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

VIA ELECTRONIC MAIL

Re: *Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants*, RIN 3038-AC96

Dear Secretary Stawick:

I. INTRODUCTION.

On behalf of the Working Group of Commercial Energy Firms (the “Working Group”), Hunton & Williams LLP submits the following in response to the request for public comment set forth in the Notice of Proposed Rulemaking issued by the Commodity Futures Trading Commission (“CFTC” or “Commission”) and published in the *Federal Register* on December 9, 2010,¹ proposing to implement recordkeeping requirements and daily trading records requirements for Swap Dealers and Major Swap Participants, pursuant to Sections 731(f) and 731(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”).

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.

¹ Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 76,666 (Dec. 9, 2010) (“*Proposed Daily Trading Records Rule*”). The *Proposed Daily Trading Records Rule* is being promulgated simultaneously with the Commission’s other recordkeeping and reporting rulemaking proceedings. See Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76,141 (Dec. 7, 2010) (“*Proposed Real-Time Reporting Rule*”); Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76,574 (Dec. 8, 2010) (“*Proposed General Reporting Rule*”). The Working Group encourages the Commission to reconcile these rulemakings as appropriate to avoid all unnecessary duplication.

Commercial energy firms, such as those in the Working Group, generally use the swap markets as an adjunct to their commercial activities. Historically, they have not been viewed as Swap Dealers. Members of the Working Group believe that, in principle, they should not fall within the definition of Swap Dealer under the Act or the Commission's regulations. However, at the present time, the Commission has not finalized the regulatory definition of Swap Dealer.

The Working Group will comment in the rulemaking proceeding further defining the term Swap Dealer as the Commission's outstanding proposal is vague in certain material respects. Given this uncertainty, commercial energy firms do not know whether they will fall within the definition of Swap Dealer and become subject to certain requirements contained in this and other CFTC proposals applicable to Swap Dealers. Members of the Working Group are therefore compelled to comment on such proposals in light of that possibility. In this letter, the Working Group refers to "Non-bank Swap Dealers," if, in fact, there are any, as commercial entities that are not affiliated with banks. These commercial entities have not been traditionally viewed by the CFTC or the swaps markets as Swap Dealers, but are nevertheless potentially within the scope of the Swap Dealer definition adopted as final by the Commission for all or part of their activities.

II. EXECUTIVE SUMMARY.

The Working Group strongly supports the goals of the Act to enhance transparency in the swap markets and offers the following comments to assist the Commission in developing the general and daily trading record rules required by the Act. The comments cover several issues reflecting the Working Group's concerns with various portions of the *Proposed Daily Trading Records Rule*, and, where appropriate, the Working Group respectfully offers proposed solutions and alternatives for the Commission's consideration. The following principles represent the Working Group's general concerns detailed in Part III, while Part IV provides responses to specific questions posed by the Commission.

- As drafted, the requirements of the *Proposed Daily Trading Records Rule* are excessive and overly broad. The Commission should re-evaluate the need for, and costs of, requiring the retention of the broad scope of information being requested.
- Swap Dealers and Major Swap Participants ("MSP") should be permitted to retain physical transaction and business records as they currently do in the normal course of business and in a manner compatible with the systems they currently have in place.
- The information technology ("IT") systems of Non-bank Swap Dealers are designed to support trading activity associated with the delivery of physical energy commodities and do not currently support the retention of information in a manner contemplated by the Commission.
- Several of the proposed daily trading record requirements are excessive and would be technologically impracticable to implement, including retaining records of all pre-trade

execution information, pre-trade execution communications, and timestamps and records of sources for all quotations.

