IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal Number: 08-CR-00411
	)	
MARK DAVID RADLEY,	)	
JAMES WARREN SUMMERS,	)	
CODY DEAN CLABORN, and	)	JUDGE GRAY H. MILLER
CARRIE KIENENBERGER,	)	
	)	
Defendants.	)	

DEFENDANTS RADLEY, SUMMERS AND CLABORN'S MOTION TO DISMISS
BASED ON COMMODITY EXCHANGE ACT SECTION 2(g)

Defendants Mark Radley, James Summers, and Cody Claborn, through undersigned counsel, upon the accompanying Memorandum of Law in Support of their Motion to Dismiss Based on Commodity Exchange Act Section 2(g), and pursuant to FED. R. CRIM. P. 12, hereby move this Court for an order dismissing the Indictment in this case, as the Indictment fails to allege an offense, and should be dismissed as a matter of law, due to the terms of 7 U.S.C. § 2(g).

Dated: March 6, 2009

Respectfully submitted,

/s/ Charles R. Mills

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Certificate of Service

I, Charles R. Mills, hereby certify that on this 6th day of March, 2009, a true and correct copy of Defendants Radley, Summers and Claborn's Motion to Dismiss Based on Commodity Exchange Act Section 2(g), Memorandum in Support of Defendants' Motion, Declaration of Charles R. Mills and Appendix of Unreported Cases and Other Authorities were served on all counsel of record in the above matter via the Court's electronic filing system.

/s/ Charles R. Mills

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DEFENDANTS RADLEY, SUMMERS AND CLABORN'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS
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DEFENDANTS RADLEY, SUMMERS AND CLABORN'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS <u>BASED ON COMMODITY EXCHANGE ACT SECTION 2(g)</u>

Defendants Mark David Radley, James Warren Summers, and Cody Dean Claborn move to dismiss all counts of the Superseding Indictment.

I. INTRODUCTION

A. Statement of Nature and Stage of Proceeding.

All defendants are charged in a 26-count Superseding Indictment (the "Superseding Indictment") with conspiracy to manipulate and attempt to manipulate the price of February 2004 TET propane, cornering and to attempting to corner the 2004 TET propane market, as well as conspiracy to commit wire fraud, all in violation of 18 U.S.C. § 371 (Count One); attempted and perfected commodity price manipulation in violation of Section 9(a)(2) of the Commodity Exchange Act, as amended ("CEA"), codified at 7 U.S.C. § 13(a)(2)) ("Section 13(a)(2)") (Counts Two-Seventeen); attempted and perfected cornering of the market in February 2004 TET propane in violation of Section 13(a)(2) (Counts Eighteen and Nineteen); and wire fraud in violation of 18 U.S.C. § 1343 (Counts Twenty –Twenty-Six). Discovery is proceeding. Trial is scheduled for October 5, 2009.

B. Statement of Issues and Standard of Review.

Whether CEA Section 2(g), 7 U.S.C. § 2(g) ("Section 2(g)") excludes the activity alleged in the Superseding Indictment from the application of Section 13(a)(2). A motion to dismiss due to failure to state an offense requires the Court to "'take the allegations of the indictment as true and to determine whether an offense has been stated.'" *United States v. Kay,* 359 F.3d 738, 742 (5th Cir. 2004) (quoting *United States v. Hogue*, 132 F.3d 1087, 1089 (5th Cir. 1998)).

C. Summary of Argument.

The gravamen of the Superseding Indictment is that defendants, using the financial resources of BP America Inc. ("BP"), entered into transactions involving propane stored and transported in the TEPPCO system in February 2004 ("February 2004 TET Propane") and that through these transactions, they attempted to and did manipulate and corner the market for February 2004 TET propane in violation of Section 13(a)(2). (SI, ¶¶ 2, 34, 39, 43, 44, 49, 71, 73, 75, 77.) All counts of the Superseding Indictment should be dismissed because Section 2(g) excludes the activity alleged in the Superseding Indictment from the application of Section 13(a)(2).

Section 2(g) expressly declares that "no provision" of the CEA – including Section 13(a)(2) – "shall apply to or govern any agreement, contract or transaction in a commodity" described in the Section. Section 2(g) excludes from the CEA:

1. any agreement, contract, or transaction in a commodity;
2. that is not an agricultural commodity;
3. that is entered into between "eligible contract participants" (a term defined in 7 U.S.C. § 1a(12));

4. that is "subject to individual negotiation by the parties"; and

5. that is not executed or traded on a "trading facility" (a term defined in 7 U.S.C. § 1a(33)).

All of the alleged wrongful activity in the Superseding Indictment was within the scope of a Section 2(g) agreement, contract, or transaction because: (1) propane is not an agricultural commodity; (2) BP and its counterparties to the transactions described in the Superseding Indictment were eligible contract participants as defined in 7 U.S.C. § 1a(12); (3) all of the agreements, contracts, and transactions described in the Superseding Indictment were subject to negotiation; and (4) none of them were executed or traded on a trading facility (a statutory term defined in 7 U.S.C. § 1a(33)). Accordingly, Section 2(g) excludes all of the activity alleged in Counts Two through Nineteen from the ambit of Section 13(a)(2). The conspiracy and wire fraud charges also must be dismissed because they are inextricably intertwined with the CEA counts.

This is only the second litigated criminal prosecution for manipulation and the first for cornering under Section 13(a)(2) in the 82 years since enactment of the CEA. As explained in more detail below, the commodity transactions that are at issue here are specialized ones that, for a variety of reasons, Congress determined should be completely excluded from the substantive provisions of the CEA, including Section 13(a)(2). The government's prosecution ignores the Section 2(g) exclusion and is almost identical to the attempt it made a decade ago to exercise jurisdiction over certain transactions in foreign currency even though the terms of the CEA expressly excluded them from its reach. The government's position then was unanimously rejected by the Supreme Court in *Dunn v. CFTC*, 519 U.S. 465 (1997), and this Court should reject this current effort.

II. FACTUAL AND LEGAL BACKGROUND

A. The Superseding Indictment's Allegations Relevant to this Motion.

The Superseding Indictment alleges that defendants were employees of BP America Production Company, an "indirect subsidiary" of BP America, Inc., and worked in the division of the Integrated Supply & Trading group that traded natural gas liquids ("NGL") as members of that division's trading bench ("NGL Trading Bench"). (SI ¶ 4.) The Superseding Indictment further alleges that the NGL Trading Bench was responsible for trading propane and other petroleum and natural gas products through direct bilateral transactions between parties, voice brokers, and "Chalkboard." (SI ¶¶ 4, 5, 16.)

Count One charges that defendants violated 18 U.S.C. § 371 by conspiring to corner and manipulate the price of propane "stored and transported in the TEPPCO system" in February 2004 in violation of Section 13(a)(2). (SI ¶¶ 1-3.) Count One also alleges that by causing the "benchmark index price" to be "distorted and inflated," defendants "deceived and defrauded their counterparties who engaged in transactions" based on this price. (SI ¶ 3.)

Counts Two through Twelve allege that from February 5, 2004 to March 29, 2004, defendants attempted to and did manipulate the price of February 2004 TET propane by entering into specific propane transactions on a third-party trading platform known as "Chalkboard" that caused "artificial prices" and that these artificial prices were communicated by the Chalkboard system to market participants and the public. (SI ¶ 71.)

Counts Thirteen through Seventeen allege that during this same period, defendants attempted to and did manipulate the price of February 2004 TET propane by alleged conduct that allegedly caused "the average price for February 2004 TET propane," as determined and reported by the Oil Price Information Service ("OPIS"), to be "artificial and inflated." (SI ¶ 73.)

Counts Eighteen and Nineteen allege defendants violated Section 13(a)(2) by attempting to corner and cornering the February 2004 TET propane market on February 24 and 27, 2004. (SI ¶¶ 74-75.) Counts Twenty through Twenty-six allege defendants violated 18 U.S.C. §1343. (SI ¶¶ 78-80.)

Each count incorporates and relies on the factual allegations of paragraphs 1-24 and 39-69 of the Superseding Indictment. These paragraphs allege that defendants entered into specific agreements, contracts and transactions for the purchase or sale of TET propane deliverable at the end of February 2004 (SI ¶¶ 2, 19, 43, 49, 60, 62, 71); caused BP to accept delivery of propane consistent with the transactions entered into (SI ¶ 65); engaged in bidding and made purchases of propane(SI ¶ 3); posted an offer to sell propane at a price higher than an outstanding offer to sell propane (SI ¶ 44); posted an offer to sell propane on Chalkboard (SI ¶63); declined to accept certain bids or offers for transactions (SI ¶¶ 53, 54, 55, 56, 58); and made bids or offers to purchase or sell TET propane deliverable at the end of February 2004 (SI ¶¶ 2, 57, 59).

B. Factual Background.

Propane is a NGL that is a by-product of natural gas processing and crude oil refining.[1] NGLs are stored primarily in large underground salt domes until they are delivered to end-users, usually via pipeline.[2] Mont Belvieu "comprises the largest NGL storage system in the world."[3]

On a weekly basis, the United States Energy Information Administration ("EIA") reports

1 The Court may take judicial notice of the facts herein that are commonly understood, evidenced in public documents, and not subject to dispute. FED. R. EVID. 201(f). *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *United States v. Berrojo*, 628 F.2d 368, 370 (5th Cir. 1980).

2 *See Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment* at 2, published by the Federal Trade Commission ("FTC") in connection with its announcement of its Consent Order in *In the Matter of Dan L. Duncan, et al.*, FTC File No. 051 0108, Case No. C-4173 (FTC Consent Order, Aug. 18, 2006). The FTC's *Analysis* is published at http://www.ftc.gov/os/caselist/0510108/0510108.shtm. (last visited March 6, 2009). A copy of the *Analysis* is attached as Exhibit A.

3 *Id*.

and analyzes Mont Belvieu propane prices, which the EIA defines as: "The location specified in either spot or futures contracts for delivery of propane in Mont Belvieu, Texas."[4] In addition to the focused reporting of Mont Belvieu prices, the EIA separately reports and analyzes prices of propane in specific different locations throughout the United States.[5]

One portion of Mont Belvieu's extensive underground storage facilities is referred to as the "TET" facility. "TET" is an acronym for "Texas Eastern Transmission."[6] "TET propane" refers to propane contracted for delivery to specific underground storage facilities at Mont Belvieu.[7] Therefore, to fulfill a contractual duty to supply "February 2004 TET propane" a party had to deliver propane to the TET propane storage facility in Mont Belvieu, Texas by the end of February 2004. The Superseding Indictment alleges that OPIS published certain prices at which parties agreed to buy and sell TET propane. (SI ¶ 23.)

Propane is supplied by, among others, private industrial and commercial companies that produce and/or own physical molecules of propane, including natural gas producers, oil

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4 *See* the EIA's "Definitions, Sources and Explanatory Notes," found on the EIA's website at http://tonto.eia.doe.gov/dnav/pet/TblDefs/pet_pri_fut_tbldef2.asp. (last visited March 6, 2009). Copies of selected relevant excerpts from the EIA's *Definitions, Sources and Explanatory Notes* and *Glossary* are attached as Exhibit B and Exhibit C, respectively.

5 *See* the EIA's "Wholesale Propane Prices by Region and State," found on the EIA's website at http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/ weekly_petroleum_status_report/current/pdf/tablec4.pdf. (last visited March 6, 2009). This page is attached as Exhibit D.

6 Texas Eastern Transmission formerly owned that particular storage cavern. Traders and other participants continue to refer to it by that acronym. *See* the definitions of "TET" and "Non-TET" in the *OPIS Energy Glossary* published by OPIS found at http://opisnet.com/market/glossary.asp. (last visited March 6, 2009). An excerpt of this page showing selected OPIS definitions is attached as Exhibit E.

7 *See* the definition of "US Gulf" in the *Platt's Petrochemicals Guide to Specifications*, ("Platt's assesses propane and butane on an FOB Mont Belvieu, Texas basis. Assessments are for the TET pipeline and non-TET product. TET material moves on the Texas Eastern Transmission Pipeline which runs from south Texas northward to Ohio and terminates in Massachusetts.") A select portion of the *Platt's Petrochemicals Guide to Specifications* is attached as Exhibit F.

refineries, gas fractionators, and companies holding private stocks of propane in storage.[8] Participants in the TET propane market include producers, industrial users (such as chemical companies), distributors, importers, and speculators involved with the production, use, shipment, and purchase or sale of propane. Representative participants are ExxonMobil, Chevron, Enterprise, Trammo Gas, Dow Chemical, Koch Industries, and, of course, BP.[9]

The Superseding Indictment alleges that in February 2004, TET propane predominantly was traded over-the-counter in three ways: (a) directly between two parties; (b) through voice brokers; and (c) through an electronic trading platform known as "Chalkboard." (SI ¶ 16.) Bilateral transactions were negotiated between parties. In voice broker transactions, "brokers negotiated and executed deals on behalf of a buyer and seller." (SI ¶ 17.) In Chalkboard transactions, "buyers and sellers posted anonymous bids and offers on the Chalkboard electronic website, and learned the counterparty's identity only upon completing a transaction." (SI ¶ 18.)[10] The Commodity Futures Trading Commission ("CFTC") has described Chalkboard as "an electronic bulletin board that provides a means for propane traders to engage in bilateral negotiations. Chalkboard allows parties to post bids and offers and negotiate transactions in propane but Chalkboard does not take title to propane."[11]

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8 *See Propane Supplier's Guide*, LP Gas, November 1, 2005, http://www.lpgasmagazine.com/lpgas/propane+dealer+operations/propane-suppliers-guide/articlestandard/article/detail/197148, (last visited March 6, 2009), attached as Exhibit G.

9 *See* Exhibit H, Appendix E to FTC Decision and Order, in Docket No. C-4173 available at: http://www.ftc.gov/os/caselist/0510108/decisionorderpublicappendixE.pdf. (detailing entities with storage or pipeline facilities at Mount Belvieu: Valero, Shell, Exxon, Dow and Enterprise) (last visited March 6, 2009).

10 Usage and License Agreement of ChemConnect, Provision 3.2. Exhibit 1 to Declaration of Charles R. Mills ("Mills Decl.").

11 CFTC Release 5193-06, Attachment 1, Glossary, definition of "Chalkboard" available at: http://www.cftc.gov/newsroom/enforcementpressreleases/2006/pr5193-06.html (last visited March 6, 2009). Exhibit P.

In February 2004, Chalkboard was owned and operated by ChemConnect, Inc. Chalkboard was described in the user agreement with BP as an "electronic brokerage system" that provided "buyers and sellers of energy commodities . . . a computerized electronic method *of identifying* other buyers and sellers of [p]roducts."[12] ChemConnect acknowledged that it was not "a 'trading facility' as defined in Section 1a(33) of the CEA." ChemConnect's Clearing Policies, Section 10.2. Mills Decl. Exhibit 5. It also made clear that: "If, … it is determined that ChemConnect is a trading facility or intends to operate an electronic trading facility, ChemConnect shall take such steps as are required under the CEA to become an excluded electronic trading facility pursuant to Section 2 of the CEA." *Id*. Chalkboard allowed qualified users to: (1) post on an electronic platform anonymous bids and offers for the purchase or sale of specific quantities of TET propane at specific prices; and (2) electronically lift the bids and offers of others, which would form the basis for a binding transaction at the specific price and quantity, pursuant to the terms the parties agreed to between themselves.[13] Chalkboard's electronic platform also had a negotiation function, which allowed a user, prior to lifting a posted bid or offer, to electronically contact and communicate with the other party through the Chalkboard system to negotiate terms.[14]

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12 Usage and License Agreement of ChemConnect (emphasis added). Mills Decl. Exhibit 1 (which was produced by the government in discovery in this case).

13 Although Chalkboard provided a means for interaction among buyers and sellers with respect to particular energy products, the financial, credit, legal, and other terms pursuant to which the parties would transact business were negotiated between the parties. *See* Mills Decl. Exhibits 2, 3, and 4 (copies of confirmations of trades for propane between BP and various counterparties). Nothing in ChemConnect's Usage and License Agreement or policies established such terms between the parties. *See* Mills Decl. Exhibit 1.

14 *See* ChemConnect's Usage and License Agreement. ("All transaction fees for crude and refined products are payable by seller, unless buyer has agreed to pay transaction fees *during the matching process*.") (emphasis added). Mills Decl. Exhibit 1 at A-1.

It is important to note that Chalkboard did not automatically match like bids and offers to form contracts. There was no deal between Chalkboard participants until a posted offer or bid was accepted by another party. The requirement that parties affirmatively accept a bid or offer further distinguishes Chalkboard from electronic exchange trading systems that automatically match bids and offers to form binding contracts pursuant to an automated trade matching and execution algorithm.

Chalkboard was limited to use only by those entities that qualified as an "eligible commercial entity," a term defined in Section 1a(11) of the CEA, 7 U.S.C. § 1a(11) ("Section 1a(11)"). ChemConnect's "Clearing Policies" for Chalkboard required each participant to warrant that it is an "eligible commercial entity." Mills Decl. Exhibit 5. Entities meet the definition of eligible commercial entities if they satisfy the net worth and commercial and financial standards set forth in Section 1a(11). As relevant to Section 2(g), which covers agreements, contracts, and transactions between parties that are "eligible contract participants" as defined in Section 1a(12), all eligible commercial entities are by the definition in Section 1a(11) also "eligible contract participants."

C. <u>Legal Background</u>.

1. The Commodity Exchange Act and the Enactment of CEA Sections 2(g) and 2(i) in the Commodity Futures Modernization Act of 2000.

The CEA establishes special legal standards and regulatory and enforcement powers with respect to the trading of standardized commodity futures contracts traded on federally regulated commodity futures exchanges such as the Chicago Mercantile Exchange. It "has been aptly characterized as 'a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.'" *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 355-356 (1982) ("*Merrill Lynch*"), *quoting* H.R. Rep. No. 93–975, p. 1 (1974). The CEA is administered by the CFTC, an independent federal agency with "exclusive jurisdiction" over the regulation of "accounts," "agreements," and "transactions" in commodity futures transactions traded on exchanges regulated by the CFTC. 7 U.S.C. § 2(a)(1).[15]

Section 2(g) was enacted into law as part of the Commodity Futures Modernization Act of 2000 ("CFMA").[16] The CFMA streamlined the regulation of commodity futures and options transactions on regulated futures exchanges and established through Section 2(g) and other provisions various exclusions and exemptions from regulation for off-exchange transactions generally referred to as over-the-counter ("OTC") transactions. The enactment of Section 2(g) followed many years of regulatory and legislative attempts to establish clear jurisdictional demarcations for the CEA's application to OTC transactions.[17] The CEA's potential application

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[15] The CEA was enacted in 1936 and superseded The Grain Futures Act of 1922. *See Merrill Lynch*, 456 U.S. at 355-367 (1982), for a description of the CEA's early legislative history. The CEA's statutory terminology for a regulated futures exchange is a "contract market." *See* 7 U.S.C. § 1a. The CEA does not use the term "futures contract." Rather, it establishes legal requirements for what it variously refers to as "a contract for the purchase or sale of a commodity for future delivery" and a "contract of sale of a commodity for future delivery." CEA Section 4(a), 7 U.S.C. § 6(a), ("Section 6(a)") and CEA Section 2(a)(1), 7 U.S.C. § 2(a)(1) ("Section 2(a)(1)").

[16] The CFMA was passed December 15, 2000 and signed into law by President Clinton on December 21, 2000.

[17] For example, 1992 amendments to Section 6(c) of the CEA authorized the CFTC to exempt transactions from the CEA. However, the agency's exercise of that authority did not keep pace with the changing landscape of OTC commodity markets. In addition, the CFTC generally followed a "twenty-twenty hindsight" approach to determining the CEA's application to any particular OTC transaction. This was criticized by several courts. "It is essential to know *beforehand* whether a contract" is covered by the CEA because "[c]ontracts allocate price risk, and they fail in that office if it can't be known until years after the fact whether a given contract was lawful." *Nagel v. ADM Investor Services, Inc.*, 65 F. Supp. 2d 740, 752 (N.D. Ill. 1999), *aff'd.*, *Nagel v. ADM Investor Services, Inc.*, 217 F.3d 436 (7th Cir. 2000). *See also, e.g., In re Competitive Strategies for Agric., Ltd.*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,635 (CFTC Nov. 25, 2003) (compare the majority opinion and the dissent of Commissioner Sharon Brown-Hruska) Appendix Tab 3.

to OTC transactions and the extent of that application was important because applying the CEA's requirements to certain OTC commodity transactions could render them unlawful *per se*.[18]

Recognizing the complexity of this issue, in September 1998, Congress requested that the President's Working Group ("PWG")[19] study OTC commodity markets and provide legislative recommendations. In November 1999, the PWG issued its *Report on Over-the-Counter Derivatives and the Commodity Exchange Act* ("*PWG Report*") recommending that certain OTC commodity transactions be excluded from the reach of the CEA and its exchange-only trading requirements.[20] The PWG Report found that the legal uncertainty under the CEA for OTC commodity transactions was a detriment to the American economy.[21]

Following publication of the PWG Report, Congress began its work on what would become the CFMA.[22] Consistent with the recommendations of the PWG, a key purpose of the CFMA was to encourage the growth and innovation of certain OTC markets and to encourage

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18 *See* Section 6(a). That Section declares that entering into certain types of commodity transactions is *per se* illegal. Delineating which off-exchange transactions were illegal and which were not was the issue that confounded courts, regulators and legislators for decades prior to the enactment of Section 2(g) and the other exemptive provisions of the CEA in the CFMA.

19 The PWG is a standing group composed of the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, the Chairman of the Securities and Exchange Commission, and the Chairman of the CFTC.

20 *See* Exhibit I. The PWG Report noted the terminology used to describe derivative instruments is not precise. As innovative contract terms and characteristics developed, legal ambiguity grew over the classification of different OTC transactions, as labels such as forward, swap, hybrid, hedge-to-arrive and others were used indiscriminately and inconsistently. The PWG Report recognized the term "swap" as generically referring to a broad range of OTC transactions: "Because Congress never conclusively determined whether swaps would be subject to the CEA in the absence of the [CFTC promulgated] exemption, the exact status of these instruments (*i.e.*, whether they are forwards, futures, options, or none of the above) is unclear." PWG Report at 11. Similarly, swaps were considered by some economists to be "nothing more complicated than a series of forward contracts strung together." *In re Cargill*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,425 at 51,232 n. 127 (CFTC ALJ Nov. 22, 2000), *quoting* John Hull, *Options Futures and Other Derivative Securities* 19 (2d ed. 1993). Appendix Tab 4.

21 PWG Report at 1, 6. Exhibit I.

22 The PWG Report was issued November 9, 1999, and H.R. 4541 was introduced May 25, 2000. Exhibit I, Appendix Tab 14.

those markets not to relocate outside the United States due to legal uncertainty under United States law.[23] Thus, in drafting the CFMA, Congress sought to achieve these goals by enacting a host of different exclusions and exemptions for certain OTIC agreements, contracts, and transactions. Some provisions, like Section 2(g), expressly and completely excluded certain OTC agreements, contracts, and transactions within its terms from the substantive provisions of the CEA.[24] Congress took the extra precaution to ensure that the statutory exclusions and exemptions enacted in the CFMA would be given their full exclusionary meaning and effect by also enacting CEA Section 2(i), 7 U.S.C. § 2(i) ("Section 2(i)"). Section 2(i) mandates that no provision of the CEA should be construed "as implying or creating any presumption" that any agreement, contract, or transaction within the terms of the CEA's exclusions and exemptions "would otherwise be subject to this Act."

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[23] Representative Thomas Ewing, a sponsor of the CFMA, explained that:

> the Commodity Futures Modernization **Act of 2000 . . . provides us with an historic opportunity to modernize the U.S. futures and over-the-counter market laws.**
>
> The time is now to ensure that the United States continues to be the world's financial leader. * * * **The legal uncertainty surrounding the U.S. over-the-counter markets must be removed to prevent domestic business from migrating overseas and causing our share of these $90 trillion markets to shrink.**
>
> The [CFMA will] provide regulatory relief for the domestic futures exchanges, **legal certainty for over-the-counter products, and allow for the trading of single stock futures.**

146 Cong. Rec. H12488 (daily ed. Dec. 15, 2000) (emphasis added). Appendix Tab 10. *See, e.g.*, S. REP. NO. 106-390, at 1-4 (Aug. 25, 2000); Appendix Tab 5. H.R. REP. NO. 106-711, Part 1, at 28-29 (Agriculture Committee) (June 29, 2000); Appendix Tab 6. H.R. REP. NO. 106-711, Part 2, at 53-54 (Banking and Financial Services Committee) (Sept. 6, 2000); Appendix Tab 7. H.R. REP. NO. 106-711, Part 3, at 45-47 (Commerce Committee) (Sept. 6, 2000). Appendix Tab 8. 146 Cong. Rec. S11925 (daily ed. Dec. 15, 2000) (statement of Sen. Lugar). Appendix Tab 9.

[24] Examples of other exemptions or exclusions included those pertaining to foreign exchange transactions (Section 2(c)), transactions in "excluded commodities" (Section 2(d)), and transactions for qualifying hybrid instruments (Section 2(f)).

The CFMA not only revamped the CEA, but also substantially amended the federal securities and banking laws and added new provisions to the Gramm-Leach-Bliley Act with respect to their application to OTC commodity transactions. Since its enactment, institutional parties transact trillions of dollars of OTC commodity transactions specifically in reliance on the exclusion from the CEA contained in Section 2(g). *See, e.g.,* Oral Testimony of CFTC Acting Chairman Walter Lukken Before the House Committee on Agriculture, Oct. 15, 2008, attached as Exhibit J.

2. The Section 13(a)(2) Prohibition.

The Superseding Indictment charges defendants with violations of Section 13(a)(2) of the CEA, which makes it a felony for:

> (2) Any person to ***manipulate or attempt to manipulate the price of any commodity*** in interstate commerce, or for future delivery on or subject to the rules of any registered entity, ***or to corner or attempt to corner any such commodity*** or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.

7 U.S.C. § 13 (a)(2) (emphasis added).

3. The Section 2(g) Exclusion.

Section 2(g) provides in pertinent part:

> Excluded swap transactions
>
> ***No provision of this chapter*** (other than section 7a (to the extent provided in section 7a (g) of this title), 7a–1, 7a–3, or 16(e)(2) of this title) ***shall apply to or govern any agreement, contract, or transaction in a commodity*** other than an agricultural commodity **if** the agreement, contract, or transaction is—

> **(1)** entered into only between persons that are ***eligible contract participants*** at the time they enter into the agreement, contract, or transaction;
>
> **(2)** ***subject to individual negotiation*** by the parties; and
>
> **(3)** ***not executed or traded on a trading facility***.

7 U.S.C. § 2(g) (emphasis added).[25]

Section 2(g) thus expressly precludes application of the substantive provisions of the CEA to: (a) any agreement, contract, or transaction in a commodity; (b) that is not an agricultural commodity; (c) between "eligible contract participants"; (d) "subject to individual negotiation by the parties"; and (e) not executed or traded on a "trading facility."

4. The Section 2(i) Confirmation of the Section 2(g) Exclusion.

Section 2(i) provides:

> (1) No provision of this Act shall be construed as implying or creating any presumption that—
>
> (A) any agreement, contract, or transaction that is excluded from this Act under section 2(c), 2(d), 2(e), 2(f), or **2(g)** of this Act or title IV of the Commodity Futures Modernization Act of 2000…, or exempted under section 2(h) or 4(c) of this Act;
>
> * * *
>
> is or would otherwise be subject to this Act.

7 U.S.C. § 2(i) (emphasis added). Section 2(i) reinforces the principle that the exclusions and exemptions to the CEA enacted as part of the CFMA are to be generously construed and applied as their plain terms provide and that transactions, agreements, and contracts that qualify for more

[25] The parenthetical contained in this exclusion generally preserves the continued application of certain CEA provisions applicable to (1) the trading of exempt transactions on a registered derivatives transaction execution facility (Section 5a(g)) or an exempt board of trade (Section 5d), (2) registered derivatives clearing organizations, which might clear excluded OTC transactions (Section 5b), and (3) preemption of certain state and local laws from application to exempt OTC transactions (Section 12(e)(2)(B)). None of those exceptions affect the issues raised in this Motion.

than one exemption or exclusion should have the benefit of the broadest applicable exclusion or exemption.

III. ARGUMENT

A. Counts Two through Twenty-Six Must Be Dismissed Because Section 2(g) Precludes the Application of Section 13(a)(2) to the Conduct Alleged in the Superseding Indictment.

1. Congress made clear that agreements, contracts and transactions covered by Section 2(g) are not subject to Section 13(a)(2).

Section 2(g) unambiguously states that "**No provision of this Act** . . . shall apply to or govern any agreement, contract or transaction in a commodity" that meets the terms of the provision. This means that the agreements, contracts, and transactions covered by Section 2(g) are not subject to Section 13(a)(2). Congress made clear in Section 2(i) that no provision of the CEA "shall be construed as implying or creating any presumption" that any agreement, contract, or transaction within the terms of the CEA exemptions and exclusions – including Section 2(g) – "would otherwise be subject to this Act."[26] In contrast, there are other exemptive provisions that expressly provide for the application of certain of Section 13(a)(2)'s proscriptions. *See e.g.*, 7 U.S.C. § 7a-3(c). The Supreme Court in construing the CEA has declared that it is a court's duty

[26] In light of CEA § 2(g)'s unambiguous terms, it is of no surprise that Columbia Law School Professor John Coffee testified before Congress in 2002 that Section 2(g)'s plain meaning excludes Section 2(g) transactions from the CEA's proscription of fraud and manipulation:

> If 2(g) is read with a plain meaning analysis, it says there is no authority [under the CEA] over anyone who falls in Section 2(g) . . . . If you fall within 2(g), the plain meaning says there is no authority.

CFTC Regulation and Oversight of Derivatives: Hearing Before the S. Comm. on Agriculture, Nutrition and Forestry, 107th Cong. 48 (July 10, 2002). Appendix Tab 12. Former CFTC Commissioner Thomas J. Erickson similarly testified in his prepared remarks that: "[T]he vast majority of OTC swap transactions in energy and metal commodities become excluded" by Section 2(g), and as a result, "they are not subject to the Commission's fraud or manipulation authorities." *Id.* at 76-77. Appendix Tab 13. His oral testimony was equally definitive that CEA § 2(g)'s excluded transactions "are completely excluded from the Commission's jurisdiction" which "takes them out of the jurisdiction for all purposes, including fraud and manipulation." *Id.*. at 16.

to "apply the statute as Congress wrote it." *Dunn*, 519 U.S. at 470 (*quoting Hubbard v. United States*, 514 U.S. 695, 703 (1995)).

The clarity of Section 2(g) makes it unnecessary to examine the legislative history. *United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history") citing *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 254 (1992); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). Nonetheless, were this Court to have any doubt about the meaning of these terms, the legislative history unmistakably confirms that Congress meant exactly what it said.[27]

2. All of the agreements, contracts and transactions alleged in the Superseding Indictment meet the requirements of Section 2(g).

a. The acts alleged in the Superseding Indictment are agreements, contracts, or transactions in a commodity.

Section 2(g) covers all agreements, contracts, or transactions in a commodity, and, although these terms are not defined in the CEA, they are terms of ordinary understanding that should be given their ordinary meaning. *United States v. Santos*, 128 S. Ct. 2020, 2024 (2008) (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). "Contract" is defined as "a

[27] In May 2000, H.R. 4541, entitled the Commodity Futures Modernization Act of 2000, was introduced, which contained, among other things, provisions excluding various types of OTC transactions from the CEA. The bill was considered by three different House Committees (Agriculture, Commerce, and Banking and Financial Services), each of which proposed amendments. The version reported by the House Committee on Banking and Financial Services on September 6, 2000, contained a precursor to Section 2(g). Section 110 of that bill, entitled "Excluded Swap Transactions," provided that "no provision" of the CEA "shall apply to or govern any agreement, contract or transaction in a commodity other than an agricultural commodity" that is entered into only between eligible contract participants, the material economic terms of which are subject to individual negotiation and are not specified by the rules terms or conditions of a trading facility." H.R. REP. NO. 106-711, Part 2 (Banking and Financial Services Committee), at 13 (Sept. 6, 2000). Appendix Tab 7. That provision clearly covered OTC energy transactions. The CFTC opposed all of the provisions of the various bills that would exempt or exclude OTC energy and metals transactions from the CEA and the CFTC's jurisdiction to regulate them. *E.g.*, Letter from CFTC Chairman William T. Rainer to Representative Carolyn B. Maloney, dated September 19, 2000 (reprinted at 146 Cong. Rec. H8436 (Sept. 28, 2000)). Appendix Tab 11.

binding agreement between two or more persons or parties; *especially*: one legally enforceable." *Merriam Webster Online Dictionary* (relevant portions attached hereto as Exhibit K) (emphasis added). "Agreement" is generally defined as including, among other things, "the act or fact of agreeing" and "an arrangement as to a course of action." *See* Exhibit K. *Black's Law Dictionary* also states that "[t]he term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract." *Black's Law Dictionary* 74 (8th ed. 2004) (internal quotation marks and citation omitted) (attached hereto as Exhibit Q.) "Transaction" encompasses conduct broader than contract or agreement, and is defined as "a communicative action or activity involving two parties or things that reciprocally affects or influences each other." *See* Exhibit K.[28] The Fifth Circuit has described the ordinary meaning of "transaction" to be "a broad reference to many different types of business dealings between parties. . ." *Hamilton v. United Healthcare of La.*, 310 F.3d 385, 391 (5th Cir. 2002) (interpreting the term transaction in the context of the Fair Debt Collection Practices Act).

The Supreme Court has held that the meaning of the word "in" within the CEA – specifically as used in the context of referring to a transaction "in a" commodity – is "synonymous with [the] expressions 'in regard to,' 'respecting,' [and] 'with respect to[.]'" *Dunn*, 519 U.S. at 470 (quoting *Black's Law Dictionary* 758 (6th ed. 1990)); *see Babbitt v. Sweet Home Chapter, Cmtys. for a Great Or.*, 515 U.S. 687, 697-698 (1995). Applying these ordinary meanings of the words, Section 2(g) covers any action regarding or with respect to an agreement, contract or transaction in a commodity covered by the Section. Consistent with this plain

[28] "This Court's duty to give effect, where possible, to every word of a statute makes the Court reluctant to treat statutory terms as surplusage." *Duncan v. Walker*, 533 U.S. 167 (2001) (citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)).

meaning, the CFTC has repeatedly taken the position that Section 2(g) excludes from the CEA "any activity in furtherance of the negotiation, performance or settlement of . . . transactions"[29] and "any activity intended to further the negotiation, performance or settlement of a contract, agreement or transaction."[30]

Counts Two through Nineteen specifically allege that defendants' CEA violations occurred by and through the specific agreements, contracts or transactions regarding February 2004 TET propane. Using the government's own construction of Section 2(g), *all* of the activities described in the Superseding Indictment concern activity excluded from prosecution under Section 13(a)(2) because all of the alleged activity – the bids, offers, negotiations and trading decisions – were "in furtherance of" or "respecting" the "negotiation," of agreements, contracts, or transactions. The Superseding Indictment's factual allegations revolve around specific agreements, contracts and transactions and activity that furthered, related to, or was intended to further or relate to the negotiation, performance, or settlement of agreements, contracts, or transactions (SI ¶¶ 2 and 30 (gathered information); ¶ 32 (presented offers); ¶ 33 (used bidding tactics); ¶¶ 39 and 41 (discussed the market); ¶ 40 (used BP funds); ¶¶ 45 and 46 (discussed their activity and strategy for buying and selling); ¶ 47 (talked to purchasers); ¶¶ 50, 51 and 52 (discussed strategy); ¶¶ 53, 54, and 55 (decided when to enter or not enter into contracts); ¶ 57 (placed bids on Chalkboard); and ¶ 61 (offered to sell)).

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[29] *Plaintiff's Consolidated Response to Defendants' Several Motions to Dismiss Pursuant to Federal Rules of Civil Procedure 9 and 12 and Brief in Support*, at p. 18, *CFTC v. Johnson*, CA No. H-05-0332 (S.D. Tex.) (Exhibit L); *Accord, e.g., Plaintiff's Opposition to Defendants' Joint Motion to Dismiss Plaintiff's Complaint*, at p. 14, *CFTC v. Atha*, C.A. No. 1:05-cv-0293-JOF (N.D. Ga.) (Exhibit M); and *Plaintiff Commodity Futures Trading Commission's Opposition to Defendant's Motion to Dismiss*, at pp. 8-11, *CFTC v. Bradley*, Case No. 05-CV-62-JHP-FHM (N.D. Okl.) (Exhibit N).

[30] *Opposition of the CFTC to Motion to Dismiss or Alternatively Transfer Venue* (dated October 8, 2004), *CFTC v. NRG Energy, Inc.*, C.A. No. 04-3090 (MJD/JGL) (D. Minn.) (Exhibit O). *Accord, e.g.*, authorities cited in footnote 21, *supra*.

The Supreme Court has previously rejected government attempts to circumvent the plain meaning of a CEA exclusion. In *Dunn,* the government brought a civil action alleging that solicitations for options for foreign currency transactions were fraudulent. *Id.* at 467. Although the government conceded that the CEA's statutory exclusion known then as the Treasury Amendment expressly excluded "transactions in foreign currency" from the statute's reach, it argued that *options* on foreign currency were not within the exclusion and, therefore, were subject to the CEA. *Id.* at 467, 469. The Supreme Court unanimously rejected the government's position holding that the plain meaning of the exclusion for "transactions in foreign currency" encompasses all transactions in which "foreign currency is the fungible good whose fluctuating market price provides the motive for trading" because (as noted above) the ordinary meaning of the key word "in" is usually thought to be "synonymous with [the] expressions 'in regard to,' 'respecting,' [and] 'with respect to.'" *Id.* at 470, citing *Black's Law Dictionary* 758 (6th ed. 1990) and *Babbitt*, 515 U.S. at 697-698.

As has been detailed above, every act alleged in the Superseding Indictment falls within the scope of Section 2(g)'s exclusion for "contracts, agreements, or transactions in" propane. Accordingly, such activity is not, as a matter of law, subject to prosecution under Section 13(a)(2).[31]

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[31] Although the title of Section 2(g) is "Excluded Swap Transactions," the substantive terms of Section 2(g) do not refer to swap transactions. Rather, Section 2(g) refers to "any agreement, contract or transaction in a commodity" that comports with the characteristics set forth in the Section. The title of a section is not to be used in interpreting clear statutory text. *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-529 (1947); *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, 617 n. 12 *reh'g granted on other grounds*, 403 F.3d 272 (5th Cir. 2005); *United States v. Morganfield*, 501 F.3d 453, 459 (5th Cir. 2007) (*quoting Bhd. of R.R. Trainmen*, 331 U.S. at 528 (1947)). It bears noting, however, that Congress enacted a specific and broad definition of the term "swap agreement" in Article III of the CFMA, which was codified as Section 206A of the GLB Act:

> "(a) IN GENERAL.-Except as provided in subsection (b), as used in this section, the term 'swap agreement' means any agreement, contract, or

Decisions declining to apply Section 2(g) in cases where Section 13(a)(2) violations based on false reporting of commodity transaction prices to price index publishers are inapplicable to this case. The central issue in those cases was whether Section 2(g) excludes a trader's *false report* to a commodity index publisher about *a transaction that did not occur*. Those cases were based on the distinct offense of "false reporting" contained in Section 13(a)(2), which is not alleged here, found that Section 2(g) does not exclude from the CEA reports about a fictitious transaction. *See, e.g., CFTC v. Johnson*, 408 F. Supp. 2d 259 (S.D. Tex. 2005), and *CFTC v. Bradley*, 408 F. Supp. 2d 1214 (N.D. Okl. 2005); *see also United States v. Valencia*, No. H-03-024, 2003 U.S. Dist. LEXIS 24327 at *6 (S.D. Tex. 2003) *rev'd on other grounds*, 394 F.3d 352 (5th Cir. 2004) (Appendix Tab 1) (recognizing the distinction between fictitious transactions and actual transactions as a basis for refusing protection under 7 U.S.C. § 2(h), which also exempts "certain transactions," similar to Section 2(g)). Not only does the Superseding Indictment not charge the offense of "false reporting," it does not allege that

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> transaction between eligible contract participants … (as defined in Section la(12) of the Commodity Exchange Act as in effect on the date of the enactment of this section), other than a person that is an eligible contract participant under section 1a(12)(C) of the Commodity Exchange Act, the material terms of which (other than price and quantity) are subject to individual negotiation, and that –
>
> * * *
>
> "(4) provides for the purchase or sale, on a fixed or contingent basis, of any commodity, currency, instrument, interest, right, service, good, article, or property of any kind, or
>
> "(5) is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of paragraphs (1) through (4).

All of the propane agreements, contracts, and transactions alleged in the Superseding Indictment are within this definition.

defendants reported fictitious transactions or reported false information about any transaction.[32]

b. Propane is not an agricultural commodity.

CFTC Rule 3.13(a), 17 C.F.R. 3.13(a), defines an "agricultural trade option merchant," and sets forth the CFTC's enumeration of agricultural commodities. Propane is not among them. The government does not allege that propane is an agricultural commodity, and the Court may take judicial notice that propane is not an agricultural commodity for purposes of Section 2(g).

c. The agreements, contracts and transactions alleged in the Superseding Indictment were entered into between eligible contract participants.

