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David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Elizabeth M. Murphy
Secretary,
Securities and Exchange Commission
100 F Street, N.E. E
Washington, D.C. 20549-1090

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant" and "Eligible Contract Participant" 75 *Fed. Reg.* 80173 (December 21, 2010). RIN 3038-AD06; SEC File No. S7-39-10

Dear Mr. Stawick and Ms. Murphy:

We are submitting these comments on behalf of our client, ONEOK, Inc. ("ONEOK"). We and ONEOK appreciate the opportunity to submit our views on the Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC") joint proposed rule relating to the definition of "Swap Dealer" in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").¹

ONEOK

ONEOK is one of the nation's largest energy companies involved in the natural gas and natural gas liquids businesses. ONEOK has three business units: Distribution (which also includes a retail natural gas marketing subsidiary, hereinafter referred to as "Retail Marketing"), Energy Services, and ONEOK Partners, L.P.

ONEOK Distribution is the eighth largest natural gas distribution business in the United States. ONEOK's three natural gas distribution companies serve over two million customers in Oklahoma, Kansas, and Texas.

¹ *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010).

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ONEOK is the sole general partner and owns 42.8 percent of ONEOK Partners, L.P., a publically traded limited partnership engaged in natural gas gathering and processing, natural gas pipelines, and natural gas liquids.

The Energy Services business segment consists of ONEOK Energy Services Company, L.P. ("OES"), a wholly-owned subsidiary of ONEOK, Inc. OES engages in the physical marketing and delivery of natural gas and bundled services throughout the United States and Canada. It derives the majority of its earnings from its physical natural gas marketing business.

In order to provide strong internal controls, concentrate expertise and for administrative convenience, OES enters into swaps to manage the risk of all three ONEOK business units. OES enters into "back-to-back" swaps with a particular ONEOK business unit and an outside counterparty. These transactions are exclusively to mitigate a commercial risk of the applicable ONEOK business unit.

By way of example, when ONEOK Distribution or Retail Marketing sells a fixed rate contract for natural gas to its retail customers, OES will hedge the unit's price risk by entering into a swap with a third party and a mirror swap with the ONEOK unit. This practice enables each ONEOK division or affiliate to hedge its price risk, but to have all outward-facing swap documentation centralized with one, expert ONEOK entity. OES does not charge any mark-up on the swaps to its affiliates. Likewise, OES may hedge commodity price risk for a ONEOK Partners entity by entering into a swap with that entity and a mirror or back-to-back swap with a third party, leaving the ONEOK Partners entity hedged and OES with no net exposure.

OES also enters into swaps for its own account with outside counterparties, primarily to hedge its own risk in physical gas trading. OES does not trade any security-based swaps.

Definition of "Swap Dealer"

Recognizing the diversity of swap markets, the CFTC and SEC ("the Commissions") in proposing to define "swap dealer" noted that particular market segments may raise specific definitional issues.² Accordingly, the Commissions noted that physical market participants have developed highly customized transactions and practices in connection with markets in physical commodities such as oil, natural gas, chemicals, and metals and particularly invited comments from physical market participants on the definition of "Swap Dealer."

The Dodd-Frank Act takes a functional approach to defining "Swap Dealer" in terms of whether a person engages in certain types of activities involving swaps. There are four

² "Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant" and "Eligible Contract Participant" 75 *Fed. Reg.* 80173 at 80183 (December 21, 2010) ("Proposing Release").

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independent tests for defining "Swap Dealer." One of these defines a "Swap Dealer" as any person who "regularly enters into swaps with counterparties as an ordinary course of business for its own account."³

As noted above, OES enters into mirror, or back-to-back, swaps with its corporate affiliates and outside counterparties. Thus, it has been organized and staffed by ONEOK for the purpose of trading on behalf of all three of ONEOK's business units. OES also enters into swaps for its own account. Read literally, its activities might be thought of as coming within this part of the definition of "Swap Dealer" (i.e., any person who "regularly enters into swaps with counterparties as an ordinary course of business for its own account"). The Commissions in the Proposing Release have addressed the applicability of this test to such inter-affiliate arrangements.

