Peabody

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

Re: Proposed Regulations Concerning End User Exception to Mandatory Clearing of Swaps – CFTC RIN 3038-AD10

Dear Mr. Stawick:

Peabody Energy Corporation ("Peabody") is pleased to submit the following comments on proposed part 39.6 of the Commission's Regulations which would establish the qualifications and prerequisites for end users to be exempted from the mandatory clearing of swaps required by Section 2(h) of the Commodity Exchange Act ("CEA" or "Act").[1]

A. Introduction

Peabody, which is headquartered in St. Louis, Missouri, is the world's largest private-sector coal company, supplying the world's thermal power and steel markets on six continents. Peabody has 7,000 employees globally, approximately 5,600 of which are located in the United States. The company controls approximately 9 billion tons of coal reserves and holds a majority interest in 28 coal mining operations in the United States and Australia. Peabody's principal operations include the extraction, transportation, and the purchase and sale of coal with third parties.

Peabody uses swaps to hedge or mitigate the commercial risks related to its worldwide coal mining and sale operations. Such risks include (i) the price of coal in various markets throughout the world, (ii) ocean-going freight rates and other transportation costs, and (iii) the products used in extracting and transporting coal (*e.g.*, explosives, gasoline, and diesel fuel). We also frequently use currency derivatives to hedge and mitigate the substantial currency exchange rate risks inherent in Peabody's global operations, particularly to hedge foreign exchange rate risk associated with our Australian mining and sales. In addition, we

[1] 75 Fed. Reg. 80747 (December 23, 2010).

have used interest rate swaps to mitigate the risks of interest rate volatility related to our corporate debt program.

Peabody is interested in the proposed rulemaking because it believes Congress clearly intended that the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") would preserve the ability of market participants like Peabody to continue to conduct their core business and maintain the incentives to use swaps to hedge and mitigate commercial risk. Peabody generally supports the Commission's end user exception and respectfully submits several changes to clarify the Commission's rules to improve compliance, make the requested reports more useful to the Commission, and reduce the administrative and cost burdens on end users, so that they may continue to grow and reinvest in their core businesses.

B. The Requirements of the Proposed Part 39.6 of the Commission's Regulations Should Be Changed to a System of Annual Reporting to Ease the Administrative Burden on End Users, While Giving the Commission All of the Necessary Information

Peabody respectfully recommends that the proposed part 39.6 of the Commission's Regulations should be amended to permit end users to demonstrate both their qualifications to enter into uncleared swaps and the form or forms of financial support they will rely upon to meet swap obligations through an annual filing rather than through the filing of a separate report for every swap. The Regulation also could require intra-year amendments to the filing in the event that the information materially changes during the year. Following the filing of an end users' first annual report, it could be assigned an identification number that could thereafter be included on each swap transaction report to signify its reliance on the end user exemption and the information contained in its annually filed report, without having to repeat that information for every swap transaction.

The foregoing procedure will provide the Commission with the information needed to determine the bona fides of any end user's claim of exemption, should that become necessary, while eliminating the burden on both end users and the Commission or a swap data repository to report or archive unnecessarily repetitive data. Annual filings rather than swap-by-swap filings are adequate to meet the Commission's needs because an end user's status as such will remain constant throughout the year and, in Peabody's experience, each end user typically uses the same forms of financial support for all of its swaps. We note that in other contexts where the Commission provides for an entity to claim an exclusion from a statutory definition or an exemption from registration, a one-time filing is all that is required.[2] Accordingly, an annual election of the exemption should be adequate and

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[2] *See, e.g.,* part 4.5(c) of the Commission's Regulations (exclusion from definition of the term "commodity pool operator" for certain otherwise-regulated entities); part 4.13(b) of the Commission's Regulations (exemption from registration as a commodity pool operator under the CEA based upon certain criteria such as *de minimis* futures trading or limiting investors

preferable to meet the regulatory needs. If unforeseen circumstances arise where the staff believes more information is needed, it can use a special call to obtain such information.

Permitting end users to make annual filings also will eliminate entangling third-party swap dealers or others in reporting for the end user, which could lead to controversies over liability for reporting mistakes. End users should not be held liable for errors or delays in transmission that may be made by a swap dealer or other reporting counterparty.