- The *Proposed Daily Trading Records Rule* creates uncertainty with respect to the retention of records for “related cash and forward transactions.” The Commission should provide clarity and guidance as to what constitutes a “related” cash or forward transaction, specifically whether they include physical transactions. The Working Group submits that Congress did not intend to extend swap regulation over millions of physical energy transactions.
- The Working Group believes that the *Proposed Daily Trading Records Rule* should not create any recordkeeping requirements related to physical transactions beyond records already required to be kept in the normal course of business.
- The *Proposed Daily Trading Records Rule*’s requirement to keep records of trade execution including “a record of the date and time of execution...to the nearest minute” conflicts with the *Proposed Real-Time Reporting Rule* and the *Proposed General Reporting Rule*. The Working Group believes each of the proposed rules should be consistent by requiring time of execution to be recorded to the nearest hour and minute, but not to the nearest second.
- The Working Group seeks clarification on the requirements to retain records of “rationales” for certain transactions reported pursuant to the *Proposed Real-Time Reporting Rule*.
- The Working Group recommends that the Commission adopt a single regulation to cover the recordkeeping requirements of the *Proposed Daily Trading Records Rule*, the *Proposed General Reporting Rule*, and the *Proposed Real-Time Reporting Rule*. Doing so would avoid costly and unnecessary duplication.
- The Commission should not implement the *Proposed Daily Trading Records Rule* until certain threshold criteria are met, including: finalization and definition of all required data elements; the formation, registration, and testing of swap data repositories (“SDRs”) and third party service providers; the publication of an SDR reporting format and standardized requirements for data fields and product descriptions; and until all of the standards for Unique Identifiers are established.
- The Commission should adopt a phased-in approach to implementing the *Proposed Daily Trading Records Rule* by delaying the effective date of a final rule for six to twelve months following its publication in the *Federal Register*. Within this time period, the Commission could provide a staggered series of effective dates to account for differences between certain market participants.

III. GENERAL COMMENTS OF THE WORKING GROUP.

A. RECORDKEEPING REQUIREMENTS OUTLINED IN THE PROPOSED DAILY TRADING RECORDS RULE ARE EXCESSIVE AND OVERLY BROAD.

The Working Group supports the intent of Sections 731(f) and 731(g) of the Act and the *Proposed Daily Trading Records Rule*, which is to ensure that Swap Dealers and MSPs maintain adequate records of their swap transactions and related business activity. However, the *Proposed Daily Trading Records Rule* sets forth numerous specific requirements that the Working Group considers to be excessive relative to the intent of these sections. Such overly broad record requirements include, but are not limited to:

- Records of unfilled or cancelled orders;
- Records of all formal and informal complaints;
- Pre-execution trade information;
- Pre-execution and execution information to the nearest minute;
- Equivalent requirements for cash and forward transactions;
- Records of numerous daily calculations;
- All marketing and sales presentations; and
- Records documenting compliance with all federal requirements.

The Working Group respectfully submits that, in developing a final rule in this proceeding, the Commission should reevaluate the need for, and costs of, requiring Swap Dealers and MSPs to record and retain the broad scope of information being requested pursuant to this rulemaking. Additionally, where Swap Dealers and MSPs are already capturing required information, the Commission should permit such entities to record and retain such information as they currently do in the normal course of business.

B. NON-BANK SWAP DEALERS WILL BE REQUIRED TO IMPLEMENT MORE ROBUST INFORMATION TECHNOLOGY SYSTEMS TO MEET THE REQUIREMENTS OF THE PROPOSED DAILY TRADING RECORDS RULE.

The Working Group supports the Commission's recognition in the *Proposed Daily Trading Records Rule* that "there will be differences in the size and scope of the business of particular swap dealers and major swap participants."² Further, the Commission appropriately solicits comment on whether "certain provisions of the proposed regulations should be modified

² *Proposed Daily Trading Records Rule* at 76,667.

or adjusted to reflect the differences among swap dealers and major swap participants.”³ The Working Group provides the following comments in order to assist the Commission in understanding the key differences among Swap Dealers so that it can tailor its regulations and subsequent implementation to properly account for these differences.

