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February 22, 2011

**Via Electronic Submission**

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

**Re: End-User Exception to Mandatory Clearing of Swaps  
(RIN 3038-AD10)**

Dear Mr. Stawick:

EDF Trading North America, LLC (“EDF Trading”) respectfully submits these comments in response to the proposed rule addressing the end-user exception to mandatory clearing of swaps (the “Proposed Rule”) issued by the Commodity Futures Trading Commission (“Commission” or “CFTC”).<sup>1</sup> In the Proposed Rule, the Commission also proposes a definition for the term “hedging or mitigating commercial risk.”<sup>2</sup>

EDF Trading appreciates the opportunity to provide input regarding the implementation of the end-user exception from mandatory clearing (“End-User Exception”) contained Section 2(h)(7) of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).<sup>3</sup> In this letter, EDF Trading provides the Commission with comments about how the Proposed Rule will impact the business operations of EDF Trading and other commercial energy end users, and proposes modifications to the Proposed Rule that EDF Trading believes will help facilitate end users’ efficient and effective compliance with the End-User Exception.

**I. Description of EDF Trading and Its Interest in the Proposed Rulemaking**

EDF Trading is a Texas limited liability company with its principal place of business in Houston, Texas. EDF Trading is a wholly-owned direct subsidiary of EDF Trading North America, Inc., which itself is a wholly-owned indirect subsidiary of Électricité de France, SA.

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<sup>1</sup> 75 Fed. Reg. 80,747 (Dec. 23, 2010).

<sup>2</sup> *Id.* at 80,757 (Proposed Rule 39.6(c)).

<sup>3</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).



## EDF TRADING

David A. Stawick  
February 22, 2011  
Page 2

EDF Trading is a natural gas and power marketer authorized by the Federal Energy Regulatory Commission (“FERC”) to engage in the sale at wholesale of natural gas and electricity and related services at market-based rates. EDF Trading also (through its wholly-owned subsidiaries) acts as a competitive retail energy service supplier to commercial and heavy industrial energy consumers as well as providing supply and risk management services to other energy retailers.

EDF Trading’s wholesale marketing business focuses on low-risk arbitrage of locational opportunities and the capture of wholesale product opportunities that are primarily driven by its customers’ and counterparties’ business needs and product requirements. EDF Trading typically purchases and sells wholesale energy products with customer classes that include generators, producers, transporters, municipalities, investor-owned utilities, governmental and quasi-governmental entities. EDF Trading’s wholesale marketing operations also involve a wide variety of transactions with other energy marketers that possess market-based rate authority and that conduct wholesale energy marketing operations similar to those of EDF Trading.

EDF Trading engages in physical and financial transactions in various areas of operation for purposes of managing the risk of a producer or end-use customer, as well as for the purpose of managing risks associated with its own contracted assets. Often the risk management that EDF Trading provides stems from the need for a bespoke arrangement that addresses the risks unique to EDF Trading’s customers. Moreover, it offers customers whose financial positions may not coordinate with the financial markets the ability to enter into hedging transactions by taking on such risk, providing an invaluable risk management service to its end-use customers.

EDF Trading provides a variety of risk management functions to its customers. For example, EDF Trading has recently expanded its presence in the retail energy markets. Through wholly-owned subsidiaries acting as competitive retail electric suppliers, EDF Trading engages in retail sales of electric energy and related services at market-based rates to customers in Texas, New York, and Illinois. EDF Trading’s subsidiaries buy power and/or natural gas from EDF Trading and resell that to their end-use customers, and in turn enter into power and/or natural gas hedge transactions to mitigate price risk.

EDF Trading also provides risk management services to non-affiliated generation owners, electric retailers, natural gas distributors, and energy transmission, storage and transportation operators, providing such services typical of those provided by what are known as “energy management services providers.” EDF Trading provides these services as an adjunct to its physical business. In this role, EDF Trading routinely enters into contracts with third-party asset owners to assist the owners in their efforts to manage risks arising from volatile prices in the natural gas, coal, or fuel oil, and electricity markets, and to optimize the owner’s generation