Noting that this prong of the test has caused much comment, the Commissions suggested that it should be read in conjunction with the express exception to the definition of "Swap Dealer" in subparagraph (C) for persons that enter into swaps for such persons' own accounts, "either individually or in a fiduciary capacity, but not as part of a regular business." The Commissions further stated that persons who engage in swaps as part of a "regular business" would be those who are "available to accommodate demand for swaps from other parties." However, this formulation might be read to include accommodating the demand of the entity's own corporate affiliates.

Moreover, focusing primarily on the express exclusion of subparagraph (C) for persons that "enter into swaps for such person's own account either individually or in a fiduciary capacity, but not as part of their regular business" does not provide additional clarity with respect to the applicability of the definition of "Swap Dealer" in the context of corporate affiliates. Indeed, without further explanation, reliance on the exclusion fails to address those practices which may not fall within the literal language of the exclusion. For example, it may not be clear whether a corporate entity which enters into back-to-back transactions on a principal-to-principal basis for its corporate affiliates does so as a "fiduciary."⁴ Nevertheless, without doubt such an inter-affiliate relationship is not the type of relationship that the statute seeks to define as a swap dealer, *i.e.* "those persons whose function is to serve as the points of connection" in the swap markets."⁵ For this reason we request that the Commissions clarify that the test of whether an

³ *See* Commodity Exchange Act ("CEA") § 1a(49), 7 U.S.C. 1a(49) (1999) (as amended by the Dodd-Frank Act).

⁴ It is also unclear what the Commissions mean by the term "fiduciary" and how strictly that term is intended to apply. For example, the relationship between ONEOK, Inc. and ONEOK Partners, L.P., is based on the partnership agreement, not partnership law that might be the usual basis for a "fiduciary relationship."

⁵ Proposing Release at 80177.

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entity is engaging in swaps as part of a “regular business” is that the entity enters into swaps to “accommodate demand for swaps from other, *non-affiliated*, parties.”

Interpretation of “Common Control”

The Commissions seek to clarify the application of the definition of “Swap Dealer” by referring to the “economic reality of any swaps and security-based swaps it enters into with affiliates . . . including whether the swaps and security-based swaps simply represent an allocation of risk within a corporate group.” The Proposing Release continues that swaps “between persons under common control may not involve interaction with unaffiliated persons that we believe is a hallmark of the elements of the definitions that refer to holding oneself out as a dealer.”⁶ The Proposing Release continues, however, by seeking comment on when transactions between persons under common control might be used to avoid the definition of dealer. In particular, the Commissions ask how they should interpret “common control” and whether this interpretation should be limited to wholly-owned affiliates.

Interpreting common control to apply only to wholly owned affiliates would be contrary to the functional approach generally used by the Commissions, including with respect to the proposed definition of “Swap Dealer.” As discussed above, ONEOK, like many energy companies, includes one or more limited partnerships within its corporate family. Both ONEOK and ONEOK Partners are publicly traded. As the sole general partner, ONEOK clearly exercises both legal and functional control over the business operations of the limited partnership, and the entities have a partnership agreement in place to govern their relationship. Accordingly, there can be no doubt that the two entities are under common control although they are under different ownership.⁷

One way that the Commissions could approach the issue of whether an affiliate is acting as a Swap Dealer rather than on behalf of its corporate affiliates is whether the trading interests of the various entities are aligned. It may be that in some circumstances, corporate affiliates operate entirely different lines of business and their individual trading interests differ so significantly that it would be appropriate to conclude that one affiliate is acting as a Swap Dealer to its affiliates. This would be particularly true where the trading entity also carries out these trading functions for persons outside of the corporate group. That case is quite different from

⁶ Id. at 80183.

⁷ This also comports with the definitions of “affiliate” and “control” under 17 C.F.R. Section 230.405. The term “affiliate” is defined as “[a]n affiliate of, or person affiliated with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.” “Control” is defined as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” As the sole general partner of ONEOK Partners, ONEOK possesses the power to direct the management and policies of ONEOK Partners.