Particularly in energy markets, there are notable differences between “Swap Dealers” and “Non-bank Swap Dealers.” The Working Group views Swap Dealers as certain large financial firms and other similarly-situated entities. In contrast, Non-bank Swap Dealers are certain participants in the physical commodity swap markets that may be required to register all or part of their business as a Swap Dealer, *i.e.*, commercial firms transacting in energy markets. Such entities are viewed today as non-dealers, but may be subject to new regulation as Swap Dealers and thus be subject to the numerous new recordkeeping and reporting obligations proposed by the Commission.

Non-bank Swap Dealers do not have as robust internal IT systems and associated business processes as Swap Dealers. This difference is primarily reflected through the fact that Swap Dealers employ larger IT professions and have larger budgets than Non-bank Swap Dealers that are designed to support very active derivatives trading operations in financial markets.

In contrast, the IT systems owned and operated by commercial energy firms that may be subject to Commission oversight as Non-bank Swap Dealers are designed to support trading activity associated with their underlying, primary business operation which is the production, marketing and delivery of physical energy commodities. Consequently, Non-bank Swap Dealers in the energy industry do not currently have the necessary systems and appropriate business processes in place to record and retain information in the manner contemplated by the Commission in the *Proposed Daily Trading Records Rule*.

Before adopting final record retention requirements in this proceeding, the Commission should further evaluate the actual costs, availability of technology, and ability of Non-bank Swap Dealers to deploy the technology required to comply with such requirements. Such an evaluation will provide a basis for the Commission to draft regulations that provide sufficient flexibility to accommodate the unique characteristics of Non-bank Swap Dealers.

C. **CERTAIN RECORDKEEPING REQUIREMENTS PERTAINING TO DAILY TRADING RECORDS ARE EXCESSIVE AND WOULD BE TECHNOLOGICALLY IMPRACTICABLE TO IMPLEMENT.**

The *Proposed Daily Trading Records Rule* specifies numerous daily trading records requirements that the Working Group believes would, at a minimum, be highly burdensome and, in some cases, virtually impossible to implement in a cost-effective manner.

³ *Id.*

1. PRE-EXECUTION TRADE INFORMATION.

a. The Commission Should More Thoroughly Consider the Availability of Current Technology and Industry Practice for Energy Markets.

With respect to pre-execution trade information, the *Proposed Daily Trading Records Rule* would require Swap Dealers and MSPs “to maintain records of all communications provided or received concerning information that leads to the execution of a swap, whether conveyed by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media.”⁴ Moreover, each recorded communication must be maintained as a separate electronic file identifiable and searchable by transaction and counterparty. Simply retaining the required information—in any form—would entail very significant expense. As explained below, maintaining the data in separate files that are identifiable and searchable would require astronomically expensive manual processes.

From an IT standpoint, the Working Group is unaware of existing technology, other than through a manual process, that would allow records of telephone conversations, instant messages, voice recordings, e-mails, and other electronic communications to be maintained in an individual file that would be identifiable and searchable by transaction and counterparty. Even if such technology exists, the Working Group does not believe that it would be possible to identify much, if any, of the pre-execution data specified by the Commission as being applicable to any specific trade because traders and other commercial employees typically engage in ongoing dialogue with any number of counterparties over an extended period of time and do not necessarily initiate communications with counterparties specific to any single trade or prospective trade. It would be extremely difficult and time consuming – if not impossible – to manually review each and every communication, electronic or otherwise, of a specific trader to determine which specific pre-execution conversations or documents ultimately led to the execution of a particular swap and, consequently, to assign each particular communication to a segregated, unified file for that particular swap transaction.

To reiterate, putting aside the impossibility of identifying all of the communications that might relate to an individual transaction, the Working Group is currently unaware of any existing IT system that could provide segregated, unified files containing all swap transaction information, including pre-transaction and post-transaction data, identifiable and searchable by transaction and counterparty.⁵ Even if such a system could be acquired or developed, the Working Group believes that it would be prohibitively costly to do so.

