



February 22, 2011

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Subject: Comments of Encana Marketing (USA) Inc. on the Proposed Rule on End-User Exception to Mandatory Clearing of Swaps, RIN Number 3038-AD10

Dear Secretary Stawick:

Encana Marketing (USA) Inc. (EMUS) hereby files comments on the Notice of Proposed Rulemaking (NOPR) issued by the Commodity Futures Trading Commission (Commission) in this proceeding.¹ EMUS is an indirect wholly owned subsidiary of Encana Corporation (Encana). Its principal U.S. office is located in Denver, Colorado. EMUS' marketing activities include selling and purchasing natural gas, natural gas liquids, other related energy commodities and services in the U.S. wholesale energy markets. As part of EMUS' marketing activities, Encana, for itself and its subsidiaries, enters into hedging transactions or swaps to manage and mitigate commercial risks associated with EMUS' sales, purchases and movement of these energy commodities. It considers itself to be an end-user of swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act).

Comments

As amended by the Act, Section 2(h)(7)(A) of the Commodity Exchange Act (CEA) provides that a swap that is otherwise subject to mandatory clearing qualifies for an elective exception from clearing if one party to the swap (1) is not a financial entity, (2) is using the swap to hedge or mitigate commercial risk, and (3) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps. In this NOPR, the Commission proposes to adopt requirements governing the elective exception to the mandatory clearing of swaps established by CEA Section 2(h)(7)(A).

¹ *End-User Exception to Mandatory Clearing of Swaps*, 75 Fed. Reg. 80,747 (Dec. 23, 2010).

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1. Form of Notice to the Commission

Proposed § 39.6(a) would require an electing counterparty (*i.e.*, end-user) to provide or cause to be provided certain information regarding its election to use the exception to mandatory clearing of swaps to a registered swap data repository (SDR) on a transaction-by-transaction basis.² However, for most swap transactions, a swap dealer or major swap participant, not the end-user, will be the counterparty responsible for reporting swap data, including the notice required under proposed § 39.6(b), to a registered SDR.

As a threshold matter, EMUS is concerned that, in general, an end-user will be dependent upon a reporting counterparty to provide the Commission with notice of its election to use the exception to mandatory clearing of swaps via reporting to a registered SDR. EMUS is aware that the Commission has proposed § 49.11 which would require a registered SDR to confirm with both counterparties to a swap the accuracy of swap data submitted to it and correct any errors in a separate rulemaking.³ However, EMUS remains concerned that the proposed regulations may be inadequate to protect an end-user from potential liability if a reporting counterparty misreports information regarding the end-user's election to use the exception to mandatory swap clearing.

EMUS also questions whether it is necessary to report information regarding an end-user's election to use the exception to mandatory clearing of swaps to a registered SDR on a transaction-by-transaction basis. EMUS encourages the Commission to consider adopting an alternative process which would enable a person to be certified by the Commission as an end-user that is eligible to use the exception to mandatory swap clearing for a specified time period or until circumstances change. For example, a natural gas producer that qualifies for the exception to the mandatory swap clearing established by CEA Section 2(h)(7) could voluntarily submit an application to the Commission to demonstrate that it is not a financial entity, it is using swaps to hedge or mitigate commercial risk, and how it generally meets its financial obligations associated with entering into non-cleared swaps. The information to be provided in such an application could mirror the information set forth in proposed § 39.6(b). In light of the Commission's budgetary constraints, an applicant could pay a filing fee to the Commission to cover the cost of the staffing and technological resources needed to process its end-user certification application.⁴

² This information would be provided to the Commission if no registered SDR was available.

³ *Swap Data Repositories*, 75 Fed. Reg. 80,898, 80,905 (Dec. 23, 2010).

⁴ President Obama has proposed user fees as a way to boost the Commission's budget. See Jessica Holzer and Jamila Trindle, *CFTC, SEC Get Funding Increases for Dodd-Frank Work*, WALL ST. J., Feb. 14, 2011, <http://online.wsj.com/article/SB1000142405274870358480457614422589096178.html>.

