



October 29, 2008

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

Re: Petition for an Amendment to Commission Regulation 35 to Permit the Clearing of OTC Agricultural Swap Transactions and Provide for Reporting of Certain Cleared Swap Agreements to the Commission

Dear Mr. Stawick:

Agora-X, LLC ("**Agora-X**") submits this petition ("**Petition**") in accordance with Commodity Futures Trading Commission ("**Commission**") Regulation 13¹ and respectfully requests that the Commission exercise its authority under Section 4(c) of the Commodity Exchange Act ("**Act**")² and amend Commission Regulation 35 ("**Part 35**")³ to:

- (a) Allow "swap agreements" (as defined in Part 35) to be cleared by derivative clearing organizations ("**DCO**"); and
- (b) Implement a pilot program to require that certain cleared swap agreements under Part 35 be reported to the Commission.

The precise amendments that are requested by this Petition are attached as Exhibit A hereto.

As we demonstrate below: (i) the proposed amendments are consistent with the requirements and conditions of Section 4(c) of the Act; and (ii) clearing of swap agreements under Part 35 and the new reporting requirements for certain cleared swaps will have a positive effect on the ability of the Commission, DCOs, and applicable designated contract markets ("**DCM**") to discharge their regulatory or self-regulatory duties under the Act.

¹ 17 C.F.R. pt. 13.2 (2008). (**Petition for issuance, amendment, or repeal of a rule.** Any person may file a petition with the Secretariat of the Commission for the issuance, amendment or repeal of a rule of general application.... The petition shall be directed to Secretariat, ... and shall set forth the text of any proposed rule or amendment or shall specify the rule the repeal of which is sought. The petition shall further state the nature of the petitioner's interest and may state arguments in support of the issuance, amendment or repeal of the rule.)

² 7 U.S.C. § 1 *et seq.*, as amended.

³ 17 C.F.R. pt. 35 (2008).

AGORA-X, LLC



Because of the current volatile conditions in the U.S. financial markets and the desirability of providing over-the-counter (“*OTC*”) derivative market participants with access to enhanced credit management facilities, we respectfully request that the Commission review and approve this Petition on an expedited basis.⁴

I. The Commission’s Legal Authority / Exemption under Part 35

A. Swap Exemption

The Commission adopted the Part 35 swap exemption (“*Swap Exemption*”) 14 years ago.⁵ In the intervening period, Congress has enacted major amendments to the Act and there has been a significant increase in the use of swap agreements by commercial and other participants in the U.S. agricultural industry. The Commodity Futures Modernization Act of 2000 (“*CFMA*”) superseded the Swap Exemption with respect to swap transactions involving exempt and excluded commodities and expressly permitted such transactions to be cleared by a DCO.⁶ However, counterparties who enter into swaps on agricultural commodities must continue relying on the Part 35 Swap Exemption. The Swap Exemption affords relief from the exchange trading requirement of the Act if:

- (a) the swap agreement is entered into solely between eligible swap participants at the time such persons enter into the swap agreement;
- (b) the swap agreement is not part of a fungible class of agreements that are standardized as to their material economic terms;
- (c) the creditworthiness of any party having an actual or potential obligation under the swap agreement would be a material consideration in entering into or determining the terms of the swap agreement, including pricing, cost, or credit enhancement terms of the swap agreement; and
- (d) the swap agreement is not entered into and traded on or through a multilateral transaction execution facility.⁷

Part 35.2 also provides that subsections (b) and (d) above do not preclude arrangements or facilities between the parties that provide for netting of payments or payment obligations.

⁴ See also 17 C.F.R. pt 13.5(b)(2) and pt 13.6(a).

⁵ Exemption for Certain Swap Agreements, 58 Fed. Reg. 5587 (January 22, 1993).

⁶ Pub. L. No. 106-554, § 1(a)(5) (The CFMA provided legal certainty for certain off-exchange “excluded swap transactions” (Section 2(g)), and for certain “transactions in exempt commodities” (Section 2(h)). Sections 2(g) and 2(h) do not cover transactions involving agricultural commodities.

⁷ 17 C.F.R. pt. 35.2(a)-(d) (2008).