⁴ *Proposed Daily Trading Records Rule* at 76,669.

⁵ The Working Group also seeks clarification as to what the Commission means when it seeks “reliable timing data for the initiation” of a transaction. See Proposed CFTC Rules 23.202(a)(1)(i) and (b)(2).

b. The Commission Should Not Require a Timestamp for Every Quote Nor a Record of the Source of Quotations.

Proposed CFTC Rule 23.202(a)(1)(ii) requires Swap Dealers and MSPs to record date and time by timestamp for “each quotation provided to, or received from, the counterparty prior to execution.” Requiring a record for every quote given or received will not assist in trade reconstruction and thus the Working Group believes this requirement is unnecessary, overly burdensome, and would provide no discernible benefit.

In addition, the Commission requests comment on whether it should “require a record of the source of quotations, including the source of any input if the quotation is generated by a formula or model.”⁶ The Working Group submits that most entities do not currently capture or store this information, and it would be difficult to do so, particularly given that quotations may be developed by multiple sources. In any event, the Working Group questions the Commission’s need for this information given that requiring retention of the source of quotations will add additional compliance costs on market participants, yet provide little regulatory value, if any. As such, the Commission should not require the retention of quotation sources, nor should it require a timestamp for every quote given or received.

c. The Commission Should Re-evaluate its Proposed Retention Period for Pre-Execution Communications.

The Commission solicits comment regarding whether the retention period for pre-execution communications should be shorter than the retention period applicable to other business records. The *Proposed Daily Trading Records Rule* contemplates the retention of significant amounts of pre-execution communications, the long-term electronic storage of which will prove costly over the proposed five-year period. Accordingly, the Commission should consider adopting a two-year retention period for pre-execution communications.

2. DAILY TRADING RECORDS FOR RELATED CASH AND FORWARD TRANSACTIONS.

Proposed CFTC Rule 23.202(b) would require retention of records for “related cash and forward transactions” executed by the Swap Dealer or MSP, including all information “necessary to conduct a comprehensive and accurate trade reconstruction for each related cash or forward transaction.”

As currently drafted, proposed CFTC Rule 23.202(b) creates uncertainty and should be clarified by the Commission. Specifically, neither proposed CFTC Rule 23.202(b) nor interpretive guidance in the *Proposed Daily Trading Records Rule* specifies what constitutes a “related” cash or forward transaction. For instance, it is not clear whether a “related” cash or forward transaction is (i) a physical transaction that is hedged by a swap transaction, or (ii) a

⁶ *Proposed Daily Trading Records Rule* at 76,669.

physical transaction that is otherwise related; for example, part of a structured transaction that includes physical and financial elements.

If it is the Commission's intent that the phrase "related transactions" means physical transactions being hedged by swaps, the Working Group respectfully requests the Commission to recognize that, although participants in physical energy commodity markets use swaps and futures to hedge underlying physical positions, they do not, as a general matter, execute such transactions specifically for the purpose of hedging a specified underlying physical position. Rather, the predominant practice in physical energy markets is to hedge underlying physical positions on a portfolio or aggregate basis. Given the wide use of portfolio hedging in energy markets, it would be difficult, if not impossible, for energy market participants to link physical positions with arguably "related" swap transactions.

Given the broad text of proposed CFTC Rule 23.202(b), practically any physical transaction could be "related" to a swap. The number of physical transactions undertaken by members of the Working Group and other energy companies far exceeds the number of swap transactions that they are party to. Large commercial energy firms conduct hundreds of thousands of individual physical transactions each year. If adopted without further clarification, compliance with proposed CFTC Rule 23.202(b) would impose a large number of very expensive and burdensome requirements on millions of physical transactions that are undertaken by commercial energy firms that are also parties to swap transactions.