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EDF TRADING

David A. Stawick  
February 22, 2011  
Page 3

assets. Where EDF Trading is engaged to provide these services, the owners of such generators retain control over the power plants and EDF Trading provides services for the owner, which include: managing and/or procuring fuel supplies through standard purchase and sale arrangements, providing scheduling and dispatch services at the request and direction of the owner, and providing other logistical services that may be unique to the generation entity involved. In each of these cases, the services are provided to the generation owner and energy retailer in a manner tailored to fit the customer's needs. Many of the asset owners for which EDF Trading provides these services are firms that seek to obtain economies of scale by outsourcing physical management capabilities and expertise to providers like EDF Trading. In exchange for these services, EDF Trading is paid a service fee by the owner. In a similar fashion, EDF Trading provides risk management services to entities serving natural gas and electrical load, such as retail energy service companies. In those cases, EDF Trading assists its customers by identifying and procuring wholesale supplies of natural gas and electricity, and optimizing those supplies with the actual needs of the consumers.

EDF Trading also has a fully integrated coal and freight business and is a major participant in the U.S. gas market, with a network of contracted physical assets. Through lease and other contractual arrangements, it is active in transportation, storage, and wholesale trading, offering customized products and transacting across markets.

In all of these cases, its marketing, operations and management services require EDF Trading to maintain standard energy trading functions and platforms. EDF Trading's trading business executes transactions, manages the associated risk of originated transactions and optimizes EDF Trading's proprietary market position. The trading operations are conducted in a manner consistent with EDF Trading's internal business policies, its market-based rate authorizations, its internal risk management procedures and policies, and the other laws and regulations applicable to EDF Trading's business throughout the United States.

The nature of EDF Trading's business renders it difficult to definitively differentiate between transactions entered into for varying discrete areas of its business, as it may be managing the risk of a customer or risk stemming from its own activities and assets. For example, in order to manage a customer's risk, EDF Trading may transact to purchase a generator's output at a fixed price, and concomitantly transact for offsetting physical and/or financial positions. In order to manage an asset, EDF Trading may inject gas into subscribed storage capacity at a fixed price and sell the gas in the future at an agreed price.

As a commercial end user of physical commodities and an entity that provides risk management services for itself and other commercial participants, EDF Trading will be affected by the Commission's regulations implementing the End-User Exception.

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EDF TRADING

David A. Stawick  
February 22, 2011  
Page 4

## **II. The Commission Should Adopt a Commercially Practical End-User Notification Requirement**

### **A. The Commission Should Adopt a Practical and Convenient Rule for End Users**

The Dodd-Frank Act generally requires all swaps to be cleared through a derivatives clearing organization (“DCO”). However, this clearing requirement does not apply to a swap if one or more of the counterparties is what has become known as an “end user,” and the end user elects to employ the End-User Exception. Under the End-User Exception contained within Section 2(h)(7) of the Commodity Exchange Act, as amended by the Dodd-Frank Act (“CEA”), an end user is a commodity market participant that:

1. is not a financial entity;
2. is using swaps 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.<sup>4</sup>

In order to use the End-User Exception, end users only are required by statute to notify the Commission, in a manner set forth by the Commission, how they generally meet their financial obligations associated with entering into non-cleared swaps.<sup>5</sup> The Commission’s Proposed Rule would require an end user to notify the Commission every time it uses the exception to enter into a non-cleared swap transaction. EDF Trading believes that this proposed notification requirement goes beyond the requirements of the Dodd-Frank Act. This transaction-by-transaction requirement would place an unnecessary reporting obligation on end users that depend on swaps to hedge or mitigate the risks of their commercial business.

Although the Commission has characterized the proposed transaction-by-transaction notification requirement as a simple “check the box” notice, the reality is that the proposed notification will require more than simply checking boxes. Because there will be circumstances

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<sup>4</sup> CEA § 2(h)(7)(A).

<sup>5</sup> *Id.*



EDF TRADING

David A. Stawick  
February 22, 2011  
Page 5

in which an end user must be the “reporting counterparty”<sup>6</sup> under the Commission’s proposed rules, there will be some instances in which an end user will need to submit information to a swap data repository (“SDR”), which presents certain challenges, especially given that the Commission appears to contemplate using an automatic electronic system for the submission of data, including End-User Exception notifications, to SDRs.<sup>7</sup> Although some energy marketers and suppliers employ electronic systems for recording trades, these systems may not comport with the Commission’s technological requirements for its automated data submission system. Adopting systems that comply with still-uncertain regulatory requirements could cause energy marketers and suppliers to face unrealistic deadlines and uneconomic expenses in order to comply with the Dodd-Frank Act. EDF Trading respectfully suggests that, instead of the proposed transaction-by-transaction notification requirement presented in the Proposed Rule, the Commission adopt a less complex (but no less effective) notification requirement that provides the Commission with the information it needs to implement its Dodd-Frank Act legislative mandates, while ensuring that end users do not face undue compliance costs in the process.