II. Proposed Amendments to Part 35

A. Summary of Proposed Revisions

The proposed revisions to Part 35 are intended to:

- (a) permit the clearing by DCOs of swaps entered into between eligible swap participants under Part 35;
- (b) replace the undefined term “multilateral transaction execution facility” (“*MTEF*”) with the term “trading facility” as defined in Section 1(a)(34) of the Act; and
- (c) include a requirement to electronically report certain cleared swap agreements entered under Part 35 to the Commission.

Below we explain in more detail the rationale for each of the suggested revisions and provide in a redlined version of the proposed revisions to Part 35 attached hereto as Exhibit A.

B. Limited Conforming Amendments to Part 35

Agora-X requests that the Commission make a limited number of amendments to the Swap Exemption to permit clearing and to conform defined terms in the amendment to certain terms in the CFMA.

First, we request that the requirement that the swap agreements must not be a “part of a fungible class of agreements that are standardized as to their material economic terms” be changed to require only that swap agreements must be subject to individual negotiation between eligible swap participants. This revision will make it possible to clear swap agreements on a DCO. It also will make it easier to negotiate swap agreements via electronic communication networks (“*ECNs*”) and bulletin boards which should increase liquidity in the market and make prices more transparent to users of the system.

Second, we request that the requirement that the “creditworthiness of any party ... be a material consideration” be amended to state that the creditworthiness of the counterparty must be a material consideration at the time when the swap agreement is made.

Third, we request that the term “multilateral transaction execution facility” be replaced with the term “trading facility” as defined in the Act.

C. Promotion of Clearing of Swaps

The “creditworthiness” requirement creates uncertainty about the permissibility of clearing of swap agreements under Part 35 because when a contract is cleared, it is novated to a third party. At that point, the creditworthiness of original counterparties to a swap agreement is substituted with the creditworthiness of a clearing house, such as a DCO. By amending Part 35, to require that creditworthiness be a material consideration only when eligible swap participants enter into



a swap agreement, this requirement is retained, but the amendment also allows the subsequent clearing of swap agreements.

Clearing of swap agreements will reduce counterparty credit risk and, by reducing bilateral collateral requirements, should promote increased liquidity in the market. In addition, clearing of swap agreements will enhance the financial stability of the market because once cleared, the credit of individual counterparties will be substituted by the credit of a DCO. Furthermore, it is likely that systemic risks will be reduced because the failure of any one swap trader will have a lesser effect on the market if transactions with that swap trader were novated to a DCO. Clearing of OTC agricultural swaps, in particular, is also likely to increase the credit available to agricultural aggregators, agricultural cooperatives, and other agricultural market participants.

D. Replacement of MTEF with the Term Trading Facility

The term “multilateral transaction execution facility” is not defined in either the Act or any of the Commission rules and regulations. The absence of a definition creates uncertainty in the market because the line between an undefined MTEF and an ECN used for bilateral negotiations is unclear. In addition, the Swap Exemption does not expressly provide that the clearing of a swap agreement negotiated via an ECN does not convert the ECN into an MTEF, which then would render the transaction ineligible for the safe harbor of the Swap Exemption. The uncertainty surrounding scope of the undefined term MTEF is compounded by the fact that the Act has been amended several times since 1993 and now includes a revised definition of “trading facility”.⁸ Significantly, the definition of “trading facility” provides that submitting for clearing to a DCO a transaction that has been executed on or through an entity that does not otherwise qualify as a “trading facility” does not cause the entity to become a “trading facility.”⁹ Accordingly, to

⁸ 7 U.S.C. 1a (34) (defining “trading facility” as “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 – (i) by accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or (ii) through the interaction of multiple bids or multiple offers within a system with a predetermined non-discretionary automated matching and execution algorithm. (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 by the parties and not from interaction of multiple bids and multiple offers within a predetermined, nondiscretionary automated trade matching and execution algorithm;... or (iii) facilities on which bids and offers, and acceptances of bids and offers effected on the facility, are not binding. Any person, group of persons, dealer, broker, or facility described in clause (i) or (ii) is excluded from the meaning of the term “trading facility” for the purposes of this chapter without any prior specific approval, certification, or other action by the Commission”).