For example, these requirements include, but are not limited to: (i) the retention of all oral and written communications related to each cash and forward transaction; (ii) the time stamping of each such transaction; and (iii) a record of the daily calculation of the daily value of each such transaction. These records are virtually the same records that the *Proposed Daily Trading Records Rule* requires Swap Dealers and MSPs to retain for swap transactions. Moreover, because physical transactions are frequently negotiated and executed by personnel different than those who execute swaps transactions, and because the transaction data is often entered and maintained in different systems than those used for swaps, including physical transactions in the trading records requirements would have a disproportionate affect on compliance costs. In short, proposed CFTC Rule 23.202(b) would multiply the considerable cost of retaining trading records by several-fold.

The Working Group respectfully submits that Title VII and the underlying Congressional intent did not contemplate extending swap regulation over millions of physical energy transactions. For these reasons, the final rule issued in this proceeding should clarify that the "related cash and forward transactions" language in proposed CFTC Rule 23.202(b) does not include, or otherwise apply, to "related" physical transactions, beyond the routine retention of data captured in the normal course of business.

3. EXECUTION TRADE INFORMATION.

Proposed CFTC Rule 23.202(2)(iv) requires Swap Dealers and MSPs to make and keep trade execution records including a "record of the date and time of execution of each swap, to the

nearest minute” This conflicts with both the *Proposed Real-Time Reporting Rule* and *Proposed General Reporting Rule*, which require that the time of execution be displayed to the second, rather than minute. The Working Group generally believes that an hour and minute requirement is reasonable; however, displaying time of execution to the second is unnecessary and not aligned with current industry practice. The Working Group seeks consistency across all of the Commission’s proposed recordkeeping and reporting rules, and further requests the Commission to adopt a minute requirement, rather than displaying to the second.⁷

D. GENERAL RECORDS REQUIREMENTS.

1. TRANSACTION RECORDS.

Proposed CFTC Rule 23.201(a)(1) would require Swap Dealers and MSPs to maintain records of each transaction, including all documents on which transaction information is originally recorded, in a form and manner identifiable and searchable by transaction and by counterparty. As stated in Part III.A., above, the Working Group considers these requirements to be overly broad and excessively burdensome to market participants. In particular, tying records of unfilled or cancelled orders, correspondence (*e.g.*, voice records, e-mail, and instant messages), journals, memoranda, and other records required by 23.201(a)(1)(i) to each individual transaction in a manner that is identifiable and searchable by transaction would create an enormous technical burden, likely requiring the review, sorting, and assignment of such data to each transaction by individual employees.

The Working Group submits that the *Proposed Daily Trading Records Rule* should permit Swap Dealers and MSPs to retain such records as they already do in the normal course of business and in a manner compatible with the recordkeeping systems they have in place; provided that such records remain readily accessible within the time period specified in the *Proposed Daily Trading Records Rule* and can be provided to the Commission, within a reasonable amount of time, upon request.

2. BUSINESS RECORDS.

With respect to business records, the Working Group submits that market participants presently retain the records required by Proposed CFTC Rule 23.201(b), although not in a single comprehensive file. The Commission should permit these records to be retained as they currently are in the normal course of business. For example, many entities retain financial records within their accounting departments, while marketing and sales materials would be retained separately within another division; they should be permitted to continue with this approach, as long as such records can be readily accessed and provided to the Commission upon request.

⁷ The Commission requires recordation of the date and time to the nearest minute for pre- and post-execution trade information as well, and thus the Commission should provide similar clarification with respect to pre- and post-execution data.

Additionally, the Commission should provide clarity as to what level of an entity's business records must be retained. Specifically, in instances where a subsidiary is determined to be a Swap Dealer or MSP, but its parent company is not, business records should only be required to be retained for the subsidiary.