A periodic end-user certification process may be a more effective than requiring an end-user to provide an election notice to a registered SDR on a transaction-by-transaction basis. An end-user would also have more confidence that the data reported to a SDR was accurate if it had been previously certified by the Commission as eligible to elect to use the exception to the mandatory clearing of swaps.

2. Form and Manner of Reporting Under Proposed § 39.6(b)(1)-(6)

EMUS encourages the Commission to clarify the form and manner in which the information set forth in proposed § 39.6(b) would be reported to a registered SDR. The NOPR states that the Commission plans to employ a user-friendly, check-the-box schema type approach to the notification requirements. However, EMUS is concerned that different reporting counterparties could provide the same information to a registered SDR in different formats. To help standardize reporting, EMUS suggests that a reporting party be required to submit data in a “yes” or “no” schema for each of the items set forth in proposed § 39.6(b)(1)-(6). For example, the reporting counterparty would indicate whether the counterparty electing to use the exception to mandatory clearing “is a ‘financial entity’ as defined in section 2(h)(7)(C)(i) of the Act” under § 39.6(b)(1) by submitting either a “yes” or a “no” data element. This format would be used to report each piece of information required to be reported to a registered SDR under § 39.6(b)(1)-(6). EMUS has proposed data elements to incorporate this information into the overall package of swap-related information that must be submitted by a reporting counterparty to a registered SDR in comments filed on February 7, 2011 in the *Swap Data Recordkeeping and Reporting Requirements* rulemaking proceeding.⁵ EMUS believes adopting a “yes” or “no” schema for data elements approach to the reporting of swap data to a registered SDR will help ensure that the information is easily understood and unambiguous.

3. Finance Affiliate Status in Proposed § 39.6(b)(3)

In the NOPR, the Commission states that “[p]roposed § 39.6(b)(3) requires an indication of whether a person electing to use the end-user clearing exception is an affiliate of another person qualifying for the exception under CEA Section 2(h)(7), and satisfies the additional requirements of CEA Sections 2(h)(7)(C)(iii) or 2(h)(7)(D).”⁶ However, the regulatory text of proposed § 39.6(b)(3) itself requires an indication of “[w]hether the electing counterparty is a finance affiliate meeting the requirements described in sections 2(h)(7)(C)(iii) or 2(h)(7)(D) of the Act” (emphasis added). The Commission should clarify whether this data element would need to be submitted if the electing counterparty entered into the swap pursuant to CEA Section 2(h)(7)(D)(i).

⁵ *Swap Data Recordkeeping and Reporting Requirements*, 75 Fed. Reg. 76,574 (Dec. 8, 2010).

⁶ NOPR at 80,750 (emphasis added).

4. Meeting Financial Obligations under Proposed § 39.6(b)(5)

EMUS believes that the information the Commission proposes to collect in § 39.6(b)(5) regarding how the electing counterparty generally expects to meet its financial obligations associated with its uncleared swap is sufficient and no further detail is required.

Encana uses the International Swap and Derivatives Association's (ISDA) Master Agreement with related schedules and annexes (*e.g.*, credit support agreements, as applicable) in all of its swaps. EMUS believes that most, if not all, of other counterparties to swaps transactions also use the IDSA and related schedules, and annexes. Thus, EMUS believes it is unnecessary for a swap counterparty using an ISDA to provide an ISDA credit support agreement that includes collateral or margin terms and conditions, forms of guarantee or other agreements regarding securities since it would be duplicative of information that is already readily available from ISDA on their standard agreements, schedules and annexes.

5. End-User Board Approval in Proposed § 39.6(b)(6)

Section 2(j) of the CEA, which was added by the Act, provides that the exemption from the mandatory clearing requirements:

shall be available to a counterparty that is an issuer of securities that are registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports pursuant to section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o) only if an appropriate committee of the issuer's board or governing body has reviewed and approved its decision to enter into swaps that are subject to such exemptions.

