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July 20, 2012

Mr. David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Telefacsimile: (202) 418-5521 and
Email to secretary@cftc.gov and electronically to <http://comments.cftc.gov>

Re: Petition for Rulemaking to Amend and Extend the Effective Date of CFTC Regulations 1.3(m), 1.3(ggg) and 1.3(hhh) in the Commission's Final Rule to Further Define Swap Dealer, et al. (RIN 3038-AD06, May 23, 2012), and to Allow the Submission of Additional Comments/Requests for Additional Guidance/Requests for Reconsideration of such Regulations

Dear Mr. Stawick:

The International Energy Credit Association ("IECA" or "Petitioner") respectfully petitions the Commodity Futures Trading Commission ("Commission" or "CFTC") under CFTC Regulation 13.2 to amend and extend the "effective date" and the "comment date" in the preamble of the CFTC's Final Rule with respect to Regulations 1.3(m), 1.3(ggg) and 1.3(hhh),¹ which regulations contain the new definitions of "Eligible Contract Participant," "Swap Dealer" and "Major Swap Participant." The Petitioner specifically requests that the Commission amend that portion of the preamble of the Commission's Final Rule entitled "Further Definition of Swap Dealer, Security-Based Swap Dealer, Major Swap Participant, Major Security-Based Swap Participant and Eligible Contract Participant," RIN 3038-AD06, 77 Fed. Reg. 30596, May 23, 2012, (herein referred to as the "Swap Dealer Rule") to amend and extend the "effective date" until 120 days, and extend the "comment date" to allow additional comments on (requests for additional guidance or requests for reconsideration of) the Swap Dealer Rule to be submitted to the Commission until 60 days, after the publication in the Federal Register of the latest to occur of the following (referred to herein as the "Completion Date"):

- (i) the Commission's Final Rule entitled "Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement; Mixed Swaps; Security-Based Swap Agreement Recordkeeping," RIN 3038-AD46 (herein referred to as the "Swap Definition Rule");

¹ 77 Fed. Reg. 30596, at 30596.

- (ii) the Commission's decision on the Interim Final Rule under the Swap Dealer Rule;
- (iii) the Commission's decision on the Trade Option Exemption under the Commodity Option Rule; or
- (iv) the Commission's decision on all pending petitions under CEA Section 4(c)(6) for public interest waivers filed by various entities in the energy industry.

Such a rule amendment is permitted by the Commodity Exchange Act ("CEA") as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").² The rule amendment is necessary in order to allow the Petitioner and other members of the public the opportunity to ask the Commission to consider or reconsider aspects of the Swap Dealer Rule affected by the Commission's definition of "Swap" and certain other pending Commission rulemakings after the Commission's reasoning on all of those inter-related rulemakings has become clear on the so-called Completion Date.

The IECA requests that interested members of the public be allowed to submit comments, which could be written as requests for additional guidance or requests for reconsideration, to the Commission by no later than the 60th day after that Completion Date and the Commission would then have 30 days to determine whether to modify its Swap Dealer Rule and/or its Swap Definition Rule as a result of its review of such comments and requests (with the balance of the 120 day period reserved for affected parties to review the Commission's actions before the Commission's rules and statutory interpretations become effective).

In addition, the Commission may need to allow additional comments on other final rules where the implementation and scope of such rules depend on how the Commission further defines "Swap." In this regard, the Commission has passed several final rules prior to finalizing necessary key terms. Accordingly, a decision by the Commission to not reopen the comment period(s) will greatly limit the public's due process right to adequately review and comment on these proposed and final rules.

I. THE TEXT OF THE PROPOSED RULE AMENDMENT (Additional language is underlined and italicized)

In the preamble to Commission's adoption of amendments to 17 CFR part 1 (in the above-captioned Swap Dealer Rule):³

DATES: *Effective date.* The effective date for the joint final rule and joint interim final rule: July 23, 2012, *except for CFTC Regulations 1.3(m), 1.3(ggg) and 1.3(hhh) which shall be effective 120 days after publication in the Federal Register of the latest to occur of the following (referred to herein as the "Completion Date"):*

² Pub. L. No. 111-203, 124 Stat. 1376 (2010).