3. RECORDS OF DATA REPORTED TO AN SDR AND RECORDS REPORTED IN REAL-TIME.

The *Proposed Daily Trading Records Rule* requires Swap Dealers and MSPs to retain all information and data required to be reported to an SDR pursuant to the *Proposed General Reporting Rule*, as well as all information and data required to be reported in real-time pursuant to the *Proposed Real-Time Reporting Rule*. Both requirements – proposed CFTC Rules 23.201(c) and (d), respectively – require that such records be maintained along with a “record of the date and time” the Swap Dealer or MSP made the report. The Working Group seeks clarification that it is appropriate to record time to the minute, rather than to the second, for purposes of providing a record of the date and time a report was made. The Working Group generally believes that an hour and minute requirement is reasonable and aligned with current industry practice.

4. PROVIDING A “RATIONALE” FOR CERTAIN SWAP DETERMINATIONS.

As noted above, Swap Dealers and MSPs are required to maintain a record of when swap information is provided in real-time pursuant to the *Proposed Real-Time Reporting Rule*. Notably, the Commission is requiring Swap Dealers and MSPs to record certain subjective “rationales” related to such transactions. Specifically, proposed CFTC Rule 23.201(d)(2) requires Swap Dealers and MSPs to record the rationale for reporting a less specific data field in order to protect the anonymity of the counterparties to a swap. Moreover, proposed CFTC Rule 23.201(d)(3) requires Swap Dealers and MSPs to record the rationale for determining that a swap is a large notional swap. The Working Group seeks clarification as to what the Commission is seeking with respect to a “rationale” for these scenarios. Moreover, in light of the fact that this requirement might apply to hundreds of thousands of individual transactions, the Working Group questions what purpose this information would serve, or what benefit the Commission hopes to derive for purposes of carrying out its duties under the Act.

E. RETENTION AND INSPECTION OF RECORDS.

1. COST AND IMPLEMENTATION CONCERNS.

The Working Group strongly recommends that the Commission adopt a single regulation to cover the retention of records for purposes of the *Proposed Daily Trading Records Rule*, the *General Reporting Rule*, and the *Proposed Real-Time Reporting Rule* in order to avoid costly and unnecessary duplication. The retention of data is directly related to the costs borne by a market participant, meaning longer retention periods will increase costs. Thus, the Commission should re-evaluate whether all records subject to the retention requirements of the *Proposed Daily Trading Records Rule* require a five-year retention period. As noted above, certain

records, such as records relating to pre-execution trade information, will lose value well before the five-year retention period expires.

Moreover, the Working Group respectfully submits that the costs and burdens associated with requiring Non-bank Swap Dealers to comply with the proposed record retention requirements clearly outweigh any demonstrable benefit to swap markets. To facilitate the cost-effective implementation of Title VII, as encouraged by President Obama in the recently-issued supplement to Executive Order No. 12866, the *Proposed Daily Trading Records Rule* should be revised to recognize that cost burdens on market participants to retain this information outweigh any benefit to swap markets associated with retaining this information. Accordingly, the Commission should further evaluate the actual costs to comply with the record retention requirements set forth in the *Proposed Daily Trading Records Rule*, as well as the *Proposed Real-Time Reporting Rule* and the *Proposed General Reporting Rule*.

Finally, the Working Group respectfully seeks clarification with respect to what the Commission means when it states that records must be “readily accessible” during the first two years of the five-year retention period. The Working Group seeks clarification whether this means readily accessible by the market participant or by the Commission.

2. USING SECTION 1.31 OF THE COMMISSION’S REGULATIONS.

The Commission solicits comment on whether the proposed recordkeeping requirement under the *Proposed Daily Trading Records Rule* should be the same as Section 1.31 of the Commission’s regulations. The Working Group submits that Section 1.31 is outdated and inappropriate for application to the proposed recordkeeping rules. In its present form, its application to the recordkeeping requirements would be severely onerous and difficult to comply with, making it an unworkable model for these purposes. Specifically, Section 1.31 appears to apply to written documents, including electronic images of such documents, and does not seem suitable for electronic records such as those in a trading system, that do not originate from a written document. As such, to be made workable for purposes of complying with the Commission’s proposed obligations, Section 1.31 would require significant revision to reflect current technologies and industry practices relating to digitized data storage.