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<sup>6</sup> The “reporting counterparty” is the party to a swap transaction that will be required to submit information regarding the swap to a swap data repository (“SDR”). Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76,574, 76,599 (Proposed Rule 17 C.F.R. § 45.1). Proposed Rule 17 C.F.R. § 45.5 provides the following guidance on which party will constitute the “reporting counterparty” in a swaps transaction:

- (a) If only one counterparty is [a swap dealer], the [swap dealer] shall fulfill all counterparty reporting obligations.
- (b) If neither party is [a swap dealer], and only one counterparty is [a major swap participant], the [major swap participant] shall fulfill all counterparty reporting obligations.
- (c) If both counterparties are [swap dealers], or both counterparties are [major swap participants], or both counterparties are non-[swap dealer]/[major swap participant] counterparties, the counterparties shall agree as one term of their swap transaction which counterparty shall fulfill reporting obligations with respect to that swap; and the counterparty so selected shall fulfill all counterparty reporting obligations.

*Id.* at 76,604. Proposed Rule § 45.5(d) further provides that in cases where only one counterparty is a U.S. entity, the U.S. entity will be the reporting counterparty. This would cause end-users that transact swaps with non-U.S. entities to be reporting parties for at least some of their swaps.

<sup>7</sup> EDF Trading is aware that in instances in which there is not an SDR available to accept reporting information regarding a swap, the information related to a swap will be provided directly to the Commission. For the purposes of this letter, when EDF Trading refers to submitting information to an SDR, it should be read also to refer to submitting information to the Commission in lieu of submitting the same information to an SDR.



EDF TRADING

David A. Stawick  
February 22, 2011  
Page 6

**B. The Commission Should Require the Submission of a One-Time Financial Obligation Notice Rather than Transaction-by-Transaction Notices**

The Commission proposes to ask end users to provide answers to five questions regarding how they generally meet their financial obligations associated with each swap transaction entered into pursuant to the End-User Exception (known as the “Financial Obligation Notice”). The Commission proposes to require that an end user utilizing the End-User Exception identify, for each transaction, whether it expects to meet its financial obligations using (1) a written credit support agreement, (2) pledged or segregated assets, (3) a written third-party guarantee, (4) solely its own financial resources, or (5) other means (or any combination thereof). EDF Trading does not object to providing this information; rather, EDF Trading submits that this may not be the most effective or efficient way of gathering information regarding how end users generally satisfy their financial obligations related to non-cleared swaps.

Instead of requiring a Financial Obligation Notice with each transaction, EDF Trading suggests that the Commission should require each end user who uses the End-User Exception to submit a one-time notification. This notice could describe the methods the end user generally uses to secure its financial obligations, and require the end-user to update the information presented in the notification in the event of any material changes or exceptions to its standard methods of satisfying financial obligations. For example, a one-time Financial Obligation Notification requirement could require that end users provide general descriptions of their risk mitigation measures, credit support documents, pledged assets, guarantors, and other aspects of their risk management activities. Such requirement would provide potentially helpful information to the Commission, while avoiding increased transaction costs for end users. A one-time Financial Obligation Notice would give the Commission access to pertinent information from each end user upfront, ensure that the Commission is alerted to any changes in the way an end user secures its financial obligations related to non-cleared swaps, and potentially provide other information benefits to the Commission.

A one-time Financial Obligation Notification requirement makes particular sense in the swaps market, where market participants tend to establish trading relationships with counterparties through executing master and credit support agreements that set out, among other material terms, the type of financial assurances to be provided by both parties. These agreements are negotiated at the beginning of a trading relationship, are amended infrequently, and contain financial assurance terms that almost never change materially from transaction to transaction.