³ 77 Fed. Reg. 30596, at 30596.

- (i) the Commission’s Final Rule entitled “Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,” RIN 3038-AD46;
- (ii) the Commission’s decision on the Interim Final Rule under the Swap Dealer Rule;
- (iii) the Commission’s decision on the Trade Option Exemption under the Commodity Option Rule; or
- (iv) the Commission’s decision on the pending petitions under CEA Section 4(c)(6) for public interest waivers filed by various RTOs, ISOs and public power companies.

, and except for CFTC regulations at 17 CFR 1.3(m)(5) and (6), which are effective December 31, 2012.

Comment date. The comment period for the interim final rule (CFTC regulation at 17 CFR 1.3(ggg)(6)(iii)) will close July 23, 2012 and the comment period for the public to submit comments on, including requests for additional guidance or reconsideration of, the definitions of “swap dealer” and “major swap participant” will close 60 days after the above-referenced Completion Date.

II. THE PETITIONERS

The IECA is a 90-year old association of several hundred energy company credit management professionals grappling with credit-related issues in the energy industry. Our members’ concerns regarding the Commission’s regulations implementing the Dodd-Frank Act have led us to submit comments to the Commission with respect to several of the Commission’s proposed rules applicable to what previously were unregulated over-the-counter (“OTC”) financial derivatives. The IECA’s efforts in this regard are intended to advise the Commission of the potential practical effects of its proposed regulations on energy companies and especially on the continued use of OTC financial derivatives by energy companies.

Correspondence with respect to these comments should be directed to the following individuals:

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III. NATURE OF THE PETITIONERS' INTEREST

The IECA submits that its requested amendment and extension of the “effective date” of the Swap Dealer Rule and its request for an extension of the “comment date” to allow an opportunity to submit comments, requests for additional guidance and requests for reconsideration of the Swap Dealer Rule and/or the Swap Definition Rule are necessary elements of the requirements for due process and reasoned decisionmaking under the Administrative Procedures Act (“APA”), because of the interconnected relationship of these newly defined terms in the Commission’s regulations arising under the Dodd-Frank Act.

Based on the historical definition of OTC financial derivatives, many companies engaged in a business involving physical commodities transactions would never have imagined that they could be subject to regulation as a Swap Dealer. Upon the occurrence of the Completion Date, however, members of the public will learn what types of commodity transactions, beyond the industry’s historical understanding of the definition of OTC financial derivatives, the Commission now intends to regulate as Swaps.

IV. SUPPORTING ARGUMENTS

For the following reasons, the Commission should approve the proposed rule amendment as soon as possible:

Just as most other U.S. federal agencies provide in their procedural rules an opportunity for the public to request reconsideration of their final decisions, the IECA submits that the Commission should utilize its authority to grant a petition requested under Part 13.2 of the Commission’s Public Rulemaking Procedures, to amend and extend the effective date of the Swap Dealer Rule and allow the public an opportunity to request reconsideration by the Commission of aspects of the Swap Dealer Rule and the Swap Definition Rule that may be affected by the Commission’s decisions that will not be known until the Completion Date.

Affording due process rights to the interested members of the public affected by the Commission’s Swap Dealer regulations demands such an opportunity and the IECA finds it difficult to believe that the Courts would conclude that the Commission has engaged in reasoned decisionmaking if the Commission does not extend the effective date of its Swap Dealer Rule specifically in order to provide an opportunity for members of the public to evaluate the Swap Dealer Rule after the crucial term “Swap” has been defined.

Moreover, granting an extension of the effective date of the Swap Dealer Rule until 120 days after the Completion Date will not result in any appreciable delay in the Commission’s efforts to implement the new regulations it has been charged with issuing under the Dodd-Frank Act. Instead, it will allow the Commission an opportunity to improve upon the regulations by which it will regulate Swaps and Swap Dealers.