(Emphasis added). It is important to emphasize that the Act does not require this board approval to be certified to the Commission on a transaction-by-transaction basis.

Proposed § 39.6(b)(6) would require each person electing to use the end-user clearing exception to indicate whether it is an issuer of securities registered under Securities Exchange Act of 1934 (Exchange Act) Section 12 or required to file reports under Exchange Act Section 15(d) (*i.e.*, SEC Filer). In response to the questions posed by the Commission in the NOPR, EMUS encourages the Commission to provide additional guidance as to the meaning of the term "issuer of securities" as used in CEA Section 2(j) by providing examples of such "issuer of securities."

In the NOPR, the Commission states that, "the exception to mandatory clearing of swaps under CEA Section 2(h)(7) is available to SEC Filers only if an appropriate board or governing body has reviewed and approved the issuer's decision to enter into swaps that are subject to

the exception.⁷ Consistent with the plain language of CEA Section 2(j), this statement does not appear to require board approval on a transaction-by-transaction basis. However, as currently drafted, proposed § 39.6(b)(6)(ii) would require information as to “[w]hether an appropriate committee of the board of directors (or equivalent body has reviewed and approved the decision not to clear the swap” (emphasis added) to be reported for each swap transaction. EMUS believes that it would be unduly burdensome to require board of director approval on a transaction-by-transaction basis. The Commission should clarify that a board of directors may authorize a person to enter into swaps that are subject to the exception from mandatory clearing of swaps. A board of directors should be afforded broad discretion on how it approves the decision to enter into swaps that are subject to the exception to mandatory swap clearing. For example, one board of directors may approve the decision on a hedging program-by-hedging program basis, while another board of directors may approve the decision on an annual basis.

6. Definition of “Hedge or Mitigate Commercial Risk” in Proposed § 39.6(c)

EMUS encourages the Commission to adopt a single definition of the term “hedge or mitigate commercial risk” to be used consistently throughout all of its regulations. Specifically, the Commission should not adopt a definition of that term in proposed § 39.6(c) that is different from the definition of “hedging or mitigating commercial risk” in the proposed definition of major swap participant⁸ in order to address the specific circumstances of the end-user exception. EMUS believes that using different definitions for the same term would cause confusion, raise the potential for conflicts among various parts of the Commission’s regulations, and increase the risk of non-compliance with one or more of the rules adopted by the Commission to implement the requirements of the Act.

7. Technological or Administrative Burdens

EMUS believes that the technological or administrative burdens of complying with the proposed rule by counterparties that are not swap dealers, major swap participants, designated clearing organizations, or SDRs can be minimized if the Commission adopts certain data information protocols and data sets for reporting counterparties to send and receive required information for each swap transaction. After the final rules are established and the information requirements for swap transactions, including end-user exception from mandatory clearing, are known, then all persons should be able to set up their respective practices, procedures and systems to capture such information to send in an electronic data file to a registered SDR for each swap transaction.

⁷ NOPR at 80,750 (emphasis added).

⁸ *Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant”*, 75 Fed. Reg. 80,174 (Dec. 21, 2010).

EMUS believes that these protocols and data sets should include at a minimum:

- Standard single electronic data set for a party's use in sending required information for each swap transaction including end-user election for exception to clearing to the SDR or Commission, as applicable.
- Protocols between a party and SDR for confirmation of send and receive of the Standard electronic data set file.
- Protocols for SDR's review of electronic data set files received from a party and transmittal of SDR's confirmation that information contained in the electronic data set complies with information requirements for swap transaction.
- Protocols for party to request and receive from the SDR information on swap transactions where such party is counterparty to the swap transaction. Generally, SDR should be required to provide a counterparty an electronic data file equivalent to the electronic data file received for each swap transaction within one (1) business day.

Conclusion

EMUS appreciates the opportunity to file comments on the NOPR, and encourages the Commission to take the comments and recommendations set forth above into consideration in this rulemaking.

Sincerely,

Handwritten signature of Keith M. Sappenfield, II in cursive script.

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