CEA Section 1a(12), 7 U.S.C. § 1a(12), defines "eligible contract participant" to include persons meeting certain specific financial and/or commercial criteria. The statutory definition includes, among others, any corporation or other entity that has: (1) "total assets exceeding $10,000,000" or "a net worth exceeding $1,000,000" and (2) "enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business[.]"[33]

Each party to each transaction alleged in the Superseding Indictment was an "eligible contract participant" as defined in Section 1a(12). The list of counterparties to BP's transactions as detailed in Exhibit F to the government's Opposition to Defendants' Motion to Dismiss for Improper Venue, includes quite substantial commercial entities such as ExxonMobil, Louis Dreyfus, and Koch Hydrocarbon LP. *See United States v. Radley*, No. 07-CR-689 (N.D. Ill. filed

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32 Defendants do not concede that these false reporting cases correctly interpret or apply Section 2(g). It is unnecessary to reach such issues because even if correctly decided those precedents do not prevent the application of Section 2(g) in this case.

33 7 U.S.C. § 1a(12).

Feb. 19, 2008) (Docket # 78-7) at 1. The Court may take judicial notice that these firms exceeded the CEA's financial test outlined above.

The Chalkboard transactions also were confined to eligible contract participants. To use the Chalkboard platform in 2004, participants were required to warrant that they were "eligible commercial entities." ChemConnect's Clearing Policy at Section 10.1. Mills Decl. Exhibit 5. That term is defined in Section 1a(11). It delineates a particular subset of "eligible contract participants" as defined in Section 1a(12). Accordingly, Chalkboard's terms of usage expressly limited usage to only particular types of eligible contract participants, thereby satisfying the requirements of Section 2(g).

d. The agreements, contracts, and transactions alleged in the Superseding Indictment were subject to individual negotiation by the parties.

The term "subject to individual negotiation by the parties" has not been construed by any court, but its meaning is clear and unambiguous. "Subject to individual negotiation" means that the parties to a transaction, contract, or agreement have had an opportunity to negotiate the terms, even if they did not utilize that opportunity. The CFTC confirmed this before Congress in 2002: "In 2(g), if you have the opportunity for individual negotiation, they are excluded [from the CEA]."[34]

The "subject to individual negotiation" requirement in Section 2(g) distinguishes the OTC agreements, contracts, and transactions excluded from the CEA by Section 2(g) from exchange-traded futures contracts. The terms of exchange-traded futures contracts are set by the

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34 Testimony of Thomas J. Erickson, CFTC Commissioner, *Hearings before the Senate Committee on Agriculture, Nutrition, and Forestry on CFTC Regulation and Oversight of Derivatives*, 107th Cong., 2nd Sess. 23 (July 10, 2002). Appendix at Tab 13. That the opportunity to negotiate rather than actual negotiations is the meaning of the phrase "subject to" negotiations is clear from the legislative history. Congress considered, but declined to adopt, language that would have limited the exemption for "Excluded Swap Transactions" to an agreement, contract, or transaction that "*is* individually negotiated." (emphasis added.) *See* H.R. 4541 § 107 (October 19, 2000), Appendix at Tab 14.

exchange, standardized and cannot be negotiated by the parties, other than as to price and quantity. *See In re Murphy and Rudman*, No. 8-37, 1985 CFTC LEXIS 184, *60-62 (Sept. 25, 1985) (noting that the terms of the underlying futures contract are for the contract market to set and for market participants to honor). Market participants who are dissatisfied with the terms of a futures contract (including delivery terms) are free either to petition the exchange to alter those terms or to refrain from trading an instrument they deem to be unsatisfactory. *In re Cox*, [1986 – 1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,786 at P. 34,063 (CFTC 1987). Appendix Tab 2. This is in sharp contrast to the way the OTC transactions worked.

As previously discussed, the Superseding Indictment alleges that in February 2004 participants in the TET propane market predominantly traded in three ways: (a) directly between two parties; (b) through voice brokers; and (c) through Chalkboard. (SI ¶ 16). Regardless of which type of transaction occurred, the parties had an opportunity to negotiate the terms of their transaction, and thus those terms were "subject to negotiation." The Superseding Indictment does not suggest otherwise. Each of the direct agreements, contracts, and transactions alleged in the Superseding Indictment was entered into pursuant to private, bilateral agreements between the parties. These agreements determined contractual terms such as credit, default, notice, delivery, and time and means of payment. No third party exercised, determined, or controlled those terms for the parties which, like any contractual arrangement, were subject to negotiation. *See* Mills Decl. Exhibits 2, 3 and 4 (representative examples of the transactional documentation between the parties confirming the terms of their transactions).[35]

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[35] For example, Mills Decl. Exhibit 2 is the paperwork supporting a ChemConnect transaction between BP and Shell Trading including the statement on the ChemConnect confirmation that: "This transaction is subject to the approval of buyer's credit by the seller" (BPDOJ 098157) and the following negotiation on the Shell Confirmation requesting BP to "Please add the following clauses… the UN Convention on contracts for the international sale of goods shall not apply." (BPDOJ 098161). Exhibit 3 is the paperwork supporting a ChemConnect transaction between BP and AmeriGas Propane, LP, which

As explained *supra* at 7, the government has acknowledged that Chalkboard is "an electronic bulletin board that provides a means for propane traders to engage in bilateral negotiations."[36] Accordingly, there can be no debate that the Chalkboard transactions alleged in the Superseding Indictment were subject to negotiation and, therefore, meet the requirements of Section 2(g).

e. None of the agreements, contracts, or transactions alleged in the Superseding Indictment were executed or traded on a "trading facility."

A "trading facility" is defined in Section 1a(34) of the CEA, in relevant part, as follows:

> (A) IN GENERAL. – The term "trading facility" means a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions by accepting bids and offers made by other participants that are open to multiple **participants in the facility or system**.
>
> (B) EXCLUSIONS. – The term "***trading facility" does not include –***
>
> > (i) a person or group of persons solely because the person or group of persons constitutes, maintains, or provides an electronic facility or system ***that enables participants to negotiate the terms of and enter into bilateral transactions as a result of communications exchanged***

contains the following language on the AmeriGas Sales Agreement: "Unless both parties have fully agreed Terms & Conditions on file with authorized signatures on behalf of the contractual parties, this agreement is subject to … standard terms and conditions…" (DOJ-A01154946-01-000868). Exhibit 4 is the paperwork supporting a ChemConnect transaction between BP and Louis Dreyfus Energy Services, and contains the following negotiated term: "Acknowledge receipt and confirm agreement to the commercial terms set out in your confirmation dated 17th February 2004. SUBJECT TO THE FOLLOWING MODIFICATIONS…" (DOJ-A01154941-11-014450).

36 *See* CFTC Release 5193-06, Attachment 1, attached hereto as Exhibit P. As described in its usage contract with BP, Chalkboard operated as an "electronic brokerage system" that provided "buyers and sellers of energy commodities . . . a computerized electronic method of identifying other buyers and sellers of [p]roducts." Mills Decl. Exhibit 1. As explained *supra* at 8, although Chalkboard provided a means to interact with other buyers and sellers with respect to particular energy products, the financial, credit, legal, and other terms pursuant to which the parties would transact were determined between them through their separate agreements were in fact subject to negotiation. *See* discussion *supra* at 8.

> ***by the parties and not from interaction of multiple bids and multiple offers within a predetermined, nondiscretionary automated trade matching and execution algorithm;****…*

7 U.S.C. § 1a(34) (emphasis added).

There are no reported cases in which a court or the CFTC has addressed this provision, although, as relevant here, the plain meaning is clear. Section 1a(34)(B)(i) provides that a trading platform is not a "trading facility" if it enables the parties to negotiate the terms of bilateral transactions and enter into bilateral transactions by accepting bids and offers, rather than automatically matching bids and offers by an execution algorithm (*i.e.*, there is an affirmative and volitional act required of a party to lift and accept a bid or offer posted on the platform).

The Superseding Indictment does not allege that any of the alleged agreements, contracts, or transactions were executed or traded on a "trading facility" and none were. (SI ¶ 16.) Transactions entered into directly between the parties or through voice brokers plainly did not involve a trading facility. As noted, neither was Chalkboard a "trading facility" within the CEA's definition. The plain terms of Section 1a(34)(B)(i) expressly exclude from the definition of "trading facility" trading platforms like Chalkboard that enable the parties to negotiate the terms of and enter into bilateral transactions as a result of communications exchanged between the parties and not from an execution algorithm that automatically matches bids and offers. Chalkboard allowed qualified users: (1) to post anonymous bids and offers for the purchase or sale of specific quantities of propane at specific prices; and (2) to electronically "lift" bids and hit offers to form the basis for a binding transaction pursuant to whatever contractual terms the contracting parties agreed to between themselves. *See* Mills Decl. Exhibits 2, 3, 4. Chalkboard's electronic platform also included a "negotiation" function that allowed a user, prior to lifting a posted offer or hitting a bid, to electronically contact and communicate with the other party through the Chalkboard system and negotiate the terms of their agreement.[37] Thus the government has described Chalkboard as "an electronic bulletin board that provides a means for propane traders to engage in bilateral negotiations," *see* Exhibit P, and the Superseding Indictment calls it a "platform" not a "trading facility." (SI ¶ 16.) Consistent with the foregoing facts, ChemConnect specifically and correctly represented to its users that "ChemConnect . . . is not a 'trading facility' as defined in Section 1a(33) of the CEA." Section 10.2 of ChemConnect's Clearing Policies, Mills Decl. Exhibit 5.

The agreements, contracts, and transactions alleged in the Superseding Indictment met all of the requirements of Section 2(g). Accordingly, Section 13(a)(2) does not apply to or govern them. Thus, Counts Two through Nineteen must be dismissed.

3. Assuming Arguendo that there is Any Ambiguity in the terms Governing the Scope of Section 2(g), the Rule of Lenity Requires that those Ambiguities be Resolved in Favor of Defendants in a Criminal Case.

It is well settled under the rule of lenity that when there are two rational readings of a criminal statute, one harsher than the other, courts are to apply the construction most favorable to the defendant. *E.g.*, *McNally v. United States*, 483 U.S. 350, 359-360 (1987) superseded by statute on other grounds as stated in *United States v. Turner*, 551 F.3d. 657, 667 (7th Cir. 2008); *United States v. Bass*, 404 U.S. 336, 348 (1971); *see also United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position [on the meaning of the statute] is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor"). Thus, where the harsher construction is not clear and definite, under the rule of lenity, courts must apply the less harsh reading.

[37] *See* ChemConnect Terms of Usage. ("All transaction fees for crude and refined products are payable by seller, unless buyer has agreed to pay transaction fees *during the matching process*.") (emphasis added). Mills Decl. Exhibit 1 at A-1.

The unambiguous terms of Section 2(g) excluding the OTC agreements, contracts, and transactions involved here do not require resort to the rule of lenity to determine that criminal prosecution for violation of any of the proscriptions of the CEA will not lie. Even if the government could fashion a construction of Section 2(g) to try to meet its goals for this criminal prosecution, under no circumstances could such a construction be so clear and definite when compared to the plain language of Section 2(g) that it would defeat application of the rule of lenity. Accordingly, the rule of lenity requires dismissal of all Counts alleging violation of the CEA.

B. There is No Legal Basis for the Conspiracy Charge.

Based on the foregoing, Section 13(a)(2) does not apply to or govern the agreements, contracts, and transactions alleged in the Superseding Indictment. Therefore the conspiracy charge in Count One of the Superseding Indictment, alleging a conspiracy to violate Section 13(a)(2), must be dismissed. The Supreme Court has repeatedly held that "the essence of a conspiracy is an agreement to commit an *unlawful* act." *United States v. Recio*, 537 U.S. 270, 274 (2003) (citing *Ianelli v. United States*, 420 U.S. 770, 777 (1975)) (emphasis added). Where, as here, the alleged violation underlying the conspiracy charge is without legal basis, the conspiracy charge cannot survive. *Id.*; *see also United States v. Fernandez*, 892 F.2d 976, 987 (11th Cir. 1989) ("[I]t is fundamental to the law of conspiracy that the government show an agreement between two or more persons to commit a *crime*") (emphasis in original).

C. There is No Legal Basis for the Wire Fraud Charges.

Counts Twenty through Twenty-six do not allege an independent wire fraud violation; rather, the allegations of wire fraud are wholly dependent upon the allegations of a violation of the CEA and *are tied to specific transactions*. SI ¶¶ 79-80. The essential contention of the wire fraud charges is that defendants "did knowingly and intentionally devise and intend to devise a scheme and artifice to defraud purchasers of February 2004 TET propane at a price based on the OPIS index." The underlying premise for such a contention, however, is that the OPIS index was rendered invalid because of the alleged violations of the CEA. Because no claim lies as to CEA violations, the alleged scheme to defraud based on such CEA violations does not state a chargeable offense. In addition, the Superseding Indictment does not allege a material false representation, a necessary element to sustain a violation of the wire fraud statute. Pattern Crim. Jury Inst. 5th Cir. 2.60 (2001).

IV. CONCLUSION

For all the foregoing reasons, the Superseding Indictment should be dismissed as a matter of law.

Dated: March 6, 2009

Respectfully submitted,

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Certificate of Service

I, Charles R. Mills, hereby certify that on this 6th day of March, 2009, a true and correct copy of Defendants Radley, Summers and Claborn's Memorandum in Support of Their Motion to Dismiss Based on Commodity Exchange Act Section 2(g), Declaration of Charles R. Mills and Appendix of Unreported Cases and Legislative History were served on all counsel of record in the above matter via the Court's electronic filing system.

/s/ Charles R. Mills

Exhibit A

ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT
In the Matter of Dan L. Duncan,* et al., *File No. 051-0108

The Federal Trade Commission, subject to its final approval, has accepted for public comment an Agreement Containing Consent Order ("Consent Agreement") with Dan L. Duncan, EPCO, Inc., Texas Eastern Products Pipeline Company, LLC, and TEPPCO Partners, L.P. (collectively "Duncan"). The Consent Agreement remedies the anticompetitive effects that otherwise would be likely to result from the acquisition described herein. The terms of the Consent Agreement require Duncan to divest its interests in the Mont Belvieu Storage Partners natural gas liquids storage facility and related pipeline, land, and other assets to a buyer approved by the Commission.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested people. Comments received during this period will become part of the public record. After thirty (30) days, the Commission again will review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw the proposed Consent Agreement or make it final.

On February 24, 2005, EPCO, Inc., through DFI GP Holdings, L.P., acquired from Duke Energy Field Services, LLC: (1) TEPPCO's general partner, Texas Eastern Products Pipeline Company, LLC, for $1.1 billion, and (2) 2.5 million limited partnership units of TEPPCO Partners, L.P., at an estimated value of $100 million (collectively "the acquisition"). The acquisition was not reportable under the Hart-Scott-Rodino Act. Both EPCO and TEPPCO are leading providers of salt dome storage for natural gas liquids ("NGLs") in Mont Belvieu, Texas. EPCO operates the Enterprise NGL storage facility in Mont Belvieu. TEPPCO operates the Mont Belvieu Storage Partners NGL storage facility in Mont Belvieu. As a result of this acquisition, two of the four commercial storage providers for NGLs were placed under Enterprise's control.

I. The Parties

Enterprise Products Partners L.P. ("Enterprise") is one of the largest publicly traded midstream energy partnerships in the United States, with an enterprise value of approximately $15 billion. Enterprise's services include NGL fractionation, transportation, import/export terminaling, and storage. Enterprise owns the largest and most liquid NGL storage facility in Mont Belvieu, along with several pipelines into and out of Mont Belvieu, and substantial brine handling capacity in Mont Belvieu. Enterprise also markets NGLs in Mont Belvieu. Dan L. Duncan ultimately controls Enterprise and EPCO, Inc. ("EPCO"), the general partner of Enterprise.

TEPPCO Partners, L.P. ("TEPPCO") is a publicly traded master limited partnership. TEPPCO's general partner is Texas Eastern Products Pipeline Company, LLC ("Texas Eastern"), which, post-acquisition, ultimately is controlled by EPCO and Dan L. Duncan. Through various subsidiaries, TEPPCO owns and operates NGL transportation and storage assets. TEPPCO's Mont Belvieu NGL storage assets are owned by Mont Belvieu Storage Partners, a 50/50 joint venture between TEPPCO and Louis Dreyfus Energy Services L.P. TEPPCO controlled, and continues to control, the day-to-day operations of the Mont Belvieu Storage Partners NGL storage facility, through its wholly-owned subsidiary, TE Products Pipeline Company, Limited Partnership. TEPPCO also owns and operates the TE Products Pipeline, the primary source of propane to the northeastern United States and an important outlet for NGLs stored at the Mont Belvieu Storage Partners facility.

Since the acquisition, the general partners of Enterprise and TEPPCO have maintained separate boards of directors and management teams. The practical result of the acquisition, however, is that Dan L. Duncan ultimately owns and controls both entities.

II. Salt Dome Storage for Natural Gas Liquids in Mont Belvieu, Texas

The relevant market in which to analyze the effects of the acquisition is the market for salt dome storage for natural gas liquids ("NGLs") in Mont Belvieu, Texas. NGLs are a group of light hydrocarbons–including ethane, propane, normal butane, isobutane, and natural gasoline–which are used, among other uses, as feedstocks in the production of ethylene and propylene, as fuel for heating or industrial processes, and in blending components for motor gasoline. NGLs primarily are stored in large underground wells formed out of geological salt domes under the Earth's surface until they are delivered to end-users, usually via pipeline. Mont Belvieu, Texas, comprises the largest NGL storage system in the world and pipeline connections that allow NGL marketers to reach the broadest array of end use markets. There are no viable competitive alternatives to salt dome storage for NGLs in Mont Belvieu.

The market for salt dome storage for NGLs in Mont Belvieu, Texas, is highly concentrated, with Enterprise and TEPPCO as the two largest suppliers based on storage volumes, and two of the three largest suppliers based on permitted storage volume. Together the two account for about 70% of storage volume in Mont Belvieu. Targa Resources, Inc. and Valero Energy Corporation are the two other competitors that account for the remaining volume.

Storage wells are differentiated by their connectivity, both to pipelines bringing product into the wells from fractionators, and to pipelines taking product out of storage to the major product pipelines that transport NGLs to markets throughout the United States. Mont Belvieu's attraction as a storage hub for NGLs stems from the flexibility it provides to owners to move their product to various markets. Storage customers evaluate wells on the basis of the flexibility they provide in receiving and moving product.

Prior to the acquisition, Enterprise and TEPPCO directly competed for storage volumes in Mont Belvieu based on price and service levels. Both Enterprise and TEPPCO are connected to the Dixie Pipeline and competed for storage volumes for customers wishing to ship product, primarily propane, into the Southeastern United States. In addition, Enterprise and TEPPCO, along with Targa Resources, Inc., competed for storage customers' marginal volumes. Many customers must store minimum volumes at certain facilities due to pipeline connections or other restrictions. Finally, Enterprise and TEPPCO competed for trading volumes. Because Enterprise and TEPPCO are the two most liquid storage providers, many trading customers ranked them as their first and second choice for storage.

The acquisition significantly increased concentration in the Mont Belvieu market for salt dome storage for NGLs, leaving EPCO controlling a dominant share of storage volume and capacity. A combined Enterprise/TEPPCO would have an enhanced ability unilaterally to exercise market power in the market because many customers view the two suppliers as first and second choices and the handful of other viable suppliers are incapable of replacing the competition lost as a result of the merger. Reducing the already small number of competitors also increases the likelihood of coordinated interaction after the merger. Thus, eliminating competition between the two leading suppliers likely would result in higher prices and lower levels of service for storage customers.

III. Entry

Entry into the Mont Belvieu storage market is unlikely to deter or counteract the likely anticompetitive effects. Entry is difficult and time-consuming and potential entrants would face substantial barriers in the form of permit requirements and land use restrictions.

IV. Terms of the Proposed Consent Agreement

The proposed Consent Agreement effectively remedies the acquisition's alleged anticompetitive effects by requiring TEPPCO to divest its interests in Mont Belvieu Storage Partners and certain related pipeline, land, and other assets (collectively the "divested assets"). The Commission's purposes with respect to the divestiture are: (1) to ensure the continuation of the divested assets as a going concern in the same manner as of the date the Consent Agreement was signed, and (2) to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's Complaint.

In order to achieve these purposes, Paragraph II of the proposed Consent Agreement directs Duncan to sell TEPPCO's interests in certain Mont Belvieu NGL storage assets and related pipeline, land, and other assets to a Commission-approved buyer no later than December 31, 2006, and in a manner approved by the Commission, subject to the Commission's final approval. If Duncan is unable to divest this set of assets to a Commission-approved buyer within this timeframe, Paragraph III of the proposed Consent Agreement contains the standard divestiture trustee provisions pursuant to which the Commission may appoint a trustee to divest the assets to a Commission-approved buyer.

Paragraph IV.A of the proposed Consent Agreement requires Duncan to provide prior notice to the Commission of its planned acquisitions, operatorships, or management of any NGL storage facility in Mont Belvieu, Texas, for a period of ten (10) years. Paragraph IV.C requires Duncan to send copies of all new NGL storage leases with third party NGL storage facilities in Mont Belvieu within the earlier of fifteen (15) days of being signed or becoming effective. These provisions ensure that subsequent acquisitions or leases do not adversely impact competition in the market at issue and undermine the remedial goals of the proposed Consent Agreement.

In order to achieve successfully the Commission's purposes, Paragraph II of the proposed Consent Agreement contains provisions that ensure that the acquirer receives all resources necessary to operate the divested assets. First, Paragraph II requires Duncan to give the acquirer the opportunity to interview and hire employees who spend more than ten percent (10%) of their time working on the divested assets, and prevents Duncan from offering these employees incentives to decline the acquirer's offer of employment. This will ensure that the acquirer has access to staff who are familiar with the NGL storage, pipelines, and other related assets. Second, Paragraph II requires Duncan to convey to the acquirer licensed intangible property necessary for the operation of the divested assets to ensure that the acquirer has the software and other assets necessary to operate the divested assets in the same manner as of the day the parties signed the Consent Agreement.

To maintain the competitive viability of the divested assets, including TEPPCO's interest in Mont Belvieu Storage Partners, in the same manner as of the date the Consent Agreement was signed, the proposed Consent Agreement contains several provisions relating to the operation of TEPPCO's TE Products Pipeline. TEPPCO provides "open stock" service to propane shippers from Mont Belvieu Storage Partners, a service whereby shippers who ship on the pipeline and who have adequate inventory in the TEPPCO system, given certain inventory and availability requirements, can take delivery of propane at any of TEPPCO's terminals along the pipeline without having to wait for the pipeline transit time it would take to move the product physically from origin to destination. The open stock service allows TEPPCO to transfer product from any origination point along the pipeline it chooses to meet shippers' needs, irrespective of the storage facility in which the shipper actually has inventory. EPCO's plans to build a pipeline connecting its Mont Belvieu storage facility to the TEPPCO pipeline raises several concerns regarding its ability to disadvantage any prospective acquiror of TEPPCO's interest in Mont Belvieu Storage Partners. First, TEPPCO could decline to offer the open stock service at Mont Belvieu Storage Partners, or offer the service there at less advantageous terms than at EPCO's Mont Belvieu facility. Second, TEPPCO could impede Mont Belvieu Storage Partners' ability to market its storage capacity by allocating product from other storage facilities along the pipeline to meet shipper's needs, keeping Mont Belvieu Storage Partners' capacity occupied disproportionately. The proposed Consent Agreement contains provisions addressing these concerns.

First, the proposed Consent Agreement requires TEPPCO to continue to operate the TE Products Pipeline on open stock service for propane. Second, if Duncan builds a pipeline, referred to in the proposed Consent Agreement as the "New Pipeline," connecting the TE

Products Pipeline to any NGL storage facility it owns in Mont Belvieu, Texas, the proposed Consent Agreement requires Duncan to (1) connect the new pipeline to the Mont Belvieu Storage Partners NGL storage facility at its own cost, (2) operate the TE Products Pipeline for propane on an open stock basis for shippers who ship from Mont Belvieu Storage Partners on terms and conditions that are no less advantageous than those for shippers who ship propane from an NGL storage facility in Mont Belvieu owned by Duncan, and (3) operate the TE Products Pipeline for products other than propane on terms and conditions that are no less advantageous than those for shippers who ship products other than propane from an NGL storage facility in Mont Belvieu owned by Duncan.

Third, the proposed Consent Agreement contains provisions relating to the implementation of new allocation procedures for the TE Products Pipeline. Paragraph IV.B requires TEPPCO to provide advance written notice to the Commission of any new allocation procedures relating to the movements of NGLs on the TE Products Pipeline originating in Mont Belvieu, Texas. Paragraph VI requires any new allocation procedures to include a requirement that shippers originating product movements on the pipeline from the Mont Belvieu Storage Partners NGL storage facility nominate that movement to both TEPPCO and Mont Belvieu Storage Partners and also provides that such new allocation procedures shall allow shippers who ship product originating at Mont Belvieu Storage Partners' facility to ship on terms and conditions that are no less advantageous than those given to shippers who ship from an NGL storage facility owned by Duncan.

The purpose of the provisions relating to the operation of the TE Products Pipeline is to maintain the competitive viability of the Mont Belvieu Storage Partners NGL storage facility in the same manner as of the date the Consent Agreement was signed by ensuring that Duncan cannot disadvantage shippers who originate product movements from the Mont Belvieu Storage Partners' facility in favor of shippers who originate product movements from its own storage facility in the event that Duncan interconnects an NGL storage facility it owns in Mont Belvieu, Texas, to the TE Products Pipeline.

V. Opportunity for Public Comment

By accepting the proposed Consent Agreement, subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed Consent Agreement, including the proposed divestitures, to aid the Commission in its determination of whether it should make final the proposed Consent Agreement contained in the agreement. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement or modify the terms of the proposed Consent Agreement in any way. Further, the proposed Consent Agreement has been entered into for settlement purposes only and does not constitute an admission by Dan L. Duncan, EPCO, Texas Eastern, or TEPPCO that it violated the law or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

Exhibit B

Definitions, Sources and Explanatory Notes

Category: Petroleum Prices
Topic: Futures Prices (NYMEX)

Key Terms	Definition
Contract 1	A futures contract specifying the earliest delivery date. • For gasoline, heating oil, and propane each contract expires on the last business day of the month preceding the delivery month. Thus, the delivery month for Contract 1 is the calendar month following the trade date. • For crude oil, each contract expires on the third business day prior to the 25th calendar day of the month preceding the delivery month. If the 25th calendar day of the month is a non-business day, trading ceases on the third business day prior to the business day preceding the 25th calendar day. After a contract expires, Contract 1 for the remainder of that calendar month is the second following month.
Contract 2-4	Represent the successive delivery months following Contract 1.
Crude Oil	A mixture of hydrocarbons that exists in liquid phase in natural underground reservoirs and remains liquid at atmospheric pressure after passing through surface separating facilities. Depending upon the characteristics of the crude stream, it may also include: • Small amounts of hydrocarbons that exist in gaseous phase in natural underground reservoirs but are liquid at atmospheric pressure after being recovered from oil well (casinghead) gas in lease separators and are subsequently commingled with the crude stream without being separately measured. Lease condensate recovered as a liquid from natural gas wells in lease or field separation facilities and later mixed into the crude stream is also included; • Small amounts of nonhydrocarbons produced with the oil, such as sulfur and various metals; • Drip gases, and liquid hydrocarbons produced from tar sands, oil sands, gilsonite, and oil shale. Liquids produced at natural gas processing plants are excluded. Crude oil is refined to produce a wide array of petroleum products, including heating oils; gasoline, diesel and jet fuels; lubricants; asphalt; ethane, propane, and butane; and many other products used for their energy or chemical content.
Futures Price	The price quoted for delivering a specified quantity of a commodity at a specified time and place in the future.
Light, Sweet Crude Oil, Cushing, Oklahoma	Specific domestic crudes with 0.42% sulfur by weight or less, not less than 37° API gravity nor more than 42° API gravity. The following domestic crude streams are deliverable: West Texas Intermediate, Low Sweet Mix, New Mexican Sweet, North Texas Sweet, Oklahoma Sweet, South Texas Sweet. In addition, specific foreign crudes of not less than 34° API nor more than 42° API. The following foreign streams are deliverable: U.K. Brent and Forties, and Norwegian Oseberg Blend, for which the seller shall receive a 30¢-per-barrel discount below the final settlement price; Nigerian Bonny Light and Colombian Cusiana are delivered at 15¢ premiums; and Nigerian Qua Iboe is delivered at a 5¢ premium.
Oxygenates	Substances which, when added to gasoline, increase the amount of oxygen in that gasoline blend. Ethanol, Methyl Tertiary Butyl Ether (MTBE), Ethyl Tertiary Butyl Ether (ETBE), and methanol are common oxygenates.
Propane (C_3H_8)	A normally gaseous straight-chain hydrocarbon. It is a colorless paraffinic gas that boils at a temperature of -43.67 degrees Fahrenheit. It is extracted from natural gas or refinery gas streams. It includes all products designated in ASTM Specification D1835 and Gas Processors Association Specifications for

	commercial propane and HD-05 propane. For price data, it does not include the propane portion of any natural gas liquids (NGL) mixes; i.e., butane-propane and ethane-propane mix.
Mont Belvieu	The location specified in either spot or futures contracts for delivery of propane in Mont Belvieu, Texas.
New York Harbor	The location specified in either spot or futures contracts for delivery of a product in New York Harbor.
No. 2 Heating Oil	A distillate fuel oil for use in atomizing type burners for domestic heating or for use medium capacity commercial-industrial burner units, with distillation temperatures between 540-640 degrees Fahrenheit at the 90-percent recovery point; and the kinematic viscosities between 1.9-3.4 centistokes at 100 degrees Fahrenheit as defined in ASTM Specification D396-92.
RBOB	"Reformulated Gasoline Blendstock for Oxygenate Blending" is a motor gasoline blending component which, when blended with a specified type and percentage of oxygenate, meets the definition of reformulated gasoline.
Reformulated Gasoline	Finished motor gasoline formulated for use in motor vehicles, the composition and properties of which meet the requirements of the reformulated gasoline regulations promulgated by the U.S. Environmental Protection Agency under Section 211(k) of the Clean Air Act. Note: This category includes oxygenated fuels program reformulated gasoline (OPRG) but excludes reformulated gasoline blendstock for oxygenate blending (RBOB).
Regular Gasoline	Gasoline having an antiknock index (average of the research octane rating and the motor octane number) greater than or equal to 85 and less than 88. Note: Octane requirements may vary by altitude.

Definitions

For definitions of related energy terms, refer to the EIA Energy Glossary.

Sources

Crude oil futures: New York Mercantile Exchange (NYMEX); Products: Reuters Ltd.

Explanatory Notes

The futures prices shown are the official daily closing prices at 2:30 p.m. from the trading floor of the New York Mercantile Exchange (NYMEX) for a specific delivery month for each product listed.

Exhibit C

Glossary

S

References
- Energy Basics 101
- EIA Abbreviations
- Energy Kid's Page
- Frequently Asked Quest
- Energy A-Z

Salable coal: The shippable product of a coal mine or preparation plant. Depending on customer specifications, salable coal may be run-of-mine, crushed-and-screened (sized) coal, or the clean coal yield from a preparation plant.

Salable natural gas: Natural gas marketed under controlled quality conditions.

Sales: See Energy sales.

Sales for resale: A type of wholesale sales covering energy supplied to other electric utilities, cooperatives, municipalities, and Federal and state electric agencies for resale to ultimate consumers.

Sales to end users: Sales made directly to the consumer of the product. Includes bulk consumers, such as agriculture, industry, and utilities, as well as residential and commercial consumers.

Sales type: Sales categories of sales to end-users and sales for resale.

Sales volume (coal): The reported output from Federal and/or Indian lands, the basis of royalties. It is approximately equivalent to production, which includes coal sold, and coal added to stockpiles.

Salt dome: A domical arch (anticline) of sedimentary rock beneath the earth's surface in which the layers bend downward in opposite directions from the crest and that has a mass of rock salt as its core.

Salt gradient solar ponds: These consist of three main layers. The top layer is near ambient and has low salt content. The bottom layer is hot, typically 160° F to 212° F (71° C to 100° C), and is very salty. The important gradient zone separates these zones. The gradient zone acts as a transparent insulator, permitting the sunlight to be trapped in the hot bottom layer (from which useful heat is withdrawn). This is because the salt gradient, which increases the brine density with depth, counteracts the buoyancy effect of the warmer water below (which would otherwise rise to the surface and lose its heat to the air). An organic Rankine cycle engine is used to convert the thermal energy to electricity.

Sample (coal): A representative fraction of a coal bed collected by approved methods, guarded against contamination or adulteration, and analyzed to determine the nature; chemical, mineralogic, and (or) petrographic composition; percentage or parts-per-million content of specified constituents; heat value; and possibly the reactivity of the coal or its constituents.

Schedule: A statement of the pricing format of electricity and the terms and conditions governing its applications.

Scheduled outage: The shutdown of a generating unit, transmission line, or other facility for inspection or maintenance, in accordance with an advance schedule.

Scheduling coordinators: Entities certified by the Federal Energy Regulatory Commission (FERC) that act on behalf of generators, supply aggregators (wholesale marketers), retailers, and customers to schedule the distribution of electricity.

Scoop loading: An underground loading method by which coal is removed from the working face by a tractor unit equipped with a hydraulically operated bucket attached to the front; also called a front-end loader.

Screenings: The undersized coal from a screening process, usually one-half inch or smaller.

Seam: A bed of coal lying between a roof and floor. Equivalent term to bed, commonly used by industry.

Seasonal energy efficiency ratio (SEER): Ratio of the cooling output divided by the power consumption. It is the Btu of cooling output during its normal annual usage divided by the total electric energy input in watt hours during the same period. This is a measure of the cooling performance for rating central air conditioners and central heat pumps. The appliance standards required a minimum SEER of 10 for split-system central air conditioners and for split-system central heat pumps in 1992. (The average heat pump or central air conditioner sold in 1986 had an SEER of about 9.)

Seasonal pricing: A special electric rate feature under which the price per unit of energy depends on the season of the year.

Seasonal rates: Different seasons of the year are structured into an electric rate schedule whereby an electric utility provides service to consumers at different rates. The electric rate schedule usually takes into account demand based on weather and other factors.

Seasonal units: Housing units intended for occupancy at only certain seasons of the year. Seasonal units include units intended only for recreational use, such as beach cottages and hunting cabins. It is not likely that this type of unit will be the usual residence for a household, because it may not be fit for living quarters for more than half of the year.

Seasoned wood: Wood, used for fuel, that has been air dried so that it contains 15 to 20 percent moisture content (wet basis).

Secondary heating equipment: Space-heating equipment used less often than the main space-heating equipment.

Secondary heating fuel: Fuels used in secondary space-heating equipment.

Sector: See Energy-use sectors.

Securitization: A proposal for issuing bonds that would be used to buy down existing power contracts or other obligations. The bonds would be repaid by designating a portion of future customer bill payments. Customer bills would be lowered, since the cost of bond payments would be less than the power contract costs that would be avoided.

Securitize: To aggregate contracts into one pool, which then offers shares for sale in the investment market. This strategy diversifies project risks from what they would be if each project were financed individually, thereby reducing the cost of financing.

Selective absorber: A solar absorber surface that has high absorbtance at wavelengths corresponding to that of the solar spectrum and low emittance in the infrared range.

Self-Generator: A plant whose primary product is not electric power, but does generate electricity for its own use or for sale on the grid; for example, industrial combined heat and power plants.

Seller type: Categories of major refiners and other refiners and gas plant operators.

Semianthracite: See **Anthracite**.

Semiconductor: Any material that has a limited capacity for conducting an electric current. Certain semiconductors, including silicon, gallium arsenide, copper indium diselenide, and cadmium telluride, are uniquely suited to the photovoltaic conversion process.

Separate metering: Measurement of electricity or natural gas consumption in a building using a separate meter for each of several tenants or establishments in the building.

Separative work unit (SWU): The standard measure of enrichment services. The effort expended in separating a mass F of feed of assay x_f into a mass P of product assay x_p and waste of mass W and assay x_w is expressed in terms of the number of separative work units needed, given by the expression SWU = $WV(x_w) + PV(x_p) - FV(x_f)$, where V(x) is the "value function," defined as $V(x) = (1 - 2x)\ 1n((1 - x)/x)$.

Septic tank: A tank in which the solid matter of continuously flowing sewage is disintegrated by bacteria.

Series connection: A way of joining photovoltaic cells by connecting positive leads to negative leads; such a configuration increases the voltage.

Series resistance: Parasitic resistance to current flow in a cell due to mechanisms such as resistance from the bulk of the semiconductor material, metallic contacts, and interconnections.

Service area: The territory in which a utility system or distributor is authorized to provide service to consumers.

Service provider: See Energy service provider.

Service well: A well drilled, completed, or converted for the purpose of supporting production in an existing field. Wells of this class also are drilled or converted for the following specific purposes: gas injection (natural gas, propane, butane or fuel-gas); water injection; steam injection; air injection; salt water disposal; water supply for injection; observation; and injection for in-situ combustion.

Shaft mine: A mine that reaches the coal bed by means of a vertical shaft.

Shakes/shingles: Flat pieces of weatherproof material laid with others in a series of overlapping rows as covering for roofs and sometimes the sides of buildings. Shakes are similar to wood shingles, but instead of having a cut and smoothly planed surface, shakes have textured grooves and a rough or "split" appearance to give a rustic feeling.

Shallow pitting: Testing a potential mineral deposit by systematically sinking small shafts into the earth and analyzing the material recovered.

Shell storage capacity: The design capacity of a petroleum storage tank which is always greater than or equal to working storage capacity.

Short circuit: An electric current taking a shorter or different path than intended.

Short circuit current: The current flowing freely through an external circuit that has no load or resistance; the maximum current possible.

Short purchases: A single shipment of fuel or volumes of fuel purchased for delivery within 1 year. Spot purchases are often made by a user to fulfill a certain portion of energy requirements, to meet unanticipated energy needs, or to take advantage of low-fuel prices.

Short term sales: Any short-term purchase covering a time period of 2 years or less. Purchases from intrastate pipelines pursuant to Section 311(b) of the NGPA of 1978 are classified as short-term sales, regardless of the stated contract term.

Short ton: A unit of weight equal to 2,000 pounds.

Short-term debt or borrowings: Debt securities or borrowings having a maturity of less than one year.

Short-term purchase: A purchase contract under which all deliveries of materials are scheduled to be completed by the end of the first calender year following the contract-signing year. Deliveries can be made during the contract year, but deliveries are not scheduled to occur beyond the first calendar year thereafter.

Shortwall mining: A form of underground mining that involves the use of a continuous mining machine and movable roof supports to shear coal panels 150 to 200 feet wide and more than half a mile long. Although similar to longwall mining, shortwall mining is generally more flexible because of the smaller working area. Productivity is lower than with longwall mining because the coal is hauled to the mine face by shuttle cars as opposed to conveyors.

Shrinkage: The volume of natural gas that is transformed into liquid products during processing, primarily at natural gas liquids processing plants.

Shut in: Closed temporarily; wells and mines capable of production may be shut in for repair, cleaning, inaccessibility to a market, etc.

Shut-in royalty: A royalty paid by a lessee as compensation for a lessor's loss of income because the lessee has deferred production from a property that is known to be capable of producing minerals. Shut in may be caused by a lack of a ready market, by a lack of transportation facilities, or by other reasons. A shut-in royalty may or may not be recoverable out of future production.

Shutdown date: Month and year of shutdown for fuel discharge and refueling. The date should be the point at which the reactor became subcritical.

Sidetrack drilling: This is a remedial operation that results in the creation of a new section of well bore for the purpose of (1) detouring around junk, (2) redrilling lost holes, or (3) straightening key seats and crooked holes. Directional "side-track" wells do not include footage in the common bore that is reported as footage for the original well.

Siding: An exterior wall covering material made of wood, plastic (including vinyl), or metal. Siding is generally produced in the shape of boards and is applied to the outside of a building in overlapping rows.

Silicon: A semiconductor material made from silica, purified for photovoltaic applications.

Silt: Waste from Pennsylvania anthracite preparation plants, consisting of coarse rock fragments containing as much as 30 percent small-sized coal; sometimes defined as including very fine coal particles called silt. Its heat value ranges from 8 to 17 million Btu per short ton. Synonymous with **culm**.

Silt, culm, refuse bank, or slurry dam mining: A mining operation producing coal from these sources of coal.

Single-circuit line: A transmission line with one electric circuit. For three-phase supply, a single circuit requires at least three conductors, one per phase.

Single crystal silicon: An extremely pure form of crystalline silicon produced by dipping a single crystal seed into a pool of molten silicon under high vacuum conditions and slowly withdrawing a solidifying single crystal boule (rod) of silicon. The boule is sawed into thin silicon wafers and fabricated into single-crystal photovoltaic cells.

Single crystal silicon (Czochralsky): Silicon cells with a well-ordered crystalline structure consisting of one crystal (usually obtained by means of the Czochralsky growth technique and involving ingot slicing), composing a module. Ribbon silicon is excluded.

Single-family housing unit: See housing structure/housing unit, specifically under Residential Sector heading.

Single purpose project: A hydroelectric project constructed only to generate electricity.

Site characterization: An onsite investigation at a known or suspected contaminated waste or release site to determine the extent and type(s) of contamination.

Site energy: The Btu value of energy at the point it enters the home, sometimes referred to as "delivered" energy. The site value of energy is used for all fuels, including electricity.

Site energy consumption: The Btu value of energy at the point it enters the home, building, or establishment, sometimes referred to as "delivered" energy.