In addition, it will allow the Commission incremental time to review the comments submitted in response to the Commission’s Interim Final Rules on Trade Options and Swap Dealers, and to finalize the Trade Option requirements. Moreover, it will provide additional time

for the Commission to act upon the Regional Transmission Organizations (“RTOs”) and other exemption petitions under CEA 4(c)(6), and will afford the impacted parties the necessary review time after the Commission acts on all of the foregoing inter-related decisions. The 120 day extension can also be used by the Commission to review other final rules that incorporate the term Swap.

The Commission has recently recognized the benefits of reopening certain rulemakings to allow for additional comments and the same approach is appropriate in this instance. For example, on July 6, 2012, the Commission reopened the public comment period on its Notice of Proposed Rulemaking on Margin Requirements for Uncleared Swaps, nearly a full year after the end of the original public comment period.

The IECA submits that satisfaction of the standards for reasoned decisionmaking under the APA applicable to the Commission’s rulemaking procedures should cause the Commission to want to hear from members of the affected public about how the Commission’s definitions of “Swap Dealer” and “Swap” will impact the public. Not only should the Commission want to know, the APA demands that the Commission follow such procedures.

When commenting on the “Swap Dealer” proposed rule without knowing how the Commission would define the term “Swap,” members of the IECA were unable to adequately evaluate:

- whether and how many, if any, of their various transactions in the energy industry, which previously were not considered to be OTC financial derivatives, would now be considered by the Commission to be Swaps;
- whether and to what extent their routine day-to-day business activities would make such entities Swap Dealers or Major Swap Participants;
- what impacts, intended or unintended, the Commission’s Swap Dealer Rule would have on their business structures, business strategies and routine day-to-day business activities in the energy industry; and
- what steps they would need to take and what expenses they would need to incur to ensure they are in compliance with all relevant provisions of the Dodd-Frank Act.

At the Commission meeting on the Swap Definition Rule on July 10, 2012, there was a significant colloquy between one of the Commissioners and the Commission Staff that indicated a significant level of confusion with respect to how the further definition of a “Swap” in the final rule treated embedded volumetric optionality in a forward contract, which is a key feature of many types of energy industry transactions. The determination of whether such transactions are “Swaps” could affect whether various energy industry companies are “Swap Dealers” or “Major Swap Participants.”

During this colloquy on July 10th, the Commissioner and the Commission Staff were talking with the benefit of actually seeing a final draft of the Swap Definition Rule. The IECA believes that the public, in commenting on the Swap Dealer proposed rule, would have benefited

greatly from seeing a final version of the Swap Definition Rule before submitting those comments. While we cannot alter the process by which we got to this point in the Commission's rulemaking process, the IECA submits that the Commission has a significant opportunity to remedy some of the shortcomings of its rulemaking process to date by granting this Petition and allowing the public to submit requests for reconsideration of the Commission's Swap Dealer Rule after the Completion Date.

The IECA is sympathetic to the enormous task laid before the Commission when Congress instructed the Commission to issue regulations implementing the Dodd-Frank Act and some rules under the Dodd-Frank Act must be completed before other rules under the Dodd-Frank Act. The Commission, however, must also be sympathetic to the enormous burden laid upon the public, and particularly companies doing business in the energy industry, by requiring them to predict, without the benefit of the Swap Definition Rule, which of their activities the Commission would consider to be Swaps, and then, based on that prediction, provide meaningful comments on the Commission's proposed definitions of Swap Dealers and Major Swap Participants.

The IECA believes that the inability to submit comments to the Commission on the Swap Dealer Rule after seeing the final version of the Swap Definition Rule and the other related decisions that will not be known until the Completion Date is fundamentally counter to the intent of the APA, the Congress, and the Commission.