⁹ 7 U.S.C. § 1a (34) (C) (stating “[a] person or group of persons that would not otherwise constitute a trading facility shall not be considered to be a trading facility solely as a result of the submission to a derivatives clearing organization of transactions executed on or through the person or group of persons”).



promote legal certainty in the negotiation and execution of agricultural swaps and to promote the clearing of agricultural swaps, this provision of Part 35 should be revised.¹⁰

E. Pilot Program for Electronic Reporting of Certain Cleared OTC Agricultural Swaps

Several legislative efforts during the summer and fall of 2008 indicate a growing consensus that the access to more information about cleared OTC swap transactions would enhance the Commission's ability to effectively carry out its statutory mandate of market regulation and supervision.¹¹ Because in practice Part 35 Swap Exemption applies to only a limited class of swap agreements – *i.e.*, entered with respect to agricultural commodities – rather than swaps on all other commodities entered under Section 2(g) (which carves out swaps on agricultural commodities from its exclusion), the Commission has an opportunity through this request to amend Part 35 to institute a pilot program to implement reporting rules immediately without waiting for legislative amendments to the Act. Instituting a pilot reporting program will allow the Commission to evaluate the benefits of reporting in the context of a single class of commodities on an expedited basis. Furthermore, the information derived from the pilot program will assist the Commission in developing legislative proposals, if appropriate, to implement a statutory reporting requirement for cleared OTC agricultural swaps.¹²

Agora-X's proposed revision to Part 35 includes a specific provision under which a swap agreement that is entered into or negotiated via an ECN or similar facility, that is cleared, and that meets certain minimum quantitative parameters (*i.e.*, is not *de minimis*) must be reported to the Commission. It will not be burdensome for any ECN or DCO to comply with this pilot requirement because they already collect and maintain electronic records of transactions negotiated on or cleared through them.

The Commission's ability to collect data concerning cleared agricultural swap transactions on a pilot basis will significantly expand the information available to the Commission as a regulator of commodities markets. The increased legal certainty and reduced credit risk that adoption of Agora-X's proposed amendments to Part 35 Swap Exemption would provide for agricultural

¹⁰ Given that the definition of "trading facility" excludes facilities that serve as ECNs, bulletin boards or computer messaging systems, greater legal certainty concerning the parameters of permissible electronic systems for negotiating swaps will promote efficient execution of swap agreements that until now routinely have been executed over the telephone or via an AOL, Yahoo, Google or any other online chat-box or messaging system.

¹¹ See Commodity Markets Transparency Act of 2008, H.R. 6604, 110th Cong. § 14 (2008) (requiring routine monthly reporting to CFTC of OTC transactions exempt commodities, excluded commodities, excluded swap transactions or transactions entered into under an exemption issued by the CFTC rule, regulation, or order that are fungible with agreements, contracts, or transactions traded on or subject to the rules of any board of trade or electronic trading facility, with respect to a significant price discovery contract).

¹² See also, Staff Report on Commodity Swap Dealers & Index Traders with Commission Recommendations, September 2008, where the Commission recommended enhanced reporting with respect to OTC commodity swaps.



swap transactions should increase liquidity in the market and the transparency to the Commission of the extent of, and exposures created by, such transactions.

III. Requirements of Section 4(c) of the Act

Because the Commission adopted Part 35 under its authority granted by Section 4(c) of the Act, the Commission must apply the same criteria in deciding whether to adopt Agora-X's proposed amendments to the Swap Exemption.

A. Requirements for an Exemption under Section 4(c) of the Act

Section 4(c)(1) of the Act provides that, “[i]n order to promote responsible economic or financial innovation and fair competition” the Commission may exempt contracts, and persons who provide services with respect to such contracts, from any applicable requirement that such contracts must be executed on a DCM or a registered derivatives transaction execution facility or from any other provision of the Act (with certain specified exceptions). Furthermore, to grant an exemption from the exchange trading requirement, the Commission must determine that:

- (a) the amendment will be consistent with the public interest and the purposes of the Act;
- (b) the contracts will be entered into solely between “appropriate persons;” and
- (c) the amendment will not have a material adverse effect on the ability of the Commission or the relevant market to discharge its regulatory or self-regulatory duties under the Act.

Below we discuss how Agora-X's proposed revisions to Part 35 satisfy each of the requirements for an exemption under Section 4(c).

