



May 3, 2010

The Honorable Harry Reid
Majority Leader, U.S. Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader, U.S. Senate
361A Russell Senate Office Building
Washington, DC 20510

The undersigned associations represent utilities and energy companies that serve most consumers in the United States. We greatly appreciate your commitment to ensuring a commercial end-user exemption from mandatory clearing of over-the-counter (OTC) derivatives as part of financial reform efforts. Our industry makes use of derivatives, both over-the-counter and through exchanges to manage commercial risks on behalf of our consumers. Because our longstanding activity is focused on hedging, it does not pose systemic risk and was not at issue in the financial crisis.

We support the passage of strong financial reform that would increase oversight of derivatives and transparency of the markets through mandatory reporting requirements of all swap transactions and the mandatory clearing of standardized transactions between financial entities such as banks and hedge funds. We believe the proposed commercial end-user exemption is consistent with our long-held assertion that end-users do not pose a systemic risk to the financial system. Moreover, we believe that a clear commercial end-user exemption is absolutely critical for us to maintain stable and affordable rates while continuing to invest in America's energy infrastructure, resulting in the creation of more jobs and a cleaner, more efficient and globally competitive economy.

To ensure that commercial end-users can rely upon the end-user exemption, it is critical that these commercial entities are not inadvertently misclassified as either a Swap Dealer or a Major Swap Participant. We ask for the following clarifications:

- The legislation should define Swap Dealer as “any person who – (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly engages in the purchase and sale of swaps in the ordinary course of *its primary* business **as a market maker or dealer**; and (iv) engages in any activity causing the

person to be commonly known in the trade as a dealer or market maker in swaps” instead of as any person meeting any one of those criteria. Alternatively, this concern can also be remedied by simply clarifying that a Swap Dealer, by definition, excludes Commercial End-Users. There are a number of possible solutions to ensure that commercial end-users are not considered Swap Dealers, our main concern is that this uncertainty will be addressed.

- Under the definition of Major Swap Participant, the legislation should define Substantial Position. “For purposes of subparagraph (A), the Commission shall define by rule or regulation the term ‘substantial position’ at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important ***and*** can significantly impact the financial system of the United States. ***In no instance shall the term “substantial position”, as defined by the Commission, be lower than the hedge exemption granted to any entity or the speculative position limit or accountability level, as applicable, for any contract, transaction or agreement in the relevant commodity at the time of the Commission’s determination.”***
- The definition of “swap” in CEA § 1a should expressly exclude **“any sale of a nonfinancial commodity or security for deferred shipment or delivery.”** This modification will make the exclusion consistent with the exclusion of forward or deferred delivery contracts from the definition of “future delivery”. Clarifying the exclusion will ensure that physical forward contracts in which the parties later agree to book-out their delivery (but not payment) obligations for commercial convenience are excluded from the definition of a swap.
- Under Section 731(h)(2), swap dealers would be charged with a fiduciary duty towards state and local governments (as well as pension plans, endowments and retirement plans). However, swap dealers and end-users enter into swap transactions on an arm’s length basis as counterparties. By definition, the two parties to a swap (or any other commodity transaction) have conflicting interests, *i.e.*, one party wants to buy low and the other wants to sell high. Mandating a fiduciary responsibility on swap dealers will prevent them from entering into swap transactions with state and local governments. We do not oppose greater regulation of swap transactions entered into by governmental entities. However, this could be accomplished in a more practical and straightforward manner by requiring that governmental entities engage a CFTC-registered “swap transaction advisor” to act on their behalf as their fiduciary in their swap transactions with a swap dealer. Such swap transaction advisors would perform a similar function to “commodity trading advisors”, which already are required to register with the CFTC and are subject to extensive CFTC regulation. We also suggest that governmental entities with significant portfolios and investment experience and that have developed this expertise internally be exempt from the requirement of engaging an outside swap transaction advisor.

We believe that clarification of these issues are essential to ensure that commercial end- users are all classified appropriately under the legislation, and to avoid any costly and unnecessary unintended consequences.

We also urge the Senate to resolve the jurisdictional issues between the Federal Energy Regulatory Commission (FERC) and the Commodity Futures Trading Commission (CFTC). Finally, we want to ensure that our members won't inadvertently fall under the definition of **Futures Commission Merchant**. Once again, we greatly appreciate your work to ensure a commercial end-user clearing exemption.

Sincerely,

American Gas Association	Edison Electric Institute
American Public Gas Association	Electric Power Supply Association
American Public Power Association	Independent Petroleum Association of America
American Wind Energy Association	Large Public Power Council
The COMPETE Coalition	Natural Gas Supply Association

CC: The Honorable Christopher Dodd, Senate Committee on Banking, Housing, and Urban Affairs

The Honorable Blanche Lincoln, Chairman, Senate Committee on Agriculture, Nutrition and Forestry

The Honorable Saxby Chambliss, Ranking Member, Senate Committee on Agriculture, Nutrition and Forestry

The Honorable Richard Shelby, Ranking Member, Senate Committee on Banking, Housing, and Urban Affairs

Members of the U.S. Senate

Attachment:

The National Association of Regulatory Utility Commissioners' resolution on Financial Reform Legislation Affecting Over-the-Counter Risk Management Products and Its Impacts on Consumers