Moreover, the IECA does not believe that the Commission's actions can withstand judicial scrutiny under the APA if the Commission:

- (i) allows the Swap Dealer Rule to become final and effective on July 23, 2012, before the Commission has disclosed to the universe of potential Swap Dealers and Major Swap Participants which and how many of their current business practices will be considered by the Commission to be Swaps and, therefore, which and how many of their current business practices will render them Swap Dealers and Major Swap Participants; and
- (ii) does not allow the public to comment on, or request reconsideration of, the Swap Dealer Rule after issuance of the Swap Definition Rule and the other related Commission decisions that will not become known until the Completion Date.

The US Court of Appeals for the DC Circuit, in The Second National Natural Gas Rate Cases v. FPC, 567 F.2d 1016 at 1031 (D.C. Cir. 1977) stated the standard for the Commission's reasoned decisionmaking quite clearly: "With all the latitude for expertise and specialization of the agency, the Court must still probe the essential particulars – to assure itself that the Commission has seriously sought answers and engaged in reasoned decisionmaking."

Moreover, the Courts have said that an agency's decision must be set aside if it is arbitrary and capricious, which standard is embodied in Sections 557(c) and 706(2)(A) of the Administrative Procedures Act (5 U.S.C. 557(c) and 706(2)(A) the "APA"). In Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983), the Supreme

Court held that this standard requires the agency to “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choices made.’”

In the case of the Swap Dealer Rule, as well as the Trade Options rule, the Swap Definition Rule which has not yet been published in the Federal Register, and the other rules the Commission has published to date which by their express terms depend on a further definition of the term "swap," the Commission has begun the process of complying with the DC Circuit's standard for reasoned decisionmaking in the Second National case. The Commission has issued proposed rules, received and considered public comments, in some cases repropose rules and in others issued "interim final rules" while proposing more questions. The Commission continues to "seriously [seek] answers" by asking dozens of questions aimed specifically at understanding the transactions in the energy industry. The APA standard clearly cannot be deemed to have been met until the Commission is satisfied that it has the answers that it continues to seek, evaluates those answers and finalizes its decisionmaking process.

For the energy industry, the Commission has not, as yet, finalized the process of reasoned decisionmaking. The Commission continues to seek, and the energy industry continues to provide, answers to the Commission's questions. Until that process concludes, the energy industry remains in the dark as to whether their transactions are "Swaps" or "Trade Options," and how to determine whether a particular entity is required to register as a "Swap" dealer, or can comply with the thresholds in the "de minimis" exception.

The legal standard articulated in Second National and Motor Vehicles cannot be interpreted as merely requiring the Commission to ask questions. Surely, the Commission is required to (a) allow the public the opportunity to respond with the answers the Commission continues to "seriously seek," and (b) analyze those answers in order to glean the facts upon which the Commission can only then finalize its reasoned decisionmaking.

In this instance, the IECA submits that its members, each of which is a participant in the energy industry, do not currently know, and cannot know until the Completion Date, which and how many different types of their existing transactions with respect to a particular energy commodity will be deemed by the Commission to be a Swap.

Further, according to the information provided from the dais, the volumetric option aspect of the Swap Definition Rule is actually an interim final rule, which will be subject to further comment and will not become final for at least 60 days after publication in the Federal Register of the Swap Definition Rule. These factors should at the very least suggest a delayed compliance date with the Swap Dealer Rule for commodity based end-users.

Coupled with the clarification just provided that the pending petitions under CEA Section 4(c)(6) requested by various RTOs will not be dealt with in the Swap Definition Rule, but rather must wait for the public interest waiver process to be played out, is a further reason justifying such a delay in the effective date of the Swap Dealer Rule.

As a result, the IECA respectfully requests that the Commission amend and extend the “effective date” of its Swap Dealer Rule to allow interested members of the public an additional

period of 60 days, after the Completion Date, in which to submit additional comments, or requests for reconsideration, to the Commission regarding the impacts, intended or unintended, of the Swap Dealer Rule in light of the universe of commodity transactions that the Commission has deemed to be Swaps in its Swap Definition Rule.