Site-specific information DSM program assistance: A DSM (demand-side management) assistance program that provides quidance on energy efficiency and load management options tailored to a particular customer'sfacility; it often involves an on-site inspection of the customer facility to identify cost-effective DSM actions that could be taken. They include audits, engineering design calculations on information provided about the building, and technical assistance to architects and engineers who design new facilities.

Sinter: A chemical sedimentary rock deposited by precipitation from mineral waters, especially siliceous sinter and calcareous sinter.

Slope mine: A mine that reaches the coal bed by means of an inclined opening.

Slot: A physical position in a rack in a storage pool that is intended to be occupied by an intact assembly or equivalent (that is, a canister or an assembly skeleton).

Sludge: A dense, slushy, liquid-to-semifluid product that accumulates as an end result of an industrial or technological process designed to purify a substance. Industrial sludges are produced from the processing of energy-related raw materials, chemical products, water, mined ores, sewerage, and other natural and man-made products. Sludges can also form from natural processes, such as the run off produced by rain fall, and accumulate on the bottom of bogs, streams, lakes, and tidelands.

Slurry: A viscous liquid with a high solids content.

Slurry dam: A repository for the silt or culm from a preparation plant.

Small pickup truck: A pickup truck weighing under 4,500 lbs GVW.

Small power producer (SPP): Under the Public Utility Regulatory Policies Act (PURPA), a small power production facility (or small power producer) generates electricity using waste, renewable (biomass, conventional hydroelectric, wind and solar, and geothermal) energy as a primary energy source. Fossil fuels can be used, but renewable resource must provide at least 75 percent of the total energy input. (See Code of Federal Regulations, Title 18, Part 292.)

Sodium lights: A type of high intensity discharge light that has the most lumens per watt of any light source.

Sodium silicate: A grey-white powder soluble in alkali and water, insoluble in alcohol and acid. Used to fireproof textiles, in petroleum refining and corrugated paperboard manufacture, and as an egg preservative. Also referred to as liquid gas, silicate of soda, sodium metasilicate, soluble glass, and water glass.

Sodium tripolyphosphate: A white powder used for water softening and as a food additive and texturizer.

Solar cell: See Photovoltaic cell.

Solar constant: The average amount of solar radiation that reaches the earth's upper atmosphere on a surface perpendicular to the sun's rays; equal to 1353 Watts per square meter or 492 Btu per square foot.

Solar cooling: The use of solar thermal energy or solar electricity to power a cooling appliance. There are five basic types of solar cooling technologies: absorption cooling, which can use solar thermal energy to vaporize the refrigerant; desiccant cooling, which can use solar thermal energy to regenerate (dry) the desiccant; vapor compression cooling, which can use solar thermal energy to operate a Rankine-cycle heat engine; and evaporative coolers ("swamp" coolers), and heat-pumps and air conditioners that can by powered by solar photovoltaic systems.

Solar declination: The apparent angle of the sun north or south of the earth's equatorial plane. The earth's rotation on its axis causes a daily change in the declination.

Solar dish: See Parabolic dish.

Solar energy: The radiant energy of the sun, which can be converted into other forms of energy, such as heat or electricity.

Solar pond: A body of water that contains brackish (highly saline) water that forms layers of differing salinity (stratifies) that absorb and trap solar energy. Solar ponds can be used to provide heat for industrial or agricultural processes, building heating and cooling, and to generate electricity.

Solar power tower: A solar energy conversion system that uses a large field of independently adjustable mirrors (heliostats) to focus solar rays on a near single point atop a fixed tower (receiver). The concentrated energy may be used to directly heat the working fluid of a Rankine cycle engine or to heat an intermediary thermal storage medium (such as a molten salt).

Solar radiation: A general term for the visible and near visible (ultraviolet and near-infrared) electromagnetic radiation that is emitted by the sun. It has a spectral, or wavelength, distribution that corresponds to different energy levels; short wavelength radiation has a higher energy than long-wavelength radiation.

Solar spectrum: The total distribution of electromagnetic radiation emanating from the sun. The different regions of the solar spectrum are described by their wavelength range. The visible region extends from about 390 to 780 nanometers (a nanometer is one billionth of one meter). About 99 percent of solar radiation is contained in a wavelength region from 300 nm (ultraviolet) to 3,000 nm (near-infrared). The combined radiation in the wavelength region from 280 nm to 4,000 nm is called the broadband, or total, solar radiation.

Solar thermal collector: A device designed to receive solar radiation and convert it to thermal energy. Normally, a solar thermal collector includes a frame, glazing, and an absorber, together with appropriate insulation. The heat collected by the solar collector may be used immediately or stored for later use. Solar collectors are used for space heating; domestic hot water heating; and heating swimming pools, hot tubs, or spas.

Solar thermal collector, high temperature: A collector that generally operates at temperatures above 180 degrees Fahrenheit.

Solar thermal collector, low-temperature: A collector that generally operates at temperatures below 110 degrees Fahrenheit. Typically, it has no glazing or insulation and is made of plastic or rubber, although some are made of metal.

Solar thermal collector, medium-temperature: A collector that generally operates at temperatures of 140 degrees F to 180 degrees Fahrenheit, but can also operate at temperatures as low as 110 degrees Fahrenheit. Typically, it has one or two glazings, a metal frame, a metal absorption panel with integral flow channels or attached tubing (liquid collector) or with integral ducting (air collector) and insulation on the sides and back of the panel.

Solar thermal collector, special: An evacuated tube collector or a concentrating (focusing) collector. Special collectors operate in the temperature range from just above ambient temperature (low concentration for pool heating) to several hundred degrees Fahrenheit (high concentration for air conditioning and specialized industrial processes).

Solar thermal panels: A system that actively concentrates thermal energy from the sun by means of solar collector panels. The panels typically consist of fat, sun-oriented boxes with transparent covers, containing water tubes of air baffles under a blackened heat absorbent panel. The energy is usually used for space heating, for water heating, and for heating swimming pools.

Solar thermal parabolic dishes: A solar thermal technology that uses a modular mirror system that approximates a parabola and incorporates two-axis tracking to focus the sunlight onto receivers located at the focal point of each dish. The mirror system typically is made from a number of mirror facets, either glass or polymer mirror, or can consist of a single stretched membrane using a polymer mirror. The concentrated sunlight may be used directly by a Stirling, Rankine, or Brayton cycle heat engine at the focal point of the receiver or to heat a working fluid that is piped to a central engine. The primary applications include remote electrification, water pumping, and grid-connected generation.

Solar trough or solar parabolic trough: See **Parabolic trough**.

Source material: The term "source material" means (1) uranium, thorium, or any other material that is determined by the Atomic Energy Commission pursuant to the provisions of section 61 of the Atomic Energy Act of 1954, as amended, to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

Space heating: The use of energy to generate heat for warmth in housing units using space-heating equipment. The equipment could be the main space-heating equipment or secondary space-heating equipment. It does not include the use of energy to operate appliances (such as lights, televisions, and refrigerators) that give off heat as a byproduct.

Special collector: An evacuated tube collector or a concentrating (focusing) collector. Special collectors operate in the temperature range from just above ambient temperature (low concentration for pool heating) to several hundred degrees Fahrenheit (high concentration for air conditioning and specialized industrial processes).

Special contract rate schedule: An electric rate schedule for an electric service agreement between a utility and another party in addition to, or independent of, any standard rate schedule.

Special naphthas: All finished products within the naphtha boiling range that are used as paint thinners, cleaners, or solvents. These products are refined to a specified flash point. Special naphthas include all commercial hexane and cleaning solvents conforming to ASTM Specification D1836 and D484, respectively. Naphthas to be blended or marketed as motor gasoline or aviation gasoline, or that are to be used as petrochemical and synthetic natural gas (SNG) feedstocks are excluded.

Special nuclear material: The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material that the Atomic Energy Commission, pursuant to the provisions of section 51 of the Atomic Energy Act of 1954, as amended, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

Special purpose rate schedule: An electric rate schedule limited in its application to some particular purpose or process within one, or more than one, type of industry or business.

Specular reflectors: Specular reflectors have mirrorlike characteristics (the word "specular" is derived from the Greek word meaning mirror). The most common materials used for ballasts, the devices that turn on and operate Fluorescent tubes, are aluminum and silver. Silver has the highest reflectivity; aluminum has the lowest cost. The materials and shape of the reflector are designed to reduce absorption of light within the fixture while delivering light in the desired angular pattern. Adding (or retrofitting) specular reflectors to an existing light fixture is frequently implemented as a conservation measure.

Speculative resources (coal): Undiscovered coal in beds that may occur either in known types of deposits in a favorable geologic setting where no discoveries have been made, or in deposits that remain to be recognized. Exploration that confirms their existence and better defines their quantity and quality would permit their reclassification as identified resources.

Speculative resources (uranium): Uranium in addition to Estimated Additional Resources (EAR) that is thought to exist, mostly on the basis of indirect evidence and geological extrapolations, in deposits discoverable with existing exploration techniques. The locations of deposits in this category can generally be specified only as being somewhere within given regions or geological trends. The existence and size of such deposits are speculative. The estimates in this category are less reliable than estimates of EAR. SR corresponds to DOE's Possible Potential Resources plus Speculative Potential Resources categories.

Spent fuel: Irradiated fuel that is permanently discharged from a reactor. Except for possible reprocessing, this fuel must eventually be removed from its temporary storage location at the reactor site and placed in a permanent repository. Spent fuel is typically measured either in metric tons of heavy metal (i.e., only the heavy metal content of the spent fuel is considered) or in metric tons of initial heavy metal (essentially, the initial mass of the fuel before irradiation). The difference between these two quantities is the weight of the fission products.

Spent fuel disassembly hardware: The skeleton of a fuel assembly after the fuel rods have been removed. Generally, SFD hardware for PWR assemblies includes guide tubes; instrument tubes, top and bottom nozzles; grid spacers; hold-down springs; and attachment components, such as nuts and locking caps. For BWR fuel assemblies, SFD hardware includes the top and bottom tie plates, compression springs for individual fuel rods, grid spacers, and water rods.

Spent liquor: The liquid residue left after an industrial process; can be a component of waste materials used as fuel.

Spillway: A passage for surplus water to flow over or around a dam.

Spinning reserve: That reserve generating capacity running at a zero load and synchronized to the electric system.

Split system: When applied to electric air-conditioning equipment, it means a two-part system--an indoor unit and an outdoor unit. The indoor unit is an evaporator coil mounted in the indoor circulating air system, and the outdoor unit is an air-cooled condensing unit containing an electric motor-driven compressor, a condenser fan, and a fan motor.

Split tails: Use of one tails assay for transaction of enrichment services and a different tails assay for operation of the enrichment plant. This mode of operations typically increases the use of uranium, which is relatively inexpensive, while decreasing the use of separative work, which is expensive.

Spontaneous combustion, or self-heating, of coal: A naturally occurring process caused by the oxidation of coal. It is most common in low-rank coals and is a potential problem in storing and transporting coal for extended periods. Factors involved in spontaneous combustion include the size of the coal (the smaller sizes are more susceptible), the moisture content, and the sulfur content. Heat buildup in stored coal can degrade the quality of coal, cause it to smolder, and lead to a fire.

Spot market (natural gas): A market in which natural gas is bought and sold for immediate or very near-term delivery, usually for a period of 30 days or less. The transaction does not imply a continuing arrangement between the buyer and the seller. A spot market is more likely to develop at a location with numerous pipeline interconnections, thus allowing for a large number of buyers and sellers. The Henry Hub in southern Louisiana is the best known spot market for natural gas.

Spot market (uranium): Buying and selling of uranium for immediate or very near-term delivery. It typically involves transactions for delivery of up to 500,000 pounds U_3O_8 within a year of contract execution.

Spot-market price: See **spot price** below.

Spot price: The price for a one-time open market transaction for near-term delivery of a specific quantity of product at a specific location where the commodity is purchased “on the spot” at current market rates. See also spot market terms associated with specific energy types.

Spot purchases: A single shipment of fuel or volumes of fuel purchased for delivery within 1 year. Spot purchases are often made by a user to fulfill a certain portion of energy requirements, to meet unanticipated energy needs, or to take advantage of low-fuel prices.

SPR: See **Strategic Petroleum Reserve** (below).

Stabilization lagoon: A shallow artificial pond used for the treatment of wastewater. Treatment includes removal of solid material through sedimentation, the decomposition of organic material by bacteria, and the removal of nutrients by algae.

Stability: The property of a system or element by virture of which its output will ultimately attain a steady state. The amount of power that can be transferred from one machine to another following a disturbance. The stability of a power system is its ability to develop restoring forces equal to or greater than the disturbing forces so as to maintain a state of equilibrium.

Stack: A tall, vertical structure containing one or more flues used to discharge products of combustion to the atmosphere.

Stand-alone generator: A power source/generator that operates independently of or is not connected to an electric transmission and distribution network; used to meet a load(s) physically close to the generator.

Standard contract: The agreement between the Department of Energy (DOE) and the owners or generators of spent nuclear fuel and high-level radioactive waste, under which DOE will make available nuclear waste disposal services to those owners and generators.

Standard fluorescent: A light bulb made of a glass tube coated on the inside with fluorescent material, which produces light by passing electricity through mercury vapor causing the fluorescent coating to glow or fluoresce.

Standard Industrial Classification (SIC): Replaced with North American Industry Classification System. See NAICS.

Standby charge: A charge for the potential use of a utility service, usually done by an agreement with another electric utility service. These services include system backup support and other running and quick-start capabilities.

Standby electricity generation: Involves use of generators during times of high demand on utilities to avoid extra "peak-demand" charges.

Standby facility: A facility that supports a utility system and is generally running under no-load. It is available to replace or supplement a facility normally in service.

Standby heat loss: A term used to describe heat energy lost from a water heater tank.

Standby service: Support service that is available as needed to supplement a customer, a utility system, or another utility if a schedule or an agreement authorizes the transaction. The service is not regularly used.

Startup test phase of nuclear power plant: A nuclear power plant that has been licensed by the Nuclear Regulatory Commission to operate but is still in the initial testing phase, during which the production of electricity may not be continuous. In general, when the electric utility is satisfied with the plant's performance, it formally accepts the plant from the manufacturer and places it in commercial operation status. A request is then submitted to the appropriate utility rate commission to include the power plant in the rate base calculation.

Startup/flame stabilization fuel: Any fuel used to initiate or sustain combustion or used to stabilize the height of flames once combustion is underway.

State: One of the 50 States, including adjacent outer continental shelf areas, or the District of Columbia.

State permit/license/mine number: Code assigned to a mining operation by the state in which the operation is located.

State severance taxes: Any severance, production, or similar tax, fee, or other levy imposed on the production of crude oil, natural gas, or coal by any State, local government acting under authority of State law, or by an Indian tribe recognized as eligible for services by the Secretary of the Interior.

Station (electric): A plant containing prime movers, electric generators, and auxiliary equipment for converting mechanical, chemical, and/or nuclear energy into electric energy.

Station use: Energy that is used to operate an electric generating plant. It includes energy consumed for plant lighting, power, and auxiliary facilities, regardless of whether the energy is produced at the plant or comes from another source.

Steam: Water in vapor form; used as the working fluid in steam turbines and heating systems. Also see District heat.

Steam (purchased): Steam, purchased for use by a refinery, that was not generated from within the refinery complex.

Steam boiler: A type of furnace in which fuel is burned and the heat is used to produce steam.

Steam coal: All nonmetallurgical coal.

Steam electric power plant (conventional): A plant in which the prime mover is a steam turbine. The steam used to drive the turbine is produced in a boiler where fossil fuels are burned.

Steam expenses: The cost of labor, materials, fuel, and other expenses incurred in production of steam for electric generation.

Steam for heating/cooling: Steam produced at a combined heat and power plant for the purpose of heating and/or cooling space, such as district heating systems.

Steam from other sources: Steam purchased, transferred from another department of the utility, or acquired from others under a joint-facility operating agreement.

Steam or hot water radiators or baseboards: A distribution system where steam or hot water circulates through cast-iron radiators or baseboards. Some other types of equipment in the building may be used to produce the steam or hot water or it may enter the building already heated as part of a district hot water system. Hot water does not include domestic hot water used for cooking and cleaning.

Steam or hot-water system: Either of two types of a central space-heating system that supplies steam or hot water to radiators, convectors, or pipes. The more common type supplies either steam or hot water to conventional radiators, baseboard radiators, convectors, heating pipes embedded in the walls or ceilings, or heating coils or equipment that are part of a combined heating/ventilating or heating/air-conditioning system.The other type supplies radiant heat through pipes that carry hot water and are held in a concrete slab floor.

Steam transferred-credit: The expenses of producing steam are charged to others or to other utility departments under a joint operating arrangement.

Steam turbine: A device that converts high-pressure steam, produced in a boiler, into mechanical energy that can then be used to produce electricity by forcing blades in a cylinder to rotate and turn a generator shaft.

Still gas (refinery gas): Any form or mixture of gases produced in refineries by distillation, cracking, reforming, and other processes. The principal constituents are methane, ethane, ethylene, normal butane, butylene, propane, propylene, etc. Still gas is used as a refinery fuel and a petrochemical feedstock. The conversion factor is 6 million BTU's per fuel oil equivalent barrel.

Stock change: The difference between stocks at the beginning of the reporting period and stocks at the end of the reporting period. *Note*: A negative number indicates a decrease (i.e., a drawdown) in stocks and a positive number indicates an increase (i.e., a buildup) in stocks during the reporting period.

Stocks: Inventories of fuel stored for future use.

Storage additions: Volumes of gas injected or otherwise added to underground natural gas reservoirs or liquefied natural gas storage.

Storage agreement: Any contractual arrangement between the responding company and a storage operator under which gas was stored for, or gas storage service was provided to, the responding company by the storage operator, irrespective of any responding company ownership interest in either the storage facilities or stored gas.

Storage capacity: The amount of energy an energy storage device or system can store.

Storage field capacity (underground gas storage): The presently developed maximum capacity of a field (as collected on EIA Survey Form 191) .

Storage hydroelectric plant: A hydroelectric plant with reservoir storage capacity for power use.

Storage site: Spent nuclear fuel storage pool or dry cask storage facility, usually located at the reactor site, as licensed by (or proposed to be licensed by) the Nuclear Regulatory Commission (NRC).

Storage withdrawals: Total volume of gas withdrawn from underground storage or from liquefied natural gas storage over a specified amount of time.

Storm door: A second door installed outside or inside a prime door creating an insulating air space. Included are sliding glass doors made of double glass or of insulating glass such as thermopane and sliding glass doors with glass or Plexiglas placed on either the outside or inside of the door to create an insulating air space. Not included are doors or sliding glass doors covered by plastic sheets or doors with storm window covering on just the glass portion of the door.

Storm or multiple glazing: A building shell conservation feature consisting of storm windows, storm doors, or double- or triple-paned glass that are placed on the exterior of the building to reduce the rate of heat loss.

Storm window: A window or glazing material placed outside or inside a window creating an insulating air space. Plastic material over windows is counted a a storm window if the same plastic material can be used year after year or if the plastic is left in place year-round and is in good condition (no holes or tears). If the plastic material must be put up new each year, it is not counted as a storm window. It is counted as "plastic coverings." Glass or Plexiglas placed over windows on either the interior or exterior side is counted as storm windows.

Stranded benefits: Benefits associated with regulated retail electric service which may be at risk under open market retail competition. Examples include conservation programs, fuel diversity, reliability of supply, and tax revenues based on utility revenues.

Stranded costs: Costs incurred by a utility which may not be recoverable under market-based retail competition. Examples include undepreciated generating facilities, deferred costs, and long-term contract costs.

Strategic Petroleum Reserve (SPR): Petroleum stocks maintained by the Federal Government for use during periods of major supply interruption.

Stratigraphic test well: A geologically directed drilling effort to obtain information pertaining to a specific geological condition that might lead toward the discovery of an accumulation of hydrocarbons. Such wells are customarily drilled without the intention of being completed for hydrocarbon production. This classification also includes tests identified as core tests and all types of expendable holes related to hydrocarbon exploration.

Stratosphere: The region of the upper atmosphere extending from the tropopause (8 to 15 kilometers altitude) to about 50 kilometers. Its thermal structure, which is determined by its radiation balance, is generally very stable with low humidity.

Stream-flow: The rate at which water passes a given point in a stream, usually expressed in cubic feet per second.

Strip mine: An open cut in which the overburden is removed from a coal bed prior to the removal of coal.

Strip mining (surface): A method used on flat terrain to recover coal by mining long strips successively; the material excavated from the strip being mined is deposited in the strip previously mined.

Strip or stripping ratio: The amount of overburden that must be removed to gain access to a unit amount of coal. A stripping ratio may be expressed as (1) thickness of overburden to thickness of coal, (2) volume of overburden to volume coal, (3) weight of overburden to weight of coal, or (4) cubic yards of overburden to tons of coal. A stripping ratio commonly is used to express the maximum thickness, volume, or weight of overburden that can be profitably removed to obtain a unit amount of coal.

Stripper well: An oil or gas well that produces at relatively low rates. For oil, stripper production is usually defined as production rates of between 5 and 15 barrels of oil per day. Stripper gas production would generally be anything less than 60 thousand cubic feet per day.

Styrene: A colorless, toxic liquid with a strong aromatic aroma. Insoluble in water, soluble in alcohol and ether; polymerizes rapidly; can become explosive. Used to make polymers and copolymers, polystyrene plastics, and rubber.

Subbituminous coal: A coal whose properties range from those of lignite to those of bituminous coal and used primarily as fuel for steam-electric power generation. It may be dull, dark brown to black, soft and crumbly, at the lower end of the range, to bright, jet black, hard, and relatively strong, at the upper end. Subbituminous coal contains 20 to 30 percent inherent moisture by weight. The heat content of subbituminous coal ranges from 17 to 24 million Btu per ton on a moist, mineral-matter-free basis. The heat content of subbituminous coal consumed in the United States averages 17 to 18 million Btu per ton, on the as-received basis (i.e., containing both inherent moisture and mineral matter).

Subcompact/compact passenger car: A passenger car containing less than 109 cubic feet of interior passenger and luggage volume.

Subdivision: A prescribed portion of a given State or other geographical region.

Submetered data: End-use consumption data obtained for individual appliances when a recording device has been attached to the appliance to measure the amount of energy consumed by the appliance.

Subsidiary: An entity directly or indirectly controlled by a parent company which owns 50% or more of its voting stock.

Substation: Facility equipment that switches, changes, or regulates electric voltage.

Subtransmission: : A set of transmission lines of voltages between transmission voltages and distribution voltages. Generally, lines in the voltage range of 69 kV to 138 kV.

Sulfur: A yellowish nonmetallic element, sometimes known as “brimstone.” It is present at various levels of concentration in many fossil fuels whose combustion releases sulfur compounds that are considered harmful to the environment. Some of the most commonly used fossil fuels are categorized according to their sulfur content, with lower sulfur fuels usually selling at a higher price. *Note:* No. 2 Distillate fuel is currently reported as having either a 0.05 percent or lower sulfur level for on-highway vehicle use or a greater than 0.05 percent sulfur level for off-highway use, home heating oil, and commercial and industrial uses. Residual fuel, regardless of use, is classified as having either no more than 1 percent sulfur or greater than 1 percent sulfur. Coal is also classified as being low- sulfur at concentrations of 1 percent or less or high-sulfur at concentrations greater than 1 percent.

Sulfur dioxide (SO_2): A toxic, irritating, colorless gas soluble in water, alcohol, and ether. Used as a chemical intermediate, in paper pulping and ore refining, and as a solvent.

Sulfur hexafluoride (SF_6): A colorless gas soluble in alcohol and ether, and slightly less soluble in water. It is used as a dielectric in electronics. It possesses the highest 100-year Global Warming Potential of any gas (23,900).

Sulfur oxides (SO_x): Compounds containing sulfur and oxygen, such as sulfur dioxide (SO_2) and sulfur trioxide (SO_3).

Summer and winter peaking: Having the annual peak demand reached both during the summer months (May through October) and during the winter months (November through April).

Sunk cost: Part of the capital costs actually incurred up to the date of reserves estimation minus depreciation and amortization expenses. Items such as exploration costs, land acquisition costs, and costs of financing can be included.

Superconductivity: The abrupt and large increase in electrical conductivity exhibited by some metals as the temperature approaches absolute zero.

Supplemental gas: Any gaseous substance introduced into or commingled with natural gas that increased the volume available for disposition. Such substances include, but are not limited to, propane-air, refinery gas, coke-oven gas, still gas, manufactured gas, biomass gas, or air or inerts added for Btu stabilization.

Supplemental gaseous fuels supplies: Synthetic natural gas, propane-air, coke oven gas, refinery gas, biomass gas, air injected for Btu stabilization, and manufactured gas commingled and distributed with natural gas.

Supply: The components of petroleum supply are field production, refinery production, imports, and net receipts when calculated on a PAD District basis.

Supply, petroleum: A set of categories used to account for how crude oil and petroleum products are transferred, distributed, or placed into the supply stream. The categories include field production, refinery production, and imports. Net receipts are also included on a Petroleum Administration for Defense (PAD) District basis to account for shipments of crude oil and petroleum products across districts.

Supply source: May be a single completion, a single well, a single field with one or more reservoirs, several fields under a single gas-purchase contract, miscellaneous fields, a processing plant, or a field area; provided, however, that the geographic area encompassed by a single supply source may not be larger than the state in which the reserves are reported.

Support equipment and facilities: These include, but are not limited to, seismic equipment, drilling equipment, construction and grading equipment, vehicles, repair shops, warehouses, supply points, camps, and division, district, or field offices.

Supporting structure: The main supporting unit (usually a pole or tower) for transmission line conductors, insulators, and other auxiliary line equipment.

Surface drilling expenses (uranium): These include drilling, drilling roads, site preparation, geological and other technical support, sampling, and drill-hole logging costs.

Surface mine: A coal-producing mine that is usually within a few hundred feet of the surface. Earth above or around the coal (overburden) is removed to expose the coalbed, which is then mined with surface excavation equipment, such as draglines, power shovels, bulldozers, loaders, and augers. It may also be known as an area, contour, open-pit, strip, or auger mine.

Surface mining equipment:

- An **Auger machine** is a large, horizontal drill, generally 3 feet or more in diameter and up to about 100 feet long. It can remove coal at a rate of more than 25 tons per minute.
- A **bucket-wheel** excavator is a continuous digging machine equipped with a broom on which is mounted a rotating wheel with buckets along its edge. The buckets scoop up material, then empty onto a conveyor leading to a spoil bank. It is best suited for removing overburden that does not require blasting. This excavator is not widely used in the United States.
- A **bulldozer** is a tractor with a movable steel blade mounted on the front. It can be used to remove overburden that needs little or no blasting.
- A **carryall scraper** (or **pan scraper**) is a self-loading machine, usually self-propelled, with a scraper-like retractable bottom. It is used to excavate and haul overburden.
- A **continuous surface miner**, used in some lignite mines, is equipped with crawlers, a rotating cutting head, and a conveyor. It travels over the bed, excavating a swath up to 13 feet wide and 2 feet deep.
- A **dragline excavator** removes overburden to expose the coal by means of a scoop bucket that is suspended from a long boom. The dragline digs by pulling the bucket toward the machine by means of a wire rope.
- A **walking dragline** is equipped with large outrigger platforms, or walking beams, instead of crawler tracks. It "walks" by the alternate movement of the walking beams.
- A **drilling rig** is used to determine the amount and type of overburden overlying a coal deposit and the extent of the deposit, to delineate major geologic features, and to drill holes for explosives to fragment the overburden for easier removal.
- A **front-end loader** is a tractor with a digging bucket mounted and operated on the front. It is often used to remove overburden in contour mining and to load coal.
- An **hydraulic shovel** excavates and loads by means of a bucket attached to a rigid arm that is hinged to a broom.
- A **power shovel** removes overburden and loads coal by means of a digging bucket mounted at the end of an arm suspended from a broom. The shovel digs by pushing the bucket forward and upward. It does not dig below the

level at which it stands.
- A **thin-seam miner** resembles an auger machine but has a drum-type cutting head that cuts a rectangular cross section.

Surface mining methods:

- **Auger mining** recovers coal through the use of a large-diameter drill driven into a coalbed in the side of a surface mine pit. It usually follows contour surface mining, particularly when the overburden is too costly to excavate.
- **Area mining** is practiced on relatively flat or gently rolling terrain and recovers coal by mining long strips successively; the material excavated from the strip being mined is deposited in the strip pit previously mined.
- **Contour mining** is practiced when the coal is mined on hillsides. The mining follows the contour of the hillside until the overburden becomes uneconomical to remove. This method creates a shelf, or bench, on the hillside. Several variations of contour mining have been developed to control environmental problems. These methods include slope reduction (overburden is spread so that the angle of the slope on the hillside is reduced), head-of-hollow fill (overburden is placed in narrow V-shaped valleys to control erosion), and block-cut (overburden from current mining is backfilled into a previously mined cut).
- **Explosives casting** is a technique designed to blast up to 65 percent of the overburden into the mine pit for easier removal. It differs from conventional overburden blasting, which only fractures the overburden before it is removed by excavating equipment.
- **Mountaintop mining**, sometimes considered a variation of contour mining, refers to the mining of a coalbed that underlies the top of a mountain. The overburden, which is the mountaintop, is completely removed so that all of the coal can be recovered. The overburden material is later replaced in the mined-out area. This method leaves large plateaus of level land.
- **Open-pit** coal mining is essentially a combination of contour and area mining methods and is used to mine thick, steeply inclined coalbeds. The overburden is removed by power shovels and trucks.

Surface rights: Fee ownership in surface areas of land. Also used to describe a lessee's right to use as much of the surface of the land as may be reasonably necessary for the conduct of operations under the lease.

Surplus energy: Energy generated that is beyond the immediate needs of the producing system. This energy may be supplied by spinning reserve and sold on an interruptible basis.

Suspended rates: New rates that have been accepted for review by a utility commission. When these rates are suspended, they do not go into effect for a designated period of time. Charges under the new rate may be refunded after the resolution of the rate proceeding.

Swamp coolers (evaporative coolers): Air-conditioning equipment that removes heat by evaporating water. Evaporative cooling techniques are most commonly found in warm, dry climates such as in the Southwest, although they are found throughout the country. They usually work by spraying cool water into the air ducts, cooling the air as the spray evaporates.

Switching station: Facility equipment used to tie together two or more electric circuits through switches. The switches are selectively arranged to permit a circuit to be disconnected or to change the electric connection between the circuits.

Synthetic natural gas (SNG): (Also referred to as substitute natural gas) A manufactured product, chemically similar in most respects to natural gas, resulting from the conversion or reforming of hydrocarbons that may easily be substituted for or interchanged with pipeline-quality natural gas.

System (gas): An interconnected network of pipes, valves, meters, storage facilities, and auxiliary equipment used in the transportation, storage, and/or distribution of natural gas or commingled natural and supplemental gas.

System (electric): Physically connected generation, transmission, and distribution facilities operated as an integrated unit under one central management or operating supervision.

System interconnection: A physical connection between two electric systems that permits the transfer of electric energy in either direction.

Other glossary pages:

A B C D E F G H I J K L M N O P Q R **S** T U V W XYZ

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Exhibit D

Table C4. Wholesale Propane Prices by Region and State
(Cents per Gallon)

2007-2008 Heating Season Monthly						
Region/State	October	November	December	January	February	March
Average	150.0	162.8	160.6	156.7	155.6	164.1
East Coast (PADD I)	155.0	168.8	165.6	163.4	155.0	160.8
Central Atlantic (PADD IB)	156.5	169.4	167.1	164.5	155.0	161.6
Lower Atlantic (PADD IC)	152.6	167.2	163.4	161.6	155.0	159.6
Midwest (PADD II)	148.0	160.5	158.6	154.0	155.9	165.4

2008-2009 Heating Season Monthly						
Region/State	October	November	December	January	February	March
Average	114.6	91.3	80.2	88.6	86.1	NA
East Coast (PADD I)	118.7	91.2	81.1	91.4	89.3	NA
Central Atlantic (PADD IB)	119.0	91.3	80.1	90.2	88.7	NA
Lower Atlantic (PADD IC)	118.3	91.2	82.7	93.1	90.3	NA
Midwest (PADD II)	113.0	91.3	79.9	87.5	84.8	NA

2008-2009 Heating Season Weekly												
Region/State	12/15	12/22	12/29	1/5	1/12	1/19	1/26	2/2	2/9	2/16	2/23	3/2
Average	79.0	85.3	80.7	82.3	91.3	90.5	90.2	96.4	86.3	84.6	77.1	75.8
East Coast (PADD I)	79.1	85.1	83.0	85.2	92.2	94.4	93.6	96.8	89.6	89.0	81.8	79.2
Central Atlantic (PADD IB)	77.1	83.6	80.6	83.2	91.0	93.4	93.5	96.1	89.1	88.0	81.6	78.7
Delaware	80.0	86.0	86.0	86.0	92.0	95.0	93.0	93.0	86.5	89.0	86.0	86.0
New Jersey	80.0	89.8	87.0	90.0	97.0	100.0	105.0	110.0	100.0	98.0	92.0	81.0
New York	76.0	81.5	78.2	80.9	88.5	91.1	89.6	91.5	85.4	84.7	77.6	78.1
Pennsylvania	75.9	81.2	78.1	80.6	89.1	91.0	89.6	91.6	85.6	84.6	78.1	77.2
Lower Atlantic (PADD IC)	82.2	87.4	86.7	88.5	94.2	96.0	93.9	98.0	90.6	90.5	82.1	79.8
North Carolina	81.8	86.5	86.0	88.3	92.9	95.0	93.0	96.5	88.9	89.3	80.8	79.5
Virginia	83.1	89.8	88.5	88.9	97.4	98.4	96.2	102.0	94.8	93.6	85.4	80.6
Midwest (PADD II)	78.9	85.4	79.7	81.1	90.9	88.9	88.8	96.3	85.0	82.8	75.2	74.4
Illinois	81.3	86.8	79.7	79.2	95.4	91.7	92.5	101.1	87.5	84.6	76.0	76.3
Indiana	71.3	77.0	73.4	76.3	84.9	87.3	86.1	88.6	82.5	80.4	73.4	75.0
Iowa	80.8	87.5	81.1	83.1	91.6	88.5	88.3	96.9	84.6	82.8	75.3	73.8
Kansas	78.3	84.1	77.4	78.7	88.8	85.6	85.8	94.2	81.9	80.1	72.1	70.9
Minnesota	82.8	90.2	85.3	87.1	94.9	92.9	94.0	102.3	90.6	87.3	80.1	77.9
Missouri	79.5	86.5	80.6	82.4	90.7	87.4	87.4	96.0	83.6	81.7	74.2	72.9
Nebraska	79.9	87.0	81.0	82.9	91.0	87.9	87.9	96.6	84.6	82.7	75.7	74.4
North Dakota	82.0	95.0	95.0	88.0	95.0	100.0	97.5	105.5	93.5	88.5	82.0	76.0
Ohio	71.6	77.2	73.8	76.9	85.4	87.8	86.2	88.6	82.7	80.8	73.8	75.3
South Dakota	81.6	88.2	82.0	83.7	92.7	89.1	89.2	98.1	85.4	83.9	76.7	75.0
Wisconsin	83.7	91.1	84.8	86.9	94.8	91.8	91.4	100.1	87.8	86.0	78.6	77.4

Source: Data are average prices collected by Oil Price Information Service (OPIS).

Exhibit E

N	Top of Page

N-Grade - A pipeline designation for unleaded gasoline.

Naked Option - Sale of an option (either a put or a call) without ownership of the underlying futures contract.

Naphtha - A petroleum product off of the distillation process (220°F to 315°F) that is subsequently upgraded to make up the major constituent of gasoline.

Naphtha less Than 401o F - A naphtha with a boiling range of less than 401 degrees Fahrenheit that is intended for use as a petrochemical feedstock.

Naphtha-Type Jet Fuel - A fuel in the heavy naphtha boiling range having an average gravity of 52.8 degrees API, 20 to 90% distillation temperatures of 290 degrees to 470 degrees Fahrenheit, and meeting Military Specification MIL-T-5624L (Grade JP-4). It is used primarily for military turbojet and turboprop aircraft engines because it has a lower freeze point than other aviation fuels and meets engine requirements at high altitudes and speeds. Note: Beginning with January 2004 data, naphtha-type jet fuel is included in Miscellaneous Products.

National Futues Association (NFA) - Trade association which is responsible for promoting and monitoring rules of conduct, and which mediates disputes between customers and brokers. One of the regulatory bodies which oversees futures trading.

Nation's Freight Bill - The amount spent annually on freight transportation by the nation's shippers; also represents the total revenue of all carriers operating in the nation.

Natural Gas - A naturally-occurring raw material often produced in conjunction with crude oil that is processed through a variety of facilities to yield NGLs. It is a commercially acceptable product for industrial and residential consumption and is shipped via pipeline.

Natural Gas Field Facility - A field facility designed to process natural gas produced from more than one lease for the purpose of recovering condensate from a stream of natural gas; however, some field facilities are designed to recover propane, normal butane, natural gasoline, etc., and to control the quality of natural gas to be marketed.

Natural Gas Liquids - Those hydrocarbons in natural gas that are separated from the gas as liquids through the process of absorption, condensation, adsorption, or other methods in gas processing or cycling plants. Generally such liquids consist of propane and heavier hydrocarbons and are commonly referred to as lease condensate, natural gasoline, and liquefied petroleum gases. Natural gas liquids include natural gas plant liquids (primarily ethane, propane, butane, and isobutane; see Natural Gas Plant Liquids) and lease condensate (primarily pentanes produced from natural gas at lease separators and field facilities; see Lease Condensate).

Natural Gas Plant Liquids - Those hydrocarbons in natural gas that are separated as liquids at natural gas processing plants, fractionating and cycling plants, and, in some instances, field facilities. Lease condensate is excluded. Products obtained include ethane; liquefied petroleum gases (propane, butanes, propane-butane mixtures, ethane-propane mixtures); isopentane; and other small quantities of finished products, such as motor gasoline, special naphthas, jet fuel, kerosene, and distillate fuel oil.

Natural Gas Processing Plant - Facilities designed to recover natural gas liquids from a stream of natural gas that may or may not have passed through lease separators and/or field separation facilities. These facilities control the quality of the natural gas to be marketed. Cycling plants are classified as gas processing plants.

Natural Gasoline and Isopentane - A mixture of hydrocarbons, mostly pentanes and heavier, extracted from natural gas, that meets vapor pressure, end-point, and other specifications for natural gasoline set by the Gas Processors Association. Includes isopentane which is a saturated.

Net Average - An average of all rack suppliers, calculated with any prepayment discount reduced from the applicable suppliers.

Net Receipts - The difference between total movements into and total movements out of each PAD District by pipeline, tanker, and barge.

Net Profit Margin - A measure of profitability based on the ratio of net income to total operating revenues.

Netbacks - The price a refiner receives for the sale of petroleum products after deducting the transportation or affiliated costs in shipping the product from its point of origin (i.e., pipeline tariffs, waterborne freight, storage fees, line loss, cost of capital, etc.).

Netback Differential - The difference between the spot and rack prices for refined petroleum products.

Netback Pricing or Agreements - Contractual crude oil arrangements very prevalent during the mid-80's which set the sales price of crude oil on the value of the derivative petroleum products.

Nomination - The notification by the seller of a spot market obligation of the attempt to deliver the product to satisfy the commitment.

Non-Regulated Trucking - A carrier which is exempt from economic regulation (e.g. exempt from agricultural shipments and private trucking operations).

Non-TET - The designation used within the industry to specify that product is in a location at Mont Belvieu other than the Texas Eastern Products Pipeline, LP storage, or physically in the pipeline, at Mont Belvieu, Texas. Non-TET locations include facilities owned and operated by Valero, Enterprise Products Partners, Targa Resources, etc. BBL located in non-TET storage may be shipped via pipeline to TET, or moved to various other locations such as end users (petrochemical companies, export facilities, the Dixie Pipeline, etc.)

NOPEC - A group of independent crude oil producing nations that are not members of OPEC, but have collectively restricted production levels in support of OPEC. Includes Malaysia, Mexico, Oman, Egypt, Angola, China and Columbia.

New York Mercantile Exchange (NYMEX) - Exchange where a number of commodities, including WTI crude, heating oil and unleaded gasoline are traded on a future basis.

T	[Top of Page]

TAME (Tertiary amyl methyl ether) (CH3)2(C2H5)COCH3 - An oxygenate blend stock formed by the catalytic etherfication of isoamylene with methanol.

Tank Farm - An installation used by gathering and trunk pipeline companies, crude oil producers, and terminal operators (except refineries) to store crude oil.

Tanker and Barge - Vessels that transport crude oil or petroleum products. Data are reported for movements between PAD Districts; from a PAD District to the Panama Canal; or from the Panama Canal to a PAD District.

TBA (Tertiary butyl alcohol) (CH3)3COH - An alcohol primarily used as a chemical feedstock, a solvent or feedstock for isobutylene production for MTBE; produced as a co-product of propylene oxide production or by direct hydration of isobutylene.

Tariff - A schedule of rates that a common carrier pipeline is permitted to charge to transport petroleum products or crude.

Technical Analysis - Analysis primarily derived from studying historical buying/selling patterns in futures and spot markets and attempting to predict with reasonable certainty the probability of mimicking those movements again. Technical analysis is often very sophisticated and is probably the single most critical factor in determining day-to-day futures price movements.

