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

VIA ELECTRONIC MAIL

Re: *Petitions under Section 723(c) of Dodd-Frank*

Dear Secretary Stawick:

I. INTRODUCTION.

On behalf of the Working Group of Commercial Energy Firms (the “Working Group”), Hunton & Williams LLP hereby petitions the Commodity Futures Trading Commission (“CFTC” or the “Commission”) to act *sua sponte* regarding the ability of persons to submit a petition pursuant to Section 723(c)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”)¹ to obtain legal certainty that their exempt commodity transactions that fall within the terms of Section 2(h) of the Commodity Exchange Act (“CEA”) (as in existence on the day before the Enactment Date) may remain subject to CEA Section 2(h) for a one year period commencing on the general effective date of the Act, *i.e.*, July 15, 2011 (“Effective Date”), or for a period deemed appropriate by the Commission (the last day of which is the “Extension Date”).²

In light of the (i) lack of procedural and substantive guidance in Section 723(c)(1) of the Act, (ii) potentially overwhelming administrative burden that could be placed on the Commission under the Section 723(c)(2) requirement to promptly review all petitions filed

¹ 7 U.S.C. § 2(h). On July 21, 2010, President Obama signed the Act into law (the “Enactment Date”). Upon the Effective Date, Title VII of the Act will repeal substantially all of the existing provisions of Section 2(h) of the CEA.

² Among other things, CEA Section 2(h) establishes a statutory exclusion from the CEA with respect to certain transactions in “exempt commodities.” Such exempt commodities include, among other things, energy and energy-linked commodities. For example, under CEA Section 2(h)(1), 7 U.S.C. § 2(h)(1), market participants that are “eligible contract participants” can enter into bilateral, negotiated over-the-counter transactions, so long as such transactions are not executed on a trading facility. Additionally, under CEA Section 2(h)(3), 7 U.S.C. § 2(h)(3), market participants that are “eligible commercial entities” can enter into principal-to-principal transactions executed on an electronic trading facility, *i.e.*, on an exempt commercial market.

pursuant to Section 723(c)(1), and (iii) need for an adequate period of time for market participants with exempt commodity transactions to review, interpret, and comply with final rules implementing Title VII of the Act, the Working Group respectfully requests that the Commission act *sua sponte* and issue either:

- a blanket order pursuant to Section 723(c)(2) of the Act grandfathering all persons that transact, operate, or otherwise rely on the provisions of CEA Section 2(h) (as in existence on the day before the Enactment Date), as well as all transactions subject to this provision of the CEA, for a one year period commencing on the Effective Date or for a period deemed appropriate by the Commission; or
- formal guidance as soon as practicable regarding the procedural and substantive requirements for petitions submitted pursuant to Section 723(c)(1) of the Act.

The issuance of a blanket order by the Commission pursuant to Section 723(c)(2) is in the public interest, as the public has an interest in the:

- establishment by the Commission of an orderly transition process designed to efficiently use its resources to implement its new authority under Title VII of the Act via Congressionally-mandated rulemakings.
- avoidance of potentially harmful disruptions to markets for exempt commodities and the incurrence of unnecessary costs by commercial energy firms, either of which could result in increased energy prices.
- implementation of the new framework for the regulation of derivatives set forth in Title VII of the Act in a manner that ensures that all persons transacting or operating in reliance on CEA Section 2(h) (as in existence on the day before the Enactment Date), and all transactions subject to this statutory provision, are treated in a uniform and orderly fashion.

A blanket order will achieve these objectives. Given that exempt commodities constitute approximately .4% of the notional value of outstanding over-the-counter derivatives world-wide, a blanket order will preserve Commission resources and allow the Commission to proceed in a timely manner with its rulemaking obligations under Title VII of the Act.³ It will also provide legal certainty to all persons that transact or operate in reliance upon the existing provisions of CEA Section 2(h) by avoiding the piecemeal implementation of the new regulatory framework for over-the-counter derivatives that would occur through the approval or rejection of individual petitions submitted pursuant to Section 723(c)(1). Furthermore, to ensure legal certainty throughout the grandfather period, the blanket order should allow

³ Table 19 of Bank for International Settlements semi-annual OTC derivatives statistics at end-December, 2009, <http://www.bis.org/statistics/derstats.htm>.

transactions subject to CEA Section 2(h) (as in existence on the day before the Enactment Date) entered into before or after the grandfather period has commenced to remain subject to this statutory provision through the Extension Date.