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EDF TRADING

David A. Stawick  
February 22, 2011  
Page 7

The Commission's proposal to require an end user to provide a notification every time it enters into a swap would be particularly problematic for end users in the energy industry who transact in the physical power markets. Energy end users, like EDF Trading, sell one product in particular – power – that cannot be stored. Because energy end users have a commercial need to produce or procure power, but cannot store it, they must enter into frequent physical power transactions. The need for frequent physical power transactions leads to an attendant need for frequent hedging of the risks of those transactions. If energy end users are required to provide a notification every time they enter in to a swap, they will be impacted more than most, and will face increased transaction costs and staffing needs, which could lead to higher energy prices in the market as a whole. EDF Trading recommends that the Commission adopt a one-time Financial Obligation Notice, coupled with a requirement to update the Commission with any material changes, as the most effective and least expensive way to implement the Financial Obligation Notice requirement.

**C. The Commission Should Provide a Flexible End-User Notification Requirement, Particularly When the “Reporting Counterparty” is an End User**

Whatever method of notification requirement the Commission chooses to adopt, EDF Trading requests that the Commission ensure that the method it employs is sufficiently flexible to allow end users to comply with them without causing undue hardship or costs to their commercial enterprises. In particular, EDF Trading requests that the Commission adopt flexible timelines for the reporting of End-User Exception data to SDRs, whether by the end user or another reporting counterparty.

EDF Trading additionally requests that the Commission provide alternative means for reporting End-User Exception notification information to SDRs other than the automated electronic reporting procedures the Commission appears to be contemplating. Although a possibly infrequent occurrence, when an end user is the reporting counterparty, the reporting rules should be made as simple and flexible as possible. For instance, the Commission could agree to allow end users to provide their “check the box” information in hardcopy, which could be mailed or faxed to the SDR. Establishing a flexible and commercially practicable End-User Exception notification requirement will accomplish the Commission's purposes without causing end users to face increased infrastructural and transaction costs.







EDF TRADING

David A. Stawick  
February 22, 2011  
Page 8

**D. The Commission Should Prevent Abuse by Requiring End Users to Represent Their Eligibility to Use the End-User Exception Instead of Requiring Transaction-by-Transaction Notifications**

In addition to the Financial Obligation Notification, the Commission proposes to collect certain additional information to assist in preventing abuse of the End-User Exception. The Commission proposes to collect, for each swap transaction, the following information from each end user electing to use the End-User Exception (each one an “electing counterparty”):

1. the identity of the electing counterparty;
2. whether the electing counterparty is a financial entity;
3. whether the electing counterparty is a finance affiliate meeting the requirements of §§ 2(h)(7)(C)(iii) or 2(h)(7)(D) of the CEA;
4. whether the swap is being used by the electing counterparty to hedge or mitigate commercial risk; and
5. whether the electing counterparty is an issuer of securities registered under § 12 of the Securities Exchange Act of 1934, and if so:
  - a. the Securities and Exchange Commission (“SEC”) Central Index Key number for the electing counterparty; and
  - b. whether an appropriate committee of the electing counterparty’s board of directors has reviewed and approved the decision not to clear the swap.<sup>8</sup>

EDF Trading notes that no provision of the CEA requires end users to report these five or seven pieces of information, and that the Commission states in the Proposed Rule that it is collecting this information “to confirm compliance with particular requirements of CEA Section 2(h)(7) or otherwise produce information necessary or useful to aid the Commission in its efforts to prevent abuse of the end-user clearing exception.”<sup>9</sup> As with the Financial Obligation Notification, EDF Trading does not object to providing the information the Commission requests, but believes that

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<sup>8</sup> 75 Fed. Reg. at 80,757 (Proposed Rule 17 C.F.R. § 39.6(b)).

<sup>9</sup> *Id.* at 80,750.





EDF TRADING

David A. Stawick  
February 22, 2011  
Page 9

there are alternate means of conveying this information that could better accomplish the Commission's objectives without requiring the information be reported to an SDR for each transaction.

EDF Trading suggests that instead of requiring this additional information to be reported to an SDR, the Commission require each electing entity to make a representation in each of its swap agreements certifying that the electing entity satisfies all the requirements to utilize the End-User Exception. In fact, the Commission has already proposed a rule that would require documentation of swaps entered into pursuant to the End-User Exception to include these types of representations.<sup>10</sup> Accordingly, documentation for non-cleared swaps entered into pursuant to the End-User Exception will likely already include these representations.

