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September 29, 2017

VIA ELECTRONIC SUBMISSION

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Commodity Futures Trading Commission's Request for Information, *Project KISS*, RIN 3038-AE55

Dear Mr. Kirkpatrick,

On May 3, 2017, the Commodity Futures Trading Commission ("CFTC" or "Commission") voted to seek public input into its "Keep It Simple, Stupid" or "KISS" initiative.¹ As described by the Commission, "the CFTC is seeking ideas from industry, other stakeholders and interested parties, and the broader public on where the CFTC rules can be simplified and made less costly to comply."²

The members of the Coalition of Physical Energy Companies ("COPE")³ are physical energy companies in the business of producing, processing, and merchandizing energy commodities at retail and wholesale. COPE members generally use swaps, futures, options, and trade options in conjunction with their physical businesses, most typically for hedging.

COPE appreciates the opportunity to provide comments on the Commission's KISS initiative. As physical end-users utilizing swaps and futures for risk management and hedging, COPE believes it is appropriate to revisit the multitude of regulations and no action relief granted in the significant undertaking to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").⁴ It is COPE's view that there is much to simplify and clarify. COPE believes the outcome of the KISS initiative should be less burdensome rules for end-users with clarity that will enhance compliance. To further that end, COPE suggests the following:

¹ *CFTC Requests Public Input on Simplifying Rules*, Release No. PR7555-17 (May 3, 2017); see also, *Project KISS Request for Information*, 82 Fed. Reg. 21494, RIN 3038-AE55 (May 9, 2017); and correction thereto, 82 Fed. Reg. 23765, RIN 3038-AE55 (May 24, 2017).

² *CFTC Requests Public Input on Simplifying Rules*, Release No. PR7555-17 (May 3, 2017).

³ The members of COPE are: Apache Corporation; Avangrid Renewables, LLC; Kinder Morgan, Inc.; MarkWest Energy Partners, L.P.; Shell Energy North America (US), L.P.; SouthStar Energy Services LLC; and Targa Resources.

⁴ Public Law No. 111-203, 124 Stat. 1376 (2010).

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BRACEWELL

Mr. Christopher Kirkpatrick, Secretary
September 29, 2017
Page 2

Swap Recordkeeping: The Commission's rules require that end-users "keep full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty" in a way that makes the records retrievable by the counterparty within five business days.⁵ At the time the Commission issued the Swap Data Recordkeeping and Reporting Requirements rule, it was asked to better define "all pertinent data and memoranda."⁶ The Commission declined to do so stating:

Under...existing requirements, all DCMs, DCOs, futures commission merchants ("FCMs"), introducing brokers ("IBs"), and members of contract markets are generally required to keep full and complete records, together with all pertinent data and memoranda, of all activities relating to the business of the entity or person that is subject to the Commission's authority...The Commission also does not believe that it should specifically delineate the meaning of 'all pertinent data and memoranda.' This phrase is not further defined in the Commission's existing futures regulations.⁷

Generally, COPE members are not Commission registrants or members of an exchange. They do not have businesses focused on swaps and futures but, rather, use them for risk management when needed. The fact that sophisticated derivatives-oriented firms have not had issues with complying with a regulation designed for them is not surprising. However, that is not the case for physical end-users. Attempting to discern what "all pertinent data and memoranda" means and systematically recording it for each transaction is burdensome for end-users and may result in non-compliance due to the ambiguity of the phrase and end-user unfamiliarity with recordkeeping practices of registrants and exchange members.

Further, given physical end-users' place in the market as hedgers and risk management customers, COPE can see little regulatory value in a requirement to preserve the same type of data that registrants and exchange members are required to preserve. In other words, at least as to end-users, the burden outweighs any regulatory benefit.

As a result, COPE recommends that the Commission limit swap data recordkeeping by physical end-users to only the commercial documentation of transactions. However, if the Commission is unwilling to go that far, it should at least provide a definition of "all pertinent data and memoranda" that is limited and precise.

Electronic Form 40: The Commission has replaced its paper Form 40/40S with an electronic version that is submitted via a portal. This change was made with little or no public roll-out, instructions, or FAQs. While similar to the prior paper form, the new materials are not identical (and as COPE understands it,

⁵ *Swap Data Recordkeeping and Reporting Requirements*, 77 Fed. Reg. 2136, 2198-99 (Jan. 13, 2012); 17 C.F.R. § 45.2 (2017).

⁶ 77 Fed. Reg. at 2140.

⁷ 77 Fed. Reg. at 2141.

BRACEWELL

Mr. Christopher Kirkpatrick, Secretary
September 29, 2017
Page 3

Form 40S still is not swap-focused in its terminology). COPE members are the types of entities that may receive a Form 40 request due to their transactions with large trader counterparties. These entities need clarity and certainty with respect to their filings with the government. COPE believes that the electronic Form 40 represents a regulatory change that requires a full explanation of data requirements and processes.