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ONEOK, which has established a single trading entity for the corporate group. OES operates only for itself and its affiliates, and there is an alignment of interest among the various units with respect to this trading arrangement. Moreover, due to its status as the sole general partner of ONEOK Partners, ONEOK exercises control over the management and operations of the partnership.

Accordingly, "common control" is not limited to being a 100% wholly owned affiliate. Therefore, rather than merely looking at ownership, the Commissions should focus on the actual control relationship among affiliates, taking into account indices of actual control such as percentage of ownership, being the general partner of a partnership, a common business among affiliates, whether there is an internal mechanism that appropriately assigns risk among the affiliates, and whether any mark-up on the swaps is charged to the affiliate(s).

Nature of Back-to- Back Contracts

In order to be able to offer their customers fixed price contracts for delivery of natural gas, the ONEOK business unit must have a mechanism for mitigating that price risk over the term of the contract. As described above, the ONEOK business units hedge their risk by entering into a swap with OES, which in turn enters into an economically offsetting swap with a third party. In doing so, OES endeavors to mirror the transactions with its affiliates and the outside counterparties and to maintain a neutral exposure from these affiliate transactions. Generally, the business unit will ask OES for an indicative price before it enters into a fixed price contract with its customer. OES will in turn enter into a transaction with its affiliate at the same price that it obtains from the outside counterparty. However, the markets are dynamic and retail transactions may be small relative to the notional quantities in commonly traded swaps and futures, thus OES may not be able to enter into perfectly matching transactions on a one-to-one basis. Rather, OES may be required to bundle together a number of affiliate transactions and to enter into a single transaction with an outside counterparty. Conversely, OES may be required to enter into a number of transactions with an outside counterparty to economically offset the transaction that it has entered into with its affiliates. Or, there may be a degree of basis risk in the transactions because the tenor of the transactions may not be in exact alignment or there may be geographic differences in the contracts. For this reason, OES for short periods of time may not have a balanced position. However, the imbalance is temporary and OES always seeks to be in a neutral position with respect to its trading activities on behalf of its affiliates.

The markets are complex and do not have perfect liquidity. Accordingly, OES's positions may not always be perfectly matched; that is, there may be some basis risk in any particular hedge. As noted by the Commission in the Proposing Release, this type of risk is merely an allocation of risk among the corporate affiliates. It does not in any way affect the fundamental reality of the relationship or function of the trading affiliate. Indeed, it is likely that

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such basis risk to the corporate group as a whole is reduced by centralizing such activities in an expert trading division.

* * * * *

ONEOK and its affiliates function as an integrated business under the common control of ONEOK. Using this integrated business model, ONEOK has been highly successful in a complex and volatile market. An important part of ONEOK's success has been the ability to centralize trading in a single business unit. This unit, OES, was not formed to operate, and does not operate, as a "Swap Dealer." We request that the Commissions provide further clarification that the definition of "Swap Dealer" does not apply to a business unit that on a centralized basis, trades with outside counterparties for all affiliates of a corporate group, whether or not the individual affiliates are wholly owned, and regardless of whether its does so as agent for its affiliates or through back-to-back inter-affiliate transactions. The Commissions should further clarify that such inter-affiliate transactions should generally mirror the transactions with third party counterparties but they will not always do so perfectly and may not do so for short periods of time.

ONEOK appreciates the Commissions' understanding of the unique aspects of the physical commodity markets and the challenges that physical market participants face. ONEOK thanks the Commissions for seeking comment on these important issues.

We would be happy to discuss our comments at greater length with the staff. If you have any questions regarding ONEOK's comments, please feel free to contact Vicky Hale, Vice President and Associate General Counsel, Compliance and Regulatory, ONEOK, Inc. at 918-588-7949, Michael L. Pate, Managing Attorney, ONEOK Partners at 918-588-7022, or the undersigned, at 202-663-6240.

Respectfully submitted,



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cc: John Barker, General Counsel
Vicky Hale
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