However, if the Commission decides not to issue a blanket order as requested herein, the Working Group respectfully requests that the Commission issue formal guidance regarding the procedural and substantive requirements applicable to individual petitions submitted pursuant to Section 723(c)(1) of the Act. The Working Group has attached for the Commission's review a *pro forma* form of petition (Attachment 1) that could be submitted by parties under Section 723(c)(1). Recognizing that certain aspects of the *pro forma* petition must be tailored to each company's individual circumstances, the use of a common form of petition would bring uniformity to the process and significantly lessen the administrative burden on Commission staff reviewing these submissions.

II. REQUEST FOR COMMISSION ACTION.

A. THE COMMISSION SHOULD ACT ON ITS OWN INITIATIVE AND ISSUE A BLANKET ORDER TO PROVIDE LEGAL CERTAINTY AND FACILITATE AN ORDERLY TRANSITION TO NEW REGULATION.

The Working Group respectfully requests that the Commission act *sua sponte* and issue a blanket order allowing all persons that transact, operate, or otherwise rely on the terms of CEA Section 2(h) (as in existence on the day before the Enactment Date), as well as transactions subject to this statutory provision, to remain subject to CEA Section 2(h) for a period of one year or for a period deemed appropriate by the Commission. The grandfather period should commence on the Effective Date and expire on the Extension Date established by the Commission. The blanket order would not, however, apply to the following final rules which Congress has directed the Commission to issue prior to the Effective Date:

- interim final rule on the reporting of existing, pre-enactment uncleared swaps, which must be issued within 90 days of the Enactment Date pursuant to Section 729 of the Act;
- final rule on conflicts of interests in the governance of derivatives clearing organizations, swap execution facilities, and contract markets, which must be issued within 180 days of the Enactment Date pursuant to Section 726 of the Act;
- final rule on position limits for exempt commodities, which must be issued within 180 days of the Enactment Date pursuant to Section 737(a)(4) of the Act; and
- final rule on whistle blower protections, which must be issued within 270 days of the Enactment Date pursuant to Section 748 of the Act.

The requested Commission action may be accomplished by deeming all persons that transact, operate, or otherwise rely on the terms of CEA Section 2(h) (as in existence on the day before the Enactment Date) to have submitted a timely petition pursuant to Section 723(c)(1) of the Act. In furtherance of this objective, the Commission may also use the authority granted under Section 754 of the Act to establish a realistic and reasonable grandfather period.⁴ The policy and business rationale supporting such action by the Commission is discussed in Section II.B., below.

B. POLICY SUPPORT FOR THE ISSUANCE OF A BLANKET ORDER.

Members of the Working Group and other commercial energy firms routinely engage in energy and energy-linked derivatives transactions in reliance on the terms of CEA Section 2(h). A substantial portion of these transactions are integral to commercial energy firms' core business of delivering physical energy and energy-linked commodities to consumers in U.S. energy markets. The repeal of CEA Section 2(h) and implementation of measures designed to comply with the new provisions of Title VII of the Act will significantly impact commercial energy firms, as well as all other persons that transact, operate, or otherwise rely on the existing provisions of CEA Section 2(h).

The Act recognizes the uncertainty that could be created in exempt commodity markets by the repeal of CEA Section 2(h) and provides a statutory mechanism that allows for the extension of the provisions of CEA Section 2(h) in effect on the day before the Enactment Date for a period of up to one year. Specifically, Section 723(c)(1) permits "any person" to submit a petition to the Commission within 60 days of the Enactment Date (September 20, 2010) to continue to remain subject to Section 2(h) of the CEA for no longer than one year after the Effective Date.

Given the implementation-related benefits that will likely accrue to persons that transact, operate, or otherwise rely on CEA Section 2(h) from an extension of the current provisions of 2(h), the Working Group believes that it is highly likely that a substantial number of petitions will be filed with the Commission pursuant to Section 723(c)(1) of the Act. To ensure a uniform and orderly transition to the new regulatory environment and to alleviate the potentially overwhelming administrative burden associated with processing such a high volume of petitions, the issuance of a blanket order *sua sponte* by the Commission is in the public interest.

⁴ Section 754 of the Act, titled "Effective Date," states:

"Unless otherwise provided in this title, the provisions of this subtitle shall take effect on the later of 360 days after the date of enactment of this subtitle, or to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after the date of the final rule or regulation implementing such provision of this subtitle."

