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February 13, 2012

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

VIA ELECTRONIC SUBMISSION

Re: *Retail Commodity Transactions Under Commodity Exchange Act,* RIN 3038-AD64

Dear Secretary Stawick:

I. INTRODUCTION.

On behalf of The Commercial Energy Working Group (the "Working Group"), Sutherland Asbill & Brennan LLP hereby submits these comments in response to the request for public comment set forth in the Commodity Futures Trading Commission's (the "CFTC" or "Commission") Notice of Proposed Interpretation, *Retail Commodity Transactions Under the Commodity Exchange Act.*[1]

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 public comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities. The Working Group appreciates the opportunity to provide the comments set forth herein and respectfully requests the Commission's consideration of such comments.

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[1] *See Retail Commodity Transactions Under the Commodity Exchange Act*, Notice of Proposed Interpretation, 76 Fed. Reg. 77,670 (Dec. 14, 2011) ("Proposed Interpretation").

II. COMMENTS OF THE WORKING GROUP.

A. TREATMENT OF RETAIL CONTRACTS FOR PHYSICAL ENERGY COMMODITIES.

Section 742 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") amends the Commodity Exchange Act (the "CEA") to provide the Commission with new authority to regulate certain retail commodity transactions "as if the agreement ... was a contract of sale for future delivery."[2] The new authority extends the "*Zelner* fraud fix" to retail off-exchanges transactions in all commodities.[3]

Specifically, Section 742 would allow the Commission to regulate any contract "entered into with... a person that is not an eligible contract participant or eligible commercial entity; and entered into...on a leveraged or margined basis, or financed by the...counterparty" as a contract for future delivery under the CEA. However, contracts that "result in actual delivery within 28 days or such other longer period as the Commission may determine ... based upon the typical commercial practice in cash or spot markets for the commodity involved or creates an enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with the line of business of the seller and buyer" are excluded from the scope of the Commission's new authority.

Section 742 was necessary to supersede judicial precedent that allowed certain investment transactions documented as spot transactions, but not treated as such in practice, to avoid regulation under the CEA. It is the Working Group's understanding that Section 742 was not, however, intended to allow the regulation of actual forward sales of physical energy commodities to customers that are the ultimate consumers of such commodities as futures contracts. As discussed below in Section II.C., the Working Group requests that the Commission confirm that understanding is consistent with the CFTC's interpretation of its authority under Section 742.

B. FORWARD SALE OF PHYSICAL ENERGY COMMODITIES TO RETAIL CUSTOMERS IS COMMONPLACE.

Commercial energy firms often enter into agreements to sell physical energy commodities at a future date to consumers that are neither eligible contract participants nor eligible commercial entities ("Retail Customers"). Such agreements often contemplate complete or partial delivery beyond twenty eight days and often include generous extended payment terms allowing payments to be made in installments or within several months of the actual taking of the commodity. In addition, it is common for energy providers to ask customers to deliver a security deposit or letter of credit. For example, commercial energy firms will agree to sell a set volume of natural gas per month to an industrial Retail Customer for a period of two years, and might allow that customer the ability to spread payments out over a couple of months, perhaps even

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2 *See* CEA Section 2(c)(2)(D)(iii).

3 *See* 156 Cong. Rec. S5,924 (daily ed. July 15, 2010) (statement of Sen. Lincoln).

foregoing payment for a period altogether. It is also common for retail contracts to have forward start dates. For example, commercial energy firms will also agree to sell electricity to a residential Retail Customer at a set price for a period of twelve months, beginning in three months.[4]

These transactions do not remotely resemble the disguised futures contracts that Congress intended Section 742 to capture. Under a broad interpretation of Section 742, however, in which the Commission adopted an expansive interpretation of "actual delivery" or what is meant by a contract done on a "leveraged or margined basis, or financed by the offerer..." these contracts might become subject to Commission oversight. We do not believe that Congress intended to provide the Commission with such oversight.

These agreements are at the core of many commercial energy firms' retail business and have been used for many years within the energy industry. These agreements are distinguishable from the speculative investment contracts that are the target of the "*Zelner* fraud fix." The agreements are for the sale and delivery of physical energy to consumers who take delivery in order to use the relevant commodity for commercial or residential purposes. They are not instruments by which counterparties to commercial energy firms seek to take exposure to commodity prices for purposes of investment gain.

C. THE WORKING GROUP'S SUGGESTED INTERPRETATION.

The Working Group requests that the Commission clarify that, for the purposes of Section 742, the provision of generous payment terms or a line of credit or that requiring the posting of a security deposit or letter of credit does not constitute entering into a contract on a "leveraged or margined basis" and does not lead to a contract being "financed by the offeror." That language in Section 742 is intended to capture contracts or transactions where a Retail Customer takes on exposure that is significantly greater than the collateral held by their counterparty, often for speculative purposes. The provision of generous payment terms or posting a security deposit in the context of an agreement to provide and deliver an energy commodity to an end user of such commodity is the ordinary course of business in not only those circumstances, but in many other commercial relationships as well. For example, a telephone or cable company will often require a security deposit prior to starting service under a contract with a customer.

The Working Group also requests that the Commission, for the purposes of Section 742, deem contracts for the forward delivery of physical energy commodities with Retail Customers that are end users of such commodities (*e.g.*, consume electricity) to fall within the exception for contracts that are in connection with a line of business.[5] While contracts for the forward delivery

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[4] The Working Group would note that in certain markets local distribution companies often cannot deliver power or natural gas to customers within 28 days as they have mandated customer enrollment periods. That is to say, in many circumstances such companies will sign up a new customer, but are not permitted to begin delivery of the relvant commodity to that customer within 28 days.

[5] *See* CEA Section 2(c)(2)(D)(ii)(III)(bb).

of physical energy commodities to industrial or commercial Retail Customers clearly fall within that exception, contracts with residential Retail Consumers may not. Including residential Retail Customer contracts within the line of business exemption is consistent with the intent underlying Section 742. These contracts result in the physical delivery of a commodity that is consumed by the recipient. The contracts are not speculative investments vehicles designed to circumvent the Commission's regulatory authority.

Finally, the Working Group requests that the Commission find that the duration of a delivery period associated with contracts for the delivery of physical energy commodities with Retail Customers qualify for the exclusion in Section 2(c)(2)(D)(ii)(III)(aa) of the CEA if that contract or a similar form of contract has a history of consistently going to physical delivery. Such an interpretation is necessary to provide commercial energy firms with legal certainty that their traditional retail business will not suddenly become subject to regulation under the CEA.

D. "ACTUAL DELIVERY" FOR ENVIRONMENTAL COMMODITIES.

The Commission provides several examples in the Proposed Interpretation of transactions that do or do not result in "actual delivery." Example 3 describes a book entry as not constituting "actual delivery" when the buyer has not fully received the commodity. Though not specifically addressed in any of the examples, the Commission might clarify that, where a book entry transfer by a third party is itself sufficient to pass title to a commodity that actual delivery has occurred. The trading of environmental commodities is one area where the treatment of book entries is of particular concern. In this market, the actual transfer of a commodity, such as renewable energy credit, is frequently done by book entry by the market administrator.

III. CONCLUSION.

The Working Group supports appropriate regulation that brings transparency and stability to the swap markets in the United States. The Working Group appreciates this opportunity to provide comments on the Interim Final Rule and respectfully requests that the Commission consider the comments set forth herein as it develops a final rule in this proceeding.

If you have any questions, please contact the undersigned.

Respectfully submitted,

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