On September 19, 2017, the Commission updated its “online filing portal for submitting CFTC Form 40 [in a manner that] improve[s] the functionality of the form and adds new, more user-friendly features, while collecting essentially the same information.”⁸ This improvement is appreciated; however, it does not specifically address the issue of the requirements of the form.

As a result, COPE recommends that the Commission provide transparent clarity to the public regarding the contents of the electronic Form 40, including up-to-date instructions and website FAQs. As submitting this form is the most likely interaction with the Commission that many end-users will have, it is a prime candidate for the KISS initiative.

Codify No Action Letters & OGC Guidance: Throughout the implementation of Dodd-Frank, a dynamic process evolved in which No Action Letters and Office of General Counsel (“OGC”) guidance were issued. These actions often clarified or altered elements of the Commission’s regulations and issuances. The outcome of this process was a hodgepodge of Commission orders and regulations coupled with staff actions addressing the same topics. As a result, physical end-users are left to wade through a confusing (and sometimes contradictory) set of issuances to try to understand the actual state of the law.

While these staff issuances were helpful as clarifications and band aids in a dynamic environment, at this point they need to be replaced with meaningful Commission actions. As time progresses, it becomes difficult to precisely determine which aspects of Commission regulations have been affected.

As a result, COPE requests that the Commission consider the various staff issuances that apply to physical end-users and comprehensively codify them where appropriate (and terminate them where they no longer make sense). Entities affected by and subject to Commission regulation should not have to search for the current rules of the road. They should be straightforward and easy to find.

Examples of staff actions requiring codification are:

- OGC issuance re lease-like contracts⁹

⁸ *CFTC’s Office of Data and Technology Improves Online Filing Portal For CFTC Form 40*, Release No. PR7612-17 (Sept. 19, 2017).

⁹ Office of the General Counsel (“OGC”) Response to Frequently Asked Questions Regarding Certain Physical Commercial Agreements for the Supply and Consumption of Energy (Nov. 14, 2012), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/leaselike_faq.pdf.

BRACEWELL

Mr. Christopher Kirkpatrick, Secretary
September 29, 2017
Page 4

- No Action Letter No. 13-09 re affiliate reporting¹⁰
- No Action Letter No. 14-144 re treasury affiliates¹¹

Define Financial Entity: Many Dodd-Frank regulations relate to *financial entities*. As defined in the statute, a financial entity is one of certain specifically identified types of entities or “a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.”¹²

It is COPE’s understanding that the intent of including this catch-all in the definition was to include entities in the financial sector that perform functions permitted for banks subject to Federal Reserve supervision. However, as the Commission has not addressed this issue, it is unclear if a legal entity within a physical end-user enterprise would be considered a financial entity if it functions solely as a conduit to the market on behalf of a larger physical firm. An example of such an entity is a market-facing legal entity in a holding company structure that transacts swaps, futures and forwards with transitory title into physical and derivatives markets as a conduit for its physical affiliates. This particular entity is one component of a physical firm that is typically structured into an affiliate group for efficiency and regulatory purposes. It is not a bank. It is not a financial business. It is an integral part of a physical business. The Commission recognized this for purely financial treasury affiliates in a No Action Letter.¹³ However, that relief never extended to mixed physical and financial market-facing entities.

It is time for the Commission to define the words “*predominantly engaged in*” in the statute to relate to the overall firm – not a market-facing affiliate. In other words, if a physical firm uses a market-facing affiliate to market its output and hedge its risk, that affiliate should not be considered *predominantly engaged in* activities that are in the business of banking or financial in nature. Thus, it should not be considered a financial entity.

Trade Options Should Not Be Considered Swaps: In comments filed with the Commission, COPE has consistently requested that physically settling agreements, such a trade options, not be considered swaps. Rather than remove trade options from the category of swaps, the Commission, after initially placing them almost on par with financially settling swaps, has limited regulation of trade options to the degree that, except for still remaining jurisdictional as swaps, they are virtually free of regulatory obligation.¹⁴ The

¹⁰ *No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements Under Parts 45, 46, and Regulation 50.50(b) of the Commission’s Regulations*, CFTC Letter No. 13-09 (Apr. 5, 2013).

¹¹ *No-Action Relief from the Clearing Requirements for Swaps Entered into by Eligible Treasury Affiliates*, CFTC Letter No. 13-22 (June 4, 2013), subsequently amended by CFTC Letter No. 14-144 (Nov. 26, 2014).

¹² 7 U.S.C. § 2(h)(7)(C)(i).

¹³ *Supra* fn 11.

¹⁴ 17 C.F.R. § 32.3 (2017).