The Court in Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission, 647 F.3d 1144, at 1148 (D.C. Cir. 2011), described the standard applicable to the Commission's decisions as:

Under the APA, we will set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' 5 U.S.C. §706(2)(A). We must assure ourselves the agency has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made.' Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted). The Commission also has a 'statutory obligation to determine as best it can the economic impacts of the rule.' Chamber of Commerce v. SEC, 412 F.3d 133, 143 (D.C. Cir. 2005).

In Business Roundtable, the Court held that "Indeed, the Commission has a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation,' [citations omitted] and its failure to 'apprise itself – and hence the public and the Congress – of the economic consequences of a proposed regulation' makes promulgation of the rule arbitrary and capricious and not in accordance with law."

Members of the public could not know and did not know whether they would be Swap Dealers under the Swap Dealer Rule and were therefore unable to provide meaningful feedback to the Commission about the "economic consequences" of the Commission's Swap Dealer Rule. The same is true for many other proposed rules for which the comment period has already closed.

The IECA submits that the Commission has the ability to reduce the strong likelihood that its Swap Dealer Rule will be reversed upon appeal to the Courts, for failure of the Commission to afford "due process" rights to the public or to exercise "reasoned decisionmaking," by granting this Petition. Amending and extending the effectiveness of its Swap Dealer Rule for a period of 120 days after, and allowing the public to submit requests for reconsideration of the Swap Dealer Rule and/or the Swap Definition Rule to the Commission for a period of 60 days after, the Completion Date simply makes good sense.

V. PROCESS AND TIMELINE FOR PETITION

The IECA requests that the Commission take action on this Petition as promptly as possible, but in any event no later than the scheduled effective date of the Swap Dealer Rule, namely July 23, 2012. The Petitioner respectfully requests Commission action as soon as possible to allow the Commission to receive the additional insights from the public that granting this Petition would afford to the Commission.

For all the foregoing reasons, the IECA respectfully requests that the Commission:

- (i) amend and extend the “effective date” of its Swap Dealer Rule for a period of 120 days after the Completion Date;
- (ii) amend and extend the “comment date” of its Swap Dealer Rule for a period of 60 days after the Completion Date in order to grant the public the opportunity to submit additional comments on, including requests for reconsideration of, the impacts of the Swap Dealer Rule and/or the Swap Definition Rule;
- (iii) issue an order in response to such requests for reconsideration by no later than 90 days after the Completion Date; and
- (iv) grant any additional extensions of effective dates of other rules or statutory interpretations that may be necessary to implement any modification of the Swap Dealer Rule and/or the Swap Definition Rule the Commission may reasonably decide to make in response to such additional public input.

VI. CONCLUSION

The IECA respectfully petitions the Commission under CFTC Regulation 13.2 to amend the preamble to the Swap Dealer Rule, in order to (i) amend and extend the “effective date” of the Swap Dealer Rule and (ii) amend and extend the “comment date” of the Swap Dealer Rule, as described above. The IECA further requests that if the Commission determines that granting the relief requested in the Petition on all of the matters requested herein would not be appropriate, it grant this Petition in part as though each request were a separate petition. The IECA does not request confidential treatment of this Petition, and asks the Commission to promptly inform the IECA of where on the CFTC’s website the Petition will be posted, and of the process by which the Commission will accept comments in support of the Petition.

The IECA notes this Petition represents a submission of the IECA, and does not necessarily represent the opinion of any particular member.

Respectfully submitted,

/s/

Phillip G. Lookadoo, Esq.
Reed Smith, LLP

/s/

Jeremy D. Weinstein
Law Offices of Jeremy D. Weinstein

cc: Honorable Gary Gensler, Chairman
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O’Malia, Commissioner
Honorable Mark P. Wetjen, Commissioner
Dan M. Berkovitz, General Counsel