TET - The designation used within the industry to specify that product is in Texas Eastern Products Pipeline, LP storage, or physically in the pipeline, at Mont Belvieu, Texas.

Temporary Voluntary Allowance (TVA) - A discount given to a jobber, often when the supplier has a surplus and is likely to run down inventories, or when retail profit pressure requires temporary rack discounting.

Tertiary Storage - The petroleum storage tanks of end users, such as vehicle gasoline tanks or home heating oil storage.

Thermal Crackings **-** A refining process in which heat and pressure are used to break down, rearrange or combine hydrocarbon molecules. Thermal cracking includes visbreaking, fluid coking, delayed coking and other thermal cracking processes.

Third Structure Tax - Any tax on road users other than registration fees or fuel taxes (e.g. Ton-mile tax).

Time Value - The part of an options premium which reflects the excess over the intrinsic value, or which may reflect the entire premium if there is no intrinsic value. A call option for 60cts gal oil in a 58cts gal market that is trading at a premium of 2cts gal would represent a case where the entire premium is attributable to time value. Time value generally declines as an options contract nears expiration; it can represent the lion's share of the premium at great distances from expiration.

TOFC - Trailer on (rail) flat car. A form of piggyback movement of freight.

Toluene (C6H5CH3) - Colorless liquid of the aromatic group of petroleum hydrocarbons, made by the catalytic reforming of petroleum naphthas containing methyl cyclohexane. A high-octane gasoline-blending agent, solvent, and chemical intermediate, base for TNT.

Ton (Metric Ton) - The unit of measurement for crude or products outside of the United States. On average, there are seven barrels of crude per metric ton.

Ton-Mile - The movement of one ton of freight a distance of one mile. Ton-miles are computed by dividing the weight in tons of each shipment transported by the distance hauled.

Ton-Mile Tax - A tax calculated by measuring the weight of each truck for each trip. The gross weight is assigned a tax rate which is multiplied by the miles of travel.

Tractor Semitrailer - A combination vehicle consisting of a power unit (tractor) and a semitrailer.

Traders - Buyers and sellers of large quantities of petroleum products. They use the spot markets as a basis for their deals.

Trailer - A vehicle designed without motive power, to be drawn by another vehicle.

Transit Time - The period of time designated by a pipeline company for petroleum products to become available at the destination.

Trigger Deals **-** Futures-related or derivative instrument which allows a marketer to lock into a price relationship, but gives him the opportunity to set the absolute price at a later date. A supplier might sell a trigger deal to a heating oil marketer whereby the marketer is guaranteed product at 2cts gal over the Dec. futures price for No. 2 oil. The marketer has until an agreed upon date to "pull the trigger" to set the absolute value of the transaction.

Truck - A motor vehicle designed to carry an entire load. It may consist of a chassis and body; a chassis, cab and body; or it may be of integral construction so that the body and chassis form a single unit.

Truck Tonnage - The weight of freight in tons transported by truck.

Truckload (TL) - Quantity of freight required to fill a truck. When used in connection with freight rates, the quantity of freight necessary to qualify a shipment for a truckload rate. Usually in excess of 10,000 pounds.

Turnaround - Originally, this term applied to the periodic inspection and maintenance of an oil refinery. It now applies to any shutdown, slowdown or operational problem brought upon by refinery maintenance. Turnarounds are then said to be "planned" or "unplanned."

Turnpike Double - A combination vehicle consisting of a tractor and two trailers of 33 to 48 feet.

Twin Trailer - A short semitrailer (under 29 feet) designed to be operated as part of a combination vehicle with a tandem trailer of similar length.

Exhibit F

Platt's Petrochemicals Guide to Specifications

LPG

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Methodology
Platt's assessments are based primarily on confirmed deals reported within 48 hours of conclusion. In addition, account is taken of firm bids and offers, as well as sentiment, reported in the market. However, price assessments will ultimately be weighted towards the most recent confirmed business.

Weekly Averages
Until further notice, Platt's will publish in every Friday edition of Platt's LPGaswire an arithmetic average of daily assessments over the week for assessments in the western Mediterranean and northwest Europe.

Price Units
All European, South American and Asian spot and contract prices are expressed in $/mt. Arabian Gulf spot FOB prices are expressed as a $/mt premium over the official Saudi Aramco Contract Price (CP) as issued by Saudi Aramco. Chinese, Korean and Japanese CFR cargo prices are also expressed as a $/mt premium over the official CP plus freight. US prices are expressed in cts/gal.

Timing
Deals in NWE and ARA must specify a load date of up to 14 days from the day on which the report is compiled, except for CIF 3,000mt+ cargoes which specify a load date of up to 30 days. US prices reflect business done for loading 3-10 days from the date of the report. Arabian Gulf spot prices cover products loading up to 30-45 days from the date of the report, corresponding roughly to the official Saudi Aramco nomination schedule. C+F Japan and Korea cargo assessments are for cargoes for arrival between 30-45 days from the date of the report.

Sizes
All assessments are based on full cargoes. Part cargoes are not included in the assessments, except at the discretion of the editors when no other business has been reported. NWE/Mediterranean FOB seagoing ex-refinery/storage refers to coasters with full cargoes between 1,000-3,000mt, although smaller full cargoes or split cargoes may be included at the discretion of the editor after consultation with the market. FOB ARA refers mainly to sales onto barges of full cargoes between 400-1,200mt, but also includes sales onto coasters when the price is deemed representative of the ARA market. FCA ARA refers to sales auto, trucks, and railcars of 20-400mt. CIF 1-3,000mt refers to full cargoes of between 1,000-3,000mt sold on a CIF basis. Slightly smaller CIF cargoes may be included at the discretion of the editor, while CIF cargoes slightly over 3,000mt may occasionally be sold at prices that correspond most to the 1-3,000mt market, and therefore may also be included in the 1-3,000mt assessment. CIF 3,000mt+ refers to cargoes of over 3,000mt sold into NWE and western Mediterranean on a CIF basis. Occasionally, part-cargoes of less than 3,000mt from large shipments may be sold at prices which reflect the 3,000mt+ market, and these prices may be included in the assessment.

US

In the US, typical parcel size ranges between 25,000 barrels (around 3,000mt depending on product).

Arabian Gulf

In the Arabian Gulf, cargoes are typically between 10-45,000mt.

Japan/Korea

Cargo size ranges between 20-45,000mt. C+F Japan and Korea spot cargo indications reflect current spot market levels for propane and butane on a delivered basis. The prices are based on the established Saudi Arabian selling price (CP), plus the current spot market premium, plus freight charges. The current month’s CP is used until reliable estimates of the next month’s CP become available. However, Platt’s includes other market factors if these are relevant to the assessments.

China

C+F China assessments are based on cargoes of 1-2,000mt ex-floating storage.

Location

NWE

The assessment covers an area represented by a triangle, with Emden, Tees and Le Havre as its three corners, and also including Milford Haven and Grangemouth. Product from ports on the French Atlantic coast, as well as Portugal and the Spanish Atlantic coast, are not included in assessments. Sales into the port of Brest on the French Atlantic coast are not generally included in the assessment. For the CIF 3,000mt+ assessment, sales made into selected western Scandinavian ports - Stenungsund, Rafnes, Porvoo and K¬arsto - are included.

Western Mediterranean

The assessment includes the area west of Italy - including Algeria, Tunisia and Morocco. To the north, Italy and France are included, as well as the east and south coasts of Spain.

Arabian Gulf

The assessment refers to product sold by the main producers in Saudi Arabia, Kuwait, Abu Dhabi, Iran and Qatar, or by third parties on an FOB basis from the main export ports in each country.

US Gulf

Platt’s assesses propane and butane on an FOB Mont Belvieu, Texas basis. Assessments are for TET pipeline and non-TET product. TET material moves on the Texas Eastern Transmission pipeline which runs from south Texas northward to Ohio and terminates in Massachusetts. Isobutane is assessed on a non-TET basis only at Mont Belvieu. Additionally, Platt’s reports the closing settlement price for propane from the New York Mercantile Exchange (NYMEX). Platt’s also publishes daily assessments for ethane, ethane/propane mix and natural gasoline in Platt’s Petrochemical Alert. Ethane is assessed at Conway, Kansas. Ethane/propane mix is assessed FOB Mont Belvieu on a non-TET basis. Natural gasoline is assessed at Mont Belvieu on a Warren pipeline and non-Warren basis.

Japan/Korea

Platt’s assesses cargoes C+F Japan on basis Yokkaichi/Kashima, but prices for all Japanese Pacific coast ports are deemed representative. For Korea, Platt’s assesses cargoes basis C+F Ulsan/Yeosu.

China

Platt’s assesses LPG at two locations on the coast of China, Shenzhen/Zuhai and Shanghai.

Quality

NWE

Propane:
Platt’s includes a range of propane qualities in its NWE/Mediterranean assessments, ranging from field grade, as specified by various producers, to refinery product. Platt's assessments cover product with a maximum 30% olefin content. Field grade material may carry a slight premium to refinery material, and sales of such product would be reflected in the assessment.

Butane:
Platt’s includes a range of butane qualities in its NWE/Mediterranean assessments, ranging from field grade, as specified by various producers, to refinery product. Platt’s assessments cover normal and mixed butanes. In ARA, product with a maximum of 10% olefin/unsats content is considered, while for FOB Seagoing and CIF assessments 30% maximum olefins content is considered. Isobutane is considered to be any product with over 50% isobutane content, and such product is not assessed by Platt’s except in the US Gulf. Field grade product may carry a slight premium to refinery product.

Mediterranean

Propane:
Platt’s assesses propane with a typical maximum olefin content of 20% in Spain, 30% in Italy and 50% in France. Field grade material generally carries a slight premium to refinery grade product. Butane assessments cover a range of product: chemical grade butane, with a maximum 15 ppm sulfur content and maximum 5% olefins content and minimum isobutan content (also known as "Arco spec") and commercial butane with a typical olefins content around 50%.

Arabian Gulf

Propane:
Platt’s assessments cover propane conforming to SAMAREC A-140 specifications issued by Saudi Aramco, including: minimum 95% propane content, maximum 4% butane content and maximum 0.1% olefin content.

Butane:
Platt’s assessments cover normal butane conforming to SAMAREC A-160 specifications issued by Saudi Aramco, including: maximum 2% propane content, maximum 29% isobutane content, minimum 68% normal butane content and maximum 0.1% olefin content.

Japan/Korea/China
Platt’s assessments are for propane and butane conforming to the relevant standard SAMAREC A-140 and A-160 specifications as issued by Saudi Aramco.

US Gulf

Ethane:
Platt’s assessments cover ethane with a specific gravity of 0.3546, and boiling point of minus 89 degrees Celcius.

Propane:
Platt’s assessments cover propane with a specific gravity of 0.5077, boiling point of minus 43 degrees Celsius, a maximum sulfur content of 10 ppm and maximum olefin content of 3 ppm.

Normal Butane:
Platt’s assessments cover normal butane with a specific gravity of 0.5844, boiling point of minus 1 degree Celsius, maximum sulfur content of 15 ppm and maximum olefin content of 3 ppm.

Isobutane:
Platt’s assessment is for isobutane with a specific gravity of 0.5631, boiling point of minus 12 degrees Celsius, maximum sulfur content of 15 ppm and maximum olefin content of 3 ppm.

Natural Gasoline:
Platt’s assessments cover material with a boiling point of 90 degrees Fahrenheit and sulfur content of 0.1%.

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Exhibit G

Propane Suppliers Guide

An expanded directory of the propane industry's top product sources

Nov 1, 2005
LPGas

All State Propane

31500 Grape Street 3-404
Lake Elsinore, CA 92532
Phone: 951-244-2484
Fax: 951-780-5790
E-mail: sales@allstatepropane.com

Web site: www.allstatepropane.com
Date founded: 2005
Owners: Mike Fullerton and Dave Spinney
Service area: Southern California
Propane retail accounts: 250
Railcars: No
Transports: 1
Terminals: 1
Price info line: 951-640-3294
Management: Mike Fullerton, CEO and Dave Spinney, CFO

AmeriGas Propane

13105 Northwest Freeway, Suite 500
Houston, TX 77040
Phone: 281-552-4000
Fax: 281-552-4905
E-mail: Bartels@Amerigas.com

Corporate Address: P. O. Box 965 Valley Forge, PA 19482
Phone: 610-337-7000
Fax: 610-768-7694
Web site: www.amerigas.com
Service area: Entire United States
Supply points: Numerous locations
Railcars: Yes
Transports: Yes
Terminals: 8 rail
Import Terminals: 1 - San Pedro, CA (281-552-4019) 2 -280,000 mb refrigerated surface storage tanks
Storage: 3.4mm (bbls)
Location: Salt dome cavern in Bumstead, AZ (281-552-4019)
Pipelines: Major shipper on all pipelines
Contracts: annual, spot, pre-buy
Price info line: 800-955-9101
Management: David Lugar, vice president of supply and logistics (281-552-4056); Russell Bartels, director of wholesale supply (281-552-4011); Dan Miller, manager of wholesale supply (281-552-4001); Anita Walth,

manager of terminal operations (281-552-4019)
Sales Reps: Dan Johansen, West (Glendora, CA - 800-246-1939); Julie Motal, Southwest (Houston - 800-448-4888); Mike Turner, Midwest (Springfield, IL - 800-243-4427); Brian Arnes, Central (Houston - 800-398-1378); Denny Kendall, Great Lakes (Cincinnati, OH - 800-935-7427); Ed Varney, Northeast (Valley Forge, PA - 800-453-0121); Don Rich, Atlantic (888-225-4486)
Customer Service: Jennifer Lewis and Shavennah Roberts (877-817-5233 or 800-955-9101)

Amthor International

237 Industrial Dr.
Gretna, VA 24557
Phone: 434-656-6233
Fax: 434-656-1101
E-mail: bamthor@amthorinternational.com

Web site: www.amthorinternational.com
Date founded: 1992
Owners: Arnold "Butch" Amthor
States serviced: 50
Service area: all of U.S.
Location: Amthor Welding, 1041 Rt. 52 Walden, N.Y. 12586 (845-778-5576)
Management: Arnold "Butch" Amthor, executive vice president (434-656-6233)
Sales Reps: Joseph DiCioccio (845-778-5576); Charles Thaxton (434-656-6233)

Aux Sable Liquid Products

6155 East U.S. Route 6
Morris, IL 60450
Phone: 815-941-5800
Fax: 815-941-5801
E-mail: mike.vanwinkle@auxsable.com

Web site: www.auxsable.com
Owners: Enbridge, Ft. Chicago, Williams
Propane retail accounts: 40
States serviced: 50
Service area: all of U.S.
Railcars: 175
Terminals: Yes
Gas Plant: Channahon, IL
Storage: 400,000 bbls.
Location: Monee and Channahon, IL
Pipelines: Alliance
Supply Points: Kinder Morgan terminals at Morris & Lemont, IL; Monee, IL
Types of contracts: Posting, index formulas
Management: Glenn Luce, director, marketing/business development (815-941-5818)
Sales Rep: Mike Van Winkle, mgr., propane marketing (815-941-5813)

Bishop Energy

P. O. Box 717
Gainesville, TX 76241
Phone: 940-665-3560
Fax: 940-668-0526
E-mail: max@enderbygas.com

Date founded: 1986
Owner: Jim Bishop
Propane retail accounts: 42
States serviced: 2
Service area: Oklahoma and Texas
Transports: 13

Contracts: Delivered price to retail location, pre-buy, fixed price, physical options for delivery.
Management: Jim Bishop, president (800-772-5921); Max Eubanks, mgr. distribution/supply (888-663-4672); Terry Moore, dispatcher (800-621-8530)
Sales representative: Anna May Etheredge, sales, Texas (888-663-4672)

BP North America, NGL's

501 Westlake Park Blvd
Houston, TX 77079
Phone: 877-569-5552
Fax: 630-836-6329
Web site: www.ngl.com
Service area: United States and Canada
Contracts: Annual, spot and pre-buy
Customer Service line: 877-569-5552
Management: Steve Williams, vice president of sales & marketing; Michael Barnes, sales manager; Lisa Autenreith, marketing and performance manager; Jeff Holtz, customer fulfillment manager.

Canadian Enterprise Gas Products, Ltd

900 6th Avenue S.W. Suite 300
Calgary, AB CANADA T2P3K2
Phone: 403-266-7487
Fax: 403-262-3662
E-mail: wendell.lepan@canent.com

Date founded: 1974
Owner: Enterprise Products Co.
Propane retail accounts: 20
States serviced: 38
Service areas: All of U.S.
Railcars: 350
Terminals: 0
Storage: 0
Locations: Edmonton, Sarnia/Marysville
Management: Wendell LePan, president; Joanne Szegedi, general manager; and Bev Barclay, transportation manager (all at 800-361-4195).

CHS Inc. (CENEX Propane Partners)

5500 Cenex Drive, MS #585
Inver Grove Heights, MN 55016
Phone: 800-852-8186, ext. 8429
Fax: 651-355-8499
E-mail: andy.arendt@chsinc.com

Web site: www.cenex.com
Date founded: 1931
Owner: CHS Inc.
Propane retail accounts: 1,000
States served: 44
Service areas: Midwest, Northeast, MidSouth, Southeast, Pacific Northwest
Railcars: 420
Transports: 365
Terminals: 160
Storage: 7 million barrels (access via an exclusive supply agreement)
Pipelines: MAPCO, Kinder Morgan, Cochin, Koch, Kaneb, TEPPCO, Dixie
Contracts offered: Fixed forward physical, OTC, financial contracts, index contracts, online contract management via Propane Control Room
Price info line: www.cenex.com; North office: 800-547-3835 ext. 2; South office: 800-475-5678
Management: Kevin Williams, Sr. VP, propane operations; Monte Rockow, director of marketing.
Sales representatives: Les Klukas (Colorado, Kansas, Missouri, Kentucky); Lance Prouty (North Dakota,

South Dakota); John Duchscherer (Minnesota); Alan Groene (Wisconsin, Michican, Illinois); Jeff LaPan (Northeast, Iowa, New England); Pat McLaughlin (Northwest); Steve Earl (Louisiana, Arkansas, Mississippi, Tennessee); DJ Williams (Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia); Jay Reinking (Oklahoma, Texas, New Mexico); Steve Jordan (Indiana, Ohio, Kentucky).

ConocoPhillips

600 North Dairy Ashford
Houston, TX 77079
Phone: 800-423-4636
Fax: 281-293-4452
E-mail: sandra.r.toval@conocophillips.com

Web site: www.propane.conocophillips.com
Date founded: 1875
States serviced: 50
Service area: All USA and 49 countries
Railcars: 2,300
Terminals: 74
Import terminal: Chesapeake, VA
Locations: Bayway, NJ; Wood River, IL; Ponca City, OK; Billings, MT; Ferndale, WA; Amerada Hess-Port Reading, NJ
Pipelines: TEPPCO, Dixie, Kaneb, Kinder, MAPCO, Blue, Borger-Denver, Cherokee
Contracts: Posted, pre-buy, spot, etc.
Management: Michael Schwartje, vice president, propane marketing (281-293-1033)
Sales representatives: Lewis Bradshaw, Mid-Continent, 888-832-4364; Eric Brandt, Ohio Valley/Teppco, 866-839-7145; Cheryl Gleave, PacNW and Canada, 403-233-4177; Joe Gump, Northeast Refineries, 800-432-9365; Eric Lindsey, Southwest, 281-293-3416; George Lipford, Southeast, 800-338-0232; Steve Merveldt, Western Plains, 888-481-9909

Duke Energy NGL Services

57018 Westheimer, Suite 2000
Houston, TX 77057
Phone: 713-627-6280
Fax: 713-627-6274
E-mail: rmpaul@duke-energy.com

States serviced: 28
Service area: entire U.S.
Railcars: yes
Transports: yes
Terminals: 7
Import terminal: 1 (Providence, RI)
Supply points: York, PA; Auburn, ME; Bangor, ME; Westfield, MA; Albany, NY; TET Pipeline; Berlin, VT; Greeley, CO; Ft. Lupton, CO; Sholem, OK; Wilcox, Jamestown, LaGloria, Gulf Plains, Ozona, Odessa and Sonora, TX; and Nevis, Canada.
Contracts: various
Management: Rick Paul, vice president, 713-627-6280; John Pratt, director, 800-807-7288
Sales representatives: Tom Knouse, 713-627-6200; Rick Kramer, 713-627-6815; Bob White, 866-363-1075; Joe Taylor, 713-627-6295; Karen Kubenka, 713-627-6409, Stephanie Davis, 513-528-4242; Margaret Amiot, 513-528-4242, Forest Herron, 800-503-5455; and Jim Spetz – Canada, 403-699-1741.

Dynegy Liquids Marketing & Trade

1000 Louisiana, Suite 5800
Houston, TX 77002
Phone: 713-507-6400
Fax: 713-767-8286
Web site: www.dynegy.com
Service area: entire U.S.
Railcars: more than 2,000

Transports: 76
Marine terminals: 5
Barges: 21
Storage: 60 million Bbls
Pipelines: Dixie, TET, MAPCO, Cochin, Kaneb
Contracts: Posted, fixed, and index sales
Price info line: www.dynegy.com (wholesale gas liquids)
Management: John Gawronski, vice president, wholesale marketing and transportation (Houston); Florida/Southeast: John Nelson, director, (Tampa, FL – 800-699-6474) and Randy Hull, area manager (Atlanta, GA – 888-972-9606); Southwest: Bruce Leonard, director (Dallas, TX – 800-574-3834); West Coast: David Reagan, director (Pleasanton, CA – 925-469-2300), Patti Grantham, area manager (Pleasanton, CA – 925-866-4903) and Jack Larmour, area manager (Pleasanton, CA – 925-866-4906); Midwest: Mike Garcia, area manager (Chicago,IL – 630-575-9715); Northeast: Bill Daly, regional manager (Boston, MA – 800-747-2579) and Stan Hoffman, area manager (Louisville, KY – 502-231-7227).
Sales representatives: Florida – Brad Peters (Tampa, FL – 800-699-6474); Southwest – Frank Long (Memphis, TN – 877-202-3621) and John David Ickes (Dallas – 800-574-3834); West Coast – Jennifer Soczka (Pleasanton, CA – 925-866-4904); Midwest – Meridith Maury (Chicago – 630-575-9717); Northeast – Debbie Gerndt (Boston, MA – 800-747-2579).

Econo-Gas Supply

25132 Oakhurst, Suite 220
Spring, TX 77386
Phone: 281-364-3100
E-mail: jhavens@ev1.net

Date founded: 1980
Owner: Joe and James Havens
States served: 7
Service area: Southeast
Propane retailer accounts: 100
Storage: 295,000 Bbls.
Location: Mt. Belvieu, Hattiesburg (281-364-3100)
Supply points: Dixie pipeline; Hattiesburg, MS; Mt. Belvieu, TX
Types of contracts: Annual, spot, pre-buy
Management: James A. Havens, president (281-364-3108); Harley Boswell, division manager (251-665-0136 or 888-350-0136)
Sales rep: Larry Whelch (888-895-6086)

Global Gas Inc.

383 Inverness Parkway, Suite 100
Englewood, CO 80112
Phone: 303-790-2661
Fax: 303-790-2664
E-mail: globalgas@sprintmail.com

Web site: www.globalgas. com
Date founded: 1989
Owner: D. D. Alexander
States served: 21
Service area: Rockies to East Coast
Railcars: Yes
Transports: Yes
Storage: Mt. Belu, TX, Conway, KS; and S. Hutchinson, KS
Pipelines: TEPPCO, Williams
Supply Points: TET Pipeline and Kinder Morgan Pipeline terminals; and 29 U.S. and Canadian refineries, gas plant production and import terminals.
Contracts: Annual supply, spot, pre-buy, locked -in pricing; NYMEX, differential based pricing.
Management: D. D. Alexander, president (303-790-2661)
Sales Reps: David Collins, Northeast sales manager (518-692-0297) and Jane Bummer, Distribution manager (303-790-2661)

Inergy

Two Brush Creek Blvd., Suite 200
Kansas City, MO 64112
Phone: 816-842-8181
Fax: 816-842-1904
E-mail: Inergy@inergyservices.com

Web site: Inergypropane.com
Date founded: 1996
Owners: Public
States serviced: 35
Service area: entire U.S.
Railcars: Yes
Transports: Yes
Storage locations: Alto and Marysville, MI; Tirzah, SC; Mont Belvieu; Harford Mills; Hattiesburg; Fort Saskatchawan, Conway; and more.
Pipelines: Cochin, Dixie, TEPPCO, MAPCO, Kinder Morgan, Kanob, Williams.
Contracts: Annual, multi-year, pre-buy, index, financials, storage, exchanges
Price info line: 877-4INERGY
Management: John Sherman, president and chief executive officer; Kurt Kolbeck, vice president, wholesale marketing; Bill Gautreaux, vice president, supply.
Sales reps: Midwest: Tiffany Johnson and Tina Hoobler; Ohio Valley/Southwest: Aaron McDowell, Lindsay Ronnau and Natalie Ebbert; Northeast: Jay Jackson and Michelle Rempke; Southeast: Steve Bohannon and Emily Thrasher; Western: Kevin Phillips.

NGL Supply, Inc.

6120 S. Yale, #805
Tulsa, OK 74136
Phone: 800-628-2941, 918-481-1119
Fax: 918-492-0990
E-mail: info@ngl-supply.com

Web site: www.nglsupplyinc.com
Founded: 1967
Owner: Privately held corporation
Service area: Midwest and Northeast
Propane retail accounts: 700
States serviced: 23
Terminals: 3
Transports: 0
Pipelines: Mapco, Kinder Morgan, Kaneb, Cochin, TEPPCO, ConocoPhillips
Contracts: Fixed price, indexing, hedging, financial, annual, supply, PTO and exchanges
Management: Tulsa headquarters (918-481-1119): Stephen Tuttle, chief executive officer; Brian Pauling, president and chief operating officer; Stan Bugh, vice president, wholesale marketing; Stan Perry, vice president midwest supply and trading; Steve Rodrick, vice president, Gulf Coast supply and trading. Houston (281-931-8866): Bob Foster and Larry Gautier, vice presidents.
Sales representatives: Upper Midwest: Chuck Nolan (800-554-7670), Steve Specht (866-895-6825) and Dan Post (866-332-4243); Lower Midwest: Aaron Reece, Kay Lasnak and Beth Shiever (800-628-2941); Northeast: Tony Tophoven (888-743-9024) and Hobie Decker (800-616-8505).

North Star Energy

4418 Main Street
Selby, SD 57472
Phone: 605-649-7060
Fax: 605-649-7085
Founded: 2002
Owner: Arlyn Ritter, General Manager
Service area: South Dakota
States serviced: 1
Storage: 5 locations (Bowdle, Leola, Selby, Ipswich, Pollock)

Contracts: Annual, pre-buy, budget program, .10 down contracts
Price info: 877-754-8673
Management: For service work, Vernon Grismer (605-380-8822 or 605-649-7060), Kent Meyer (605-216-1162 or 605-649-7060), Arlyn Ritter (605-380-8823 or 605-649-7060). For Delivery of LP Gas, Loren Moak (605-380-8825 or 605-649-7060), Kent Meyer (605-216-1162 or 605-649-7060), Jerald Kallenberger (605-216-3887 or 605-649-7060).

Petromont Inc.

2931 Marie-Victorin
Varennes, Quebec, CANADA J3X 1P7
Phone: 514-650-8308
Fax: 514-650-9020
E-mail: jeannotter@petromont.com

Web site: www.petromont.com
Date founded: 1984
Owner: Dow & SCE Quebec
Service area: Northeastern US
Railcars: more than 500
Storage: 50,000 bbls
Location: Varennes, Quebec
Contracts: yearly volume

Propane Resources LLC

6950 Squibb Road, Suite 306
Mission, KS 66201
Phone: 913-262-1545, 888-739-6732
Fax: 913-262-1003
E-mail: prinfo@propaneresources.com

Web site: www.propaneresources.com
Date founded: 1991
Propane retail accounts: 150
Service area: Continental United States and Canada
Transports: 32
Railcars: Yes
Storage: Yes
Pipelines: Dixie, TET, MAPCO, Kinder Morgan
Supply points: All major North American supply points
Contracts: Physical pre-buys, financial risk management tools, market index, physical contracts, spot volume contracts
Price info (24-hours): www.propaneprice.com
Management: Marty Lerum, managing partner (888-739-6732)
Sales Representatives: Bard Black, Eastern U.S. (888-739-6732); Bob Cochlan, Northwest U.S. & Canada (403-263-7070); Allan Degenhardt, Eastern U.S. (888-739-6732); Heather Kickhaefer, Central U.S. (888-739-6732); Reid Simonett, Upper Midwest (888-739-6732); Jeff Thompson, Ohio Valley (888-739-6732); Pat Thornton, East Central U.S. (888-739-6732)

Rich Energy, Inc.

7444 Jager Ct.
Cincinnati, OH 45230
Phone: 800-837-7140
Fax: 513-271-1490
E-mail: rich@richenergy.net

Date founded: 1991
Owners: R.A. Emery
Service area: East of Mississippi
Number of Propane Retailer Accounts: 125

Pipelines: TEPPCO & Dixie
Supply points: All points on TEPPCO & Dixie pipelines as well as refineries/rail and fractionation plants
Contracts: Full service supply to include pre-buy and hedges as well as spot sales.
Price info (8 a.m.-5 p.m., EST): 800-837-7140
Management: R.A. Emery, president (513-271-1460); John McGuire, general manager (513-271-1460); Kim Groneck, assistant manager (513-271-1460
Sales representatives: Greg Smith, South Dixie Pipeline (800-837-7140); Ed Deming, Dixie Pipeline System (800-837-7140); Terry Bridewell, Penn & New York, (800-837-7140); Jack McGuire, TEPPCO Pipeline (800-837-7140); Christina Moran, Great Lakes Region (800-837-7140)

Sea-3 Inc.

190 Shattuck Way
Newington, NH 03801
Phone: 603-436-6225
Fax: 603-436-3263
E-mail: sea3inc@aol.com

Date founded: 1986
Owners: Transammonia
Service area: New England — ME, NH, MA
Terminals: 1
Storage: 600,000 barrels
Location: Newington, NH (603-431-5990) Transport and tank car loading/off-loading
Management: Paul Bogan, vice president operations
Sales representative: Barbara Murray, marketing manager

Sea-3 of Florida Inc.

3606 Pendola Point Rd.
Tampa, FL 33619
Phone: 813-546-0535
E-mail: sea3vik@aol.com

Date founded: 1998
Owners: Transammonia
Service area: Florida
Terminals: 1
Storage: 600,000 barrels
Location: Tampa, FL (813-241-0550) Transport loading only
Management: Kevin Wertman, terminal manager
Sales representative: Vernon Krutsinger, marketing manager

Smith Gas Liquids Co.

P.O. Box 2446
Holland, MI 49422-2446
Phone: 616-786-0001
Fax: 616-786-0840
E-mail: sales@smithgas.com

Web site: www.smithgas.com
Date founded: 1983
Owner: Steven A. Van Heck
Propane retail accounts: 400
States serviced: 6
Service area: Upper Great Lakes region
Storage location: All major storage locations
Pipelines: All major Midwest pipelines
Supply points: All major Midwest pipelines and refinery terminals
Contracts: Annual term, pre-buy, hedging
Price info: 800-543-9110

Management: Steven (Steve) Van Heck, president (616-786-0001); Michael (Mike) Myszka, vice president (616-786-0001 or 800-543-9110)
Sales representatives: Corey Davis, sales associate (800-543-9110)

Superior Gas Liquids

CALGARY OFFICE
Suite 312, 400 Crowfoot Crescent N.W.
Calgary, Alberta T3G 5H6
Phone: 403-283-4445, 888-849-3525
Fax: 403-283-6589
E-mail: info@superiorgasliquids.com

Web site: www.superiorgasliquids.com
Date founded: 1955
Owners: Public
Number of Propane Retailer Accounts: 100
States serviced: 50
Service area: Entire U.S.
Railcars: 300
Transports: 60
Storage: 1,000,000 barrels
Pipelines: Ship on Cochin and TEPPCO
Contracts: Fixed and indexed pricing, floating, price caps, collars and subleased storage.
Management: Sheldon Gardiner, director of marketing and supply; Scott Rurak, manager of marketing and supply - East; Todd Temple, manager of marketing and supply - West; Mina Iannuzzi, manager of finance and accounting; Leanne Salt, manager of administration; Alana Lins, office manager; James Shelford, market analyst

SARNIA OFFICE
P.O. Box 2914
301 N. Christina Street, Unit 6
Sarnia, Ontario N7T 5V4
Phone: 519.337.2774
Fax: 519-337-2774
Management: Dave Hicks, marketing representative - East
E-mail: info@superiorgasliquids.com

Web site: www.superiorgasliquids.com

Texas Liquids, LLC

1 Boland Drive
Suite 302
West Orange, NJ 07052
Phone: 973-669-8182
Fax: 973-669-4810
E-mail: jneumann@texasliquids.com

Web site: www.texasliquids.com
Date founded: 1982
Owner: Texas Liquids Holdings, LLC
Propane retail accounts 500
Number of states served: 38
Locations: All major refineries, various rail terminals and major supply points in Canada
Contracts: Volume, various types of Pre-Buy
Management: William H. Heil, President & CEO; William R. Hoatson, Executive VP and General Counsel; Jim Neumann, VP sales; William G. Connallon, VP Operations (all at 800-882-8986); Theresa Shofner, procurement manager (877-414-4131).
Sales Reps: John Bienkowski (800-452-1272); Mike Boulden (866-308-0898); Pete Geels (800-352-5779); Ron Burns (866-529-1621); Don Johnson (800-211-3313); Jeff Shermerhorn (800-765-4660); Denny Frey (877-316-1305); Jason Walter (800-410-4427); Jill Stevens (800-841-9911)

United Pacific Energy

2995 Skyline Blvd.
Suite #207
Reno, NV 89509-5163
Phone: 800-726-5747
Fax: 888-689-3155
E-mail: jim@unitedpacificenergy.com

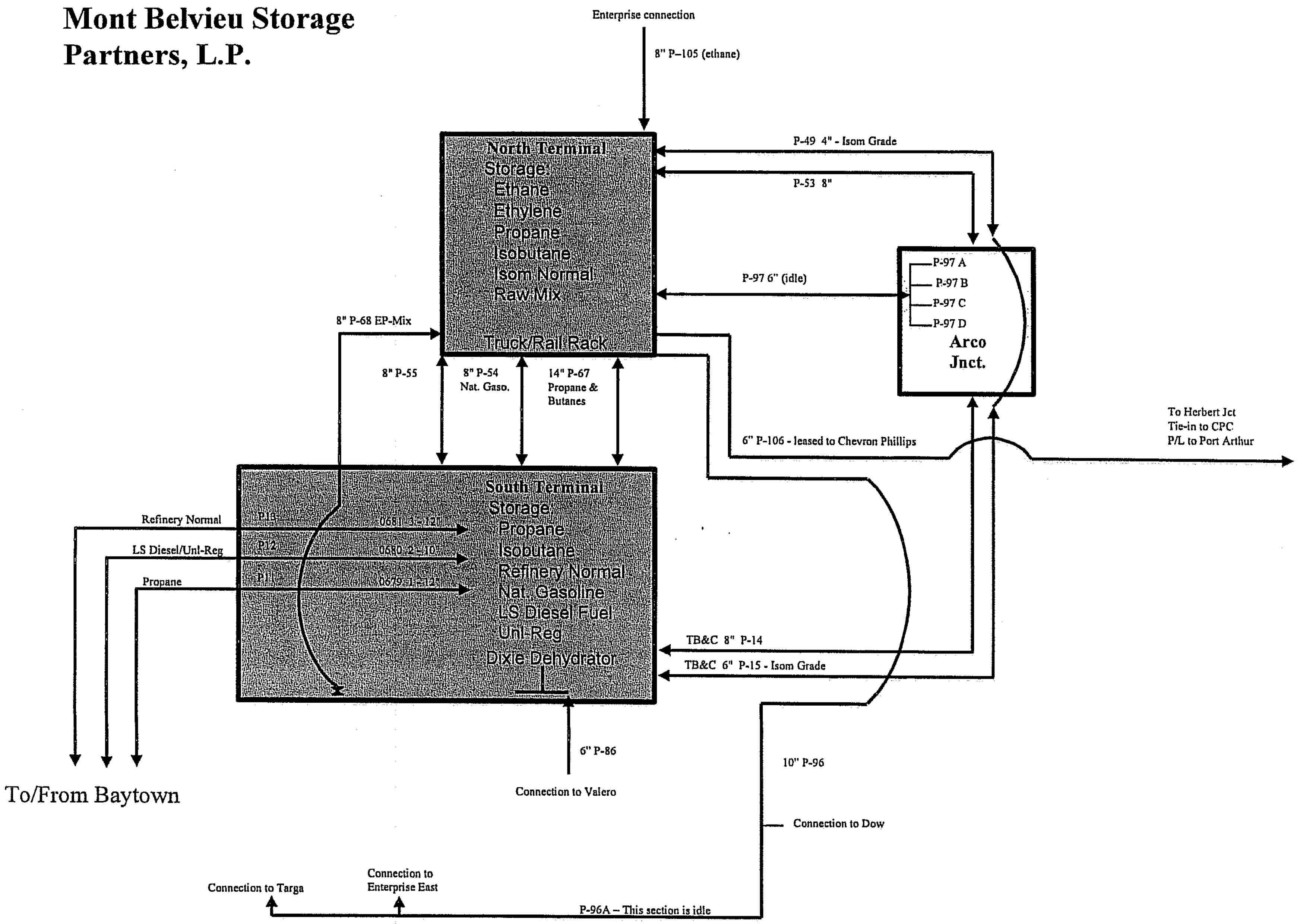
Web site: www.unitedpacificenergy.com
Date founded: 1989
Owner: Corporation
Propane retail accounts: 60
States serviced: 4
Terminals: 2
Service area: Southwest
Storage: 30,000 bbls
Storage location: Fairfield, CA, Flagstaff, AZ, Phoenix, AZ
Price info: 800-726-5747
Management: David Humphreys, president; James Weaver, vice president; Sharon Paulson, dispatch; Sherie Werner, controller, CFO.
Sales representatives: Theresa Smith, North California, 877-873-1075

Exhibit H

APPENDIX E

PIPELINES OWNED BY MONT BELVIEU STORAGE PARTNERS IN MONT BELVIEU

Mont Belvieu Storage Partners, L.P.



Mont Belvieu Storage Partners, L.P.
Overview of Gulf Coast LPG Pipelines

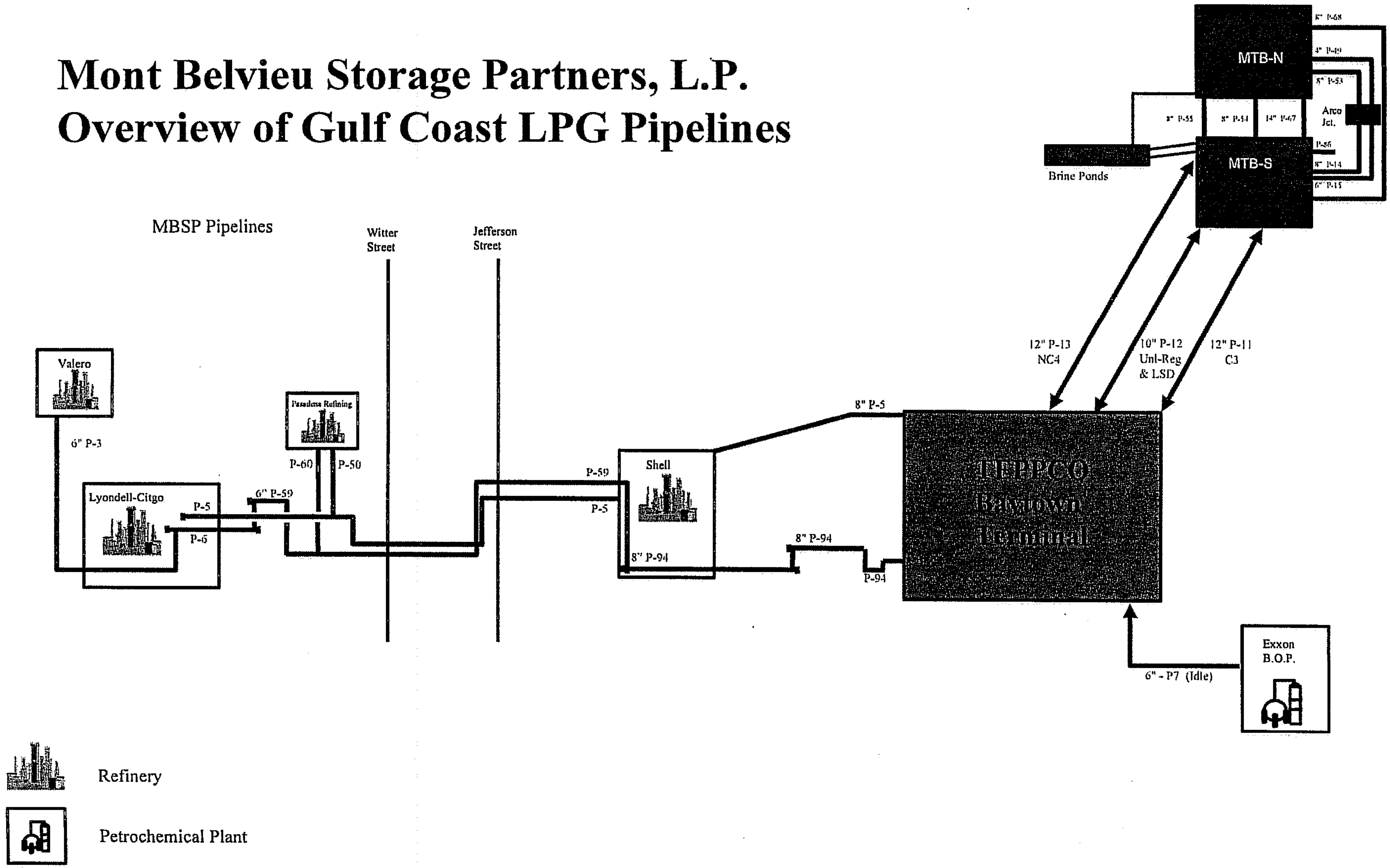


Exhibit I

Over-the-Counter Derivatives Markets and the Commodity Exchange Act

Report of
The President's Working Group on Financial Markets

Department of the Treasury

Board of Governors of the Federal Reserve System

Securities and Exchange Commission

Commodity Futures Trading Commission

November 1999

Over-the-Counter Derivatives Markets and the Commodity Exchange Act

Report of
The President's Working Group on Financial Markets

November 1999

November 9, 1999

The Honorable J. Dennis Hastert
Speaker of the House
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

We are pleased to transmit the report of the President's Working Group on Financial Markets entitled Over-the-Counter Derivatives Markets and the Commodity Exchange Act.

