The Business Council for Sustainable Energy®

January 6, 2012

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

RE: RIN No. 3235-AK65 — Proposed Rulemaking Regarding Further Definition of "Swap Dealer," "Major Swap Participant," et al.; 75 Fed. Reg. 80,174 (Dec. 21, 2010)

RIN No. 3038-AD46 — Proposed Rulemaking Regarding Further Definition of "Swap," "Security-Based Swap," "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; 76 Fed. Reg. 29,818 (17 CFR Part 1) (May 23, 2011)

Dear Secretary Stawick:

The Business Council for Sustainable Energy respectfully submits the attached two documents for the record regarding implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2011 (P.L. 111- 203). The documents include:

- A one-page summary of the Council's position related to the definition of "Swap Dealer;" and
- A one-page summary of the Council's position related to the definition of "Swap" and environmental products

The Business Council for Sustainable Energy (BCSE) is a coalition of companies and trade associations from the energy efficiency, natural gas and renewable energy sectors, and also includes independent electric power producers, investor-owned utilities, public power, commercial end-users and carbon offset project developers and greenhouse gas emissions management firms. The coalition's diverse business membership is united around the revitalization of our economy and creation of a secure and sustainable energy future for America.

We recognize that the official public comment period on these proposed rules is now closed; however, given the importance of these issues to our industries, we would appreciate the opportunity to have our comments included as part of the official record.

The Council appreciates your consideration of our request and we look forward to working with you as the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act moves forward.

Sincerely,

Lisa Jacobson

Lisa Jacobson, President
Business Council for Sustainable Energy

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CFTC Swap Dealer Definition is Key to Renewable Energy Development and Achieving Environmental Goals

Trading in Swaps Should Not Make a Company a Swap Dealer. The CFTC should implement the Swap Dealer definition by ensuring that both the law's general exception and the de minimis exception are properly applied. The general exception applies to entities entering into swaps for their own account (e.g. traders). The de minimis exception allows for the exclusion from a Swap Dealer designation of entities that engage in a de minimis quantity of swap transactions "with or on behalf of" their customers. These two exceptions are essential because they allow entities that use swaps to hedge or mitigate commercial risks, such as those risks that stem from the production of energy and agricultural commodities, to avoid being designated as Swap Dealers, a designation that would preclude eligibility for the end-user clearing exception. Entities designated as Swap Dealers would be required to transact their swaps on an exchange or to clear such transactions, subjecting them to costly margin and clearing expenses and draining the economy of billions of working capital dollars.

The CFTC Should Use the Concept of "Intermediation" to Define Swap Dealer. To achieve congressional goals, the CFTC should use a two-step process based on the Securities Exchange Act and the concept of intermediation (transacting to satisfy a customer order or, simply put, acting on behalf of a customer) to first implement the general exception and then implement the de minimis exception in the Swap Dealer definition. The Securities and Exchange Commission (SEC) precedent on the designation of a dealer provides a comprehensive way to distinguish trading from dealing. Central to the SEC case law characteristics that distinguish dealing from trading is intermediation. To implement the two exceptions, the CFTC should use the concept of intermediation as the basis for filtering dealers from traders, many of whom use swaps to hedge business risk. This approach will ensure that financial entities engaging in swaps with or on behalf of customers remain in the regulatory purview of the CFTC without diminishing the integrity of the end-user clearing exception.

Step one: Use the SEC model for distinguishing between "dealers" and "traders" to implement the general exception. Built into the Swap Dealer definition is a general exception excluding "persons that enter into swaps for that person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business"-- from designation as a Swap Dealer. Put another way, the general exclusion establishes that only an entity trading swaps that are not for its own account (*e.g.* done in an intermediary capacity) is a Swap Dealer. In securities markets, the SEC and the courts have identified a number of characteristics for dealing activity. While the securities market activities do not translate precisely to the commodity swaps market, the concept of "intermediation" does translate. The concept of intermediation can be used to implement the general exception as the starting point for sorting dealers from traders so that the integrity of the economic protection provided by the general exclusion can be maintained.