BRACEWELL

Mr. Christopher Kirkpatrick, Secretary
September 29, 2017
Page 5

Commission has eliminated the Form TO reporting requirement in which trade options were to be reported.¹⁵ Counterparties do not need to be Eligible Contract Participants.¹⁶ They are not subject to position limits.¹⁷ In effect, trade options are swaps in name only.

COPE believes that the reduction in regulation of trade options is indicative of the fact they are not the type of contract Congress intended to regulate under Dodd-Frank. The Commission should finish the natural progression of its treatment of trade options and remove them from the definition of swap.

Bookouts Should Not Require Documentation: A bookout is a common event that occurs when parties scheduling physical transactions discover that they have entered into offsetting trades. In such a case, the parties “bookout” the trades by waiving physical delivery and settling financially. The Commission has required a bookout to be documented among the parties to demonstrate that it is a subsequent agreement and not initially agreed to be financially settled.¹⁸

As bookouts are an artifact of physical forwards, COPE believes that as long as the contract is a bona fide forward initially, there should be no requirement to document bookouts. The effort of documentation is burdensome and there is a wide variety of approaches leading to confusion. To COPE’s knowledge, the Commission has not taken an interest in bookout documentation over the several years it has been required and there has been no indication of abuse. All that exists is a paperwork exercise of questionable value. It should be eliminated.

Regulation 1.35 Recordkeeping: Section 1.35 imposes “swap type” recordkeeping requirements for “members” of a swap execution facility (“SEF”).¹⁹ A SEF typically requires users to become members. Such recordkeeping includes “related cash or forward transactions.”²⁰ These are physical transactions which can comprise the bulk of a physical firm’s business. While it is important to maintain good records for commercial purposes, the broad requirement of “full, complete, and systematic records, which include all pertinent data and memoranda, of all transactions relating to its business” for regulatory purposes simply due to trading on a SEF is unnecessary and burdensome.²¹ This requirement itself is enough to cause end-users to not utilize SEFs.

¹⁵ *Trade Options*, 81 Fed. Reg. 14966, 14969 (Mar. 21, 2016).

¹⁶ 17 C.F.R. § 32.3(a).

¹⁷ 81 Fed. Reg. at 14971.

¹⁸ *Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48208, 48230 (Aug. 13, 2012).

¹⁹ 17 C.F.R. § 1.35.

²⁰ *Id.* § 1.35(a).

²¹ While the Commission has reduced certain requirements for regulation of “unregistered members,” it has not reduced the scope of the records required (“related cash or forward transactions”). *Fact Sheet- Final Rule Regarding Records of Commodity Interest and Related Cash or Forward Transactions*, CFTC Division of Swap Dealer and Intermediary Oversight (Dec. 18, 2015).

BRACEWELL

Mr. Christopher Kirkpatrick, Secretary
September 29, 2017
Page 6

As end-users can opt out of clearing, there is no requirement for them to use a SEF. COPE recognizes that SEFs may be the best, liquid and transparent market in which to transact certain swaps. However, the regularly recordkeeping burden (well in excess of over-the-counter swaps) is a material bar to using them.

COPE is not aware of any regulatory necessity for physical end-users to maintain CFTC-regulated records of their physical business merely because they traded on a SEF. As the recordkeeping requirement is quite burdensome, it is a bar to becoming a member/using a SEF. As such, this requirement is counterproductive and should be eliminated.

Swap Reporting Timing: The Commission's regulations presently require that a swap entered into and reported by a non-swap dealer/major swap participant be reported to a swap data repository within 24 business hours.²² While this is often achievable, there are circumstances in which it is unrealistic.

Many physical energy company end-users do not maintain support staff personnel to solely perform administrative duties such as swap reporting. Due to the multiple responsibilities of end-user staff, the use of the "Business Hour" construct can result in these limited resources being unable to meet a "Business Hour" deadline occurring at a seemingly random time in the work day (for example, if the 24th Business Hour occurs at 10 AM). COPE believes that, while prompt reporting is beneficial, the current timeframe is too tight and hard to track. As a result, COPE requests that the Commission make clear that end-users may report a swap by the close of the day the subsequent Business Day after swap execution.

Conclusion: COPE appreciates that the Commission is undertaking the KISS initiative. COPE understands that the Commission oversees derivatives markets to benefit and protect the public. As end-users, COPE members are beneficiaries of the Commission's oversight. However, as end-users, COPE members, to the degree their actions implicate Commission regulation, should be subject to clear, non-burdensome requirements. COPE understands that the KISS initiative is designed to meet that goal and is hopeful that these comments are useful to the Commission in achieving it.

Respectfully Submitted,

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²² 17 C.F.R. § 45.3.

BRACEWELL

Mr. Christopher Kirkpatrick, Secretary
September 29, 2017
Page 7

cc: COPE Members
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Commissioner Sharon Y. Bowen
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