One of the most dramatic changes in the world of finance during the past fifteen years has been the extraordinary development of the markets for financial derivatives. Over-the-counter derivatives have transformed the world of finance, increasing the range of financial products available to corporations and investors and fostering more precise ways of understanding, quantifying, and managing risk. These important markets are large and growing rapidly. At the end of 1998, the estimated notional value of OTC derivative contracts was $80 trillion, according to the Bank for International Settlements. In addition, these global markets have been marked by innovation in products and trading and settlement mechanisms.

A cloud of legal uncertainty has hung over the OTC derivatives markets in the United States in recent years, which, if not addressed, could discourage innovation and growth of these important markets and damage U.S. leadership in these arenas by driving transactions off-shore. Recognizing the important role that derivatives play in our financial markets, and the dangers of continued legal uncertainty, the Working Group has spent the past six months focusing on OTC derivatives and examining the existing regulatory framework, recent innovations, and the potential for future development. At the request of Congress and the Chairmen of the Senate and House Agriculture Committees, we have prepared the attached report, which reflects the consensus we have reached on a set of unanimous recommendations.

The Working Group is recommending changes to the Commodity Exchange Act ("CEA") designed to:

- promote innovation, competition, efficiency, liquidity, and transparency in OTC derivatives markets, by providing legal certainty for OTC derivatives and removing impediments to innovation (specifically to the development of electronic trading systems);

- reduce systemic risk, by removing legal obstacles to the development of appropriately regulated clearing systems;

- protect retail customers from unfair practices, by providing the CFTC authority to address problems associated with foreign currency "bucket shops"; and

- maintain U.S. leadership in these rapidly developing markets through a combination of the measures outlined above.

We, the members of the Working Group, therefore respectfully urge the Congress to give serious consideration to our proposals to help achieve these goals.

The Federal Deposit Insurance Corporation, the Federal Reserve Bank of New York, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision reviewed and commented on this report and support its conclusions and recommendations. We are grateful for their assistance.

We appreciate the opportunity to convey this report to you, and we look forward to continuing to work with the Congress on these important issues.

Sincerely,

Lawrence H. Summers Secretary Department of the Treasury	Alan Greenspan Chairman Board of Governors of the Federal Reserve System
Arthur Levitt Chairman Securities and Exchange Commission	William J. Rainer Chairman Commodity Futures Trading Commission

November 9, 1999

The Honorable Al Gore
President of the Senate
United States Senate
Washington, D.C. 20510

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Lawrence H. Summers
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Department of the Treasury

Alan Greenspan
Chairman
Board of Governors of the Federal Reserve System

Arthur Levitt
Chairman
Securities and Exchange Commission

William J. Rainer
Chairman
Commodity Futures Trading Commission

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Over-the-Counter Derivatives Markets and the Commodity Exchange Act

Report of The President's Working Group on Financial Markets

I. Introduction

Last year, Congress indicated that the President's Working Group on Financial Markets (the "Working Group")[1] should work to develop policy with respect to over-the-counter ("OTC") derivative instruments,[2] and the Chairmen of the Senate and House Agriculture Committees requested that the Working Group conduct a study of OTC derivatives markets and provide legislative recommendations to Congress.[3] This Working Group report focuses on changes to the Commodity Exchange Act (the "CEA") that are necessary to promote innovation, competition, efficiency, and transparency in OTC derivatives markets, to reduce systemic risk, and to allow the United States to maintain leadership in these rapidly developing markets.

The Working Group has concluded that under many circumstances, the trading of financial derivatives by eligible swap participants[4] should be excluded from the CEA. To do otherwise would perpetuate legal uncertainty or impose unnecessary regulatory burdens and constraints upon the development of these markets in the United States. The Working Group has also concluded that it is important to remove legal impediments to the development of electronic trading systems, which have the potential to increase market liquidity and transparency, and appropriately regulated clearing systems, which can reduce systemic risk by allowing for the

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[1] The Working Group is composed of the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System (the "Federal Reserve"), the Chairman of the Securities and Exchange Commission (the "SEC"), and the Chairman of the Commodity Futures Trading Commission (the "CFTC").

[2] H.R. Rep. No. 825, 105th Cong., 2d Sess. 991-92 (1998).

[3] Letter from the Honorable Richard G. Lugar, Chairman, Senate Committee on Agriculture, Nutrition, and Forestry, and the Honorable Robert Smith, Chairman, House Committee on Agriculture, to the Honorable Robert Rubin, Secretary of the Treasury (Sept. 30, 1998).

[4] Under the CFTC's current exemption for swap agreements, 15 C.F.R. pt. 35, "eligible swap participants" are defined to include various regulated financial institutions, business enterprises that meet certain tests relating to total assets or net worth, certain pension funds, state and local governments, and certain wealthy individuals.

mutualization of risks among market participants and by facilitating offset and netting of contractual obligations.

Specifically, with respect to OTC derivatives, the Working Group is unanimously recommending:

- An exclusion from the CEA for bilateral transactions between sophisticated counterparties (other than transactions that involve non-financial commodities with finite supplies);
- An exclusion from the CEA for electronic trading systems for derivatives, provided that the systems limit participation to sophisticated counterparties trading for their own accounts and are not used to trade contracts that involve non-financial commodities with finite supplies;
- The elimination of impediments in current law to the clearing of OTC derivatives, together with a requirement that any clearing system for OTC derivatives be regulated by the CFTC, another federal regulator, or a foreign financial regulator that satisfies appropriate standards;
- A clarification of the Treasury Amendment that clears the way for the CFTC to address the problems associated with foreign currency "bucket shops" and excludes all other transactions in Treasury Amendment products from the CEA, unless they are conducted on an organized exchange;
- A modification of the exclusive jurisdiction clause of the CEA to provide greater legal certainty to hybrid instruments; and
- A statutory clarification of the inapplicability of the Shad-Johnson Accord to hybrid instruments that reference securities.

The Working Group understands that the development of OTC derivatives markets also raises questions about the regulatory structures applicable to exchange-traded derivatives and implicates statutes other than the CEA. Accordingly, certain additional issues, including the level and scope of regulation applicable to exchange-traded derivatives and the conditions under which the trading of single-stock futures contracts might be permitted, are also discussed in this report. In deference to the CFTC's views about the need for further Congressional direction with regard to its exemptive authority, the Working Group as a whole believes that the enactment of its recommendations with respect to OTC derivatives should be accompanied by explicit authority for the CFTC to provide appropriate regulatory relief for exchange-traded financial futures if deemed by the CFTC to be consistent with the public interest.[5]

Although this report recommends the enactment of legislation to clearly exclude most OTC financial derivatives transactions from the CEA, this does not mean that transactions may not, in some instances, be subject to a different regulatory regime or that a need for regulation of currently unregulated activities may not arise in the future. Specifically, although the Working Group recommends excluding certain electronic trading systems for OTC derivatives from the CEA, the enactment of a limited regulatory regime aimed at enhancing market transparency and efficiency may become necessary under certain circumstances if, as such systems develop and grow, prices of transactions executed through the systems come to be used widely as the basis for pricing other transactions (i.e., the systems come to serve a price discovery function). If so, depending on the specific market, existing regulation, and the problems that regulation would be meant to address, the CFTC's expertise in exchange-traded derivatives could make it an appropriate choice to serve as regulator. The Working Group members will continue to monitor and consider the desirability of regulatory or legislative action to address issues that may arise in the future.

The Working Group looks forward to working with Congress to develop legislation to implement the recommendations contained in this report.

5 Such authority should not, however, permit the CFTC to provide exemptive or other regulatory relief from the requirements of the Shad-Johnson Accord. See infra note 16 and accompanying text and infra part VIII.A.

II. Over-the-Counter Derivative Instruments

The market for OTC derivatives has expanded steadily and rapidly over the past two decades. At year-end 1998, the total estimated notional amount of outstanding OTC derivative contracts was $80 trillion, reflecting an increase of 11 percent from June 1998, according to data from the Bank for International Settlements ("BIS"). In contrast, exchange-traded futures and options contracts amounted to just $13.5 trillion at the end of 1998, down almost 6 percent from the end of June 1998.[6] According to BIS, the vast majority of OTC derivatives are interest rate and foreign exchange contracts (72 percent and 26 percent, respectively); equity-related contracts make up only 2 percent of the market, while tangible commodities account for a fraction of a percent.[7]

Activity in OTC derivatives markets has been primarily concentrated in three types of instruments: swap agreements, options, and hybrid instruments.[8] The typical swap agreement is a contract between two parties providing for the exchange of cash flows based on differences or changes in the value or level of one or more interest rates, currencies, commodities, securities, or other asset categories. These cash flows are calculated with reference to a principal base (known as the "notional amount") of the underlying asset category. Because the notional amount of a swap agreement is only a contractual term used to calculate the amount of payments under the swap agreement, it generally is not exchanged between the parties to the agreement. Accordingly, the notional amount is not a measure of the value or the riskiness of a swap agreement.

An option is an instrument that provides the holder with the right, but not the obligation, to buy (call option) or sell (put option) a specified amount or value of a particular underlying interest at a specified price on, and in some cases before, its specified expiration date. Typically,

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[6] Bank for International Settlements, Quarterly Review: International Banking and Financial Market Developments (Aug. 1999).

[7] Bank for International Settlements, Press Release, The Global OTC Derivatives Market at End-December 1998 (June 2, 1999).

[8] The terminology used to describe derivative instruments is not precise. Certain complex derivative instruments (for example, "swaptions") combine the characteristics of both typical swaps and options, and the term "swap" is often used to refer collectively to typical swaps, options, and instruments that combine characteristics of both. Similarly, the term "OTC derivative" is usually meant to refer to all of these instruments and sometimes is meant to refer to hybrid instruments as well, although hybrid instruments are frequently listed for trading on securities exchanges and issued in standardized tranches and therefore are often not traded over-the-counter. Unless the context otherwise indicates, the terms used in this report are meant to be construed broadly.

OTC options provide for cash settlement, rather than delivery of the underlying asset, or a choice between the two methods of settlement.

Hybrid instruments are depository instruments (i.e., demand deposits, time deposits, or transaction accounts) or securities (i.e., debt or equity securities) that have one or more components with payment features economically similar to swaps, forwards, options, or futures contracts.

Traditionally, the exchange-traded and OTC derivatives markets have differed in several respects. Exchange-traded instruments — principally futures and options — are standardized as to their material terms and conditions, whereas the terms and conditions of OTC instruments may be negotiable between the parties to the contract and reflect individualized credit decisions. The customization of these transactions to individual customer needs as to maturity, payment intervals, or other terms has allowed customers to adjust individual risk positions with greater precision. Exchange-traded instruments, however, may offer market participants the advantages of liquidity, price transparency, and minimal credit risk. Whereas transactions in the OTC markets are conducted almost entirely between institutions on a principal-to-principal basis, exchange-traded markets are also accessible to retail customers conducting transactions through futures commission merchants ("FCMs").

As OTC markets develop, however, the extent to which market participants engage in large numbers of transactions with similar terms increases, because certain instruments serve the risk-management needs of a large number of market participants. Thus, the opportunity to negotiate the terms and conditions of an instrument may exist, but in practice this opportunity may not be used to a great extent for certain types of instruments, such as certain "plain vanilla" interest rate swaps.[9] Moreover, although the widespread use of innovations such as electronic trading and clearing have the potential to increase efficiency and reduce systemic risk, they could also blur some of the distinctions between exchange-traded and OTC instruments.

[9] Nevertheless, counterparties typically have negotiated a "master agreement" that sets forth terms and conditions, including netting and collateral provisions, applicable to all transactions between them.

III. Legal Certainty (Enforceability of Contracts) and the Development of the CEA

Legal certainty is a crucial consideration when parties to OTC derivative contracts decide with whom and where to conduct their business. Parties must be certain that the contracts into which they enter are permissible in the governing jurisdiction, that their counterparties have the legal capacity to enter into the contracts, and that the provisions of the contracts are enforceable. An environment of legal certainty for OTC derivatives and their execution and clearing will help to reduce systemic risk in the U.S. financial markets and enhance the competitiveness of the U.S. financial sector.

For OTC derivative contracts, uncertainty arises from concerns under current law as to whether some of these contracts could be construed to be subject to the CEA and whether certain types of mechanisms for executing and clearing OTC derivatives might be construed to alter the legal status of otherwise exempted or excluded instruments. These concerns force financial institutions to evaluate legal risks when developing new instruments and new risk-management initiatives and have the potential to reduce the flexibility and competitiveness of U.S. financial markets. In light of the size of OTC derivatives markets and their importance to the U.S. economy, to other markets, and to U.S. financial institutions, these concerns must be addressed.

The CEA subjects contracts for the sale of a commodity for future delivery and options on such contracts to the exclusive jurisdiction of the CFTC.[10] The CFTC also has jurisdiction over commodity option contracts, although the CEA does not unambiguously characterize the CFTC's jurisdiction over such instruments as exclusive.[11] In addition, transactions in, or in connection with, commodity futures contracts and commodity options contracts must be conducted in accordance with the CEA and regulations promulgated by the CFTC. In general, this means that, except as provided by certain administrative exemptions currently granted by the CFTC, transactions must be conducted on, or subject to the rules of, a contract market designated by the CFTC.[12] The CEA defines "commodity" to include specific agricultural commodities and

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[10] 7 U.S.C. § 2(i). The CEA also provides that the term "future delivery" does not include any sale of any cash commodity for deferred shipment or delivery. 7 U.S.C. § 1a(11).

[11] 7 U.S.C. §§ 2, 6c. But see S. Rep. 93-1131, 93d Cong. 2d Sess., reprinted in 1974 U.S.C.C.A.N. 5843, 5870; International Trading Ltd. v. Bell, 556 S.W.2d 420 (Ark. 1977), cert. denied, 436 U.S. 956 (1978).

[12] 7 U.S.C. § 6(a), 6c.

"all other goods and articles, ... and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."[13]

In 1974, Congress amended the CEA to state that "[n]othing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, securities warrants, securities rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade."[14] This statutory exclusion, known as the "Treasury Amendment," was enacted at the request of the Department of the Treasury ("Treasury") as part of the same act that expanded the definition of "commodity" from a list of specific tangible products to the broad definition contained in current law. As discussed in more detail below, however, the exact scope of the exclusion has been the subject of litigation.

Uncertainties concerning the jurisdictions of the CFTC and the SEC to regulate certain securities-based derivative instruments also arose from the amendments to the CEA enacted in 1974, which gave the CFTC exclusive jurisdiction over all futures, whether the underlying instrument was a physical commodity or a financial commodity.[15] The same amendments provided, however, that the jurisdiction of the SEC was not otherwise superseded or limited. These provisions have created conflicts regarding each agency's jurisdiction over novel financial instruments that have elements of securities and futures or commodity options contracts.

In an attempt to clarify the scope of the CEA and to permit the trading of certain stock index futures, the SEC and the CFTC agreed to specify which financial instruments fell within each agency's jurisdiction. This agreement, known as the Shad-Johnson Accord, was codified by Congress in 1982 and 1983 through amendments to the CEA and the federal securities laws.[16] The Shad-Johnson Accord amended the CEA to explicitly prohibit futures contracts based on the value of, or any interest in, an individual security (other than certain "exempt securities"),[17] or a

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13 7 U.S.C. § 1a(3).

14 7 U.S.C. § 2(ii).

15 7 U.S.C. § 2(i).

16 Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983); Act of Oct. 13, 1982, Pub. L. No. 97-303, 96 Stat. 1409.

17 "Exempt securities" include government securities and certain other securities that are exempt from many of the federal securities laws pursuant to Section 3 of the Securities Act of 1933 or Section 3(a)(12) of

securities index that does not satisfy the statute's criteria as to the composition of the index. The Shad-Johnson Accord also gives the SEC authority over options on (i) securities (including exempt securities), (ii) certificates of deposit, (iii) foreign currencies traded on a national securities exchange, and (iv) groups or indices of securities; and gives the CFTC authority over futures contracts and options on futures contracts on (i) exempt securities (other than municipal securities), (ii) certificates of deposit, and (iii) indices of securities that satisfy the statute's criteria.

To address concerns about the legal status and enforceability of OTC derivative contracts, the Futures Trading Practices Act of 1992 (the "FTPA") amended the CEA to provide the CFTC with authority to grant exemptions from the CEA for any transaction or class of transactions that meets certain criteria.[18] The FTPA did not specifically address whether or not any particular type of transaction, such as a swap agreement, is a futures contract or an option. The Conference Report language, in fact, made clear that the CFTC could grant an exemption without finding that the transaction is a futures contract subject to the CEA.[19] To grant an exemption, the CFTC must determine that the exemption is in the public interest, that the exempted transactions will be entered into only by "appropriate persons," and that the exemption will not have a material adverse effect on the ability of the CFTC or a designated contract market to fulfill its duties under the CEA.[20] Further, the FTPA expressly precluded the CFTC from exempting transactions from the Shad-Johnson Accord, including the prohibition of futures contracts on an individual non-exempt security. This limitation, coupled with Congress's

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the Securities Exchange Act of 1934. 15 U.S.C. §§ 77c, 78c(a)(12). Note, however, that transactions in government securities that are excluded from the CEA by the Treasury Amendment are subject to the provisions of the securities laws enacted in the Government Securities Act, as amended. Government Securities Act of 1986, Pub. L. No. 99-571, 100 Stat. 3208 (codified as amended in scattered sections of 15 U.S.C. and 31 U.S.C.). Although municipal securities are exempt securities under the securities laws, under the Shad-Johnson Accord they are treated like corporate debt and equity securities, foreign sovereign debt securities, and other securities that are not classified as exempt securities under the securities laws. Thus, municipal securities and other securities that are not defined as exempt securities are collectively referred to as "non-exempt securities" in this report.

18 Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590.

19 H.R. Rep. No. 102-978, 102d Cong, 2d Sess. 83 (1992).

20 7 U.S.C. § 6(c). Under the FTPA, "appropriate persons" include banks, insurance companies, investment companies, commodity pools, broker-dealers, FCMs, and governmental entities. A corporation or partnership may be an appropriate person if it has a net worth exceeding $1,000,000 or assets exceeding $5,000,000. The CFTC may determine that the inclusion of other persons is appropriate based on financial or other qualifications or on the application of appropriate regulatory protections.

decision to authorize an exemption (rather than an exclusion) for swap agreements and hybrid instruments, is the origin of concern about the legal status of certain derivatives that reference securities.

Since 1992, the CFTC has used its exemptive authority in connection with each of the three classes of instruments that were specifically discussed in the legislative history of the FTPA: (1) swap agreements;[21] (2) hybrid instruments;[22] and (3) certain OTC energy contracts, including Brent oil contracts, which had been found by one court to be futures contracts.[23] In exercising its authority, the CFTC also reaffirmed the continued applicability of its Policy Statement Concerning Swap Transactions (the "Swap Policy Statement") and Statutory Interpretation Concerning Certain Hybrid Instruments (the "Hybrid Interpretation"), statements of regulatory and enforcement policy with respect to swap agreements and hybrid instruments that had been issued by the CFTC prior to the enactment of the FTPA.[24]

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[21] 17 C.F.R. pt. 35 (the "Swap Exemption"). Part 35 of the CFTC Regulations exempts swap agreements from most provisions of the CEA, provided that: (a) the swap agreement is entered into solely between eligible swap participants; (b) the swap agreement is not part of a fungible class of agreements that are standardized as to their material economic terms; (c) creditworthiness is a material consideration in entering into the swap agreement; and (d) the swap agreement is not traded on a multilateral transaction execution facility.

[22] 17 C.F.R. pt. 34 (the "Hybrid Instrument Rule").

[23] Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 21,286 (Apr. 20, 1993). Cf. Transnor (Bermuda) Ltd. v. BP N. Am. Petroleum, 738 F. Supp. 1472 (S.D.N.Y. 1990).

[24] Policy Statement Concerning Swap Transactions, 54 Fed. Reg. 30,694 (July 21, 1989); Statutory Interpretation Concerning Certain Hybrid Instruments, 55 Fed. Reg. 13,582 (Apr. 11, 1990).

IV. Continuing Legal Uncertainties With Respect to Swap Agreements

A. Background

As a result of limitations in the FTPA and the continuing evolution of the OTC markets, concerns regarding legal uncertainty persist. While the range of OTC derivatives activity currently conducted in the United States generally does not fall within the category of transactions intended to be regulated (or prohibited) as futures or options contracts under the CEA, the Working Group nonetheless recognizes that any reasonable uncertainty can have undesirable effects and should be remedied. Moreover, uncertainty involving OTC derivatives has hampered private sector efforts to utilize electronic trading systems to enhance market efficiency and transparency and clearing facilities to reduce systemic risk in the OTC markets. Accordingly, the Working Group has concluded that a series of amendments to the CEA is necessary.

1. Current Treatment of Swaps under the CEA

In 1989, the CFTC issued the Swap Policy Statement, which reflected the agency's view that "most swap transactions, although possessing elements of futures or options contracts, are not appropriately regulated as such under the [CEA] and regulations."[25] Because the Swap Policy Statement was issued prior to the enactment of the FTPA, the CFTC at the time lacked authority to exempt futures contracts from the provisions of the CEA that require all such contracts to be traded on contract markets approved by the CFTC in order to be legal. Accordingly, some market participants have indicated that they viewed the Swap Policy Statement as an indication that swap agreements covered by the Swap Policy Statement are not futures contracts.

In enacting the FTPA in 1992, Congress indicated that the CFTC should use its authority to exempt swap agreements from the CEA "to the extent that such agreements may be regarded

[25] 54 Fed. Reg. at 30,694. The Swap Policy Statement created a non-exclusive safe harbor that the CFTC indicated it would recognize. To qualify for this safe harbor, swap transactions must, among other things, be settled in cash or foreign currency, have "transaction specifications" that are "individually tailored," be "based upon individualized credit determinations," and not be subject to termination by an exchange-style offset mechanism nor "supported by the credit of a clearing organization" or "a mark-to-market margin and variation settlement system designed to eliminate individualized credit risk." Also, to qualify for the non-exclusive safe harbor, swap transactions must be connected to the "parties' line of business" (which may include providing financial intermediation services) and cannot be marketed to the public.

as subject to the provisions of [the CEA]."[26] Thus, while Congress clearly indicated that swap agreements should not be regulated under the CEA, it did not establish whether swaps are commodity futures or options that would be subject to the CEA in the absence of an exemption. In 1993, the CFTC adopted the Swap Exemption,[27] which covers any swap agreement meeting the following criteria:

- The swap agreement must be entered into between eligible swap participants. "Eligible swap participants" are defined to include various regulated financial institutions, business enterprises that meet certain tests relating to total assets or net worth, certain pension funds, state and local governments, and individuals with more than $10 million in total assets.
- The swap agreement may not be part of a fungible class of agreements that are standardized as to their material economic terms.
- The creditworthiness of the parties to the swap agreement must be a material consideration in entering into and determining the terms of the swap agreement.
- The swap agreement may not be entered into and traded on or through a multilateral transaction execution facility (an "MTEF"). The CFTC explained that an MTEF "is a physical or electronic facility in which all market makers and other participants have the ability to execute transactions and bind both parties by accepting offers which are made by one member and open to all members of the facility."[28]

Although the Swap Exemption affords practical relief for a broad range of transactions, concerns about its scope persist. Because Congress never conclusively determined whether swaps would be subject to the CEA in the absence of the exemption, the exact status of these instruments (i.e., whether they are forwards, futures, options, or none of the above) is unclear. Under the Swap Exemption, the CFTC retains anti-fraud and anti-manipulation authority over

[26] 7 U.S.C. § 6.

[27] Exemption for Certain Swap Agreements, 58 Fed. Reg. 5587 (Jan. 22, 1993) (codified at 17 C.F.R. pt. 35).

[28] Id. at 5591.

otherwise exempted swap agreements, although this retained authority would be available only in instances where a statutory basis for its exercise exists.

Moreover, two actions by the CFTC in 1998 led some market participants to express concerns that the CFTC might modify the Swap Exemption and attempt to impose new regulations on the swap market. First, in a comment letter addressing the SEC's "broker-dealer lite" proposal,[29] the CFTC stated that the SEC's proposal would create the potential for conflict with the CEA to the extent that certain OTC derivative instruments fall within the ambit of the CEA and are subject to the exclusive statutory authority of the CFTC.[30] Participants in the market for swap agreements that reference non-exempt securities, such as equity swaps, credit swaps, and emerging market debt swaps, were particularly concerned by the CFTC's comment letter because statements suggesting that some swap agreements might be viewed as futures contracts were construed to imply questions about the applicability of the Shad-Johnson Accord, which prohibits futures on non-exempt securities (except futures on securities indices on designated contract markets that are cash settled and meet certain other conditions).[31] Subsequently, the CFTC issued a concept release requesting comment on whether regulation of OTC derivatives markets is appropriate and, if so, what form such regulation should take.[32] Some market participants construed the concept release as raising uncertainty about the applicability of the Swap Exemption to certain aspects of the developing OTC markets because it stated that certain OTC derivative products were becoming increasingly standardized, and

[29] OTC Derivatives Dealers, 63 Fed. Reg. 59,362 (Nov. 3, 1998). As adopted by the SEC, this rule provides OTC derivatives dealers affiliated with registered broker-dealers with an alternative regulatory regime in order to facilitate participation by such dealers in the OTC derivatives markets. Under the rule, an OTC dealer is permitted to engage in OTC derivatives transactions that qualify as securities, as well as transactions in non-security OTC derivatives, subject to capital requirements that would be more favorable to such transactions than the traditional broker-dealer regulatory regime.

[30] Letter from Jean A. Webb, Secretary, CFTC, to Jonathan G. Katz, Secretary, SEC (Feb. 26, 1998).

[31] The CFTC cannot grant exemptions from the restrictions of the Shad-Johnson Accord. Swap agreements involving non-exempt securities are routinely entered into, however, in reliance on the CFTC's comment in the Swap Policy Statement that most swap transactions are not appropriately regulated as commodity futures or options. Moreover, in adopting the Swap Exemption, the CFTC stated that market participants could continue to rely on the Swap Policy Statement. 58 Fed. Reg. at 5588. In referring to the Swap Policy Statement, the CFTC cited FTPA legislative history stating that Congress did not intend to call into question the legal status of existing securities-linked swaps.

[32] Over-the-Counter Derivatives, 63 Fed. Reg. 26,114 (May 12, 1998).

because it requested comments on the possibility of developing a regulatory framework under the CEA for electronic trading and clearing of OTC derivatives.

Legislation enacted at the request of Treasury, the Federal Reserve Board, and the SEC in 1998 limited the CFTC's rulemaking authority with respect to swaps and hybrid instruments until March 30, 1999, and froze the pre-existing legal status of swap agreements and hybrid instruments entered into in reliance on the Swap Exemption, the Hybrid Instrument Rule, the Swap Policy Statement, or the Hybrid Interpretation.[33] The legislation reduced legal uncertainty but did not provide a permanent clarification of the legal status of these instruments.

2. Electronic Trading Systems

Technological innovation in the financial markets in recent years has been significant, and it is likely that the pace of change will continue to accelerate in the future. Computer technology has the potential to increase the efficiency, transparency, and liquidity of the financial markets by increasing the speed of transactions and lowering transaction costs. At the same time, new ways of doing business present new questions about the applicability of existing laws.

Both exchange-traded derivatives markets and the OTC markets have begun to make use of new technologies. For example, the Chicago Board of Trade and the Chicago Mercantile Exchange have introduced electronic trading systems that operate in conjunction with the exchanges' traditional floor-trading activities. In the OTC markets, electronic trading systems for foreign currency derivatives have operated for several years, and more recently, an electronic system for interest rate swaps has been developed.

The development of computerized trading systems for OTC derivatives, however, has been affected by uncertainty about the applicability of the CEA. Swap agreements are not currently covered by the Swap Exemption if they are entered into and traded on or through an MTEF. The applicability of the CFTC's definition of MTEF to particular types of systems that may be developed is far from clear, however.

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[33] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, § 760, as enacted in Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-35 (1998).

Traditionally, participants in the swap market have communicated bid and offer information and entered into swap agreements via telephone and facsimile. Computer technology, however, can allow market participants to communicate with multiple parties at the same time via computer terminals, and to execute transactions automatically. The CFTC has indicated that although electronic communication systems are not MTEFs, systems used to enter orders to execute transactions may be.[34] Market participants, however, have argued that the means used to execute a swap agreement (computer systems rather than telephonic systems) should not alter the regulatory status of the agreement. Market participants have also argued that an electronic system in which the credit policies of each participant are programmed into the system is not an MTEF because an offer made by one participant would only be open to other participants with credit that was deemed acceptable by the offeror. On the other hand, representatives of organized futures exchanges have argued that electronic systems that allow for automated execution operate as exchanges and should be regulated in a similar manner.

3. Clearing Systems

Clearing systems can mitigate the loss that an individual party to a transaction suffers if its counterparty fails to settle an obligation. In a clearing system, obligations of the counterparties may be replaced by obligations of a central counterparty or by obligations of other participants in the system. Often clearing systems also entail a system for sharing losses among surviving participants or for shifting losses to a third party. Thus, clearing systems can serve a valuable function in reducing systemic risk by preventing the failure of a single market participant from having a disproportionate effect on the overall market. Clearing systems also facilitate the offset and netting of obligations arising under contracts that are cleared through the system. Because they may serve to concentrate diffuse credit risks in a single entity, however, clearing systems should be subject to regulatory oversight in order to help ensure that proper risk management procedures are established and implemented and that the clearing system is properly structured.

By its terms, the Swap Exemption "does not extend to transactions that are subject to a clearing system where the credit risk of individual members of the system to each other in a

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[34] 58 Fed. Reg. at 5591.

transaction to which each is a counterparty is effectively eliminated and replaced by a system of mutualized risk of loss that binds members generally whether or not they are counterparties to the original transaction."[35] The CFTC has indicated, however, that a person seeking to establish a clearing system for swaps might apply for a further exemption from the CEA.[36]

The CFTC's concept release, in which it sought comment on proposed regulatory approaches to clearing systems,[37] as well as questions raised by the CFTC in the context of filings by entities proposing to clear certain products involving government securities,[38] have been construed by some market participants as implicit assertions of CFTC regulatory jurisdiction over OTC derivatives clearing. The Working Group notes that the CEA does not explicitly provide for direct oversight of clearing systems by the CFTC. Rather, CFTC regulation of clearing has developed in connection with the CFTC's oversight of futures exchanges associated with clearing systems. Because the CEA does not specifically provide a framework for the oversight of a clearing system for OTC derivatives, the introduction of clearing systems for OTC financial derivatives raises complex jurisdictional issues that should be resolved. Accordingly, the Working Group has concluded that Congressional action is necessary to establish appropriate policy guidance for the establishment and oversight of clearing systems for OTC derivatives (other than derivatives, such as OTC options on securities, that are themselves securities, for which a clearing regulatory structure already exists under Section 17A of the Securities Exchange Act of 1934).[39]

B. Recommendations

1. Enhancing Legal Certainty for Swaps

The members of the Working Group agree that there is no compelling evidence of problems involving bilateral swap agreements that would warrant regulation under the CEA;

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35 Id.

36 Id. at 5591 n.30.

37 63 Fed. Reg. at 26,122.

38 See Securities Exchange Act Release No. 39,623, 63 Fed. Reg. 7022 (Feb. 11, 1998); Securities Exchange Act Release No. 40,623, 63 Fed. Reg. 59,831 (Nov. 5, 1998).

39 15 U.S.C. § 78q-1.

accordingly, many types of swap agreements should be excluded from the CEA. The sophisticated counterparties that use OTC derivatives simply do not require the same protections under the CEA as those required by retail investors. In addition, most of the dealers in the swaps market are either affiliated with broker-dealers or FCMs that are regulated by the SEC or the CFTC or are financial institutions that are subject to supervision by bank regulatory agencies. Accordingly, the activities of most derivatives dealers are already subject to direct or indirect federal oversight. To ensure that the unregulated affiliates of broker-dealers and FCMs are subject to appropriate regulatory scrutiny, however, the Working Group reiterates the recommendation made in its report on hedge funds concerning enhanced risk assessments of these affiliates.[40]

Most OTC derivatives are not susceptible to manipulation. The vast majority of the contracts are settled in cash, based on a rate or price determined by a separate highly liquid market with a very large or virtually unlimited deliverable supply. Thus, for example, it is highly unlikely that interest rate swaps could be used to manipulate interest rates. Furthermore, prices established in OTC derivatives transactions do not serve a significant price discovery function.

Due to the characteristics of markets for non-financial commodities with finite supplies, however, the Working Group is unanimously recommending that the exclusion not be extended to agreements involving such commodities. For example, in the case of agricultural commodities, production is seasonal and volatile, and the underlying commodity is perishable, factors that make the markets for these products susceptible to supply and pricing distortions and to manipulation. There have also been several well-known efforts to manipulate the prices of certain metals by attempting to corner the cash or futures markets. Moreover, the cash market for many non-financial commodities is dependent on the futures market for price discovery. The CFTC should, however, retain its current authority to grant exemptions for derivatives involving

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[40] President's Working Group on Financial Markets, Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management 38-40 (Apr. 1999). As was the case in the report on hedge funds, Chairman Greenspan of the Federal Reserve declines to endorse the recommendation for expanding risk assessment for the unregulated affiliates of broker-dealers and FCMs, but, in this instance, defers to the judgment of those with supervisory responsibility.

non-financial commodities, as it did in 1993 for energy products, where exemptions are in the public interest and otherwise consistent with the CEA.[41]

Accordingly, the Working Group unanimously makes the following recommendations:

- Bilateral swap agreements (including those that reference non-exempt securities) entered into by eligible swap participants, on a principal-to-principal basis, should be excluded from the CEA, provided that the transactions are not conducted on an MTEF (defined in a manner generally consistent with the CFTC's discussion of the term in its adoption of the Swap Exemption). Certain types of electronic trading systems described below should, however, also be excluded from the CEA.
- Because the material economic terms of many swap agreements are similar, the requirement in the current Swap Exemption that swap agreements not be standardized as to their material economic terms should be eliminated. Moreover, as discussed below, the Working Group is recommending that clearing of swap agreements be permitted, subject to appropriate regulatory oversight of the clearing function. Accordingly, insofar as transactions are subject to regulated clearing, the exclusion should not prohibit fungibility of contracts or require that creditworthiness be a material consideration.
- The exclusion should not extend to any swap agreement that involves a non-financial commodity with a finite supply.[42]
- The exclusion should only cover swaps between eligible swaps participants (defined in a manner similar to the definition in the current Swap Exemption). Thus, the exclusion should only be available for regulated financial institutions, business enterprises that meet certain tests relating to total assets or net worth, certain pension funds, state and local governments, and individuals with significant assets. Consideration should be given to further restricting the extent to which individuals qualify for the exclusion by not making it available to natural

[41] In addition, nothing in this report should be construed to affect the scope of exemptions that are currently in effect.

[42] The CFTC would retain its current exemptive authority for these derivatives.

persons who own and invest on a discretionary basis less than $25 million in investments.

- The CEA should be amended to clarify that a party to a transaction may not avoid performance of its obligations under, or recover losses incurred on, a transaction based solely on the failure of that party (or its counterparty) to comply with the terms of an exclusion or exemption under the CEA.
- To the extent that OTC derivatives transactions between eligible swap participants are excluded from the CEA, they should also be excluded from the coverage of certain state laws (such as laws designed to regulate gambling or bucket shops) that might be construed to prohibit or inappropriately regulate such transactions.

2. Electronic Trading Systems

The Working Group members agree that the introduction of electronic trading systems for OTC derivatives has the potential to promote efficiency and transparency, and, by enhancing liquidity and enabling firms that participate in the systems to impose more reliable internal controls on their traders, to reduce risks. Furthermore, there is not at this time a demonstrable need for regulation of systems with the characteristics described below. The method by which a transaction is executed has no obvious bearing on the need for regulation in markets, such as the markets for financial derivatives, that are not used for price discovery. Moreover, electronic trading systems for OTC derivatives have only just begun to emerge on a widespread basis, and such systems should be allowed to grow, unburdened by a new anticipatory statutory structure that could prove entirely inappropriate to their eventual evolution.

The Working Group has concluded, however, that a broad exclusion from the CEA should be available only for systems in which eligible swap participants trade for their own account. This limitation would provide added assurance of the sophistication of parties eligible to transact on the system (all of whom must, of course, also be eligible swap participants), because systems subject to this limitation would tend to be used only by dealers or regular participants in the market. The absence of agency transactions would also inhibit potential market abuses such as front-running that might otherwise arise.

Accordingly, the Working Group unanimously recommends that Congress amend the CEA to clarify that entering into or trading excluded swap agreements (i.e., agreements between eligible swap participants that do not involve non-financial commodities with finite supplies) through electronic trading systems with certain characteristics does not affect the status of the agreements traded through the system and does not provide a basis for regulation of the system.[43]

- Excluded electronic trading systems should include systems that are clearly not covered by the definition of MTEF in the current Swap Exemption. For example, electronic systems that assist eligible swap participants in communicating about or negotiating a bilateral agreement should be permitted.
- In addition, excluded electronic trading systems should include any form of electronic trading system (including one in which bids and offers are open to all participants), provided that participants in the system must act solely for their own account.
- Exchanges that have been designated as contract markets by the CFTC should be permitted to establish these types of excluded trading systems for qualified swaps.

The Working Group notes that its recommendation to exclude certain trading systems from the CEA should not be viewed as a determination that regulation of these systems may never be appropriate. Limited regulation aimed at enhancing market transparency and price discovery may become necessary under certain circumstances as electronic trading systems for OTC derivatives develop and grow, if problems of the sort that are appropriately addressed by regulation emerge. If so, depending on the specific market, existing regulation, and the problems that regulation would be meant to address, the CFTC's expertise in exchange-traded derivatives could make it an appropriate choice to serve as regulator. At this time, however, it is better to encourage the development of these systems by providing greater legal certainty than to attempt to anticipate an appropriate regulatory scheme for market innovations that are still in the initial stages of development and implementation.

3. Clearing Systems

Clearing of OTC derivatives has the potential to reduce counterparty risks associated with such transactions through risk management techniques that may include mutualizing risks,

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[43] The CFTC would, however, retain authority to exempt any system that does not qualify for the statutory exclusion.

facilitating offset, and netting. Clearing, however, tends to concentrate risks and certain responsibilities for risk management in a central counterparty or clearinghouse. Consequently, the effectiveness of the clearinghouse's operations and risk management systems is critical for the stability of the markets that it serves. For this reason, the Working Group unanimously recommends that Congress enact legislation to provide a clear basis for the regulation of clearing systems that may develop for OTC derivatives.

In this context, a clearing system would be defined as a system in which the obligations of counterparties to a transaction may be replaced by obligations of a central counterparty or by obligations of other participants in the system, including participants that were not the original counterparties to the transaction. Legislative action would have the beneficial effects of encouraging the development of such systems by clarifying their legal status, subjecting them to appropriate supervision, and ensuring that U.S. firms and markets are not at a competitive disadvantage relative to their foreign counterparties.

The Working Group believes that a comprehensive regulatory framework should contain provisions:

- to authorize clearing organizations that clear futures, commodity options, and options on futures also to clear OTC derivatives (other than OTC derivatives that are securities, such as securities options), subject to the oversight of the CFTC;
- to authorize securities clearing agencies (which are subject to the oversight of the SEC) also to clear OTC derivatives (other than instruments involving a non-financial commodity with a finite supply);
- to authorize the CFTC to develop rules for the establishment and regulation of clearing systems for OTC derivatives involving a non-financial commodity with a finite supply (to the extent that they are exempted by the CFTC in a manner that allows clearing);
- to require all other clearing systems for OTC derivatives to organize as a bank, bank subsidiary or affiliate, or Edge Act corporation that would be subject to the supervisory jurisdiction of the Federal Reserve or the Office of the Comptroller of the Currency;

- to establish that a clearing system subject to regulation by one agency would not become subject to regulation by another agency as a result of clearing OTC derivatives;
- to establish explicitly that clearing systems are not, and do not by themselves imply the presence of, MTEFs, and that an electronic trading system that is excluded from the CEA does not become subject to the CEA because transactions entered into through the trading system are also cleared; and
- to allow clearing through foreign clearing systems that are supervised by a foreign financial regulator that the appropriate U.S. regulator has determined satisfies appropriate standards.