Peabody respectfully suggests the annual filing by a public company end user be limited to the following information:

a. The company's name and Securities and Exchange Commission ("SEC") reference number;

b. A representation that the company satisfies the criteria of CEA Section 2(h)(7)((A)(i) and (ii); and

c. A statement that specifies the anticipated means for securing or meeting the obligations for uncleared swaps (*i.e.*, by credit support, pledged or segregated assets, third-party guarantee, available financial resources, or otherwise).[3]

C. The Proposed Definition of "Hedge or Mitigate Commercial Risk" should be Revised to Prevent End Users' Hedging Transactions Being Inadvertently Swept in with True Swap Dealing Activity

The CFTC proposes, in paragraph (c) of proposed part 39.6, to define when a swap shall be deemed to constitute a hedge or to be used to mitigate commercial risk, for purposes of that regulation and for CEA Section 2(h)(7)(A)(ii).

Peabody generally supports the proposed definition of the term "hedge or mitigate commercial risk" set forth in the proposed part 39.6(c) of the Commission's Regulations for purposes of determining who is eligible to elect the end user exception to mandatory swap

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in a pool to super-sophisticated persons); part 4.14(a)(8)(iii) of the Commission's Regulations (exemption from registration as a commodity trading advisor under the CEA for an investment adviser registered under the Investment Advisers Act of 1940).

[3] We believe that the requirement in CEA Section 2(j) that a committee or governing body of a public company end user review and approve the use of the exemption from clearing of swaps entered into for hedging or mitigating commercial risk should be permitted to be satisfied by a single determination by such committee or body and be revisited only as deemed necessary in the judgment of the committee or body.

clearing under CEA Section 2(h)(7) and proposed part 39.6.[4] However, the reference to "trading" in proposed part 39.6(c)(2)(i) should be deleted. The term "trading" in this context is too generic and therefore could inappropriately include swap trading that is used to hedge or mitigate commercial risk. The other terms used in the proposed definition, "speculating" and "investing," are sufficient to meet the Commission's regulatory goals and are consistent with the other proposed regulations and the statute.

Peabody also recommends that the proposed definition be revised to expressly include the statement from the preamble of the *Federal Register* release, "that whether a position is used to hedge or mitigate commercial risk should be determined by the facts and circumstances at the time the swap is entered into, and should take into account the person's overall hedging and risk mitigation strategies."[5] This will enhance the clarity of the definition by providing notice of that standard directly in the regulation.[6]

In response to specific questions posed by the CFTC,[7] Peabody recommends that the definition of the term "hedge or mitigate commercial risk" include swaps entered into to facilitate asset optimization and dynamic hedging, because both are commonplace and necessary in any physical commodity business such as Peabody's, where there may be changes in production volumes, customer demand, fuel demand, and market prices between the time a trade is originally entered into and the settlement of a swap.

Peabody also recommends that the underlying hedged item of an uncleared swap should *not* be limited to a non-financial commodity. In this regard, the definition of the term "hedge or mitigate commercial risk" should cover foreign exchange rate and interest rate risks relating to domestic and offshore affiliates and operations. Nothing in Dodd-Frank supports limiting the exception from mandatory clearing to swaps involving non-financial

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[4] In a separate rulemaking regarding the definitions of various terms including "swap dealer," the CFTC is proposing nearly identical regulatory language to define the meaning of the phrase "hedging or mitigating commercial risk." 75 Fed. Reg. 80173 (December 21, 2010). Peabody will file a separate comment letter addressing that rulemaking.

[5] 75 Fed. Reg. 80747, at 80753.

[6] The CFTC has adopted similar measuring points and included relevant language in the text of other regulations. *See, e.g.,* exemptions from registration as a commodity pool operator under part 4.13(a)(3) of the Commission's Regulations (limitation on aggregate initial margin and premiums is calculated "at the time the most recent position was established"), and part 4.13(a)(4) of the Commission's Regulations (limitation on persons who may invest in a commodity pool determined "at the time of investment").

[7] 75 Fed. Reg. 80747, at 80753.

commodities. Foreign exchange and interest rate risks are very real and substantial risks to end users with global operations.

D. Conclusion

Peabody appreciates this opportunity to comment on the Commission's proposed regulations. We believe that the revisions and clarifications suggested herein will enhance the legal certainty of the exception and eliminate unnecessary and unduly burdensome reporting requirements for persons electing the statutory exception to mandatory swap clearing.

Peabody would be pleased to discuss its comments in further detail with any of the Commissioners or their staffs. Please feel free to contact the undersigned or Robert Brandenburg (314) 342-7758) if you have any questions or we can be of assistance.

Very truly yours,

Walter L. Hawkins, Jr.
Senior Vice President - Finance