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**Submitted Electronically**

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

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant,"  
RIN 3038-AD06, RIN 3235-AK65, SEC File No. S7-39-10

Dear Mr. Stawick and Ms. Murphy:

As the Commodity Futures Trading Commission and the Securities and Exchange Commission (collectively, the "Commissions") finalize rules concerning the further definition of "major swap participant" ("MSP") under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),<sup>1</sup> the American Petroleum Institute ("API") would like to raise a discrete, yet pressing, concern which may impact many members of our industry. Specifically, the joint proposed rules defining MSP, wherein the Commissions propose to include in the calculation of aggregate potential outward exposure "uncollateralized threshold amounts," go beyond what is intended by the relevant provisions of Dodd-Frank and produce an inaccurate measure of an entity's swap exposure.

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<sup>1</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010). The joint proposed rules are set forth in Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174 (proposed Dec. 21, 2010) (to be codified at 17 C.F.R. pts. 1 & 240).

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As you know, Dodd-Frank provides a definition of MSP that includes, among other entities, those that maintain a “substantial position in swaps” for any major swap category. With respect to the term “substantial position,” Dodd-Frank directs the Commissions “to define the term ‘substantial position’ at the threshold that the Commission[s] determine[] is prudent for the effective monitoring, management, and oversight of entities that are systematically important or can significantly impact the financial system of the United States.”<sup>2</sup> The Commissions have, in turn, proposed a series of rules concerning the definition of substantial position comprising two tests. With respect to the second test, Proposed CEA Rule 1.3(sss)(3)(iii)(B) states that “[i]f [a] person is permitted by agreement to maintain a threshold for which it is not required to post collateral, the total amount of that threshold (regardless of the actual exposure at any time) shall be added to the person’s aggregate uncollateralized outward exposure.”<sup>3</sup> Because it is over-inclusive, Proposed CEA Rule 1.3(sss)(3)(iii)(B) is too blunt an instrument to accomplish the mission of identifying entities with a substantial swaps position.

First, in providing that entities’ aggregate uncollateralized outward exposure includes the total uncollateralized threshold amount *regardless of actual exposure*, Proposed CEA Rule 1.3(sss)(3)(iii)(B) perversely penalizes entities that, over time, have made responsible decisions in the execution and management of their swaps. As a result, those entities that have earned generous uncollateralized threshold amounts commensurate with their upstanding credit history and proven low credit risk will be penalized for their prudent risk management with a higher substantial position in swaps, possibly subjecting them to additional, unwarranted oversight. The Commissions should consider that establishing credit support agreements in advance allows for the streamlined transaction execution needed in the fast-paced energy markets while still protecting the credit interests of both parties. While essential for risk management, these thresholds should not be used as the marker for exposure between the parties with respect to determining whether an entity has a “substantial position in swaps.” Dodd-Frank seeks, among other things, to prevent high-risk behavior in swaps markets. To the extent possible, Proposed CEA Rule 1.3(sss)(3)(iii)(B) should incentivize prudent conduct in the execution and management of swaps, not penalize it.

Second, Proposed CEA Rule 1.3(sss)(3)(iii)(B) fails to account for a fundamental reality of the commodity swaps market that entities typically have in place many credit support

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<sup>2</sup> Dodd-Frank §§ 721(a)(33)(B), 761(a)(67)(B) (Commodity Exchange Act § 1a(33)(B) and Securities Exchange Act of 1934 § 78c(a)(67)(B), respectively).

<sup>3</sup> 75 Fed. Reg. at 80214. The parallel proposed rule pertaining to “major security-based swap participant” is Proposed Exchange Act Rule 3a67-3(c)(3)(ii). *See id.* at 80,217. A footnote in the joint proposed rules’ preamble provides as to both proposed rules: “If a person is permitted to maintain an uncollateralized ‘threshold’ amount under [a netting] agreement, that amount (regardless of actual exposure) would be considered current uncollateralized exposure for purposes of the [potential outward exposure] test.” *Id.* at 80,192 n.113.

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agreements with multiple counterparties. But, the fact that entities have such contracts in place does not mean, as a practical matter, that they intend to utilize fully and simultaneously all of the negotiated credit thresholds. Thus, collateral thresholds provided for in credit support agreements are not an accurate, or even approximate, predictor of future exposure.

For the foregoing reasons, API urges the Commissions to amend Proposed CEA Rule 1.3(sss)(3)(iii)(B) so that it does not include unused threshold amounts in the calculation of aggregate uncollateralized outward exposure. The calculation of aggregate uncollateralized outward exposure should be tied to features of swaps transactions that truly reflect risk and the potential for risk. The calculation should not require that assumptions be made about possible future transactions simply because the parties have endeavored to manage their credit in a streamlined manner.

API would be pleased to provide additional information regarding our views on the joint proposed rule, and would welcome the opportunity to work with the Commissions.

Sincerely yours,



Brian Knapp

Policy Advisor,  
American Petroleum Institute

cc: Honorable Gary Gensler, Chairman  
Honorable Jill E. Sommers, Commissioner  
Honorable Bart Chilton, Commissioner  
Honorable Scott D. O'Malia, Commissioner  
Honorable Mark Wetjen, Commissioner  
  
Honorable Mary Shapiro, Chairman  
Honorable Elisse B. Walter, Commissioner  
Honorable Luis A. Aguilar, Commissioner  
Honorable Troy A. Paredes, Commissioner  
Honorable Daniel M. Gallagher, Commissioner