4. Exchange-Traded Derivatives Markets

The Working Group's recommendations with respect to electronic trading and clearing for OTC derivatives and the recommended clarification of the Treasury Amendment discussed below are intended to remove legal obstacles to innovations that have the potential to increase efficiency, transparency, liquidity, and competition and to reduce systemic risk. Some market participants have argued, however, that U.S. futures exchanges are at a competitive disadvantage to OTC derivatives markets as the result of CEA regulation, and that the introduction of electronic trading and clearing for derivatives outside of the CEA has the potential to exacerbate the perceived imbalance.

The Working Group acknowledges that the enactment of its proposal for a swap exclusion that does not bar agreements that are fungible and standardized — a necessary corollary of permitting efficient electronic execution and clearing — would blur some of the distinctions between futures and swaps. Therefore, the recommended exclusion would create differences in the level of regulation between OTC derivatives that are electronically traded and cleared and products offered by futures exchanges that may have some similar characteristics. The difference would be mitigated to some extent if the Working Group's recommendations are adopted, because futures exchanges could establish electronic trading systems and clearing systems under the same conditions as their competitors. Floor-traded futures contracts with some economic characteristics similar to the derivatives for which electronic trading systems might develop would, however, face different levels or different forms of regulation.

Where regulation exists, it should serve valid public policy goals. The justifications generally cited for regulation of the futures markets include the goals of protecting retail customers from unfair practices, protecting the price discovery function, and guarding against manipulation. With similar policy goals in mind, the Working Group has recommended limiting the proposed exclusion for swap agreements to eligible swap participants trading for their own account, and, as discussed below, is also recommending that the CFTC be provided with clear authority to regulate transactions in foreign currency between retail customers and entities other than banks, broker-dealers, and their affiliates.[44] It has also recommended limiting proposed exclusions to markets that are not readily susceptible to manipulation and that do not currently serve a significant price discovery function.

To the extent that particular exchange-traded futures markets are accessible to retail customers, serve a price discovery function, or may be susceptible to manipulation, some regulation of these markets may be warranted. To the extent that these factors are less relevant to certain futures markets, regulatory adjustments may be necessary. Accordingly, existing regulatory structures (particularly those applicable to markets for financial futures) should be reviewed to determine whether they are appropriately tailored to serve valid regulatory goals. Exchange trading should not be subject to regulations that do not have a public policy justification. Although specific recommendations about the regulatory structure applicable to exchange-traded futures are beyond the scope of this report, the CFTC is currently examining the CEA to determine the extent to which modifications of the status quo are necessary.

Although the CEA gives the CFTC broad authority to grant exemptive relief if it determines it is in the public interest, the CFTC notes that the Conference Report for the FTPA specifically stated that "[t]he goal of providing the Commission with broad exemptive authority is not to prompt a wide-scale deregulation of markets falling within the ambit of the [CEA]."[45] Accordingly, the CFTC believes that further Congressional direction is necessary. In deference to the CFTC's views, the Working Group as a whole believes that the enactment of its recommendations with respect to OTC derivatives should be accompanied by explicit authority

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[44] Transactions in government securities that are excluded from the CEA by the Treasury Amendment are already subject to regulation under the Government Securities Act.

[45] H.R. Rep. 102-978, 102d Cong., 2d Sess. 81 (1992).

for the CFTC to provide appropriate regulatory relief for exchange-traded financial futures if deemed by the CFTC to be consistent with the public interest.[46]

[46] Such authority should not, however, permit the CFTC to provide exemptive or other regulatory relief from the requirements of the Shad-Johnson Accord. See supra note 16 and accompanying text and infra part VIII.A.

V. The Treasury Amendment

A. Background

Treasury proposed the Treasury Amendment in 1974 because of a concern that the very broad definition of the term "commodity" in the Commodity Futures Trading Commission Act would subject the OTC markets for government securities and foreign currency to regulation under the CEA. In the absence of the Treasury Amendment (or another applicable exemption or exclusion), any futures contract involving foreign currency or government securities would be illegal unless traded on a contract market approved by the CFTC.

There are several rationales for this exclusion from the CEA. These markets serve important macroeconomic functions that are best served by minimal regulation. The main participants in the foreign currency markets are largely sophisticated institutions, such as commercial and investment banks, central banks, foreign exchange dealers, corporations, and pension and mutual funds, that are well-informed and do not need protection. The market is highly efficient and has served the needs of the international business community well. Similarly, the government securities market is one of the most efficient markets in the world and has served the Treasury and the taxpayers well. Moreover, since 1986, government securities have been regulated under the Government Securities Act, and government securities transactions are subject to the anti-fraud and anti-manipulation provisions of the federal securities laws.

Unfortunately, the language of the Treasury Amendment, while helpful, has continued to provoke debate and litigation concerning the breadth of the exclusion it provides from the CEA. Prior to 1997, there was a disagreement as to whether foreign currency options were "transactions in" foreign currency that were excluded from the CEA. In 1997, the Supreme Court clarified that the phrase "transactions in" as used in the Treasury Amendment includes options.[47]

There has also been legal uncertainty associated with the so-called "unless" clause of the Treasury Amendment, which provides that the CEA exclusion for transactions in government securities, foreign currency, and the other listed instruments is available "unless such transactions involve the sale thereof for future delivery conducted on a board of trade." The

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[47] Dunn v. CFTC, 519 U.S. 465 (1997).

CEA broadly defines “board of trade” to mean “any exchange or association of persons who are engaged in the business of buying or selling any commodity.”[48] Treasury has argued that an overly expansive application of this definition would nullify the Treasury Amendment. Because a court will generally not interpret a statutory provision in a manner that renders it meaningless, Treasury has argued that the term, as used in the Treasury Amendment, should be viewed solely as a means of preserving the CFTC’s authority to regulate transactions that occur on organized futures exchanges.

The CFTC, however, has expressed concerns that the Treasury Amendment may be construed to limit its authority to take enforcement action against bucket shops that enter into fraudulent foreign currency transactions with members of the general public. In several enforcement actions it has taken the position that the Treasury Amendment should be interpreted in light of its legislative history, which focused on the need to shelter institutional OTC markets from regulation under the CEA. Thus, the CFTC has held that an “association of persons” entering into transactions with the general public is a board of trade.[49]

The case law on the subject is inconclusive. The only Court of Appeals that has addressed this question reached a decision that is generally consistent with Treasury’s interpretation.[50] Similarly, one judge of the District Court for the Southern District of New York has interpreted “board of trade” to mean “organized futures exchange” in a case involving transactions between a wealthy individual and an investment bank, but another judge on the same court has adopted a more expansive interpretation of the term board of trade in a case involving a retail bucket shop.[51]

From a policy perspective, these conflicting interpretations of the Treasury Amendment create a “Catch-22” situation. On the one hand, because the text of the Treasury Amendment makes no specific reference to the institutional market, there is a risk that a broad interpretation of “board of trade” in a case involving a bucket shop could later be applied to invalidate

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48 7 U.S.C. § 1a.

49 See, e.g., In re: Global Link Miami Corp., CFTC Docket No. 98-1 (May 24, 1999).

50 CFTC v. Frankwell Bullion Ltd., 99 F.3d 299 (9th Cir. 1996).

51 Compare Kwiatkowski v. Bear Stearns Co., 1997 U.S. Dist. LEXIS 13,078 (Aug. 28, 1997) with Rosner v. Korbean International Investment Corp., 1998 U.S. Dist. LEXIS 7353 (May 18, 1998).

legitimate transactions in the institutional OTC market. On the other hand, construing the term to preserve only the CFTC's authority over organized futures exchanges that trade instruments covered by the Treasury Amendment impairs the CFTC's ability to take enforcement action in cases involving retail fraud.

Uncertainty has also been expressed with respect to screen-based electronic trading systems and clearing systems for Treasury Amendment instruments. Market participants have expressed the concern that the development of such entities may be hampered by the possibility that they would be considered "boards of trade."

B. Recommendations

The Working Group members unanimously recommend that the Treasury Amendment be clarified by replacing the term "board of trade" in the Treasury Amendment with the term "organized exchange." The definition of the new term would preserve the CFTC's authority to regulate transactions in Treasury Amendment instruments[52] to the extent that such transactions occur on an exchange that is open to retail or agency transactions and that serves a self-regulatory function with respect to its members or participants (or enters into arrangements with another entity to serve such a function on its behalf). Except as discussed below with respect to certain retail foreign currency transactions, however, the provision would exclude the rest of the markets for Treasury Amendment instruments from the CEA. Accordingly, the scope of electronic trading permitted outside of the CEA would be broader for Treasury Amendment instruments than for other financial instruments.[53] As would be the case for excluded swaps, regulated clearing of Treasury Amendment products would be allowed without affecting the exclusion from the CEA.

To address the problems associated with foreign currency bucket shops, however, the Working Group also unanimously recommends that the CEA be amended to provide that transactions in foreign currency futures and options are subject to the CEA if they are entered

[52] Treasury Amendment instruments that are securities or options on foreign currency that trade on a securities exchange would continue to be subject to the jurisdiction of the SEC.

[53] Thus, for example, an electronic trading system for Treasury Amendment products that allows the execution of transactions through agents would be excluded from the CEA as long as it did not also serve (or arrange for another entity to serve) a self-regulatory function. It should be noted, however, that transactions in government securities occurring outside of the CEA are subject to the Government Securities Act.

into between a retail customer and an entity that is neither regulated or supervised by the SEC or a federal banking regulator nor affiliated with such a regulated or supervised entity.[54]

[54] As discussed supra at note 40 and accompanying text, the Working Group is recommending enhanced oversight of the currently unregulated affiliates of broker-dealers.

VI. Hybrid Instruments

A. Background

The CFTC's Hybrid Instrument Rule exempts securities and bank deposits that have some of the characteristics of commodity futures or options from all of the provisions of the CEA except the Shad-Johnson Accord.[55] Under the exemption, the value of that portion of a hybrid instrument that derives its value from aspects of the instrument that are not related to the value of commodities must be equal to or greater than the value (as determined by a calculation methodology specified in the exemption) of the aspects that are commodity-related. In addition, the hybrid instrument must be subject to securities or banking laws and sold to persons eligible to purchase the instrument under such laws, and must satisfy certain criteria regarding marketing, payment terms, and settlement. In adopting the Hybrid Instrument Rule, the CFTC did not assert that it retained anti-fraud or anti-manipulation jurisdiction over instruments that are within the scope of the exemption.

Market participants have generally been satisfied that the exemption provides a sufficient measure of legal certainty to the markets for the covered instruments. As in the case of swaps, however, there is legal uncertainty associated with hybrid instruments that reference non-exempt securities. If a court determined that such instruments were subject to the Shad-Johnson Accord's prohibition on single-stock futures, the Hybrid Instrument Rule would not apply to them, because the CFTC lacks authority to provide an exemption from the provisions of the Shad-Johnson Accord.[56]

Last year, the CFTC's concept release sought comment on whether the Hybrid Instrument Rule should be amended to expand the CFTC's jurisdiction over exempted instruments. Since hybrid instruments are securities or bank products, this raised questions about whether a broader assertion of authority by the CFTC would lead to jurisdictional disputes and increased legal uncertainty. If a hybrid instrument were legally determined to be a futures contract or a commodity option, the exclusive jurisdiction clause could imply that only the CFTC could regulate the instrument, even if it is a security or a bank product. Conversely, if an

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[55] 17 C.F.R. pt. 34.

[56] The Hybrid Instrument Rule has also been criticized by some because of its complexity.

instrument is not a futures contract or a commodity option, an assertion of jurisdiction by the CFTC could lack a legal foundation.

B. Recommendations

Hybrid instruments are either securities or bank products, and are regulated as such. Nevertheless, there is not general agreement that all hybrid instruments should be entirely excluded from the CEA. Moreover, the Working Group does not believe that codification of the Hybrid Instrument Rule is necessary to enhance legal certainty. To enhance legal certainty for hybrid instruments that reference non-exempt securities, however, the Working Group unanimously recommends enactment of a provision to clarify that the Shad-Johnson Accord shall not be construed to apply to hybrid instruments that have been exempted from the CEA. In addition, as discussed below, a modification of the CEA's exclusive jurisdiction clause is necessary to ensure that questions do not arise as to the authority of the SEC and bank regulatory agencies with respect to hybrid instruments.

The CFTC believes that it may be possible to develop a new rule that provides greater legal certainty and addresses certain of the perceived weaknesses in the current rule but does not exclude all hybrid instruments from the CEA. In recognition of the interests of the SEC and the bank regulatory agencies in this area, however, the CFTC will not propose any new rule relating to hybrid instruments without the concurrence of the other members of the Working Group. The other Working Group members will work with the CFTC on developing the rule and will give serious consideration to any proposals that it may make.

VII. Exclusive Jurisdiction

A. Background

The CEA confers on the CFTC "exclusive jurisdiction" over commodity futures and options thereon, which means that these instruments cannot be regulated by any other federal or state agency (except in certain limited circumstances where the CEA explicitly contemplates shared authority between the CFTC and another agency). This provision of the CEA has generated legal uncertainty concerning the appropriate regulator and scheme of regulation for complex derivative instruments that possess attributes of securities and futures contracts. For example, in Chicago Mercantile Exchange v. SEC[57] the Seventh Circuit Court of Appeals held that "index participations," a type of instrument based on the value of a basket of securities, were both securities and futures contracts, but that the CFTC's exclusive jurisdiction over futures contracts precluded SEC action with respect to such instruments.[58]

B. Recommendations

The Working Group members agree that the exclusive jurisdiction clause of the CEA should be modified. Treasury, the Federal Reserve, and the SEC believe that the exclusive jurisdiction clause should apply only to transactions in futures contracts or options on futures contracts effected on designated contract markets, and that the clause should be clarified by providing that the CFTC's jurisdiction over such transactions is not exclusive in instances where the CEA or some other federal statute specifically grants another agency authority. At this time, the CFTC believes that it has not had sufficient opportunity to evaluate all of the possible ramifications of this proposal. The CFTC would, however, support an amendment to the CEA to provide that insofar as hybrid instruments may be subject to the CEA, the exclusive jurisdiction clause shall not be construed to limit the authority of the SEC and the bank regulatory agencies

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[57] 883 F.2d 537 (7th Cir. 1989), cert. denied sub nom. Investment Co. Inst. v. SEC, 496 U.S. 936 (1990).

[58] In two recent enforcement cases, the SEC has been challenged by defendants on jurisdictional grounds, and asked to brief the court on why the exclusive jurisdiction clause does not preclude the SEC from bringing an enforcement action in a case involving instruments that would purportedly be subject to the CEA in the absence of the Treasury Amendment. See SEC v. Bankers Alliance Corp., Civ. No. 95-0428 (PLF) (D.D.C.); SEC v. Unique Financial Concepts, Inc., No. 99-4033 (11th Cir.).

with respect to such instruments. Accordingly, the Working Group unanimously recommends that Congress adopt this clarification of the exclusive jurisdiction clause. In addition, the CFTC agrees that it will continue to work with the other Working Group agencies to develop its views on the merits of a broader modification of the exclusive jurisdiction clause.

VIII. Other Issues

A. Single-Stock Futures

The Working Group members agree that the current prohibition on single-stock futures can be repealed if issues about the integrity of the underlying securities market and regulatory arbitrage are resolved. Because a single-stock future is a contract to purchase or sell a security and functions as a very close substitute for the underlying security, it may be appropriate to regulate these instruments as securities. On the other hand, because it is likely that such instruments would trade on organized futures exchanges, it may also be necessary to tailor legislation and regulation so as to take account of institutional differences between the futures markets and the securities markets.

From the perspective of the securities laws, the issues raised by trading of single-stock futures include levels of margin, insider trading, sales practices, real-time trade reporting, and activities of floor brokers, as well as the exclusive jurisdiction of the CFTC over futures contract markets. From the perspective of the commodity futures laws, the issues raised by these instruments include clearing, segregation, large trader reporting, and direct surveillance.[59]

The SEC is the agency with expertise concerning regulation of securities and stock exchanges; the CFTC is the agency with expertise concerning the regulation of futures markets. Thus, the Working Group unanimously recommends that these agencies work together and with Congress to determine whether the trading of single-stock futures should be permitted and if so, under what conditions.

The Working Group also notes that the futures exchanges' ability to offer a greater variety of equity-related products has been advanced by a recent court decision that interprets the SEC's authority to review proposed securities index futures contracts under the Shad-Johnson Accord[60] and by the lack of SEC objection to a recent single-sector futures contract on the Internet Stock Price Index.[61]

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59 Treasury notes that questions as to the appropriate tax treatment of such instruments would also have to be addressed.

60 Board of Trade of the City of Chicago v. SEC, 1999 U.S. App. LEXIS 18469 (7th Cir. 1999).

61 See Letter from Robert L.D. Colby, Deputy Director, Division of Market Regulation, SEC, to Steven Manaster, Director, Division of Economic Analysis, CFTC (Mar. 12, 1999).

B. Regulatory and Tax Arbitrage

A criticism of OTC derivatives is that they can be used as a means to circumvent regulation. For example, institutional investors may be prohibited from investing in certain types of financial instruments but may be able to assume a nearly identical economic position by entering into a derivatives transaction. The Working Group is aware that the derivatives industry has been quite creative in tailoring particular products to achieve certain regulatory results that were not originally intended. As difficult as the task may be, the Working Group nonetheless believes that in most instances such "regulatory arbitrage" issues should be addressed by amending the underlying statutes and regulations that most closely pertain to the regulatory goal to be achieved, and should not be used as a basis for the imposition of an unwarranted regulatory regime on derivatives. For example, judgments about the authority of pension funds or state and local governments to enter into certain derivatives transactions should be made through the laws that directly govern such entities.

Derivatives can also be used to achieve certain tax results that differ from those resulting from investments in the underlying commodity or instrument. For example, derivatives have been used in ways that arguably change the character, source, or timing of income. Treasury is particularly concerned about these issues and has been addressing them through changes in regulation and by proposing legislative changes. For example, the assumption of a derivatives position that eliminates substantially all of the economic risk of an investment asset held by the taxpayer is now viewed as a constructive sale and is thus a taxable event. Again, as in the area of regulation, the creativity of the derivatives industry in this area has given rise to many issues of concern to Treasury and the Internal Revenue Service. Tax creativity in the structuring of transactions, however, is not new, and the Working Group believes that these issues need to be addressed under the Internal Revenue Code and regulations.

C. Netting

The Working Group reiterates its strong support for the improvements in the close-out netting regime for derivatives and other financial instruments under the Bankruptcy Code and bank insolvency law recommended in its April 1999 report, Hedge funds, Leverage, and the Lessons of Long-Term Capital Management. As discussed in that report, there are improvements currently under consideration by Congress that would, if adopted, reduce systemic risk. Specifically, these proposals would improve the netting regime under the Bankruptcy Code by expanding and clarifying definitions of the financial contracts eligible for netting and by explicitly allowing eligible counterparties to net across different types of contracts, such as swaps, security contracts, repurchase agreements, and forward contracts. They would also clarify bankruptcy procedures for an entity organized in a foreign jurisdiction that has its principal business in the United States and would help to ensure that in a U.S. ancillary proceeding there would not be an issuance of a judicial stay preventing an eligible counterparty from exercising contractual termination, netting, and liquidation rights recognized under U.S. law. Finally, the netting provisions would clarify the netting regime for certain financial contracts in the case of a bank failure. The Working Group believes that these proposals should be enacted into law.

D. Derivatives Dealers

Derivatives dealers are entities whose business consists primarily of entering into derivative contracts with end users and other dealers. Derivatives dealers may also use OTC derivative instruments to hedge their own financial risks, including risks incurred to obtain desirable financing terms, and to speculate on market movements. Most OTC derivatives dealers in the U.S. are banks or affiliates of banks, or affiliates of broker-dealers or FCMs. Banks and their affiliates are subject to consolidated supervision by banking regulators, but the affiliates of broker-dealers and FCMs are generally unregulated, although the SEC and the CFTC have limited authority to obtain information about the activities of such affiliates, and the SEC has instituted a special regulatory scheme for derivatives dealers that conduct a limited securities business. A small number of U.S. derivatives dealers are affiliated with entities that are not subject to banking or securities regulation, such as insurance companies, finance companies, and energy companies.

With respect to OTC derivatives dealers, private counterparty discipline currently is the primary mechanism relied upon for achieving the public policy objective of reducing systemic risk. Government regulation should serve to supplement, rather than substitute for, private market discipline. In general, private counterparty credit risk management has been employed effectively by both regulated and unregulated dealers of OTC derivatives, and the tools required by federal regulators already exist. In its report on Hedge Funds, Leverage, and the Lessons of

Long-Term Capital Management, however, the Working Group concluded that limitations on the access of the SEC, the CFTC, and Treasury to information about the activities of the unregulated affiliates of broker-dealers and FCMs constituted a gap in the system of financial market oversight that should be filled by providing the relevant agencies with enhanced authority to obtain additional risk assessment information. Because of the importance of these affiliates in the OTC derivatives market, the Working Group reiterates this recommendation.[62]

By contrast, the activities of derivatives dealers that are not affiliated with banks, broker-dealers, or FCMs constitute a small share of the overall market, although the extent of their participation in certain markets, such as the market for energy derivatives, is quite significant.[63] In light of their small market share and the apparent effectiveness of private counterparty discipline in constraining the risk-taking of such derivatives dealers, the Working Group is not recommending legislative action with respect to such derivatives dealers at this time, but believes that continued monitoring of their activity is appropriate.

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[62] But see supra note 40.

[63] Unaffiliated OTC derivatives dealers are active primarily in the markets for derivatives on non-financial commodities, which account for only a fraction of a percent of derivatives activity. See supra note 7 and accompanying text. Moreover, in 1998, the top 25 derivatives dealers worldwide were banks, securities firms, or affiliates thereof. Swaps Monitor, vol. 12, no. 19 (Aug. 2, 1999).

Exhibit J

Commodity Futures Trading Commission
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Testimony

"Review of Credit Derivatives"

Oral Testimony of CFTC Acting Chairman Walter Lukken Before the House Committee on Agriculture

October 15, 2008

Good morning Chairman Peterson, Ranking Member Goodlatte, and other distinguished Members of the Committee and thank you for the invitation to be here today to discuss credit default swaps.

The current financial crisis is requiring policymakers to rethink the existing approach to market regulation and oversight. Many observers have singled out the $58 trillion dollar credit default swap (CDS) market as needing greater scrutiny and transparency. These over-the-counter (OTC) swap transactions are largely unregulated and have exacerbated the counterparty and systemic risk in the financial system during this crisis. The most common credit derivative—the credit default swap contract—works by a "protection buyer" agreeing to pay a premium to a "protection seller" for the obligation that the seller will pay the buyer a specified amount in the event of a default of a corporation or index of corporations. It functions similar to insurance and was intended to be used as a hedge by those with exposure to the issued debt of an underlying corporation. As we have read, however, many participants in these markets were "naked" and did not have exposure to the underlying debt obligation of the companies.

With respect to the CFTC, the Commodity Exchange Act (CEA) excludes most OTC financial derivatives, including CDS, from its regulatory and enforcement jurisdiction. But if we are to avoid repeating the mistakes of the past, we must strive to increase the transparency of these transactions and find ways to mitigate the systemic risk created by firms that offer and hold these off-exchange instruments. While wholesale regulatory reform will require careful consideration, centralized clearing is one immediate and proven response that will help mitigate the current crisis.

Clearinghouses have been functioning for many years as a means for mitigating the risks associated with exchange-traded financial products. Whether securities, options, or futures, centralized clearinghouses ensure that every buyer has a guaranteed seller and every seller has a guaranteed buyer, thus minimizing the risk that one counterparty's default will cause a systemic ripple through the markets. The clearinghouse is able to take on this role because it is backed by the collective funds of its clearing members.

This clearing guarantee goes to the root of the problems we are confronting today – the constriction of credit due to fear of default. Indeed, for futures contracts—the standardized on-exchange predecessor of OTC derivatives—clearing has worked extraordinarily well in managing credit risk. For regulated futures exchanges, the clearing and settlement mechanism serves to lessen the likelihood that large losses by a trader will cause a contagion event. At least twice daily, futures clearinghouses collect payments from traders with losing positions and credit traders with profitable positions. This twice-daily "mark-to-market" prevents the buildup of significant losses and effectively wipes clean the credit risk inherent in the system. Importantly, no U.S. futures clearinghouse has ever defaulted on its guarantee.

Just as significant, the clearing process provides transparency to regulators. When transactions are cleared, government and exchange regulators receive daily trader and pricing information, which helps them to police for manipulation and fraud and to uphold the integrity of the market.

Clearing has been proven to work for OTC derivatives. After Enron's demise in 2001, the OTC energy derivatives markets "locked up" because many energy companies lacked the requisite financial standing to back their off-exchange trades. In response, the New York Mercantile Exchange (NYMEX) sought and received approval from the CFTC in 2002 to clear OTC energy products for the first time. Today, a significant number of OTC energy derivatives are cleared through regulated clearinghouses, which has reduced systemic risk and allowed regulators a greater window into this marketplace. Clearing for OTC products now extends beyond energy products to financial products such as forward rate agreements and foreign currency swaps.

Under existing law, any derivatives clearing organization (DCO) that is registered with the CFTC may clear OTC derivatives without further registration or subjecting itself to any additional regulatory requirements. Pursuant to the CEA, the CFTC regulates DCOs and has the statutory mandate to ensure the financial integrity of transactions subject to the CEA and to safeguard against systemic risk. The CFTC relies on the 14 core principles for DCOs set forth by Congress in the CEA as a means of evaluating whether DCOs comply with U.S. law.

In analyzing compliance with these principles, the CFTC looks to the controls and tools utilized by a clearinghouse, including: (1) appropriate membership standards; (2) collection of position reports from large traders; (3) daily mark-to-market of all open positions; (4) collection of an appropriate amount of performance bond margin, which serves to cover any losses; (5) periodic stress-testing of open positions for extraordinary market moves; (6) an ability to liquidate all of a market participant's open positions quickly; and (7) availability of other financial resources for use by the clearinghouse to cover any member default. Any clearinghouse seeking to clear CDS transactions will need to show in its proposal that it can bring such tools to bear.

The CFTC, in conjunction with other financial regulators, will continue to seek ways to provide clearing solutions for OTC derivatives. Last month, in its swaps report to Congress, the CFTC recommended the further use of clearing for OTC derivatives. There are several private sector clearing initiatives currently being considered by Federal regulators, and it is imperative that regulators work cooperatively and expeditiously to conduct their due diligence and allow appropriate programs to begin operations promptly. The CFTC will continue to closely coordinate with the Federal Reserve and SEC to further this important policy objective.

While the implementation of centralized clearing for OTC products is a near-term solution that does not require legislative changes, broader reform of the OTC derivatives markets is also needed and will require decisive Congressional action. As Congress embarks on reform in the coming months, there are several guiding objectives that should be pursued by legislators to improve the oversight of these markets and prevent a similar economic disturbance in the future.

First and foremost, regulatory reform should seek to improve the transparency of these OTC markets, particularly when their size reaches a critical mass where they play a public pricing role and their failure might cause a systemic event. Clearly the CDS market has met these criteria. Enhanced transparency through reporting or other means would enable regulators to properly police these markets for misconduct and the concentration of risk. In pursuing this objective, Congress might look to the model adopted in the Farm Bill for the OTC energy swaps market, which triggers additional oversight and transparency when a product begins to serve a significant price discovery function.

Second, regulatory reform should incentivize and possibly even mandate centralized clearing and settlement for certain OTC derivatives. As mentioned, clearing brings enhanced transparency, standardization, and risk management to these products at a time when it is most needed.

Third, regulatory reform should revisit the amount of risk-based capital held by dealer firms and large participants in these OTC markets to better account for the interdependent counterparty risk that now seems so evident and to prevent these products from being held off-balance sheet in unregulated affiliates. As clearing begins for these products and trading data improves, models for assessing risk will also progress as will the accuracy of the capital charges assigned to these firms.

Fourth, regulatory reform should provide for clear enforcement authority over these products to police against fraud and manipulation. The CFTC is currently excluded by statute from bringing enforcement cases against OTC financial derivatives. Congress should rectify this by providing clear enforcement powers regarding OTC products to the CFTC and other appropriate regulators, such as the SEC.

Lastly, regulatory reform of OTC products should be globally-coordinated and non-exclusionary. As this financial crisis has shown, the world's financial system is highly intertwined, leaving no country's banking system unscathed. We have also learned that one country's actions to stem the crisis cannot be effective without close cooperation among all nations. As this crisis begins to wane and we turn to pursue long-term adjustments to the global regulatory structure, world legislators must work in close concert with each other to ensure the steps taken by one nation to improve oversight are not exploited by others in the global financial community. This also means that domestic regulators should work in tandem and not engage in the unproductive exercise of defending jurisdictional lines at a time when a comprehensive and coordinated response by regulators is most needed. The entire regulatory community must continue to unite in seeking a sensible and comprehensive solution to the global financial crisis, which may require many of us to rethink our regulatory approaches and jurisdictional biases. The CFTC is committed to playing a constructive role in seeking a cooperative regulatory solution that improves the global regulatory structure for financial markets.

Mr. Chairman, I appreciate your leadership on this critical issue, and I look forward to participating fully in Congressional and regulatory efforts to implement policies and practices that best serve the public interest. I look forward to your questions.

Exhibit K

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Main Entry: **agree·ment**
Pronunciation: \ə-ˈgrē-mənt\
Function: *noun*
Date: 15th century

1 a : the act or fact of agreeing **b :** harmony of opinion, action, or character **:** CONCORD
2 a : an arrangement as to a course of action **b :** COMPACT , TREATY
3 a : a contract duly executed and legally binding **b :** the language or instrument embodying such a contract

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contract

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[2]contract (verb)
[3]contract (adjective)
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Main Entry: [1]**con·tract**
Pronunciation: \ˈkän-ˌtrakt\
Function: *noun*
Etymology: Middle English, from Anglo-French, from Latin *contractus*, from *contrahere* to draw together, make a contract, reduce in size, from *com-* + *trahere* to draw
Date: 14th century

1 a : a binding agreement between two or more persons or parties ; *especially* **:** one legally enforceable **b :** a business arrangement for the supply of goods or services at a fixed price <make parts on *contract*> **c :** the act of marriage or an agreement to marry
2 : a document describing the terms of a contract
3 : the final bid to win a specified number of tricks in bridge
4 : an order or arrangement for a hired assassin to kill someone <his enemies put out a *contract* on him>

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transaction

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Main Entry: **trans·ac·tion**
Pronunciation: \tran-ˈzak-shən, tran(t)-ˈsak-\
Function: *noun*
Date: 1632

1 a : something transacted ; *especially* **:** an exchange or transfer of goods, services, or funds <electronic *transactions*> **b** *plural* **:** the often published record of the meeting of a society or association
2 a : an act, process, or instance of transacting **b :** a communicative action or activity involving two parties or things that reciprocally affect or influence each other
— **trans·ac·tion·al** \-shnəl, -shə-nᵊl\ *adjective*

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Exhibit L

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
MAY 3 1 2005
MICHAEL N. MILBY, CLERK OF COURT

U.S. COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** v. **DENETTE JOHNSON, et. al.** **Defendants.**	)	**CIVIL ACTION NO. H-05-0332**

PLAINTIFF'S CONSOLIDATED RESPONSE TO DEFENDANTS' SEVERAL MOTIONS TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 9 AND 12 AND BRIEF IN SUPPORT

Dated: May 27, 2005

Respectfully Submitted,

Paul Hayeck, Associate Director
John Dunfee, Chief Trial Attorney
Joseph Konizeski, Senior Trial Attorney,
Attorney In Charge

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natural gas is not among those limited natural gas activities that fall outside the Commission's jurisdiction, and indeed, bears no relation to any activity in furtherance of the negotiation, performance or settlement of any contract, agreement or transaction. *See Valencia,* 2003 WL 23174749 at *10-11 (rejecting broad interpretation of Section 2(h)).

a. The Section 2(h) Exemption of Natural Gas Transactions Is Limited and Does Not Affect Conduct Proscribed By Section 9(a)(2)

As its title states, Section 2(h) of the CEA is intended to provide "[l]egal certainty for certain *transactions* in exempt commodities." 7 U.S.C. § 2(h) (emphasis supplied). These transactions are identified as contracts, agreements or transactions, which are (1) "entered into solely between persons that are eligible contract participants at the time the persons enter into the agreement, contract, or transaction," and (2) "not entered into on a trading facility" (unless entered into on an electronic trading facility meeting the requirements of Section 2(h)(5)). 7 U.S.C. §2(h)(1)(A) and (B); S*ee* 7 U.S.C. §2(h)(3)-(5). Section 2(h) does not exempt from the Act any other conduct involving natural gas, such as the conduct alleged here: false reporting and attempted manipulation. Nevertheless, defendants argue that because their reporting of natural gas information to the reporting firms was related to transactions in natural gas, an exempt commodity, their reporting conduct therefore is exempted from the Act under Section 2(h). See Joint Motion, Rec. Doc. 21 at p.15.

Natural gas is an "exempt commodity" as defined in Section 1a(14) of the CEA, 7 U.S.C. §1a(14). "The term 'exempt commodity' means a commodity that is not an excluded commodity[18] or an agricultural commodity." *Id.* That term[19] is used to differentiate among

[18] The term "excluded commodity," as defined in Section 1a(13) of the CEA, 7 U.S.C. 1a(13), generally includes financial commodities, indexes or contingencies.

[19] The term 'exempt commodity' was first introduced into the CEA as part of the Commodity Futures Modernization Act of 2000 ("CFMA"), which was signed into law on December 21, 2000.

1951) (affirming finding of a violation of Section 9 by an individual who delivered false information regarding the demand of a commodity, i.e., lard)(**Tab M**). Therefore, Defendants received fair and reasonable warning.

IV. CONCLUSION

For the reasons set forth above Plaintiff respectfully requests the Court to deny defendants Joint Motion to Dismiss (Rec. Doc. 21) as well as all individual defendants' motions to dismiss (Rec. Docs 18, 19, 20, 22, 23 and 24).

Dated: May 27, 2005

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exchanges, and for other purposes." P.L. 67-331, Ch.309. Section 4 of The Grain Futures Act prohibited transactions in futures contracts in grain except under specified circumstances. P.L.67-331, Ch.309, Sec.4. Section 9 of The Grain Futures Act, however, went further and proscribed all false reports concerning market information that affected or tended to affect the price of grain in interstate commerce:

> Any person who shall violate the provisions of Section 4 of this Act, or who shall fail to evidence any contract mentioned in said Section by a record in writing as therein required, or who shall knowingly or carelessly deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined no more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

Accordingly, Section 9(a)(2) provides fair and reasonable notice that it applies to any person engaged in reporting or manipulative conduct involving a commodity in interstate commerce.

Exhibit M

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES COMMODITY FUTURES TRADING COMMISSION,	)	
Plaintiff,	)	Plaintiff's Opposition to Defendants' Joint Motion to Dismiss Plaintiff's Complaint
v.	)	Civil Action No.: 1:05-cv-0293-JOF
PAUL ATHA, CHRISTOPHER McDONALD, and MICHAEL WHALEN,	)	
Defendants.	)	

The Commodity Futures Trading Commission ("Commission") opposes defendants' Joint Motion to Dismiss ("Defendants' Motion") and states as follows:

I. STATEMENT OF THE CASE

As employees of energy companies in the business of buying and selling natural gas for profit, defendants traded natural gas and reported natural gas transaction prices and volumes ("market information") to natural gas price indexes ("indexes"). The indexes were calculated using market information received from market participants such as defendants. Market participants used the indexes to settle and price index trades, to assess price risk, and for price discovery.

Section 9(a)(2) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 13(a)(2) (2002) ("Section 9(a)(2)"), prohibits:

exempt commodities, Section 9(a)(2) “addresses a broader range of conduct than simply commodity transactions.” *Id.* at *35.[11] Accordingly, defendants’ attempt to use Section 2(h) to limit the reach of Section 9(a)(2) is misplaced, is contrary to the plain language and purpose of the CEA, and ignores the well-reasoned *Valencia* decision.

3. Section 2(g) Does Not Affect This Courts Jurisdiction Over Defendants’ Section 9(a)(2) Violations

Defendants argue that Section 2(g) applies to the “conduct at issue in the Complaint” (Defs.’ Mot., p. 12) to defeat this Court’s jurisdiction. By its express terms, Section 2(g) only applies to an “agreement, contract, or transaction in a commodity. . . .” Contrary to defendants’ argument, section 2(g) does not state that “all activities related to an excluded transaction (i.e. reporting natural gas transactions and attempting to manipulate the price of natural gas) are excluded.”

The application of Section 2(g) is limited (as is the application of the 1993 Exemption and Section 2(h)) and does not exclude from this Court’s jurisdiction any conduct outside the negotiation, performance, or settlement of an agreement, contract, or transaction. As such, Section 2(g) does not defeat jurisdiction in this case. *See Valencia*, 2003 U.S. Dist LEXIS 15264 at *35.

[11] As the *Valencia* court recognized, the Commission’s interpretation of Sections 2(h) and 9(a)(2) is consistent with prior pronouncements by Congress that the express purpose of the CEA is prevention of disruptions to market integrity. *See* the statement of “Findings and Purpose,” Section 3(b) of the CEA, 7 U.S.C. § 5(b) (“[i]t is further the purpose of this Act to deter and prevent price manipulation or any other disruptions to market integrity).

Respectfully Submitted,

UNITED STATES COMMODITY FUTURES TRADING COMMISSION

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CERTIFICATION

I hereby certify that this brief has been prepared with Times New Roman font, 14 point, a font and point size approved by the Court in LR 5.1C.

/s/ Laura Bonander
____

Exhibit N

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

U.S. COMMODITY FUTURES TRADING COMMISSION,	)	
Plaintiff,	)	
v.	)	**Case No. 05-CV-62-JHP-FHM**
JEFFREY A. BRADLEY and ROBERT L. MARTIN,	)	
Defendants.	)	

PLAINTIFF COMMODITY FUTURES TRADING COMMISSION'S
OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Respectfully submitted,

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Of Counsel

May 25, 2005

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Accordingly, accepting all of these factual allegations as true, and drawing all reasonable inferences from them in favor of the Commission, the Complaint amply states false reporting and attempted manipulation claims against Martin, as well as Bradley.

B. Defendants' Acts of False Reporting and Attempted Manipulation Fall Within the Scope of Section 9(a)(2) of the Act and Are Not Excluded or Exempted Under Sections 2(g) or 2(h) of the Act

Defendants' false reporting and attempted manipulation fall firmly with the scope of the CEA, under Section 9(a)(2). Notwithstanding Defendants' suggestions to the contrary, their conduct is not carved out from coverage under the CEA by Sections 2(g) or 2(h). Indeed, to support their overbroad interpretation of Sections 2(g) and 2(h), Defendants misread the plain language of those provisions. Bradley and Martin argue that Sections 2(g) and 2(h) exclude or exempt from the Commission's regulation all activities and conduct relating to natural gas. *See* JB Br. at 7-10 and n.4; RM Br. at 10-12 and n.6. This view is incorrect. Rather, both sections, by their express language, remove from the CEA's ambit only specific and limited agreements contracts, and transactions between certain market participants. False reporting of market information concerning natural gas does not constitute an agreement, contract or transaction, and therefore does not fall within the limited exclusions or exemptions of Sections 2(g) and 2(h).

Section 2(g) provides a limited exclusion from certain provisions of the CEA for "any agreement, contract, or transaction" in a non-agricultural commodity which is: (1) "entered into solely between persons that are eligible contract participants at the time the persons enter into the agreement, contract, or transaction;" (2) "subject to individual negotiation by the parties;" and (3) "not entered into on a trading facility." 7 U.S.C. §2(g)(1)-(3). Section 2(h) likewise provides that "nothing in this Act shall apply to a contract**,** agreement or transaction in an exempt commodity . . ." 7 U.S.C. §2(h)(1). Natural gas is an "exempt commodity" as defined in Section

1a(14) of the CEA, 7 U.S.C. §1a(14). The term "exempt commodity" refers to commodities that are not agricultural commodities or "excluded commodities" (*i.e.*, financial commodities, indexes or contingencies). *See* 7 U.S.C. §1a(13).[7]

Neither Section references any *other conduct* involving natural gas that is otherwise removed from regulation by the Commission under the CEA. Nevertheless, Defendants argue that because their reporting of natural gas information to the reporting firms related to transactions in natural gas, a non-agricultural exempt commodity, Sections 2(g) and 2(h) remove such conduct from the Commission's purview under the Act. *See* JB Br. at 7-10; RM Br. at 11-12.

Defendants' over-inclusive reading of these provisions ignores the plain limitations in the language of both. Section 2(g), titled "excluded swap transactions," states that "no provision of this chapter [other than a few provisions not relevant here] shall apply to or govern any **agreement**, **contract**, or **transaction** in" a non-agricultural commodity. 7 U.S.C. § 2(g) (emphasis added). As noted above, Section 2(h) includes nearly identical limiting language applicable to exempt commodities.[8]

These provisions do not state that, "nothing in this Act shall apply to excluded or exempt commodities." Nor do they state that "nothing in this Act shall apply to any activity related to excluded or exempt commodities." The distinction is important. Each of the terms highlighted above, as commonly defined and understood, embodies a mutual exchange between parties

[7] Before the court reaches the scope of Sections 2(g) and 2(h), Defendants, not the Commission, must affirmatively show that they meet the requirements of the 2(h) exemption and the 2(g) exclusion. *See FTC v. Morton Salt*, 334 U.S. 37, 44-45 (1948)(noting that the burden of proving entitlement to a statutory exemption rests on the one who claims its benefits). Defendants have not done so here.