F. IMPLEMENTATION SCHEDULE AND ADOPTING A PHASED-IN APPROACH.

The Commission solicits specific comment with respect to various implementation issues, including scheduling and whether there should be a phased-in approach. The Working Group strongly supports a phased-in approach for purposes of implementing the *Proposed Daily Trading Records Rule*, as well as the *Proposed Real-Time Reporting Rule* and *Proposed General Reporting Rule*.⁸

⁸ In addition to the three reporting and recordkeeping rulemakings identified herein, the Commission also is responsible for implementing and overseeing two related Interim Final Rules. See Interim Final Rule for Reporting Certain Post-enactment Swap Transactions, 75 Fed. Reg. 78,892 (Dec. 17, 2010); Interim Final Rule for Reporting Pre-Enactment Swap Transactions, 75 Fed. Reg. 63,080 (Oct. 14, 2010).

1. THE COMMISSION SHOULD NOT COMMENCE IMPLEMENTATION OF THIS RULE UNTIL CERTAIN THRESHOLD CRITERIA HAVE BEEN MET.

The *Proposed Daily Trading Records Rule* requires Swap Dealers and MSPs to transmit electronically all information required pursuant to the Commission's *Proposed Real-Time Reporting Rule* and *Proposed General Reporting Rule*.⁹ As such, the final rule in this proceeding should be phased-in according to the implementation plan detailed in Part III.F.2, below.¹⁰ However, as a threshold matter, in order to ensure consistency and uniformity across the Commission's proposed recordkeeping and reporting regime, the phasing-in of the final recordkeeping obligations in this proceeding should not commence until the Commission has assured that:

- All of the data elements necessary to implementation are finalized and defined by the Commission;
- SDRs have been formed, registered, and have the tested capability, and proven back-up capabilities, to accept swap data for public dissemination;
- Where there is not an SDR to accept data for a particular asset class or swap, the applicable third party service providers should have the tested capability, and proven back-up capabilities, to accept swap data for such asset class or swap;
- The Commission, as required by Section 728 of the Act, should have the tested capability to interface with SDRs and third party service providers to, among other things, confirm dissemination;¹¹
- SDRs have published a reporting format and related requirements for standardized (i) data fields, (ii) data elements, and (iii) product descriptions; and
- All of the standards for Unique Swap Identifiers, Unique Counterparty Identifiers, and Unique Product Identifiers are established.

Moreover, implementation should not commence until a technology base is established and following a testing period with SDRs and third party service providers, as applicable. The consequences of pushing forward with insufficiently tested systems and processes could prove

⁹ See proposed CFTC Rule 23.204(b) and 23.205(b).

¹⁰ Contemporaneously with the submission of these comments, the Working Group is submitting comments in response to the Commission's *Proposed Real-Time Reporting Rule* and *Proposed General Reporting Rule*. In those comments, the Working Group sets forth a detailed phase-in approach to implement the Commission's recordkeeping and reporting regime, which applies to all market participants, not just Swap Dealers and MSPs. The phase-in recommended herein relates to the approach suggested by the Working Group in the other proceedings.

¹¹ New CEA Section 21(c)(4) requires SDRs to "provide direct electronic access to the Commission . . . and provide the information . . . in such form and at such frequency as the Commission may require to comply with the public reporting requirements contained in section 2(a)(13)."

disastrous – requiring significant time and resources for multiple parties, including the Commission, to remedy, plus potentially requiring the re-submission of data on millions of transactions. To begin implementation prior to satisfaction of the above-described requirements would prove unworkable due to the many technology-related obstacles that must be addressed.