Requiring end users to provide representations of their eligibility to invoke the End-User Exception in their swap agreements will accomplish the goal of ensuring that entities are not abusing the End-User Exception, while placing a minimal reporting burden on end users.

### **III. The Commission Should Permit End Users to Hedge Commercial Risk through Affiliated Entities While Using the End-User Exception**

The Proposed Rule would require the end-user notification to identify whether the party electing to use the End-User Exception is an affiliate of another entity that qualifies for the exception. EDF Trading does not oppose this requirement, but requests that the Commission clarify that it will treat hedges made with or through a non-financial affiliate the same as it treats hedges not executed through an affiliate. Hedges executed using an affiliate should be eligible for the End-User Exception to the same degree as are hedges not executed through an affiliate, because these transactions are hedging or mitigating commercial risk, and because doing so is both beneficial to end users and consistent with the over-arching goals of the Dodd-Frank Act.

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<sup>10</sup> Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 6,715, 6,726 (Feb. 8, 2011) (Proposed Rule 17 C.F.R. § 23.505).



EDF TRADING

David A. Stawick  
February 22, 2011  
Page 10

**A. End Users Should be Permitted to Transfer Risk Internally Between Themselves and Their Affiliates**

For a variety of economic reasons, affiliated entities frequently enter into arrangements that use swaps to transfer risk from one affiliate to another. As the Commission has stated in its proposed rule further defining “swap dealer,” inter-affiliate risk transfers are essentially internal transfers, an “allocation of risk within a corporate group.”<sup>11</sup> Risks transfers like these, which are kept “in-house” within the corporate family, are a longstanding commercial practice, and they do not materially affect the market outside of the affiliate groups, and do not pose a risk to the financial system.

**B. End Users Should Be Permitted to Use the End-User Exception to Enter into Hedging Transactions with a Third Party through an Affiliate**

The Dodd-Frank Act provides: “An affiliate of a person that qualifies for [the End-User Exception] . . . may qualify for the exception only if the affiliate, acting on behalf of the person and as an agent, uses the swap to hedge or mitigate the commercial risk of the person or other affiliate of the person that is not a financial entity.”<sup>12</sup> EDF Trading requests that the Commission clarify that the end-user exception is available to any end user that uses swaps to hedge or mitigate commercial risk, including an end user who enters into a hedging swap through an affiliate, whether it be through a sleeve, a back-to-back transaction, or other means. EDF Trading understands the Dodd-Frank Act and the Commission’s Proposed Rule to permit the use of the End-User Exception under these circumstances, but if the Commission understands the law and Proposed Rule differently, EDF Trading would like the Commission to provide a clear description of how the End-User Exception will be applied in instances where an end user wishes to hedge commercial risk through one or more swaps using an affiliated entity.

Further, the Commission should allow end users to enter into non-cleared swaps through an affiliate, even if the affiliate is less than wholly-owned by the end user or the end user’s parent. Federal regulators, including the Commission and the Federal Energy Regulatory Commission (“FERC”), have long recognized that affiliate relationships can exist with much less

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<sup>11</sup> 75 Fed. Reg. 80,174, 80,183 (Dec. 21, 2010).

<sup>12</sup> CEA § 2(h)(7)(D)(i).



EDF TRADING

David A. Stawick  
February 22, 2011  
Page 11

than a 100 percent shared-ownership interest. The Commission should continue to recognize the same principle in administering the End-User Exception.<sup>13</sup>

### **C. The Dodd-Frank Act Permits the Use of the End-User Exception for International Inter-Affiliate Transactions**

An end-user's corporate family may include cross-border affiliates, and a U.S. end user may enter into hedging transactions with or on behalf of a cross-border affiliate. These transactions, like domestic inter-affiliate transactions, represent transfers of risk within a corporate family and should not be regulated as swap dealing. Cross-border swaps involving U.S. counterparties are subject to the Dodd-Frank Act,<sup>14</sup> and international inter-affiliate transactions have the same risk allocation properties that counsel against swap dealing treatment as do domestic inter-affiliate transactions. Accordingly, EDF Trading understands that the End-User Exception may be invoked in cross-border inter-affiliate transactions to the same extent it may be invoked in domestic inter-affiliate transactions. EDF Trading requests that the Commission confirm that it will treat cross-border swap transactions with U.S. affiliates the same as it treats domestic transactions of similar character.