1. **Issuance of a Blanket Order Will Ensure Stability in Markets for Exempt Commodities.**

By granting the blanket order, the Commission will provide legal certainty and ensure a uniform and orderly regulatory transition in exempt commodity markets by providing persons that rely on CEA Section 2(h) (as in existence on the day before the Enactment Date) an appropriate amount of time to review, interpret, and develop a plan to comply with rules and regulations implementing Title VII and by making clear that this specific statutory provision will remain in effect during this period. For example, the Working Group notes that such rules and regulations will be developed over the course of the next several months and, consistent with the applicable statutory deadlines, may be finalized only days or weeks before the underlying statutory provisions of Title VII become effective. Such a short period to comply with substantial new rules and regulations could result in considerable disruption in markets for exempt commodities, which would subject affected persons, particularly commercial energy firms that transact in exempt commodities in reliance on the existing provisions of CEA Section 2(h), to significant costs and increased commercial risk.⁵

Furthermore, the blanket order will also ensure that all market participants are subject to the same the legal regime. Granting petitions to only a portion of participants in markets for exempt commodities will place all market participants in the untenable position of needing to discern how or if the provisions of Section 2(h) (as in existence on the day before the Enactment Date) apply to each transaction in exempt commodities into which they enter. The piecemeal implementation of Title VII will adversely affect markets for exempt commodities, particularly energy markets, which are a key component of our national economy.

2. **Issuance of a Blanket Order Will Not Impede Efforts to Bring Transparency and Structure to Exempt Commodity Markets.**

The blanket order will not interfere with the Commission's mandate under Title VII of the Act to bring transparency and structure to over-the-counter derivatives markets. For instance, Title VII's reporting requirements for existing uncleared swaps adopted pursuant to Section 729 of the Act will bring enhanced transparency to the markets for exempt commodities. Further, the blanket order will not impede the Commission's obligation to implement rules and regulations designed to police excessive speculation in exempt commodity markets through position limits adopted pursuant to Section 737(a)(4) of the Act. The issuance

⁵ For example, pursuant to Section 721(c) of the Act, the Commission is required to adopt further rules defining critical new statutory terms, such as "Swap," "Swap Dealer," Major Swap Participant, and "Eligible Contract Participant." In addition, pursuant to sections 721(a)(16) and 721(a)(21) of the Act, respectively, the Commission is required to issue rules defining key aspects of the definition of "Major Swap Participant" and "Swap Dealer." Final rules for each of the rulemakings listed above must be issued by the Commission by no later than 360 days after the Enactment Date, *i.e.* July 15, 2011. Assuming these rules were to become effective in the minimum period of time permitted under Section 754 of the Act, parties that transact, operate or otherwise rely on the existing provisions of CEA Section 2(h) would only have a maximum of 60 days after the Enactment Date to identify how they are impacted by such rules and come into compliance.

of a blanket order will provide legal certainty and stability in markets for exempt commodities, which will leave the Commission free to focus its resources on implementing the substantive provisions of Title VII of the Act.

3. **Issuance of a Blanket Order Will Provide Legal Certainty as Persons Affected Seek to Implement Changes to Comply with the Requirements of Title VII in the Least Cost Manner.**

Issuing the blanket order will provide persons that rely on the existing provisions of CEA Section 2(h) with legal certainty during the transition to new regulation as they seek to implement measures intended to mitigate costs imposed by the regulatory framework set forth in Title VII of the Act. Within the energy industry, cost mitigation is critical to protecting consumers from increased prices for physical energy commodities, such as coal, oil, natural gas, or electricity.

In order to mitigate costs associated with complying with the requirements of Title VII, certain commercial energy firms might choose to implement internal structural or organizational changes or make changes to their respective trading operations, business practices, and internal risk management systems. Other commercial energy firms might elect to restructure some portion of their transactions to minimize margin costs and regulatory capital requirements or to more easily comply with new reporting requirements.