B. Public Interest and Purposes of the Act

The President's Working Group on Financial Markets (“*PWG*”)¹³ expressly supported the clearing of OTC transactions. The CFMA, based in part on *PWG*'s recommendations, enacted amendments to the Act to facilitate the clearing of OTC transactions by DCOs. More recently, many U.S. financial regulators, including the Commission have stated on several occasions that clearing of OTC derivatives contracts reduces counterparty risk, increases available credit to

¹³ See *Over-the-Counter Derivatives Markets and the Act: Report of the Presidents Working Group on Financial Markets* (November 1999) (noting “[c]learing of OTC derivatives has the potential to reduce counterparty risks associated with such transactions through risk management techniques that may include mutualizing risks, facilitating offset and netting”).



market participants, reduces systemic risks, contributes to greater liquidity of OTC trades and improves transparency of the OTC markets.¹⁴

Clearing of OTC swap agreements involves the substitution of the creditworthiness of two counterparties to a transaction with the creditworthiness of the clearing organization. The DCO manages counterparty risk through its system of risk mutualization and by requiring adequate margin.¹⁵ Although cleared-only contracts that are typically used to clear OTC swap agreements are not futures contracts, the substitution process will afford the DCO clearing members which carry the “cleared-only” contracts the same efficiencies and benefits that centralized clearing affords clearing members that carry DCM-listed futures contracts. Accordingly, the DCO will be able to manage the risks associated with the cleared-only positions through the same practices used by the DCO and its clearing members to manage the risks associated with futures contracts executed on a DCM in either the same or similar underlying commodities.

Amending Part 35 to permit the clearing of swap agreements by a DCO will promote one of the key public interests identified in Section 3(a) of the Act “by providing a means for managing and assuming price risks, [and] discovering prices.” The requested amendment of Part 35 is consistent with the purposes of the Act identified in Section 3(b), which include: promotion of responsible innovation and fair competition; serving the public interest through a system of effective self-regulation and implementation of internal surveillance systems; deterring and preventing price manipulation; ensuring the financial integrity of transactions and the avoidance of systemic risk; and protecting market participants from fraud and misuses of customer assets.

¹⁴ Press Release, U.S. Commodity Futures Trading Commission, Commission Announces Agricultural Market Initiatives, (June 3, 2008) (stating “[t]he Commission has tasked CFTC staff to develop a proposal for allowing the clearing of agricultural swaps. This initiative will provide farmers and grain merchandisers with another choice for managing price and basis risk with the benefit of centralized clearing and the regulatory transparency that accompanies clearing”), available at <http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5504-08.html> See also Commission Staff Report on Commodity Swap Dealers and Index Traders with Commission Recommendations at page 7 (September 2008) (stating [t]he Commission believes that market integrity, transparency, and availability of information related to OTC derivatives are improved when these transactions are subject to centralized clearing. Accordingly, the Commission will continue to promote policies that enhance and facilitate clearing of OTC derivatives whenever possible”), available at <http://www.cftc.gov/stellent/groups/public/@newsroom/documents/file/cftcstaffreportonswapdealers09.pdf>. See also, Remarks By Treasury Assistant Secretary Lewis A. Sachs on September 26, 2000 (LS-914), referring to the CFMA 2000 and the benefits of centralized clearing of OTC derivatives: “Among other things, this legislation [CFMA 2000] would allow ... centralized clearing of derivatives, thereby helping to: reduce counterparty credit risk; promote innovation; make our markets more competitive, transparent, and efficient; and reduce the costs of hedging risk and reducing exposure to other markets,” available at <http://www.ustreas.gov/press/releases/ls914.htm>.

¹⁵ In a system which does not allow clearing, counterparty credit risk is managed on a bilateral basis and in practice this may result in counterparties trading without adequate collateral. As the September and October 2008 events in the U.S. financial markets have demonstrated, this can increase systemic risks. Making clearing available leads to 3rd party margining (*i.e.*, by the DCO) and, in turn, can reduce this risk.



Cleared OTC products have not contributed to current unfavorable economic conditions, while some uncleared OTC products, such as credit default swaps, appear to have contributed to the problem. Users of Cleared OTC products will be subject to the discipline of margin; while counterparties to uncleared OTC products must make their own unique credit support arrangements. Prohibiting the clearing of agricultural swaps has no apparent regulatory benefit. Indeed, on the contrary, it may actually increase systemic credit risk to the market as a whole.

Implementation of the amendment of Part 35 that promotes clearing will serve the public interests of:

- increased stability of the OTC markets;
- reduced counterparty risk;
- increased availability of credit to market participants;
- reduced systemic risks; and
- greater liquidity in, and improved transparency of, the OTC markets.