[8] As with Section 2(g), the title of Section 2(h) – "Legal Certainty for Certain Transactions in Exempt Commodities" – reinforces its limited scope.

resulting in an alteration of the parties' relative rights and duties. *See*, *e.g.*, BLACK'S LAW DICTIONARY (8th Ed. 2004) (contract is defined as "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law;" agreement is defined as "a manifestation of mutual assent between two or more persons."); MERRIAM-WEBSTER DICTIONARY (1994) (transaction is defined as an "activity involving two parties or things that reciprocally affect or influence each other."). Defendants' reporting activities do not fall within the definitions of a contract, transaction or agreement and, thus are not subject to Sections 2(g) and 2(h).

The district court in *Valencia* rejected the overbroad interpretation of Section 2(h) espoused by Defendants here. Indicted under Section 9(a)(2), Valencia, a natural gas trader, argued that her conduct in reporting allegedly false information about natural gas trades to reporting firms did not violate Section 9(a)(2) because transactions involving natural gas are exempt from enforcement under Section 9(a)(2), except to the extent that the provision "prohibit[s] manipulation of the market price of any commodity in interstate commerce…" *Valencia*, 2003 WL 23174749 at *9. The district court disagreed, and held that "conduct proscribed by §9(a)(2)'s reporting prong is unaffected by §2(h)." *Id*. It reasoned that the "entire exemption" under Section 2(h) is confined in its application to "*contracts* in exempt commodities," *id*. at *11 (emphasis in original), and that "§9(a)(2) addresses a broader range of conduct than simply commodity transactions." *Id.* Although its holding addressed Section 2(h), the *Valencia* court's logic applies with equal force to Section 2(g), which is likewise applicable only to certain agreements, contracts or transactions.

The Commission's interpretation of Sections 2(g), 2(h) and 9(a)(2) is consistent with the express purpose of the CEA of preventing disruptions to market integrity. *See* statement of

"Findings and Purpose" of the CEA, Section 3(b), 7 U.S.C. §5(b) ("[i]t is further the purpose of this Act to deter and prevent price manipulation or any other disruptions to market integrity). As the *Valencia* court recognized, Section 2(h) speaks to particular types of conduct – namely contracts, agreements or transactions (the same is true of Section 2(g)). Section 9(a)(2), by contrast, reaches a broader range of conduct. *See Valencia*, 2003 WL 23174749 at *11.

Accordingly, Section 9(a)(2) cannot be limited by improperly superimposing Sections 2(g) and 2(h), and Defendants' attempt to do so must be rejected.

C. The Complaint Adequately Alleges That Defendants Attempted To Manipulate Natural Gas Prices

Consistent with the requirements of Federal Rule of Civil Procedure 8(a)(2), the Commission's Complaint offers "a short and plain statement" of its attempted manipulation claims. As noted above, an attempted manipulation "requires only an intent to affect the market price of a commodity and some overt act in furtherance of that intent." *Hohenberg Bros.*, 1977 WL 13562 at *7. The Complaint speaks to both of these elements. *See, e.g.*, Complaint ¶¶ 43 and 49 (alleging intent) and ¶¶ 39-42 and 46-48 (alleging overt acts). Indeed, the Complaint provides Defendants with ample fair notice of the Commission's attempted manipulation claims and the grounds on which they rest. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The Federal Rules do not require the Commission to detail the factual basis for its claims. *Id.* Moreover, notwithstanding Defendants' assertions to the contrary, averments of intent, knowledge, or condition of mind may be pled generally. *See Schwartz v. Celestial Seasonings*, 124 F.3d 1246, 1252 (10th Cir. 1997)(holding that Rule 9(b) does not apply to securities law violations where fraud need not be alleged to establish a *prima facie* case and "does not require any particularity

IV. Conclusion

For the reasons set forth above the Commission respectfully requests that the Court deny Defendants' motions to dismiss.

May 25, 2005

Respectfully submitted,

s/ James A. Garcia

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Exhibit O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** v. **NRG ENERGY, INC.,** **Defendant.**	**CIVIL ACTION NO. 04-3090 (MJD/JGL)** **Opposition of the U.S. Commodity Futures Trading Commission to Motion to Dismiss <u>or Alternatively to Transfer Venue</u>**

I. Introduction

The United States Commodity Futures Trading Commission ("Commission"), by its attorneys, submits this opposition to the Motion to Dismiss or Alternatively to Transfer Venue filed by defendant, NRG Energy, Inc. ("NRG").

NRG is charged with violations of section 9(a)(2) of the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. § 13(a)(2), for knowingly submitting false, misleading, or knowingly inaccurate information about natural gas trades to the trade press. NRG disputes liability under the CEA, arguing that a prior bankruptcy filing in the Southern District of New York insulates the company's wrongful conduct from liability, or alternatively that NRG's repeated acts of false reporting do not give rise to a cause of action under the Act.

The former is a red herring. Courts interpreting the Bankruptcy Code have uniformly held that the bankruptcy court should not become a "haven for wrongdoers." *CFTC v. Co Petro Mktg. Group, Inc.*, 700 F.2d 1279, 1283 (9th Cir. 1983) (citation omitted). *See SEC v. Brennan*, 230 F.3d 65, 71 (2nd Cir. 2000) (citation omitted). As to the latter contention, NRG's reliance on the exemption in section 2(h) of the Act, 7 U.S.C. §2(h), and the exclusion in section

2(g) of the Act, 7 U.S.C. §2(g), as support for dismissal of the Complaint, is misplaced. The language of both provisions make clear that sections 2(h) and 2(g) are intended to provide only a limited carve out from the CEA for trading in an exempt commodity -- specifically, "contract[s], agreement[s] or transaction[s]." Neither provision serves as a general exemption from the overall regulatory scheme of the Act, which reaches activities other than trading. Nor can those provisions be interpreted as a safe harbor for any activity that merely bears a relation, no matter how attenuated, to a transaction in an exempt commodity. Indeed, a federal district court in Texas in a criminal matter arising out of similar reporting conduct recently reached this very conclusion with regard to section 2(h). *See United States v. Valencia*, No. H-03-024, 2003 U.S. Dist. LEXIS 15264 (S.D.TX Aug. 26, 2003) *vacated in part*, *United States v. Valencia,* No. H-03-024, 2003 U.S. Dist. LEXIS 24327 (S.D.TX Nov. 13, 2003).

Knowingly reporting to industry publications false, misleading, or knowingly inaccurate information about natural gas trades that were previously executed is not a contract, agreement or transaction. Rather, misinformation was supplied by NRG to reporting firms. Subsequently, the reporting firms used this type of trade information to tabulate index prices -- prices that participants in the natural gas markets, in turn, used for price discovery and to price natural gas contracts. For this reason, it is the very type of conduct that the CEA is intended to prevent, and NRG's suggestion that Congress absolved the Commission of responsibility to pursue improper conduct of this kind is without merit. NRG's motion should be denied.

II. Background

In 2003, during the course of a Commission investigation of NRG for possible violations of the CEA, including reporting of false information about natural gas trades to various industry publications, the company and its subsidiaries filed voluntary petitions under

Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. *See Complaint*, ¶ 16. On November 24, 2003, the bankruptcy court confirmed NRG's plan of reorganization ("Plan"). *Id*. NRG emerged from Chapter 11 with a market capitalization in excess of $2 billion. *Id*. For the first quarter of 2004, NRG reported profits of $30.2 million. *Id*.[1]

On July 1, 2004, the Commission filed a complaint against NRG in this Court, charging the company with violating section 9(a)(2) of the CEA, 7 U.S.C. § 13(a)(2), by knowingly submitting false information about natural gas trades, including fictitious trades, to *Gas Daily*, an industry newsletter published by Platts. *Id*. ¶ 7. Pursuant to 7 U.S.C. § 13a-1, the Commission sought a permanent injunction. NRG responded with a two-prong defense.

On July 23, 2004, NRG filed the first of its defense motions -- in the bankruptcy court -- to enforce the Plan and the bankruptcy court's order confirming the Plan. *See Reorganized Debtor's Motion for Order Enforcing Compliance with Order Confirming Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code and Granting Related Compensatory Relief*, No. 03-13024 (Bankr. S.D.N.Y.). NRG sought an injunction and sanctions for the Commission's "blatant and deliberate contempt" of the bankruptcy court's confirmation order. *Id*. at p.2. Absent from NRG's submission was any acknowledgement that (i) the Commission's complaint seeks only a permanent injunction, (ii) the Plan, in relevant part, is limited to "claims," and an injunction to prevent future wrongdoing

[1] The Commission filed a Proof of Claim in the proceeding on August 20, 2003 for "potential civil monetary penalties and/or restitution or disgorgement for violations of the Commodity Exchange Act . . ." *See* Asmus Aff., Ex. A. The bankruptcy court disallowed the claim on May 18, 2003, and the Commission's motion for reconsideration is pending in the bankruptcy court.

is not a "claim", and (iii) the Commission is a governmental unit seeking to enforce its police and regulatory powers, thereby falling within an exception to the provisions of the Code.[2]

On July 27, 2004, NRG filed the present motion in this Court, arguing that the bankruptcy court has exclusive jurisdiction over its unlawful conduct; that the company's transgressions do not give rise to a claim under the CEA; and, promising not to do it any more.

III. Argument

A. The Bankruptcy Court Does Not Have Exclusive Jurisdiction Over The Commission's Enforcement Action In Minnesota

NRG argues that this Court lacks jurisdiction because the bankruptcy court has exclusive jurisdiction of the Commission's cause of action. Alternatively, the company argues that the Commission is barred from commencing the instant injunctive action by prohibitions contained in NRG's reorganization plan. The former argument inappropriately broadens the bankruptcy court's reach. The latter argument is contradicted by the plain language of the reorganization plan.

The jurisdiction vested in a bankruptcy court is derivative of the jurisdiction granted to a district court.[3] 28 U.S.C. § 1334 delineates a district court's jurisdiction over bankruptcy related matters. Section 1334(a), cited to by NRG, states, "**Except as provided in subsection (b)** of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11." (emphasis supplied). The Commission does not dispute that the

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[2] The Commission filed a response to NRG's motion in the bankruptcy court on August 13, 2004, entitled *Memorandum of Commodity Futures Trading Commission in Opposition to Motion for Order Enforcing Compliance with Confirmation Order*, setting forth the reasons why the bankruptcy court lacks jurisdiction over the matters before this Court. The Commission's position is also set forth herein.

[3] 28 U.S.C. §157(a) states, "Each district court may provide that any or all cases under title 11 [*11 USCS § § 101* et seq.] and any or all proceedings arising under title 11 [*11 USCS § § 101 et seq.*] or arising in or related to a case under title 11 [*11 USCS § § 101* et seq.] shall be referred to the bankruptcy judges for the district."

bankruptcy court in New York retains jurisdiction over NRG's voluntary petition under Chapter 11 of the Bankruptcy Code. However, under 28 U.S.C. § 1334(b), the district courts -- and thus a bankruptcy court -- shall have "original **but not exclusive** jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." (emphasis supplied). As set forth below, the instant injunctive action is not a matter covered by NRG's reorganization plan or a matter otherwise within the bankruptcy court's exclusive jurisdiction.

1. This action for injunctive relief does not involve a "claim" covered by the reorganization plan

The Commission's enforcement action seeks injunctive relief, specifically an injunction enjoining NRG from violating 7 U.S.C. § 13(a)(2).[4] Nonetheless NRG invokes and relies principally on Section 13.4(i) of the Plan, which provides, in relevant part:

> all entities who have held, hold or may hold Claims against…the Debtors, are permanently enjoined, on and after the Confirmation Date, from (i) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim or Equity Interest . . .

See Asmus Aff., Ex. C, at 25. The Plan defines a "claim" as having the same meaning as in 11 U.S.C. § 101(5). *See* Affidavit of Anthony Mansfield ("Mansfield Aff."), Ex. A, p.3. Under Code Section 101(5) "claim" means "(A) right to payment" or "(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). An injunction prohibiting future violations of the CEA is not itself a right to payment within the

[4] Although violations of the CEA may be a basis for civil monetary penalties or other monetary relief, *see* 7 U.S.C. § 13a-1(d), the Commission does not seek such an award in this action, *inter alia*, because of the terms of the Plan and because the bankruptcy court disallowed the Commission's Proof of Claim. The Commission's Complaint contains a supplemental request for "such other and further remedial and ancillary relief as [the district court] may deem necessary and appropriate." Complaint, Section VII at ¶ B. Several other types of relief beyond an injunction are available under 7 U.S.C. § 13a-1. These include civil monetary penalties and mandatory injunctions. However, the Commission believes that an award of monetary relief by this Court would not be "appropriate" absent the bankruptcy court's reinstatement of the Commission's Proof of Claim and permission to pursue establishing the value of the claim in this Court.

meaning of Code Section 101(5)(A). *See, e.g.*, *In re Davis*, 3 F.3d 113, 117 (5th Cir. 1993) ("This remedy is analogous to an injunction preventing [debtor] from committing future wrongs, which is an intangible command incapable of precise monetary estimation.").

A right to an injunction would be a claim under Section 101(5)(B) only if the injunction will result in the payment of money or the equivalent or if, under applicable law, a payment of money can substitute for the injunction. *See Kennedy v. Medicap Pharm., Inc.*, 267 F.3d 493, 495-97 (6th Cir. 2001); *In re Ben Franklin Hotel Assoc.*, 186 F.3d 301, 308 (3rd Cir. 1999); *Udell v. Stand. Carpetland USA, Inc.*, 18 F.3d 403, 408-410 (7th Cir. 1994); *In re Davis*, 3 F.3d at 116; *In re Chateaugay Corp.*, 944 F.2d 997, 1006-09 (2nd Cir. 1991). However, in this case, the relevant statute does not provide for monetary payments as an alternative to the injunctive relief sought in the Commission's enforcement action. 7 U.S.C. § 13a-1(a).[5] Rather, the civil monetary penalties and other monetary relief a district court may award for violations of the CEA are independent of the injunctive remedies. *See*, *e.g.*, 7 U.S.C. § 13a-1(d)(1).

Furthermore, a right to an injunction that merely prohibits a debtor from doing something, such as that sought in the Commission's enforcement action, is not a claim under Code Section 101(5)(B), even if the same facts that justify the injunction also support a right to monetary relief, so long as the monetary relief and injunction are cumulative remedies and not substitutes for one another. *See Udell*, 18 F.3d at 409 (fact that right to injunction and right to money damages "are triggered by a single act" does not make injunction a claim); *Chateaugay*, 944 F.2d at 1008 (EPA order to debtor to stop pollution emanating from toxic waste site is not a

[5] The facts in *Ohio v. Kovacs*, 469 U.S. 274 (1985) illustrate the circumstance where money is an alternative to injunctive relief. There, the State of Ohio obtained an injunction in state court ordering the debtor to clean up a hazardous waste disposal site. The bankruptcy court held that the obligation was dischargeable in bankruptcy as a debt. The Supreme Court agreed, noting that the debtor could not render performance other than by the payment of money and, thus, the state was seeking a money judgment as an alternative to requiring the debtor personally to perform the obligation imposed by the injunction.

claim, even though government's right to reimbursement of cost of cleaning up the site is a claim);[6] *In re Ben Franklin Hotel Assoc.*, 186 F.3d at 306 ("Parties routinely seek both money damages and equitable relief arising from the same allegedly wrongful conduct, but that does not mean that one is an 'alternative' to the other. In many cases, prayed-for monetary relief and equitable relief will serve entirely distinct remedial purposes.").

The injunctive relief the Commission seeks in this action will do more than prevent NRG from violating section 9(a)(2) of the CEA. An injunction accompanied by a finding labeling NRG's actions as violative of the CEA will send a clear message to other members of the natural gas industry that such conduct will not be tolerated, and thus will serve to protect the integrity of the natural gas markets -- an important component of a governmental agency's police and regulatory power. *See In re F.D. Roberts Sec., Inc.*, 115 B.R. 485, 490 (D.N.J. 1990). *See also, CFTC v. Avco Fin. Corp.*, 979 F.Supp. 232, 235 (S.D.N.Y. 1997), *aff'd in part*, 228 F.3d 94 (2nd Cir. 2000).

2. The Commission's enforcement action is not within the Plan's <u>prohibition of actions "with respect to" a claim</u>

NRG incorrectly asserts that the Plan's prohibition of actions "with respect to" a claim applies because the Commission's injunctive action "arises out of precisely the same course of events" that generated its claim in the bankruptcy proceeding. Motion at p.8.

As discussed above, district courts, and thus bankruptcy courts, have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to

[6] NRG also refers this Court to language in paragraph 46 of the Confirmation Order, which states, in pertinent part, "the Confirmation Order shall permanently enjoin the commencement or prosecution by any entity . . . of any claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action or liabilities **released pursuant to the NRG Plan** . . ." Asmus Aff., Ex. D at 39 (emphasis supplied). However, the injunctive relief the Commission seeks, whether characterized by NRG as a claim, a cause of action, or by any other moniker, is not dischargeable in bankruptcy. *See Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d at 496-98 (right to equitable relief not dischargeable in bankruptcy).

cases under title 11." 28 U.S.C. § 1334(b). While the "related to" language might be read, but need not be, to grant jurisdiction over more than simple proceedings involving the debtors property or estate, *see Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995), it must not be read so expansively that the bankruptcy court becomes "a haven for wrongdoers." *CFTC v. Co Petro Mktg. Group, Inc.*, 700 F.2d at 1283. *See SEC v. Brennan*, 230 F.3d at 71 (debtor should be prevented from "frustrating necessary governmental functions by seeking refuge in bankruptcy"). Striking a balance, courts focus on whether the outcome of the civil proceeding will have an effect on the estate being administered in bankruptcy. *See In re Dogpatch U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir. 1987) (citation omitted). "Effect" is generally synonymous with a financial impact. *See, e.g., In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987) (finding that the complaint could affect the bankruptcy proceeding where the plaintiff sought to recover stock and monies that the debtor allegedly appropriated).

However, in practice, bankruptcy courts do not exercise "related to" jurisdiction over every civil proceeding, the outcome of which may have any effect on the value of the debtor's estate. In the relatively small number of reported cases wherein courts found the government's exercise of its police and regulatory power a serious enough threat to the bankruptcy proceeding to enjoin the action, the potential drain on the debtor's estate was direct and significant. *See, e.g., In re State of Missouri*, 647 F.2d 768, 776-77 (8th Cir. 1981) (state regulatory action sought physical control over an asset of the debtor's estate). *Compare, In re First Alliance Mortgage Co.*, 264 B.R. 634, 654 (C.D. Cal. 2001) ("by creating the regulatory and police powers exception to the automatic stay, Congress expressly indicated that in most cases the concerns addressed by such actions are more important than the goals of efficiency and maximizing the estate.").

The Commission seeks an injunction preventing future wrongdoing by NRG. The only apparent financial impact to NRG is the cost to defend itself against the Commission's enforcement action. This is a cost the company will incur, regardless of whether this action goes forward in Minnesota. *Cf. In re First Alliance Mortgage Co.*, 264 B.R. at 656 (court rejected litigation cost as a threat to the administration of the estate, noting "the relevant comparison is not between the costs of defending the actions in multiple forums and the costs of not defending them at all, but rather between defending the actions in multiple forums and defending them in the bankruptcy proceeding.").

3. The Commission did not submit itself to the exclusive jurisdiction of the bankruptcy court by filing a proof of claim

NRG also asserts that "[b]y filing its Proof of Claim, the CFTC indisputably submitted itself to the jurisdiction of the Bankruptcy Court." Motion at p.9. When executed and filed, a proof of claim constitutes *prima facie* evidence of the validity and amount of the claim. Fed. R. Br. P. 3001(a) and (f). The proof of claim provides the basis of creditor participation in a case such that any creditor who fails to file a proof of claim "shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution." Fed. R. Br. P. 3003(c)(2). Although filing a proof of claim submits the claim and the creditor to the jurisdiction of the bankruptcy court for the resolution of that claim, it does not automatically submit the creditor to the jurisdiction of the bankruptcy court for any cause of action it may bring as a non-creditor of the bankruptcy estate.

Indeed, courts have held that creditors of a bankruptcy estate may pursue equitable relief, like that sought by the Commission, outside the bankruptcy court, notwithstanding that the creditor filed a proof of claim in the bankruptcy proceeding. *See, e.g., In re First Alliance Mortgage Co.*, 264 B.R. at 648-49 (reversing the bankruptcy court's order enjoining four governmental units, all of whom filed proofs of claim, from pursuing claims against the debtor, including claims for injunctive relief, outside the bankruptcy court). *Cf. In re Ben Franklin Hotel Assoc.*, 186 F.3d 301, 303 (3rd Cir. 1999) (affirming lower court holding that creditor, who filed proof of claim in bankruptcy proceeding, could pursue equitable relief against debtor in state court action initiated prior to debtor's voluntary petition).

NRG incorrectly cites *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), as support for its position. In *Granfinanciera*, the Supreme Court held that a non-governmental creditor who files a proof of claim in a bankruptcy proceeding may not demand a jury trial. The Supreme Court merely confirmed that by submitting claims against the bankruptcy estate, creditors subject themselves to the bankruptcy court's equitable powers as to such claims. *Id*. at 59, n.14. As discussed, *supra*, the Commission's request for injunctive relief is not a claim under the Bankruptcy Code. *See Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d at 495-97.

B. NRG's False Reporting Gives Rise To A Cause Of Action Under The CEA

NRG asks the Court to interpret sections 2(h) and 2(g) of the CEA in a way that would divest the Commission of authority over the company's repeated acts of false reporting to *Gas Daily*. The company insists that because the false, misleading, and knowingly inaccurate information NRG traders injected into the marketplace concerned transactions in natural gas, pursuant to the section 2(h) exemption and the section 2(g) exclusion, NRG's conduct allegedly falls outside the bounds of the CEA. NRG misreads the plain language of the provisions, and similarly misconstrues their purpose and history, wrongly relying on the decision of the United States Supreme Court in *Dunn v. CFTC*, 519 U.S. 465 (1997), and a 1993 Commission exemptive order. *See* 1993 Exemption for Certain Contracts Involving Energy Products ("1993 Energy Exemption"), 58 Fed. Reg. 21,286 (April 20, 1993) (final order).

As discussed further below, natural gas is defined as an "exempt" commodity under the CEA. 7 U.S.C. § 1a(14). However, regardless of whether natural gas is an exempt commodity or not, any activity that is tied to natural gas does not automatically receive a "free pass" under sections 2(h) and 2(g) of the Act. Rather, only certain conduct involving natural gas -- namely contracts, agreements and transactions, *i.e.* a limited universe of activities between market participants, are themselves beyond the Commission's reach. Reporting false information about natural gas trades to the trade press -- or reporting any information to the trade press for that matter -- is not a contract, an agreement, or a transaction. Indeed, it bears no relation to any activity intended to further the negotiation, performance or settlement of a contract, agreement or transaction. Thus, to read the section 2(h) exemption so broadly, which one court declined to do,[7] or the section 2(g) exclusion in this way, distorts the will of Congress.

1. Reporting information about natural gas transactions to the trade press is not among the activities for which the §2(h) exemption was <u>intended to provide legal certainty</u>

As its title suggests, section 2(h) of the CEA is intended to provide "[l]egal certainty for certain <u>transactions</u> in exempt commodities." These transactions are stated to include contracts, agreements or transactions, which are (1) "entered into solely between persons that are eligible contract participants at the time the persons enter into the agreement, contract, or transaction," and (2) "not entered into on a trading facility" (unless entered into on an electronic trading facility meeting the requirements of section 2(h)(5)). 7 U.S.C. §2(h)(1)(A) and (B); *see* 7 U.S.C. §2(h)(3)-(5). Absent from the language of section 2(h) is any reference to <u>other</u> <u>conduct</u>

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[7] *See United States v. Valencia*, No. H-03-024, 2003 U.S. Dist. LEXIS 15264 (S.D.TX Aug. 26, 2003) *vacated in part*, *United States v. Valencia*, No. H-03-024, 2003 U.S. Dist. LEXIS 24327 (S.D.TX Nov. 13, 2003).

involving natural gas that is otherwise subject to the CEA.[8] Nevertheless, NRG argues that because its price reporting to *Gas Daily* related to transactions in natural gas, an exempt commodity, its conduct is exempted from the Act. Associating the section 2(h) exemption with the commodity rather than specific limited activities related to the commodity is flawed.

The Commission does not dispute that natural gas is appropriately categorized as an "exempt commodity" as defined in section 1a(14) of the CEA, 7 U.S.C. §1a(14). "The term 'exempt commodity' means a commodity that is not an excluded commodity[9] or an agricultural commodity." *Id*. However, as the definition makes clear, that term, which was first introduced into the CEA as part of the Commodity Futures Modernization Act of 2000 ("CFMA"), is a term of art used to differentiate among commodities for purposes of determining which portions of the CEA will apply to transactions in those commodities. Standing alone, the definition provides no guidance regarding the implications of being an "exempt," as compared to an "excluded" or an "agricultural" commodity under the CEA. *See* 7 U.S.C. § 1a.

Section 2(h) is one provision of the Act that gives effect to the defined term "exempt commodity." Section 2(h) provides, "nothing in this Act shall apply to a **contract,**

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[8] The Complaint alleges that, over a period of "at least" nine months, natural gas traders at NRG "knowingly delivered information concerning hundreds of natural gas trades to *Gas Daily*. Complaint at ¶¶ 7, 28. Many of those trades included false or misleading or knowingly inaccurate information," including (i) individual natural gas trades that NRG traders had not executed, and (ii) actual trades entered into by NRG, but with the prices of those transactions altered and/or the volumes changed. *Id*. at ¶¶ 28-29. This conduct violates the express language of section 9(a)(2), which makes it a violation of the CEA for any person –

> knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . .

Id. at ¶ 32, quoting, 7 U.S.C. § 13(a)(2).

[9] The term "excluded commodity," as defined in Section 1a(13) of the CEA, 7 U.S.C. 1a(13), generally includes financial commodities, indexes or contingencies.

agreement or transaction in an exempt commodity . . ." 7. U.S.C. §2(h)(1) (emphasis added). It does not state, "nothing in this Act shall apply to an exempt commodity." Nor does it state, "nothing in this Act shall apply to any activity related to an exempt commodity." The distinction is an important one. Each of the highlighted terms, as commonly defined, embodies a mutual exchange between parties resulting in an alteration of the parties' relative rights and duties. *See, e.g.*, *Merriam-Webster Dictionary* (transaction is defined as an "activity involving two parties or things that reciprocally affect or influence each other."); BLACK'S LAW DICTIONARY 67 (6th Ed. 1990) (agreement is defined as "a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances."). There was nothing of the sort in NRG's reporting activities.

The United States District Court for the Southern District of Texas (Atlas, DJ) considered the same argument in the context of a criminal indictment against an individual natural gas trader for violation of section 9(a)(2), 7 U.S.C. § 13(a)(2). *See United States v. Valencia*, No. H-03-024, 2003 U.S. Dist. LEXIS 15264 (S.D. TX August 26, 2003), *vacated in part*, *United States v. Valencia*, No. H-03-024, 2003 U.S. Dist. LEXIS 24327 (S.D. TX November 13, 2003). The district court's analysis further emphasizes the distinctions between the conduct of NRG and the conduct exempted by section 2(h). In *Valencia*, the defendant argued that her conduct in reporting allegedly false information about natural gas trades to the trade press did not violate section 9(a)(2) because transactions involving natural gas are exempt from enforcement under section 9(a)(2), except to the extent that the provision "prohibit[s] manipulation of the market price of any commodity in interstate commerce…" *Valencia*, 2003 U.S. Dist. LEXIS 15264 at * 32, *citing*, 7 U.S.C. §13(a)(2). The district court disagreed: "The issue presented here is what effect, if any, §2(h) has on §13(a)(2) for conduct that is not a contract." *Id*. at *33. The district court held that "conduct proscribed by §13(a)(2)'s reporting prong is unaffected by §2(h)." *Id.* at *34. It reasoned that the "entire exemption" under section 2(h) is confined in its application to "*contracts* in exempt commodities," *id*. at * 36 (emphasis in original), and that "§13(a)(2) addresses a broader range of conduct than simply commodity transactions." *Id.* at *35.

The *Valencia* court's interpretation of sections 2(h) and 9(a)(2), contrary to that of NRG, is consistent with the express purpose of the CEA. In the statement of "Findings and Purpose" set forth in section 3(b), 7 U.S.C. §5(b), the Act states:

> It is further the purpose of this Act to deter and prevent price manipulation or **any other disruptions to market integrity**; to ensure the financial integrity of all transactions subject to this Act and the avoidance of systematic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses [sic] of customer assets; and to promote responsible innovation and fair competition among boards of trade, **other markets and market participants.** (emphasis added).

The statement makes plain that the CEA is intended to encompass activity that may disrupt market integrity and/or affect other markets and market participants. As the *Valencia* court recognized, section 2(h) speaks to one type of conduct -- namely contracts, agreements or transactions. Section 9(a)(2), however, reaches a broader range of conduct, including contracts and "other conduct." *Valencia,* 2003 U.S. Dist. LEXIS 15264 at *36. In short, the two provisions are not coterminous, and defendant's attempt to superimpose section 2(h) onto section 9(a)(2) of the CEA is misplaced.[10]

[10] Even if the Court finds that NRG's reporting constitutes a contract, agreement or transaction under sections 2(h) and 2(g) of the CEA, the 2(h) exemption and the 2(g) exclusion do not apply to NRG's conduct, absent a showing by the company that the "transactions" were (i) entered into solely between persons that are eligible contract participants, (ii) not entered into on a trading facility and, in the case of section 2(g) only, (iii) subject to individual negotiation by the parties. 7 U.S.C. §§ 2(h) and 2(g). *See Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310, 315 (8th Cir. 1946) (citation omitted) (claim of exemption from a statute is an affirmative defense for which the burden of proof is on the defendant).

2. The Section 2(g) exclusion is similarly limited to specific conduct

NRG's argument fares no better with regard to the exclusion under section 2(g) for swap transactions. Section 2(g), like the exemption under section 2(h), excludes certain conduct from the CEA -- specifically, contracts, agreements or transactions in exempt and excluded commodities that are (1) "entered into only between persons that are eligible contract participants at the time the persons enter into the agreement, contract, or transactions," (2) subject to individual negotiation by the parties," and (3) "not executed or traded on a trading facility." 7 U.S.C. §2(g). Like section 2(h), section 2(g) makes no reference to conduct other than contracts, agreements or transactions, although as section 9(a)(2) clarifies, the CEA encompasses conduct -- other than contracts, agreements or transactions -- which may affect market integrity.

Nonetheless, NRG argues that because its price reporting to *Gas Daily* involved information relating to transactions in natural gas, an exempt commodity, its conduct is excluded from the CEA under section 2(g). However, by associating the section 2(g) exclusion with the commodity rather than with the specific activities involving the commodity that fall within the exclusion, as it did with regard to the section 2(h) exemption, NRG's argument once again fails.

3. The 1993 Energy Exemption retained commission jurisdiction over reporting of false information about natural gas transactions

Though NRG correctly identifies the 1993 Energy Exemption as a historic point of reference for understanding the section 2(h) exemption and 2(g) exclusion, NRG fails to grasp

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NRG argues that the "Complaint does not assert that any of the alleged falsely reported natural gas transactions fell outside these three qualifications." Motion at p.14. However, NRG cannot meet its affirmative burden to show that its actions satisfy each element of sections 2(h) and 2(g) simply by arguing that the Commission has not shown that NRG's conduct does not meet each element. *See, e.g., In re Fellner*, 256 B.R. 898, 903-04 (8th Cir. App. Panel 2001). NRG must prove the facts underlying its affirmative defense. *See SEC v. Los Angeles Trust Deed & Mortg. Exch.*, 186 F. Supp. 830, 869 (S.D. CA 1960) (claimant of any such exemption must affirmatively establish that exemption from the registration requirements is, in fact, available).

the import of the Exemption, relying on a selective reading of its language that contradicts its plain meaning, its purpose, and its intended effect. The Exemption states, in pertinent part,

> The Commission, pursuant to Section 4c of the Act, hereby exempts from all provisions of the Commodity Exchange Act, 7 U.S.C. 1, et seq., except sections 2(a)(1)(B) of the Act and the provisions of sections 6(c), 6(d) and 9(a)(2) of the Act, to the extent that these provisions prohibit manipulation of the market price of any commodity in interstate commerce or for future delivery on or subject to the rules of any contract market, the following **transactions** entered into on or after October 23, 1974: **Contracts for the purchase and sale** of crude oil, condensates, natural gas, natural gas liquids . . .

58 Fed. Reg. 21286, 21294 (April 20, 1993) (final order) (emphasis supplied). Like section 2(h), which is recognized to "continue a substantial exemption already granted for energy," *see Commodity Futures Modernization Act of 2000: Law and Explanation (CCH) ¶ 108 (Feb. 2001)*, the 1993 Energy Exemption is limited to specific conduct involving natural gas -- *i.e.* "contracts for . . . purchase and sale."[11] Further, as with a similar exemption the Commission promulgated for certain swap agreements, *see* Exemption for Certain Swap Agreements, 58 Fed. Reg. 5,587 (1993) (to be codified at 17 C.F.R. pt. 35),[12] the 1993 Energy Exemption makes explicit that which is implicit in sections 2(h) and 2(g) of the CEA -- namely that reporting information about natural gas trades, albeit an activity <u>related</u> <u>to</u> an exempt/excluded transaction, is neither a contract, agreement or transaction, nor the type of conduct related to an exempt/excluded transaction that the Commission intended to exempt from the agency's authority.

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[11] There is nothing in the text or legislative history to suggest that Congress intended section 2(h) to repeal or supersede the 1993 Energy Exemption or, for that matter, to preclude the Commission from granting further exemptions under its continuing section 4(c) authority.

[12] The section 2(g) exclusion expands upon the Swaps Exemption in 17 C.F.R. Part 35 with regard to certain transactions in exempt and excluded commodities. Since the section 2(g) exclusion is not available to transactions in agricultural commodities, the Part 35 Swaps Exemption is the only exclusion available for transactions in agricultural commodities that meet the requirements stated therein.

a. <u>The history and purpose of the 1993 Energy Exemption</u>

In 1992, a group of entities engaged in commercial business related to crude oil, natural gas, and their derivatives (the "Energy Group") made a request to the Commission seeking legal certainty with regard to certain forward contracts in Brent blend crude oil.[13] Pursuant to section 4(c) of the Act, the Commission is authorized by rule, regulation, or order, after notice and opportunity for hearing, to exempt any agreement, contract, or transaction, including any person(s) offering, entering into, rendering advice or rendering other services with respect to the agreement, contract, or transaction from any of the requirements of section 4(a),[14] or from any other provision of the CEA,[15] upon a determination that such exemption would be consistent with the public interest and purposes of the CEA, and will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under the Act. *See* 7 U.S.C. § 6(c)(1) and (2).

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[13] Specifically, the Energy Group focused its request for exemption on certain energy-related commodities due to "the negative impact" of *Transnor (Bermuda) Limited v. BP North America Petroleum*, 738 F. Supp. 1472 (S.D.N.Y. 1990), which applied the Act to certain forward contracts in Brent blend crude oil ("15-day Brent contracts"). The Energy Group sought additional clarity and legal certainty following the Commission's response to *Transnor*, Statutory Interpretation Concerning Forward Transactions, 55 F.R. 39,188 (1990), which expressed its view that the 15-day Brent contracts are outside the scope of its authority under §2(a)(1) of the Act.

[14] Section 4(a) provides, among other things, that unless exempted by the Commission pursuant to §4(c), it is unlawful to enter into a commodity futures contract that is not made on or subject to the rules of a board of trade which has been designated by the Commission as a contract market or derivatives transaction execution facility for such commodity.

[15] The only exceptions are subparagraphs (C)(ii) and (D) of Section 2(a)(1) (formerly Section 2(a)(1)(B)).

The Commission granted the request,[16] exempting from all provisions of the CEA, except for sections 6c, 6(d), and 9(a)(2) of the Act,[17] to the extent they prohibit manipulation or attempted manipulation of the market price of any commodity in interstate commerce, certain contracts for the purchase and sale of, among other things, natural gas, entered into bilaterally between two parties meeting specified criteria and acting as principals, the material economic terms of which are subject to individual negotiation by the parties ("Energy Contracts"). 58 Fed. Reg. 21,286, 21,288. In addition, consistent with its authority under section 4(c), the Commission extended the availability of the exemption to certain persons engaged in specific activities with respect to the Energy Contracts, stating in the Proposed and Final Orders, "this order also encompasses persons offering, entering into, rendering advice or rendering other services with respect to the agreement, contract, or transaction which is the subject of this Order, for such activity." 58 Fed. Reg. 6,250, 6,252 fn. 11; 58 Fed. Reg. 21,286, 21,290 fn. 10, 21294. This latter point is of particular relevance to the issue before this Court.

b. The 1993 Energy Exemption encompasses activities relating to the negotiation, performance or settlement of a contract

NRG does not argue, nor could it argue, that reporting information about natural gas trades to the trade press itself constitutes a contract, agreement or transaction. Rather, NRG urges the Court to find that because its conduct in reporting price information was related to an exempted transaction, the reporting conduct is similarly exempted from the Commission's reach. The 1993 Energy Exemption debunks this argument.

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16 The Commission issued a proposed order in response to the Energy Group's November 16, 1992 request on January 27, 1993, providing notice and identifying particular issues for comment. *See* Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 6,250 (1993) (proposed order). After a 30-day comment period, the Commission issued a final order with full explanation on April 20, 1993, to become effective thirty days later on May 20, 1993. *See* Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 21,286 (1993) (final order).

17 Formerly §§ 6(b), 6(c), and 9(b) of the Act.

Separate and apart from their request for an exemption from the CEA for the underlying transactions, the Energy Group specifically sought protection for "any such brokers or agents, along with any persons rendering advice or other services with respect to a commercial contract." *Letter from BP Oil Company et al. to Jean A. Webb, Secretary, Commodity Futures Trading Commission* (November 16, 1992) (on file with the Commodity Futures Trading Commission). In response, the Commission's Final Order expressly extended the exemption's availability to those persons "offering, entering into, rendering advice or rendering other services with respect to such Energy Contracts." 58 Fed. Reg. 21,286, 21,290. However, in a footnote, the Commission made clear,

> As the Commission noted in the Notice Proposing Issuance of an Order, it did "not intend that the proposed condition that an Energy Contract be a principal-to-principal transaction preclude the use of brokers or other agents in connection with **the negotiation of, or the performance or settlement** of the obligations under, a contract. 58 FR 6252, n.11. The final order makes clear that it encompasses agents rendering **such services**, including advisory services, for **those activities**."

Id., n.10 (emphasis supplied). In other words, contrary to NRG's reading of the 1993 Energy Exemption, the Commission's order did not extend to <u>all</u> activities relating to the exempted transactions, but only to services "in connection with the <u>negotiation</u> of, or the <u>performance</u> or <u>settlement</u> of the obligations under, a contract." (emphasis supplied). Further emphasizing this point, and indicating its desire to keep the Commission's various section 4(c) exemptions consistent, the Commission added,

> [a]s explained in connection with the exemption for swap transactions [58 Fed. Reg. 5,587, 17 C.F.R. § 35 (1993)], **the application of this exemption to such persons "engaged in activity otherwise subject to the Act would not be exempt for such activity, even if it were connected to their exempted *** [Energy Contract] activity** . . ."

58 Fed. Reg. 21,286, 21,291 (emphasis supplied). Finally, the Commission added,

> " . . . Also in this regard, the Commission wishes to make clear that **the exemption does not apply** to any financial, recordkeeping, **reporting** or other requirements imposed on any person in connection with their activities that remain subject to regulation under the Act . . ."

Id. (emphasis supplied).

Reporting information concerning natural gas transactions to the trade press does not constitute "entering into, rendering advice or rendering other services with respect to an Energy Contract" because it does not further the negotiation of, or the performance or settlement of obligations of such contract. Rather, reporting information to the trade press about transactions otherwise exempted or excluded from the CEA is simply the voluntary transfer of information by one entity to another entity regarding, at most, the features of an executed contract that has already been negotiated, performed, and settled. The transfer of such information does not affect the actual contract or the parties thereto in that no services are rendered with regard to the contract, and it neither entails nor results in a mutual exchange or alteration of the respective rights and obligations of the parties to the contract. Therefore, under the 1993 Energy Exemption, NRG's conduct is "reporting . . . activit[y] that remain[s] subject to regulation under the Act." 58 Fed. Reg. 21,286, 21291.

4. The Supreme Court has not spoken to the application of section 9(a)(2) of the CEA to reporting of false information to the trade press

The holding of the United States Supreme Court in *Dunn v. CFTC*, 519 U.S. 465 (1997) does not advance NRG's construction of sections 2(h) and 2(g) of the CEA. In *Dunn*, the Commission commenced an enforcement action against the defendants, alleging that they improperly solicited funds for investment in over-the-counter options in foreign currencies by disseminating false information about the risks and rewards of currency trading and that they deceived their investors as to the success of their trading in order to retain control over funds for further trading. *See CFTC v. Dunn,* 58 F.3d 50, 51-52 (2nd Cir. 1995), *rev'd,* 519 U.S. 465 (1997)). In marked contrast to the facts in this case, the false information the defendants disseminated was in furtherance of the <u>negotiation</u> of the underlying transactions. Relying on the exemption language in the former Treasury Amendment, 7 U.S.C. § 2(ii), which stated, in pertinent part, "Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency," the Supreme Court held that the defendants' conduct was beyond the agency's reach. *Dunn,* 519 U.S. at 470-473, 475.