Many commercial energy firms will likely be required to make changes to their existing information technology systems or acquire new systems to comply with, among other things, new recordkeeping and reporting requirements. Systems changes of this magnitude often require a significant amount of time and the dedication of significant internal and external resources.⁶ If persons that rely on the existing provisions of CEA Section 2(h) are not provided an appropriate transition period and, as a consequence, are forced to implement such changes immediately following the Effective Date, there is a substantial risk that the limited, external supply of resources and expertise needed to facilitate these changes will be quickly exhausted by the demand for those resources and backlogged for a significant period of time, or such persons will be forced to expend considerable resources to expedite implementation. The failure to provide legal certainty and an adequate transition period will needlessly expose persons that rely on the existing provisions of CEA Section 2(h) to potential regulatory non-compliance and commercial risk until the required changes are fully implemented and tested.

Finally, the existing hedging and price discovery trading programs of many commercial energy firms utilize exempt commodities transactions. These trading programs were developed,

⁶ Given the potentially significant costs associated with complying with Title VII, after reviewing the requirements of new regulations implementing Title VII, energy markets participants will likely be required to procure new systems or services from outside vendors. This procurement process can take up to one year or more as it generally involves the solicitation and review of proposals by potential vendors, internal approvals, contract negotiations and fee discussions, and, finally, the actual implementation and testing of new systems or services.

priced, and executed in reliance upon the fact that exempt commodity transactions would be subject to the existing provisions of CEA Section 2(h). Requiring comprehensive, mid-course revisions to existing exempt transactions would likely force market participants to incur unforeseen costs and risks. As noted above, this uncertainty, could adversely affect the efficient operation of energy markets and could potentially result in consumers paying higher energy prices.

C. FORMAL GUIDANCE REGARDING THE PROCEDURAL REQUIREMENTS FOR INDIVIDUAL PETITIONS SUBMITTED PURSUANT TO SECTION 723(C)(1) OF THE ACT.

In the event that the Commission decides not to grant the proposed blanket order, the Working Group respectfully requests that the Commission act immediately to provide all persons who transact, operate, or otherwise rely on CEA Section 2(h), with formal guidance as to the proper form and procedure for submitting a petition under Section 723(c)(1) of the Act. Given that there is approximately 25 days until the 60-day statutory deadline established by Section 723(c)(1) of the Act expires (*i.e.*, September 20, 2010), expedited action by the Commission at this time is critical.

In order to minimize the potentially overwhelming administrative burden on the Commission imposed by reviewing petitions submitted by individual persons pursuant to Section 723(c)(1), the Working Group has attached a *pro forma* petition for the Commission's consideration that may be used to provide market participants guidance regarding the form and substance of the petition necessary to meet the requirements of Section 723(c)(1) of the Act. The petition sets forth a suggested policy rationale for granting the petition as well as criteria necessary to qualify to submit the petition. The suggested criteria are that the petitioner is:

- either an Eligible Commercial Entity as defined by CEA Section 1a(11) (as in existence on the day before the Enactment Date) or an Eligible Contract Participant as defined by CEA Section 1(a)(12) (as in existence on the day before the Enactment Date); and
- a party to exempt commodity transactions, or is a business that operates or is otherwise, subject to the provisions of CEA Section 2(h) (as in existence on the day before the Enactment Date).

The issuance of formal guidance and the use of a *pro forma* petition will lessen the administrative burden on the Commission by bringing uniformity and consistency to the petition review process.

III. CONCLUSION

It is critical that the Commission recognize that U.S. consumers are the direct beneficiary of deep, liquid and efficient domestic markets for energy commodities. Today, consumers enjoy reliable, affordable energy due to the ability of commercial energy firms to (a) both hedge and acquire commodities in those markets, (b) create customized, bilateral products in various delivery locations, and (c) engage in price discovery.

Grandfathering all persons, particularly commercial energy firms, that transact, operate, or otherwise rely on CEA Section 2(h) (as in existence on the day before the Enactment Date), as well as transactions subject to this statutory provision, for one year from the Effective Date or for a period deemed appropriate by the Commission will help the Commission marshal its resources to timely develop and implement its new rulemaking authorities under the Act. The blanket order will also help mitigate potentially adverse impacts to liquidity, efficiency, and product variety in energy markets as market participants adapt their business operations, as well as the terms of future exempt commodity transactions, to comply with the new requirements of Title VII.

The Working Group looks forward to continuing to work with the Commission and staff throughout the rulemaking process. Thoughtful consideration of public input of all stakeholders will result in well implemented regulation which can strengthen the derivatives markets and benefit regulators, without harming market participants or U.S. energy consumers.

Respectfully submitted,

/s/ R. Michael Sweeney, Jr.

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