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<sup>13</sup> EDF Trading provides the following examples of instances in which the CFTC, FERC, or the SEC has defined "common control" or "affiliate" to include ownership relationships of less than 100 percent:

CFTC Rule 148.4 definition of affiliate (relating to the Equal Access to Justice Act). 17 C.F.R. § 148.4 ("Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part").

FERC Rule 35.36 definition of affiliate. 18 C.F.R. § 35.36 (defining an affiliate as "[a]ny person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company").

FERC Rule 366.1 definition of affiliate. 18 C.F.R. § 366.1 (defining an affiliate as "any company, 5 percent or more of the outstanding voting securities of which are owned, controlled, or held with power to vote, directly or indirectly, by such company").

SEC Rule 405 definition of common control in the context of the definition of affiliate. 17 C.F.R. § 230.405 ("The term control (including the terms controlling, controlled by and under common control with ) means 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.").

<sup>14</sup> See CEA § 2(i) (setting forth the Commission's jurisdiction over certain activities outside the U.S.).

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David A. Stawick  
February 22, 2011  
Page 12

#### **IV. The Commission Should Adopt a Broad and Commercially Practicable Definition of “Hedging or Mitigating Commercial Risk”**

EDF Trading respectfully requests further clarification regarding the definition of “hedging or mitigating commercial risk.” EDF Trading agrees with the Commission’s decision to propose a consistent definition of commercial risk for all instances in which it is used in the CEA. As noted in the Proposed Rule, a consistent approach to defining “hedging or mitigating commercial risk” facilitates “consistency of interpretation across the CEA as a whole and help[s] provide for fair and equivalent treatment for similarly situated parties.”<sup>15</sup> We do, however, ask the Commission to clarify that “hedging or mitigating commercial risk” includes the many different ways that commodity market participants use swaps to manage their commercial risks. EDF Trading would like the Commission to carefully ensure that its rules will not inhibit the ability of end users to manage the commercial risks that are part of their commercial businesses.

The Commission should adopt a flexible test for what is appropriate or effective hedging activity that can be practically applied to swaps in the market. The Commission should not address “hedge effectiveness” in the final definition of “hedging or mitigating commercial risk” because a subjective standard of hedging effectiveness would put into effect a test that cannot be applied in a practical way. A standard that treats only “very effective” or “highly effective” hedges as “hedging or mitigating commercial risk” could be construed to encompass only near-perfect hedges, and such a standard would be inconsistent with the purpose of the Dodd-Frank Act and common industry practice. Congress intended for end users’ hedging activities to be excepted from the clearing (and clearing-related) requirements of the Dodd-Frank Act. End users’ appropriate hedging activities often do not represent “perfect” or “highly effective” hedges; rather, each hedge represents a reasonable attempt to offset commercial risks associated with one or more commercial activities. However the Commission decides to define “hedging or mitigating commercial risk,” the Commission should interpret its definition practicably and flexibly so that end users may continue to effectively hedge their commercial risks.

The Commission has stated in the Proposed Rule that, “As a general matter, the Commission preliminarily believes 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.”<sup>16</sup> EDF Trading agrees with the Commission. EDF Trading believes that looking at

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<sup>15</sup> 75 Fed. Reg. at 80,753.

<sup>16</sup> *Id.*



EDF TRADING

David A. Stawick  
February 22, 2011  
Page 13

each position at the time that the position is established in order to determine whether it hedges or mitigates commercial risk, while also taking into account the person's overall hedging and risk mitigation strategies, is the only commercially practical way to implement this standard. A standard that would analyze the hedging or mitigating characteristics of a swap after its inception would be difficult to track, and would present obstacles to hedgers, because the hedging value of a swap fluctuates over time, and the end user is not in control of the fluctuation. In fact, it is precisely this fluctuation uncertainty that is at the heart of why market participants enter into hedging transactions in the first place. Requiring an ongoing, periodic assessment of a hedge's effectiveness or purpose would be burdensome for commercial entities, and would do little to reduce systemic risk.

