The Business Council for Sustainable Energy®

Further Definition of "Swap," "Security-Based Swap," "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Proposed Rule 76 Fed.Reg 29,818 (17 CFR Part 1) RIN No. 3038-AD46 (May 23, 2011)

Clean energy industries are concerned that "environmental commodities" – such as renewable energy credits (RECs), emissions allowances, carbon offsets, energy efficiency credits, etc. – may inadvertently be defined as swaps, despite their illiquid and unique nature, which would:

- Create barriers generally to renewable energy development and specifically to nascent markets for environmental commodities.
- Increase the cost of business for renewable energy companies and the companies that purchase renewable power.
- Raise the price of clean power sources for the US consumer, discouraging retail demand.
- Discourage direct transactions by smaller clean energy market participants, thereby shifting capital to larger players and financial institutions
- Undermine national and regional goals for environmental protection, energy independence, and domestic job creation.

Environmental commodities are physically settled, non-financial instruments, which trade regarding the delivery of environmental attributes, and they should not be defined as swaps.

- While intangible, environmental commodities go hand-in-hand with physically settled transactions and should be excluded from the definition of swap by section 1a(47)(B)(ii) of the Commodity Exchange Act.
- Environmental commodities are consumed and retired, attributes characteristic of forwards.
- The Interagency Working Group for the Study on Oversight of Carbon Markets, established in section 750 of Dodd-Frank, concluded that the CFTC did not have the authority under Dodd-Frank to routinely monitor trading in carbon markets. Given that carbon offsets are environmental commodities, this finding offers a helpful window into the legislative intent behind Dodd-Frank regarding environmental commodities.
- RECs are an environmental commodity, subject to extensive review and rules, transacted with a transfer of title. Sometimes known as "green tags," RECs are only created by, and associated with, the production of energy from a specific source.
- These and like clean energy instruments exist primarily in order to comply with mandates imposed by state and federal environmental laws and regulations.
    - For example, renewable energy resource transactions and emission allowances are employed solely to demonstrate required procurements under the 33% California Renewable Portfolio Standard and California's cap and trade program.
    - Likewise, utilities enter into Resource Adequacy agreements with suppliers to certify to the Public Utilities Commission and California Independent System Operator that they purchased sufficient capacity to generate energy for certain demand contingencies.

It would be greatly helpful if language – in the preamble or another appropriate location – recognizes the unique nature of environmental products. These non-financial instruments could otherwise be defined improperly and run counter to the nation's critical energy security, clean power, and environmental protection goals.

Please note that the BCSE is a diverse coalition of business interests and not all BCSE members endorse or take positions on issues covered in this document. The comments contained in this paper represent the position of BCSE as an organization, but not necessarily the view of any particular member with respect these issues.

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