Step two: Implement the de minimis exclusion by considering the level of "dealing" transactions relative to total swap transaction activities. An entity would not qualify for the general exception if it both trades and deals. While not universal, many commercial entities with astute trading capabilities also enter into transactions with their traditional customers that may ultimately resemble dealing. Often this "dealing" is the result of the customer's interest in transacting financial hedges with a counterparty that has physical assets and a history in bringing physical product to market. This is where the de minimis exception plays a critical role. For entities that trade swaps and engage in this limited form of dealing, the CFTC should design the de minimis exception so that the level of dealing (defined by using the concept of intermediation as reflected in the SEC regulations) is compared to their total swap transactions (e.g. trading and dealing). If the level of dealing relative to the total is small, in other words, if the entity primarily trades swaps although it engages in some dealing, the de minimis exception is satisfied.

The right Swap Dealer approach works for consumers and the economy. Using the concept of intermediation to implement the general and de minimis exceptions will allow the CFTC to sort true swap dealers from those entities that trade swaps to hedge commercial business risk. This approach is consistent with existing case law and assists the advancement of U.S. environmental energy objectives. Finally, the solution provides the CFTC with a practical and valid way to regulate Swap Dealers that buy and sell swaps to satisfy customer orders, without the harm to the economy that would result from avoidable and unnecessary increases in business risk management costs.

Please note that the BCSE is a diverse coalition of business interests and not all BCSE members endorse or take positions on issues covered in this document. The comments contained in this paper represent the position of BCSE as an organization, but not necessarily the view of any particular member with respect these issues.

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Further Definition of "Swap," "Security-Based Swap," "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Proposed Rule 76 Fed.Reg 29,818 (17 CFR Part 1) RIN No. 3038-AD46 (May 23, 2011)

Clean energy industries are concerned that "environmental commodities" – such as renewable energy credits (RECs), emissions allowances, carbon offsets, energy efficiency credits, etc. – may inadvertently be defined as swaps, despite their illiquid and unique nature, which would:

- Create barriers generally to renewable energy development and specifically to nascent markets for environmental commodities.
- Increase the cost of business for renewable energy companies and the companies that purchase renewable power.
- Raise the price of clean power sources for the US consumer, discouraging retail demand.
- Discourage direct transactions by smaller clean energy market participants, thereby shifting capital to larger players and financial institutions
- Undermine national and regional goals for environmental protection, energy independence, and domestic job creation.

Environmental commodities are physically settled, non-financial instruments, which trade regarding the delivery of environmental attributes, and they should not be defined as swaps.

- While intangible, environmental commodities go hand-in-hand with physically settled transactions and should be excluded from the definition of swap by section 1a(47)(B)(ii) of the Commodity Exchange Act.
- Environmental commodities are consumed and retired, attributes characteristic of forwards.
- The Interagency Working Group for the Study on Oversight of Carbon Markets, established in section 750 of Dodd-Frank, concluded that the CFTC did not have the authority under Dodd-Frank to routinely monitor trading in carbon markets. Given that carbon offsets are environmental commodities, this finding offers a helpful window into the legislative intent behind Dodd-Frank regarding environmental commodities.
- RECs are an environmental commodity, subject to extensive review and rules, transacted with a transfer of title. Sometimes known as "green tags," RECs are only created by, and associated with, the production of energy from a specific source.
- These and like clean energy instruments exist primarily in order to comply with mandates imposed by state and federal environmental laws and regulations.
    - For example, renewable energy resource transactions and emission allowances are employed solely to demonstrate required procurements under the 33% California Renewable Portfolio Standard and California's cap and trade program.
    - Likewise, utilities enter into Resource Adequacy agreements with suppliers to certify to the Public Utilities Commission and California Independent System Operator that they purchased sufficient capacity to generate energy for certain demand contingencies.

It would be greatly helpful if language – in the preamble or another appropriate location – recognizes the unique nature of environmental products. These non-financial instruments could otherwise be defined improperly and run counter to the nation's critical energy security, clean power, and environmental protection goals.

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