reporting of a single inter-affiliate swap triggers additional reporting burdens for any physically-settling trade option. COPE believes that the existence of such swaps or other limited reporting activity should not trigger a new reporting burden when Form TO is available.

COPE recommends that the Commission permit all non-Swap Dealer/Major Swap Participants to use Form TO regardless of other reporting they may undertake. The fact that the Commission has determined to include these physical contracts as swaps should not generate new burdens.<sup>5</sup>

COPE’s comments regarding the potential burden stemming from the inclusion of physical contracts within the scope of the term “swap” (and likely the scope of the trade option subset of

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<sup>5</sup> COPE Commodity Options Comments at 9 (internal footnotes intentionally omitted).

swaps) were made before the Commission issued the final products definition rule.<sup>6</sup> In that rule, the Commission established a seven part test to distinguish forward contracts that are not swaps from commodity options that are swaps if the contract includes embedded volumetric optionality.<sup>7</sup> In the Products Rule, the Commission also sought comments on whether its seven part test was on target.<sup>8</sup> On October 12, 2012, numerous parties (including COPE) filed comments raising significant concerns about the seven part test and seeking revisions.<sup>9</sup> As of this time, no such revisions have been forthcoming.

As indicated in those comments, the seven part test will be very difficult to apply. It appears that, given the ambiguity of the test and the risk of erroneous subjectivity in its application, many contract parties will be required to characterize physical forward contracts with volumetric optionality as trade options. As a result, there will be many more trade options between End Users than expected at the time the Commodity Options Rule was issued.

The result of the foregoing is that there will be an increased burden on End Users that typically otherwise will not be the reporting party in swap transactions that are characterized as trade options. While such parties will often be counterparties to Swap Dealers in swap transactions, they will be much less likely to be counterparties to Swap Dealers in trade option transactions. If such parties have engaged in any swap reporting (e.g. for inter-affiliate swaps) under Part 45, they will not be eligible to use Form TO.

Therefore, as requested in the COPE Commodity Options Comments, the Commission should permit all End Users to use Form TO for the reporting of trade options. If the Commission is serious about limiting the burden on End Users, it must permit such reporting.

Further, as noted above, the Commission promulgated the Commodity Options Rule as a hybrid final rule/interim final rule. The Commission received comment on the interim final rule elements of the issuance on June 26, 2012. Further, on August 14, 2012, the Commission's staff issued a no-action letter effectively staying portions of the Commodity Options Rule pertaining to trade options, including reporting. That no-action letter expired on December 31, 2012.

Finally, as noted above, the Commission received comment on the seven part test established in the Products Rule on October 12, 2012. These open items have a material impact on the nature of trade options and their reporting. It is incumbent upon the Commission to promptly address the issues raised in the comments it has sought. Market participants must be provided with the final rules that they are expected to comply with in an orderly and timely manner. It would be disruptive and confusing if the Commission were to delay addressing these outstanding issues

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<sup>6</sup> *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48208 (August 13, 2012) (the "Products Rule").

<sup>7</sup> Products Rule at 48238.

<sup>8</sup> *Id.* at 48241-48242.

<sup>9</sup> See COPE Comments Regarding Interpretation Of Forward Contracts with Volumetric Options, October 12, 2012.

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any further. As the Products Rule is currently in effect, the no-action letter has expired, and swap reporting is about to begin for End Users, the Commission must make the prompt resolution of these issues a priority.

Very truly yours,

/s/ David M. Perlman

Bracewell & Giuliani LLP

Counsel to

**Coalition of Physical Energy Companies**

CC: COPE Members