In addition, the purposes of the Act will be served by:

- increased ability of the Commission to oversee the OTC markets;
- improved ability of market participants to manage counterparty risks; and
- the promotion of reasonable economic and financial innovation and fair competition in U.S. financial and derivatives markets.

C. Negotiation of Swaps Between Appropriate Persons

The second requirement for an amendment under Section 4(c) is that the agreement, contract or transaction be entered into solely between “appropriate persons.” Under Section 4(c) the category of “appropriate persons” essentially replicates the category of “eligible swap participants” in Part 35. Part 35, however, defines the subcategory of an unregulated business entity more narrowly than Section 4(c).¹⁶ Accordingly, Section 4(c)’s “appropriate persons” requirement necessarily is met by Agora-X’s proposed amendments to Part 35 Swap Exemption.

¹⁶ 17 C.F.R. pt. 35 (Part 35 requires that such entity have total assets in excess of \$10 million, while section 4(c) only set the limit at \$5 million).



D. Absence of Material Adverse Effect on the Ability of the Commission or Any DCM or Derivatives Transaction Execution Facility to discharge its Regulatory or Self-Regulatory Duties under the Act

Because of the link between transactions executed via an ECN and cleared on a DCO, the Commission will have additional information available to assist in the performance of its market monitoring and supervisory functions. Accordingly, the Commission's ability to discharge its regulatory duties under the Act with respect to agreements entered into under the Swap Exemption will be significantly improved.

DCOs will follow the same objective margining, financial and risk management procedures with respect to cleared swap agreements as they follows for all other contracts that they clear. As regulated entities, the DCOs are subject to applicable Core Principles under the Act and the swap agreements cleared by the DCOs will remain subject to the Act's anti-fraud and anti-manipulation provisions. Because the swap agreements will be subject to all of the protections applicable to transactions cleared on the DCOs, permitting the clearing of swap agreements will enhance the ability of the Commission and the DCOs to discharge their regulatory and self-regulatory responsibilities.

IV. Conclusion

Agora-X respectfully submits that the proposed revision to Part 35 will serve the public interest and the purposes of the Act by promoting:

- the clearing of OTC swap agreements;
- the harmonization of the definitions used in Part 35 with those in the Act; and
- greater transparency of cleared OTC swap agreements through a pilot requirement that certain cleared swap agreements be reported to the Commission.

Please contact: Agora-X representatives – Brent M. Weisenborn, President and CEO of Agora-X at (816) 412-3000 brentw@agora-x.com; or Paul J. Pantano, Jr., at (202) 756-8026 ppantano@mwe.com or Peter Y. Malyshev at (202) 756-8067 pmalyshev@mwe.com (as regulatory counsel for Agora-X) if you have any questions about this Petition.

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Thank you for your consideration.

Respectfully submitted,



Agora-X

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Exhibit A

Redline of the Revised Part 35

§ 35.1 Definitions.

(a) *Scope.* The provisions of this part shall apply to any swap agreement which may be subject to the Act, and which has been entered into on or after October 23, 1974.

(b) *Definitions.* As used in this part:

(1) *Swap agreement* means:

(i) An agreement (including terms and conditions incorporated by reference therein) which is a ~~rate~~ swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, ~~rate~~ cap agreement, ~~rate~~ floor agreement, ~~rate~~ collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other similar agreement (including any option to enter into any of the foregoing);

(ii) Any combination of the foregoing; or

(iii) A master agreement for any of the foregoing together with all supplements thereto.

(2) *Clearing* means the novation and clearing of swap agreements on or through a derivatives clearing organization.

(3) *Eligible swap participant* means, and shall be limited to the following persons or classes of persons:

(i) A bank or trust company (acting on its own behalf or on behalf of another eligible swap participant);

(ii) A savings association or credit union;

(iii) An insurance company;

(iv) An investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) or a foreign person performing a similar role or function subject as such to foreign regulation, *Provided That* such investment company or foreign person is not formed solely for the specific purpose of constituting an eligible swap participant;

(v) A commodity pool formed and operated by a person subject to regulation under the Act or a foreign person performing a similar role or function subject as such to foreign regulation, *provided that* such commodity pool or foreign person is not formed solely for the specific purpose of constituting an eligible swap participant and has total assets exceeding \$5,000,000;