However, like sections 2(g) and 2(h), the plain language of the former Treasury Amendment did not reach foreign currency conduct, other than transactions, that is otherwise subject to the CEA. Further, the Supreme Court's holding in *Dunn* is limited to the "narrow issue" of whether the phrase "transactions in foreign currency" in the former Treasury Amendment includes "transactions in options to buy or sell currency." *Id.* at 469.[18] Finally, even if *Dunn* were read as a complete exclusion of foreign currency transactions from the CEA's regulatory scheme, which the Commission vigorously contends cannot be so read, the purpose and construction of the Treasury Amendment cannot be superimposed on sections 2(h) and 2(g). The section 2(h) exemption and section 2(g) exclusion are not modeled on the Treasury Amendment, but are extensions of pre-CFMA exemptions promulgated by the Commission pursuant to a statutory delegation of Congress. *See* 58 Fed. Reg. 21,286; 58 Fed. Reg. 5,587. Those exemptions exclude from Commission regulation and oversight only the actual transaction and activity in furtherance of the negotiation, performance or settlement of such transactions. *See, e.g.,* 58 Fed. Reg. 21,286, 21,291. They do not apply to other conduct that is otherwise

[18] Other courts have held that the Treasury Amendment does not reach other conduct involving foreign currency that is otherwise subject to the CEA. *See, e.g., E. Vanguard Forex v. Ariz. Corp.* Comm'n, 206 Ariz. 399, 408, 79 P.3d 86, 95 (Ariz. Ct. App. 2003) (The legislative history of the Treasury Amendment simply indicates a desire to avoid adding regulation by the CFTC).

subject to the CEA, including reporting conduct, "even if it [is] connected to the[] exempted [Energy Contract] activity." *Id*. at 21,291. As such, to construe sections 2(h) and 2(g) more expansively would be to disregard the intent of the Commission in promulgating these pre-CFMA exemptions upon which sections 2(h) and 2(g) are modeled, and the will of Congress.

C. <u>Transfer Of The Action To The Bankruptcy Court Is Not Warranted</u>

Alternatively, NRG, a Minnesota based company since its inception in 1989, which is now charged with violating the CEA through repeated acts of false reporting by NRG traders from the company's offices in Minnesota, seeks to transfer this action to the bankruptcy court in New York on the grounds of convenience. The request is without support.

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). "The statutory language reveals three general categories of factors that courts must consider when deciding a motion to transfer: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice." *Terra Int'l, Inc. v. Mississippi Chemical Corp.*, 119 F.3d 688, 691 (8th Cir. 1997) (citation omitted). Courts, however, are not limited to these enumerated factors. *Id*. "Instead, courts have recognized that such determinations require a case-by-case evaluation of the particular circumstances at hand and a consideration of all relevant factors." *Id*. (citations omitted).

1. <u>The convenience of the parties weighs in the Commission's favor</u>

"In general, federal courts give considerable deference to a plaintiff's choice of forum and thus the party seeking a transfer under section 1404(a) typically bears the burden of proving that a transfer is warranted." *Terra Int'l, Inc.*, 119 F.3d at 695. *See Scott v. Cell-O-Core, Inc.*, 2004 U.S. Dist. LEXIS 13302 *5 (D.Minn. July 13, 2004). "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947). Rather than confront this obstacle head on, NRG resorts to arguing that the Commission, in fact, chose the bankruptcy court in New York as its desired locus to pursue relief against NRG. The assertion is as odd as it is wrong.

As NRG points out, on May 14, 2003, the company and certain of its subsidiaries filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the Southern District of New York. This, in turn, triggered the requirement that creditors of NRG and its subsidiaries file proofs of claim in the bankruptcy court in New York, which the Commission did on August 20, 2003. The suggestion, therefore, that the Commission chose the bankruptcy court to pursue injunctive relief against NRG pursuant to its police powers is simply ludicrous.[19]

When the Commission selected a forum to pursue this enforcement action, it chose Minnesota where NRG resides, where NRG traders committed acts in violation of the CEA, and where the preponderance of relevant documents and witnesses reside. Convenience of the parties favors Minnesota.

2. <u>The convenience of witnesses favors Minnesota</u>

With little more than the unsupported statement that "It is likely that many, if not all, of the CFTC's witnesses reside in Washington, D.C.," NRG concludes that the convenience of the witnesses favors New York. Motion at p.11. The Commission is unclear as to which witnesses NRG refers. Indeed, at this early juncture, the Commission expects that the bulk of its

[19] NRG cites to *Nelson v. Soo Line R.R Co.,* 58 F. Supp. 2d 1023, 1026 (D.Minn. 1999) for the general proposition that a plaintiff's choice of forum should be afforded less deference where the plaintiff does not reside in the forum. The case is inapposite. Where the federal government is a plaintiff, its choice of a forum is accorded "significant weight." *United States of America v. MacKay,* 1986 U.S. Dist. LEXIS 30268 *10 (N.D. IL 1986). In addition, where the government seeks to enforce its police and regulatory powers, as the Commission does here, courts recognize that the harm to the governmental unit of not being allowed to enforce its laws in the forum of its choice "must be measured with a broader perspective in mind . . ." *Cf. In re First Alliance Mortgage Co.,* 264 B.R. 634, 659 (C.D. CA 2001).

witnesses will be current and former employees of NRG, none of whom, the Commission believes, resides in Washington, and many of whom, the Commission anticipates, work and reside in Minnesota. Moreover, NRG's representation notwithstanding, motion at p.11, the company still resides in Minnesota, *see* Mansfield Aff., Ex. B, and according to an April 27, 2004 press release, "NRG's current office in Minneapolis will remain open throughout the transition to the new location."

As discussed above, there are legitimate reasons supporting the Commission's prosecution of this action in Minnesota. Furthermore, given the police and regulatory powers of the Commission, the government deserves this Court's deference. By forcing the Commission to litigate this matter in New York, the Court may dilute the impact of the Commission's efforts. Juxtaposed with this, NRG argues nothing more than the anticipated inconvenience to the company upon its move to New Jersey. However, courts routinely hold that "transfer should be denied if the effect is simply to shift the inconvenience to the other party," which is precisely the result that will occur here. *DB Indus., Inc. v. B&O Mfg., Inc.*, 2004 U.S. Dist. LEXIS 15208 * 13 (D.Minn. August 4, 2004) (citation omitted). *See Terra Int'l, Inc.*, 119 F.3d at 696-97 (citation omitted) (same).

3. <u>The interests of justice counsel against the requested transfer</u>

As previously stated, creditors are allowed to pursue injunctive relief against a debtor outside the bankruptcy court in recognition of the fact that (i) monetary and injunctive relief arising out of the same underlying facts often serve different purposes, and (ii) injunctive relief often does not constitute a "claim" under the Bankruptcy Code. *See, e.g., Udell v. Stand. Carpetland USA, Inc.*, 18 F.3d at 408-410; *In re Ben Franklin Hotel Assoc.*, 186 F.3d at 306.

NRG nevertheless argues that, for myriad reasons, the interests of justice can only be served by transferring this action to New York.

Contrary to NRG's assertion, maintenance of separate actions in multiple courts arising out of the same underlying facts is not only not "untenable," it is fairly common, particularly in the context of a governmental unit seeking to enforce its police and regulatory powers. *See*, *e.g.*, *In re First Alliance Mortgage Co.*, 264 B.R. at 641-42, 661 (allowing injunctive actions against a debtor, who filed for bankruptcy protection in California, to proceed in Massachusetts, Florida, and Illinois). Indeed, Congress in drafting the Bankruptcy Code, and courts in interpreting the statute, recognize that the police and regulatory goals of punishment and deterrence may sometimes conflict with the goals under the Bankruptcy Code of maximizing the debtor's estate and efficiently processing claims. *Id*. at 659.

Furthermore, the possibility that the bankruptcy court in New York is "as familiar with the CEA as this Court", motion at p.11, does not lead to a different result. Generally, 28 U.S.C. § 157, which governs the procedure by which a case may be referred from a district court to a bankruptcy court, "reflects Congress's perception that specialized courts should be limited in their control over matters outside their areas of expertise." *American Tel. & Tel. Co. v. Chateaugay Corp.*, 88 B.R. 581, 583 (S.D.NY 1988). Thus, for example, § 157 expressly provides that "under certain circumstances [a litigant's] assertion of a federally created right will be considered outside the narrow confines of a bankruptcy court proceeding by a district court, which considers laws regulating interstate commerce [e.g. the CEA] on a daily basis and are 'better equipped to determine them than are bankruptcy judges.'" *Id., citing*, 1 *Collier on Bankruptcy* para. 301 at 3-53 (15th ed. 1986). *See In re Horizon Air, Inc.*, 1993 U.S. Dist. LEXIS 8632 *12, n.5 (N.D. NY 1993) (citation omitted) ("While the court acknowledges that it has no more experience than [the bankruptcy court] in interpreting these particular provisions of the Federal Aviation Act, cases construing § 157(d) make clear that when a bankruptcy court is called upon to interpret statutes outside its realm of expertise, the district court is required to remove the reference."). In short, while familiarity with the law may generally be considered in determining whether transfer is appropriate, in the specialized context found here, consideration of this factor is improper.

The issue of duplicative discovery, motion at p.11, should not factor into the Court's analysis. Discovery procedures can easily be worked out by the parties, who would be the same in both matters, to avoid prejudice to either party.

Finally, NRG's reference to potential litigation costs is unavailing, if for no other reason than the fact that the company's assertions are conclusory and without any support. Motion at p.12. Contrary to NRG's suggestion, the Commission's expenses are not likely to be reduced "by litigating closer to home." *Id*. Indeed, the Commission will have to travel to Minnesota and other parts of the country to depose potential witnesses. Moreover, whether the action is situated in Minnesota or New York, Commission staff will have to travel by plane and incur hotel costs for court appearances. With regard to NRG's litigation costs, the potential for litigating in different *fora* is limited. As NRG points out, the Commission currently has no claim in the bankruptcy court because its Proof of Claim was expunged. Should the bankruptcy court restore the Commission's claim, as the Commission has formally asked the court to do, the Commission will seek leave of the bankruptcy court to pursue establishment of the value of its claim in this court, as the law permits.[20] Should the bankruptcy court grant the Commission's

[20] *Cf. In re F.D. Roberts Sec., Inc.*, 115 B.R. at 493, *citing*, 507.2 *Collier on Bankruptcy*, 15th Ed., para. 362.05[5] at 362-47 (West 1989).

request, the Commission will seek to amend its complaint in this action to request the imposition of a civil monetary penalty against NRG.

D. NRG's Argument Regarding The Merits Of An Injunction Is Misplaced

NRG's argument that the requested injunction is not warranted is, at first blush, puzzling. If NRG is correct (which it is not) that the false reporting NRG traders engaged in does not give rise to a cause of action under the CEA under sections 2(h) and 2(g), 7 U.S.C. §§ 2(h) and 2(g), then there is no "violation" which necessitates imposition of an injunction to enjoin future conduct of this kind. Thus, should the Court find that NRG's conduct does not give rise to a cause of action under the CEA, discussion about the merits of an injunction is moot.

If, on the other hand, the Court finds, as the Commission believes it must, that NRG's conduct gives rise to a cause of action under the CEA, the Complaint sets forth sufficient facts to establish a reasonable likelihood of future violations supporting an injunction. *See Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (citations omitted) ("Actions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence. Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations.").

1. The Commission demonstrated a violation of the Act

Section 6c(a), 7 U.S.C. § 13a-1(a), states, in pertinent part, "[w]henever it shall appear to the Commission that any . . . person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this Act . . . the Commission may bring an action . . . to enjoin such act or practice . . ." Pursuant to section 9(a)(2), 7 U.S.C. § 13(a)(2), it shall be a violation of the Act for

> Any person . . . knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or

> other means of communication false or misleading or knowingly inaccurate reports concerning . . . market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . .

In the Complaint, the Commission alleges, *inter alia*, that natural gas traders at NRG delivered information concerning hundreds of natural gas trades to *Gas Daily* that contained false, misleading or knowingly inaccurate information, *id*. at ¶¶ 28-29; that NRG traders knew that the information they were submitting was false, misleading or inaccurate because *Gas Daily* had specifically instructed traders at NRG about what to report, and what not to report, *id*. at ¶ 27; and that the false information NRG traders delivered to *Gas Daily* was of the kind that affected or tended to affect the price of natural gas in interstate commerce. *Id*. at ¶¶ 22-25 & 30. The Commission therefore has established past acts constituting a violation of the Act. On this basis alone, courts have found a reasonable likelihood of future violations. *See Commodity Futures Trading Comm'n v. Incomco, Inc.*, 649 F.2d 128 (2nd Cir. 1981) (allegations of past conduct were sufficient to overcome a motion to dismiss the injunctive complaint, without further need to determine at the pleading stage whether they would suffice to support a permanent injunction). *Cf. SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2nd Cir. 1975) (citation omitted) (while past misconduct does not lead necessarily to the conclusion that there is a likelihood of future misconduct, it is "highly suggestive of the likelihood of future violations.").

2. <u>False reporting by NRG traders was not isolated</u>

Contrary to NRG's assertion, the company's unlawful conduct was not "isolated," and the only way NRG is able to reach this conclusion is by misstating the Complaint as pled. The Complaint does not allege that NRG engaged in false reporting from August 2001 until May 2002. Rather, it states that "from <u>at</u> <u>least</u> August 2001 through May 2002" NRG violated section 9(a)(2) by knowingly submitting false reports to the trade press. *See* Complaint, ¶ 7 (emphasis supplied). The only reason the Commission limited the allegations to this time frame is because NRG has not produced all of the relevant subpoenaed records, claiming that they are no longer in the company's possession. Through discovery in this action, the Commission will pursue, *inter alia*, the records NRG traders submitted to the trade press <u>from the trade press</u>.

NRG's reporting involved numerous traders, implicated hundreds of trades, and occurred over many months. "When the violation has been founded on systematic wrongdoing, rather than an isolated occurrence, a court should be more willing to enjoin future misconduct." *Commodity Futures Trading Comm'n. v. Hunt*, 591 F.2d at 1220 (citation omitted).

3. NRG's representation that the company no longer reports price <u>information to the trade press is of little weight</u>

NRG's assurances that it no longer reports price information to the trade press and that it has no intention to resume price reporting is of little weight. Motion at p.21. "Voluntary cessation of illegal activity does not moot a controversy when 'the defendant is free to return to his old ways,' as it would be imprudent 'to grant defendants such a powerful weapon against public law enforcement.'" *Sierra Club v. The Hanna Furnace Corp.*, 636 F.Supp. 527, 529 (W.D. NY 1985), *quoting*, *United States v. W.T. Grant Co.*, 345 U.S.629, 632 (1953). Indeed, "[i]n the absence of convincing evidence that defendant *cannot* recommence operations, dismissal of the demand for injunctive relief is not warranted." *Id*. (emphasis in original). *See CFTC v. Cheung*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,259 at 42,186 (citation omitted) (same). A review of NRG's website confirms that the company continues to trade natural gas, showing that the very operations that gave rise to NRG's past misconduct remain. *See* Mansfield Aff., Exs. C & D.

4. **NRG's false reporting was knowing**

NRG's contention that "[t]he Complaint contains only bare, unsupported allegations that NRG knowingly violated the CEA in its gas trade reporting activities" is wrong. Motion at p.22. As but one example, the Commission alleges that *Gas Daily* specifically instructed NRG traders, among other things, not to report "intraday" trades. Complaint at ¶ 27. Nevertheless, the Complaint alleges, NRG traders reported information to *Gas Daily* about intraday trades without advising the publication about the nature of the information. *Id*. at ¶ 29.

IV. **Conclusion**

For the foregoing reasons, plaintiff respectfully requests that the Court deny defendant's Motion to Dismiss or Alternatively to Transfer Venue.

Respectfully submitted,

/s/ Gregory G. Mocek
Gregory G. Mocek [LA #22535]
Director of Enforcement

/s/ Anthony M. Mansfield
Anthony Mansfield [MA #630216]
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DATE: October 8, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES TRADING COMMISSION, **Plaintiff,** v. **NRG ENERGY, INC.,** **Defendant.**	**CIVIL ACTION NO. 04-3090 (MJD/JGL)**

AFFIDAVIT OF ANTHONY M. MANSFIELD

I, Anthony M. Mansfield, under oath, do hereby depose and state as follows:

1. I am counsel of record for plaintiff, U.S. Commodity Futures Trading Commission in this matter. I am admitted to practice before this Court *pro hac vice.*

2. I am competent to testify as to the following matters and I make this affidavit based on personal knowledge unless otherwise stated in which case my statements are based on information and belief.

3. Attached as Exhibit A to this affidavit is a true and accurate copy of an excerpt from the *Third Amended Disclosure Statement for Debtors' Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code.*

4. Attached as Exhibit B to this affidavit is a true and accurate copy of an excerpt from NRG Energy, Inc.'s public website that was downloaded on October 7, 2004.

5. Attached as Exhibit C to this affidavit is a true and accurate copy of an excerpt of NRG Energy, Inc.'s Form 10-Q, filed on August 9, 2004, and published on the company's public website.

6. Attached as Exhibit D to this affidavit is a true and accurate copy of an article published by Dow Jones on September 29, 2004.

Signed under the penalties of perjury on this 8th day of October, 2004.

/s/ Anthony M. Mansfield
Anthony M. Mansfield

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
NRG ENERGY, INC., et al.:	**Case No. 03-13024 (PCB)** (Jointly Administered)
Debtors.	

THIS DISCLOSURE STATEMENT APPLIES TO[1]:

___	All Debtors	X	NRG Power Marketing Inc.
X	NRG Energy, Inc.	X	NRG Capital LLC
___	Arthur Kill Power LLC	X	NRG Finance Company I LLC
___	Astoria Gas Turbine Power LLC	___	NRG Central U.S. LLC
___	Berrians I Gas Turbine Power LLC	___	NRG Eastern LLC
___	Big Cajun II Unit 4 LLC	X	NRGenerating Holdings (No. 23) B.V.
___	Connecticut Jet Power LLC	___	NRG New Roads Holdings LLC
___	Devon Power LLC	___	NRG Northeast Generating LLC
___	Dunkirk Power LLC	___	NRG South Central Generating LLC
___	Huntley Power LLC	___	Oswego Harbor Power LLC
___	Louisiana Generating LLC	___	Somerset Power LLC
___	Middletown Power LLC	___	South Central Generation Holding LLC
___	Montville Power LLC	___	Norwalk Power LLC
___	Northeast Generation Holding LLC	___	NRG McClain LLC
___	LSP-Nelson Energy, LLC	___	NRG Nelson Turbines LLC

THIRD AMENDED DISCLOSURE STATEMENT FOR DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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Counsel for the Debtors and Debtors in Possession

Dated: October 10, 2003

[1] The NRG entities set forth above are the only debtors currently in bankruptcy proceedings, with the exception of LSP-Pike Energy, LLC, which is subject to an involuntary bankruptcy proceeding as set forth more fully in this Disclosure Statement.

EXHIBIT F

SCHEDULE OF DEFINITIONS

CL&P means Connecticut Light & Power Company.

CL&P Agreement means that certain Standard Offer Service Wholesale Sales Agreement, dated as of October 29, 1999 by and between CL&P and PMI.

CL&P Appeal means CL&P's Notice of Appeal of the Rejection Order, filed on June 4, 2003.

Claim has the meaning set forth in section 101(5) of the Bankruptcy Code.

Claims Agent means Kurtzman Carson Consultants LLC.

Claims Objection Deadline means the deadline for filing objections to Claims, which is the date 90 days after the Effective Date (subject to being extended by the Bankruptcy Court upon a motion of the Debtors with notice and a hearing).

Class means a category of holders of Claims against or Equity Interests in the Debtors as set forth in Articles IV and V of the Plan.

Clerk means the clerk of the Bankruptcy Court.

CO_2 means carbon dioxide.

CODI means cancellation of debt income.

Collateral means any property or interest in property of the Estates of the Debtors subject to a Lien to secure the payment or performance of a Claim, which Lien is not subject to avoidance or otherwise invalid under the Bankruptcy Code or applicable law.

Committee means the official committee of unsecured creditors appointed by the United States Trustee on May 21, 2003 pursuant to section 1102 of the Bankruptcy Code.

Common Stock means the current issued and outstanding shares of the common stock of NRG Energy, Inc., all of which is held by Xcel.

Confirmation Date means the date on which the Clerk enters the Confirmation Order on the Bankruptcy Court's docket.

Confirmation Hearing means the hearing held by the Bankruptcy Court to consider confirmation of the Plan pursuant to section 1129 of the Bankruptcy Code, as such hearing may be adjourned or continued from time to time.

Confirmation Hearing Date means November 21, 2003 at 2:30 p.m. Eastern Time, the date and time for which the Bankruptcy Court has scheduled the Confirmation Hearing.

Confirmation Hearing Notice means notice of the Confirmation Hearing, to be published by the Debtors in national and local newspapers and included with solicitation packages mailed to all creditors.

Confirmation Order means the order of the Bankruptcy Court confirming the Plan pursuant to section 1129 of the Bankruptcy Code.

Connecticut Parties means CL&P, CDPUC and CTAG.

Convenience Claims means all General Unsecured Claims excluding Note Claims and Bank Claims against any Debtor that would be included in either Class 5 or Class 6, but with respect to each such Claim, the applicable Claim either (i) is equal to or less than $50,000.00 or (ii) is reduced to $50,000.00 pursuant to an election by such holder made in the Ballot.

CPUC means the California Public Utilities Commission.

Cross-Over Lenders means a member of the Bank Group that has a claim against Xcel under any Xcel credit facility.

CTAG means the Attorney General for the State of Connecticut.

EXHIBIT B

About NRG

NRG

Office

NRG Energy is headquartered in Minneapolis, Minnesota, USA.

NRG Energy, Inc (Headquarters)
901 Marquette Avenue, Suite 2300
Minneapolis, MN 55402-3265
Phone: 612-373-5300
Phone: 800-241-4NRG
Fax: 612-373-5312 or 5430

EXHIBIT C

10kWIZARD
SEC POWER SEARCH

FORM 10-Q

NRG ENERGY INC - NRG

Filed: August 09, 2004 (period: June 30, 2004)

Quarterly report which provides a continuing view of a company's financial position

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10–Q

☒ **Quarterly report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

☐ **Transition report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

For the Quarter Ended: June 30, 2004 **Commission File Number: 001–15891**

NRG Energy, Inc.

(Exact name of Registrant as specified in its charter)

Delaware (State or other jurisdiction of incorporation or organization)	**41–1724239** (I.R.S. Employer Identification No.)
901 Marquette Avenue, Suite 2300 **Minneapolis, Minnesota** (Address of principal executive offices)	**55402** (Zip Code)

(612) 373–5300
(Registrant's telephone number, including area code)

(Former name, former address and former fiscal year, if changed since last report)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes ☒ **No** ☐

Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12 b–2 of the Exchange Act).

Yes ☒ **No** ☐

Indicate by check mark whether the registrant has filed all documents and reports required to be filed by Section 12, 13 or 15 (d) of the Securities and Exchange Act of 1934 subsequent to the distribution of securities under a plan confirmed by a court.

Yes ☒ **No** ☐

As of August 2, 2004, there were 100,006,798 shares of common stock outstanding.

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NRG ENERGY, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

(Unaudited)

Note 1 — Organization

General

NRG Energy, Inc., or NRG Energy, the "Company", "we", "our", or "us", is a wholesale power generation company, primarily engaged in the ownership and operation of power generation facilities and the sale of energy, capacity and related products in the United States and internationally. We have a diverse portfolio of electric generation facilities in terms of geography, fuel type, and dispatch levels. We seek to maximize operating income through the efficient procurement and management of fuel supplies and maintenance services, and the sale of energy, capacity and ancillary services into attractive spot, intermediate and long–term markets.

On May 14, 2003, we and 25 of our direct and indirect wholly owned subsidiaries commenced voluntary petitions under chapter 11 of the bankruptcy code in the United States Bankruptcy Court for the Southern District of New York. On November 24, 2003, the bankruptcy court entered an order confirming a plan of reorganization, for NRG Energy and four of our subsidiaries, and the plan became effective on December 5, 2003. On November 25, 2003, the bankruptcy court entered an order confirming the plan of reorganization for 21 of our subsidiaries, and the plan became effective on December 23, 2003. As of June 30, 2004, three entities remain in bankruptcy.

As part of the NRG plan of reorganization, Xcel Energy, Inc., or Xcel Energy, relinquished its ownership interest in us and we became an independent public company upon our emergence from bankruptcy on December 5, 2003. We no longer have any material affiliation or relationship with Xcel Energy. As part of that reorganization, we eliminated approximately $5.2 billion of corporate level bank and bond debt and approximately $1.3 billion of additional claims and disputes by distributing a combination of equity and up to $1.04 billion in cash among our unsecured creditors. In addition to the debt reduction associated with the restructuring, we used a substantial portion of the proceeds of a recent note offering and borrowings under a new credit facility to retire approximately $1.7 billion of project–level debt on December 23, 2003. In January 2004, we used proceeds of an additional note offering to repay $503.5 million of the outstanding borrowings under our new credit facility.

As of June 30, 2004, we owned interests in 55 power projects in five countries having an aggregate net generation capacity of approximately 18,000 MW. Approximately 7,900 MW of our capacity consists of merchant power plants in the Northeast region of the United States. Certain of these assets are located in transmission constrained areas, including approximately 1,400 MW of "in–city" New York City generation capacity and approximately 750 MW of southwest Connecticut generation capacity. We also own approximately 2,500 MW of capacity in the South Central region of the United States, with approximately 1,700 MW of that capacity supported by long–term power purchase agreements. Our assets in the West Coast region of the United States consist of approximately 1,300 MW of capacity with the majority of such capacity owned via our 50% interest in West Coast Power LLC. Our assets in the west coast region are supported by a power purchase agreement with the California Department of Water Resources that runs through December 2004. One–year term "reliability must–run contracts" with the California Independent System Operator for approximately 600 MW in the San Diego area are expected to be renewed for 2005.

Our principal domestic generation assets consisted of a diversified mix of natural gas–, coal– and oil–fired facilities, representing approximately 48%, 26% and 26% of our total domestic generation capacity, respectively. In addition, 45% of our generating facilities have some capability to combust duel fuels. We also own interests in plants having a net generation capacity of approximately 2,100 MW in various international markets, including Australia, Europe and Brazil.

We perform our own power marketing through our energy marketing subsidiary, NRG Power Marketing, Inc., or PMI, which, is focused on maximizing the value of our North American assets by providing management services, and through the efficient procurement and management of fuel and the sale of energy and related products in the spot, intermediate and long–term markets. West Coast Power has arranged for power marketing and fuel management with affiliates of our other partner, Dynegy, Inc. We operate substantially all of our generating assets, including the West Coast Power plants.

We were incorporated as a Delaware corporation on May 29, 1992. Our headquarters and principal executive offices are located at 901 Marquette Avenue, Suite 2300, Minneapolis, Minnesota, 55402. Our telephone number is (612) 373–5300. Our Internet website is http://www.nrgenergy.com. Our recent annual reports, quarterly reports, current reports and other periodic filings are available free of charge through our Internet website.

EXHIBIT D

DOWJO

ADVE

NRG Would Be Good Partner For Bank Eyeing Pwr Trading-CEO

September 29, 2004: 19:54 p.m. EST

-

NEW YORK (Dow Jones)--NRG Energy Inc. (NRG) would be a good partner for an investment bank that wants to get involved in energy trading, the company's chief executive said Wednesday.

NRG owns and operates power plants, primarily in the northeast, western and south central U.S., but its trading opportunities are limited by its poor credit ratings. It emerged from Chapter 11 bankruptcy protection in December.

"NRG has the best multi-fuel, multi-regional asset platform for a trading and marketing combination with a Wall Street firm seeking to enter the asset-backed commodity trading business," Chief Executive David Crane said in a presentation at an industry conference.

He spoke hours before TXU Corp. (TXU) said it and Credit Suisse First Boston decided not to pursue the joint energy trading venture they announced in May.

The companies couldn't agree on a mutually-agreeable economic arrangement, TXU said.

NRG filed for bankruptcy protection in May 2003, when falling power prices left it unable to service a huge pile of debt.

It's working to strengthen its balance sheet and has been selling noncore assets.

-By Kristen McNamara, Dow Jones Newswires; 201-938-2061; kristen.mcnamara@dowjones.com

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No CNN/Money.com editorial staff contributed to or were involved in the production of this story.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CERTIFICATE OF SERVICE

I, Anthony M. Mansfield, hereby certify that on October 8, 2004, I caused the following documents:

Opposition of the U.S. Commodity Futures Trading Commission to Motion to Dismiss or Alternatively to Transfer Venue, and

Affidavit of Anthony M. Mansfield

to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

Charles B. Rodgers
Timothy G. Gelinske
Jason R. Asmus

I further certify that I caused a copy of the foregoing documents and the notice of electronic filing to be mailed by first class mail, postage paid, and to be sent by electronic mail, to the following non-ECF participants:

Mark D. Young
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005

DATED: October 8, 2004

/s/ Anthony M. Mansfield
Anthony M. Mansfield

Exhibit P

ATTACHMENT 1

GLOSSARY

Dennis Abbott (“**Abbott**”) was the “second-in-command” on BP’s NGL Trading Bench in February 2004.

“Any” or **“Any barrel.”** A contract for an **“any”** barrel of propane for a particular month may be delivered at any time, with agreement of the buyer and the seller, during the month up to the last calendar day.

BP Products North America (“**BPNA” or “BP**”) is a wholly owned subsidiary of BP p.l.c., the second largest energy company in the world. In 2004, BP was one of the largest Natural Gas Liquids (“NGLs”) marketers and producers in the United States. BP also consumes propane in connection with its chemical manufacturing business.

BP North American Gas and Power (“**NAGP**”) is the trading arm of BP in North America and the “face to the market” for trading NGLs, and specifically TET propane.

BP Natural Gas Liquids Business Unit (“**NGLBU**”) handles the production, wholesale marketing and transportation of NGLs in North America, including propane.

Donald Cameron Byers (“**Byers**”) is currently the CEO and President of NAGP and, in February 2004, was the Chief Operating Officer of NAGP.

“**Chalkboard**” is an electronic bulletin board that provides a means for propane traders to engage in bilateral negotiations. Chalkboard allows parties to post bids and offers and negotiate transactions in propane but Chalkboard does not take title to propane.

Cody Claborn (“**Claborn**”) was the primary trader for TET propane in February 2004 and participated in the execution of BP’s February 2004 TET propane strategy. Claborn was placed on paid administrative leave during the Division’s investigation in this matter, and was recently fired for his actions in connection with BP’s February 2004 TET propane trading strategy.

Dynegy Liquids Marketing **(“Dynegy”)** owned and operated a propane storage facility also located in Mont Belvieu Texas during the relevant period. Propane stored at that facility and deliverable to that location is referred to as “non-TET” propane by the propane industry.

Enterprise Products Partners, LP (“**Enterprise**”) owns and operates a natural gas liquids storage facility also located in Mont Belvieu Texas. Propane stored at that facility and deliverable to that location is referred to as “non-TET” propane by the propane industry.

Martin Marz (“**Marz**”) was the Compliance Manager for NAGP in February 2004. He has recently been removed from that position and is currently a Regulatory Affairs Consultant for BPNA with no responsibility for supervising trading on behalf of BP.

Mark Radley ("**Radley**") was the Bench Leader for the NGL Trading Bench for NAGP from approximately December 2002 through April 2005. Radley was placed on paid administrative leave during the Division's investigation in this matter, and was recently fired by BP for his actions in connection with BP's February 2004 TET propane trading strategy.

"NGL" is an acronym for natural gas liquids.

"NGL Bench" refers to BPNA's group of traders that trade natural gas liquids.

Oil Price Information Service ("**OPIS**"), is a private price reporting service, which conducts daily surveys of traders and provides a daily midpoint, or "OPIS Average," for the propane commodity market based on the simple average of the highest and lowest observed prices.[1] The OPIS Average is also used in the propane markets to settle financial swaps and options. The OPIS publishes prices for spot and forward months in both TET and non-TET propane, as well as for Conway, Kansas propane. It also publishes prices for each of these propane products in outlying quarters.

"Physical propane" or "Physical propane contract" refers to a contract that provides the purchase or sale of actual propane. Physical propane is traded either as "wet" barrels or as "any" barrels for purposes of delivery. Physical propane is traded in the cash markets using largely standardized contracts traded in volumes denominated in barrels of liquified propane ("bbls"). Each barrel holds 42 gallons of propane. Propane prices are quoted in cents per gallon ("cpg") at increments of 1/8th of a cent. Physical propane may be traded either at a "fixed" price or an "index" price. The index is published on a daily basis by OPIS. The delivery location of the propane is a function of the propane product being traded, *i.e.*, the delivery location for TET propane is the TEPPCO storage facility, and the delivery location for non-TET propane is either Dynegy or Enterprise.

"Propane." Propane is one of the five primary natural gas liquids (NGLs). Propane is a by-product created during the processing and separating of natural gas liquids from natural gas to meet pipeline standards, or during the crude oil refining process.

James Summers ("**Summers**") was the Vice President of NGL Trading for NAGP in February 2004.

"TET" is an acronym for Texas Eastern Transmission Corporation. The phrase "TET propane" refers to propane that is deliverable at the TEPPCO storage facility in Mont Belvieu, Texas or any where within the TEPPCO system.

"TEPPCO" is an acronym for Texas Eastern Products Pipeline Co, LLC. The TEPPCO storage facility is located in Mont Belvieu Texas. The TEPPCO storage facility is also the delivery location for the New York Mercantile Exchange's ("NYMEX") propane contract. TEPPCO is the largest single storage facility for physical propane in the world is owned and operated by

[1] The "OPIS Average" is not weighted according to volume.

TEPPCO Partners, L.P. in Mont Belvieu, Texas ("TEPPCO storage facility"). The TEPPCO storage facility is the primary source for propane used in residential, commercial and agricultural heating in the northeastern United States via the TEPPCO pipeline, which runs from Mont Belvieu, Texas north through Ohio, into New York, Pennsylvania and Illinois.

"**Voicebrokers**" are individuals that broker transactions between propane traders through telephonic as well as instant messaging and email.

"Wet" or **"wet barrel"** refers to a physical barrel of propane that has a specific delivery date within a particular month.

Exhibit Q

AGREEMENT

agreement. 1. A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. [Cases: Contracts 1. C.J.S. *Contracts* §§ 2-3, 9, 12.] **2.** The parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance. UCC § 1-201(b)(3). [Cases: Sales 33. C.J.S. *Sales* § 43.]

"The term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract. In its colloquial sense, the term 'agreement' would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other. An accepted invitation to dinner, for example, would be an agreement in this sense; but it would not be a contract, because it would neither be intended to create, nor would it in fact create, any legal obligation between the parties to it. Further, even an agreement which is intended to affect the legal relations of the parties does not necessarily amount to a contract in the strict sense of the term. For instance, a conveyance of land or a gift of a chattel, though involving an agreement, is ... not a contract; because its primary legal operation is to effect a transfer of property, and not to create an obligation." 2 *Stephen's Commentaries on the Laws of England* 5 (L. Crispin Warmington ed., 21st ed. 1950).

"An agreement, as the courts have said, 'is nothing more than a manifestation of mutual assent' by two or more legally competent persons to one another. Agreement is in some respects a broader term than contract, or even than bargain or promise. It covers executed sales, gifts, and other transfers of property." Samuel Williston, *A Treatise on the Law of Contracts* § 2, at 6 (Walter H.E. Jaeger ed., 3d ed. 1957).

***agreement incident to divorce*.** See DIVORCE AGREEMENT.

***agreement of sale*.** An agreement that obligates someone to sell and that may include a corresponding obligation for someone else to buy. [Cases: Sales 1. C.J.S. *Sales* § 2.]

***agreement to agree*. 1.** An unenforceable agreement that purports to bind two parties to negotiate and enter into a contract; esp., a proposed agreement negotiated with the intent that the final agreement will be embodied in a formal written document and that neither party will be bound until the final agreement is executed. **2.** A fully enforceable agreement containing terms that are sufficiently definite as well as adequate consideration, but leaving some details to be worked out by the parties. [Cases: Contracts 25. C.J.S. *Contracts* § 60.]

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"Although the parties expect that they will reach agreement on the missing terms, what they expect to happen if they fail to reach agreement is often unclear. They may understand that there will be no contract at all or they may understand that there will be a contract with the missing term supplied as a matter of law. If the latter is their understanding, a question arises whether the agreement is one with open terms sufficiently definite to be enforceable or whether it is a mere unenforceable 'agreement to agree.' " E. Allan Farnsworth, *Contracts* § 3.29, at 217 (3d ed. 1999).

agreement to sell. An agreement that obligates someone to sell. [Cases: Sales 1. C.J.S. *Sales* § 2.]

antenuptial agreement. See PRENUPTIAL AGREEMENT.

binding agreement. An enforceable contract. See CONTRACT. [Cases: Contracts 1. C.J.S. *Contracts* §§ 2-3, 9, 12.]

closing agreement. *Tax*. A written contract between a taxpayer and the Internal Revenue Service to resolve a tax dispute. [Cases: Internal Revenue 4761. C.J.S. *Internal Revenue* § 654.]

cohabitation agreement. See COHABITATION AGREEMENT.

divorce agreement. See DIVORCE AGREEMENT.

formal agreement. An agreement for which the law requires not only the consent of the parties but also a manifestation of the agreement in some particular form (e.g., a signed writing), in default of which the agreement is unenforceable. Cf. *formal contract* under CONTRACT. [Cases: Contracts 30. C.J.S. *Contracts* §§ 66-67, 72.]

integrated agreement. See INTEGRATED CONTRACT.

invalid agreement. See *invalid contract* under CONTRACT.

living-together agreement. See COHABITATION AGREEMENT.

marital agreement. See MARITAL AGREEMENT.

marital settlement agreement. See DIVORCE AGREEMENT.

negotiated agreement. See NEGOTIATED AGREEMENT.

outsourcing agreement. See OUTSOURCING AGREEMENT.

point-and-click agreement. See POINT-AND-CLICK AGREEMENT.

postnuptial agreement. See POSTNUPTIAL AGREEMENT.

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***prenuptial agreement*.** See PRENUPTIAL AGREEMENT.

***property settlement agreement*.** See PROPERTY SETTLEMENT (2).

***reconciliation agreement*.** See RECONCILIATION AGREEMENT.

***separation agreement*.** See SEPARATION AGREEMENT.

***side agreement*. 1.** An agreement that is ancillary to another agreement. **2.** *Int'l law*. An international accord that is specifically negotiated to supplement a broader trade treaty. • For example, NAFTA contains no provisions about labor standards or environmental protection. But two side agreements about those areas were negotiated separately and designed to supplement NAFTA, making the treaty more attractive to the ratifying bodies. -- Also termed *supplemental agreement*.

***simple agreement*.** An agreement for which the law requires nothing for its effective operation beyond some manifestation that the parties have consented.

***subordination agreement*.** An agreement by which one who holds an otherwise senior interest agrees to subordinate that interest to a normally lesser interest, usu. when a seller agrees to subordinate a purchase-money mortgage so that the buyer can obtain a first-mortgage loan to improve the property. [Cases: Secured Transactions 147. C.J.S. *Secured Transactions* § 108.]

***supplemental agreement*.** See *side agreement*.

***surrogate-parenting agreement*.** See SURROGATE-PARENTING AGREEMENT.

***takeover agreement*.** An agreement under which a defaulting party's surety agrees to perform the original contract in the defaulting party's stead.

***trust agreement*.** See *declaration of trust* (2) under DECLARATION (1).

unconscionable agreement (<<schwa>>n-**kon**-sh<<schwa>>-n<<schwa>>-b<<schwa>>l). An agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair promisee would accept. • For commercial contexts, see UCC § 2-302. -- Also termed *unconscionable contract*; *unconscionable bargain*. [Cases: Contracts 1. C.J.S. *Contracts* §§ 2-3, 9, 12.]

***underwriting agreement*.** An agreement between a corporation and an underwriter covering the terms and conditions of a new securities issue. [Cases: Corporations 79. C.J.S. *Corporations* § 186.]

***valid agreement*.** See *valid contract* under CONTRACT.

***voidable agreement*.** See *voidable contract* under CONTRACT.

***void agreement*.** See *void contract* under CONTRACT.

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Bryan A. Garner, Editor in Chief

END OF DOCUMENT

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA **v.** **MARK DAVID RADLEY,** **JAMES WARREN SUMMERS,** **CODY DEAN CLABORN** **And** **CARRIE KIENENBERGER,** **Defendants.**	)	**Criminal Number:** **H-08-411** **Judge Gray H. Miller**

[PROPOSED] ORDER GRANTING DEFENDANTS RADLEY, SUMMERS AND CLABORN'S MOTION TO DISMISS

Defendants Radley, Summers and Claborn's Motion to Dismiss the Indictment Based on Commodity Exchange Act Section 2(g) is GRANTED and it is hereby ORDERED that the Indictment is DISMISSED.

It is so ORDERED on ______________________________, 2009.

____
Judge Gray H. Miller