**2. PROPOSED FRAMEWORK FOR PHASING-IN THE GENERAL AND DAILY
RECORDKEEPING AND RETENTION REQUIREMENTS.**

To effectively and efficiently implement the *Proposed Daily Trading Records Rule*, the Commission must provide adequate transition times for Non-bank Swap Dealers. As discussed in Part III.B., above, due to the commercial nature of their swap market activities, Non-bank Swap Dealers do not have in place the necessary IT systems to record and retain swap transaction information in the manner proposed by the Commission. In this context, the Working Group recommends that the Commission delay the effective date of the final rule for six to twelve months following its publication in the *Federal Register*, thus affording both Swap Dealers and Non-bank Swap Dealers adequate time to develop and deploy the necessary IT systems and business practices.

Furthermore, within this six to twelve month period, the Commission could provide a staggered series of effective dates to account for the differences between Swap Dealers and Non-bank Swap Dealers. For instance, the Commission could require Swap Dealers to begin compliance first, and then phase-in Non-bank Swap Dealers sometime thereafter.

IV. RESPONSES TO SPECIFIC REQUESTS FOR COMMENTS.

The Working Group respectfully requests the Commission fully consider the critical policy issues and principles addressed above with respect to the Commission's proposed general records and daily trading records requirements. Once these overarching concerns have been addressed, the Working Group recommends the Commission to then solicit further input from Swap Dealers and MSPs to develop consensus on the many technical issues raised by the Commission's specific requests for comment. Doing so will ensure that the technical details fit within the larger scope of the Commission's recordkeeping regime.

Nevertheless, the Working Group provides the following responses to certain questions set forth in the *Proposed Daily Trading Records Rule*.

A. GENERAL RECORDS REQUIREMENT.

Question: Should the Commission provide greater specificity on the requirement that transaction records be kept in a form and manner identifiable and searchable by transaction and counterparty?

Response: Requiring a single, searchable file for each transaction that contains all records relating to that transaction is unfeasible. The Working Group is unaware of any systems that are able to comply with the recordkeeping requirements, specifically with respect to retaining searchable and retrievable files of voice and instant message communications. (See section III.C.1.a. above.)

Question: Are there additional types of records that should be required to be kept by Swap Dealers and MSPs? For example, should drafts of documents be kept?

Response: From an IT standpoint, requiring additional records will increase costs. Generally, the Working Group believes that the current proposal is sufficient and any additional record retention requirements will be of little value to the Commission.

B. DAILY TRADING RECORDS.

Question: With respect to records regarding related cash and forward transactions, the Commission solicits comment upon whether the Commission has provided sufficient clarity concerning what type of information would be required to be retained.

Response: As detailed in Part III.C.2., above, additional clarity would be helpful to market participants. Specifically, the Commission should clarify how cash and forward transactions would be determined to be "related" to swaps. Additionally, requiring records for cash and forward transactions will dramatically increase costs.

Question: The Commission also requests comment on whether it should require Swap Dealers and MSPs to keep records related to high frequency trading, and what the nature of those records should be.

Response: Non-bank Swap Dealers, particularly those operating in energy markets, generally do not engage in high-frequency trading. To the extent the Commission may require records related to such activity, the Commission should take into consideration that additional recordkeeping requirements, and the level of specificity of those records, will increase costs to market participants.

V. **CONCLUSION.**

The Working Group supports tailored regulation that brings transparency and stability to the Swap markets in the United States. We appreciate the balance the Commission must strike between effective regulation and not hindering the energy-based swap markets. The Working Group offers its advice and experience to assist the Commission in implementing the Act.

The Working Group expressly reserves the right to supplement these comments as deemed necessary and appropriate.

If you have any questions, or if we may be of further assistance, please contact the undersigned directly.

Respectfully submitted,

/s/ R. Michael Sweeney, Jr.

R. Michael Sweeney, Jr.

Mark W. Menezes

David T. McIndoe

*Counsel for the Working Group of
Commercial Energy Firms*