(vi) A corporation, partnership, proprietorship, organization, trust, or other entity not formed solely for the specific purpose of constituting an eligible swap participant (A) which has total assets exceeding \$10,000,000, or (B) the obligations of which under the swap agreement are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity referenced in this paragraph (b)(23)(vi)(A) of this section or by an entity referred to in paragraph (b)(23)(i), (ii), (iii), (iv), (v), (vi) or (viii) of this section; or (C) which has a net worth of \$1,000,000 and enters into the swap agreement in connection with the conduct of its business; or which has a net worth of \$1,000,000 and enters into the swap agreement to manage the risk of an asset or liability owned or incurred in the conduct of its business or reasonably likely to be owned or incurred in the conduct of its business;

(vii) An employee benefit plan subject to the Employee Retirement Income Security Act of 1974 or a foreign person performing a similar role or function subject as such to foreign regulation with total assets exceeding \$5,000,000, or whose investment decisions are made by a bank, trust company, insurance company, investment adviser subject to regulation under the Investment Advisers Act of 1940 (15 U.S.C. 80a-1 *et seq.*), or a commodity trading adviser subject to regulation under the Act;

(viii) Any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing;



(ix) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation, acting on its own behalf or on behalf of another eligible swap participant: *Provided, however,* That if such broker-dealer is a natural person or proprietorship, the broker-dealer must also meet the requirements of either paragraph (b)(23) (vi) or (xi) of this section;

(x) A futures commission merchant, floor broker, or floor trader subject to regulation under the Act or a foreign person performing a similar role or function subject as such to foreign regulation, acting on its own behalf or on behalf of another eligible swap participant: *Provided, however,* that if such futures commission merchant, floor broker, or floor trader is a natural person or proprietorship, the futures commission merchant, floor broker, or floor trader must also meet the requirements of paragraph (b)(23) (vi) or (xi) of this section; or

(xi) Any natural person with total assets exceeding at least \$10,000,000.

§ 35.2 Exemption.

(a) Exemption. A swap agreement is exempt from all provisions of the Act and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to such agreement, is exempt for such activity from all provisions of the Act (except in each case the provisions of sections 2(a)(1)(B), 4b, and 4c of the Act and §32.9 of this chapter as adopted under section 4c(b) of the Act, and the provisions of sections 6(c) and 9(a)(2) of the Act to the extent 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), provided the following terms and conditions are met:

(a1) The swap agreement is entered into solely between eligible swap participants at the time such persons enter into the swap agreement;

(a2) The swap agreement is ~~not part of a fungible class of agreements that are standardized as to their material economic terms;~~ subject to individual negotiation by the parties;

(a3) ~~At the time when the parties enter into the swap agreement, the~~ creditworthiness of any party having an actual or potential obligation under the swap agreement would be a material consideration in entering into or determining the terms of the swap agreement, including pricing, cost, or credit enhancement terms of the swap agreement; and

(a4) The swap agreement is not entered into and traded on or through a ~~multilateral transaction execution trading facility;~~

Provided, however, That paragraphs (b) and ~~(d)~~(b) Netting of Payment Obligations and Clearing. Paragraphs (2), (3) and (4) of Rule 35.2(a) shall not be deemed to preclude arrangements or facilities between parties to swap agreements, that provide for netting of payment obligations resulting from such swap agreements or clearing of such swap agreements nor shall these subsections be deemed to preclude arrangements or facilities among parties to swap agreements, that provide for netting of payments resulting from such swap agreements; ~~Provided further, That any or clearing of such swap agreements.~~

(c) Reporting. Any swap agreement entered into under this exemption that:

(1) is cleared on a derivatives clearing organization; and

(2) is entered into, on or through the means of any electronic communication network or any other similar negotiation platform that is excluded from the definition of the trading facility; and

(3) has more than *de minimis* value

shall be reported by the DCO to the Commission in the form and to the extent specified by the Commission. For the purpose of this Paragraph (c), *de minimis* value shall mean [TO BE DETERMINED BY CFTC].

(d) Applying to Commission for Additional Exemptions. Any person may apply to the Commission for exemption from any of the provisions of the Act (except 2(a)(1)(B)) for other arrangements or facilities, on such terms and conditions as the Commission deems appropriate, including but not limited thereto, the applicability of other regulatory regimes.