EDF Trading encourages the Commission to allow flexibility for trading positions that are not perfect hedges, and for hedging positions that are of varying duration. Market participants need flexibility in order to hedge effectively. A swap that does not perfectly hedge a related physical position should not be deemed to be speculative if its original intended purpose was to hedge or mitigate commercial risk. As noted above, rather than being "perfect," end users' hedges are reasonable efforts to hedge commercial risks of conducting a commercial business. Furthermore, whether a hedger intends to hold a position for a short or a long period of time is not relevant to whether the position hedges or mitigates commercial risk. As positions and prices change, hedges can and should be adjusted dynamically to ensure reasonably complete, cost-effective coverage. End users frequently use both swaps on financial and non-financial commodities alike to manage their business risks. A swap should qualify for the End-User Exception, regardless of whether it is based on a financial or non-financial commodity, if one of the parties to the swap otherwise qualifies for and elects to employ the End-User Exception. The Commission should define "hedging or mitigating commercial risk" in a manner that provides end users with sufficient flexibility to operate their physical commodities businesses.

EDF Trading is a provider of energy management services to market participants in the energy industry, and requests that the Commission clarify that that swaps entered into in connection with energy management services fall within the definition of "hedging or mitigating commercial risk." Energy management services, which are described in detail in Section I of this letter, are a critical risk management tool for many energy end users, including energy generators and suppliers, as well as industrial energy customers. They are risk management services geared toward providing customers with price predictability and operational continuity in the face of market uncertainty. Energy marketers and suppliers often offer energy management services as a complement to the physical commodity services they provide to their customers. When energy marketers and suppliers like EDF Trading seek out or provide hedges for a customer as part of its energy management services, they engage in hedging activity that

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EDF TRADING

David A. Stawick  
February 22, 2011  
Page 14

the customer would engage in on its own if it could do so as effectively as can the marketer or supplier. Energy management services are “[n]ot used for a purpose that is in the nature of speculation, investing, or trading.”<sup>17</sup> Energy management services are offered for the purpose of hedging the risks involved in operating a physical energy business, and should be encompassed by the definition of “hedging or mitigating commercial risk” under the Dodd-Frank Act.

In addition, the Commission should adopt a definition of “hedging or mitigating commercial risk” for swap transactions that is consistent with the definition of bona fide hedging transactions for futures and swaps. The proposed definition of “hedging or mitigating commercial risk” includes, among other things, positions that qualify for a bona fide hedge exemption from position limits set under the CEA. EDF Trading agrees with the Commission’s decision to include bona fide hedging transactions in the definition of “hedging or mitigating commercial risk.” *However, EDF Trading is unable to provide fully informed and meaningful comments on this issue until the Commission finalizes its proposed definition of the term “bona fide hedging.”*

Lastly, EDF Trading requests that the Commission provide an assurance to entities that the definition of “hedging or mitigating commercial risk” will encompass swaps transactions in which an entity hedges the commercial risk of an affiliate. Consistent with EDF Trading’s comments in Section IV of this comment letter, the Commission should clarify that it will treat the inter-affiliate risk transfers of end users as within the definition of “hedging or mitigating commercial risk.”

**V. The Commission Should Provide a Reasonable Transition Period for End Users to Come into Compliance with the Dodd-Frank Act**

It is important that end users have sufficient time to adjust their business practices to conform with the Commission’s regulations under the Dodd-Frank Act. In order to ensure that end users have an adequate opportunity to come into compliance with the Commission’s regulations, EDF Trading requests that the Commission grant end users a transition period of at least one year from the effective date of the Dodd-Frank Act to come into compliance with the final rule on the End-User Exception. As EDF Trading noted in its petition for relief under Section 2(h) of the CEA, submitted on September 20, 2010, “[t]he information technology challenges raised by the transformational nature of *Dodd-Frank* alone warrant providing . . . relief.” Providing end users with a transition period to come into compliance with the End-User

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<sup>17</sup> See *Id.* at 80,757 (Proposed Rule 17 C.F.R. § 39.6(c)(2)(i)).



EDF TRADING

David A. Stawick  
February 22, 2011  
Page 15

Exception will provide end users an opportunity to adjust their business practices in a way that responsibly implements the requirements of the final rule.

## VI. Conclusion

EDF Trading thanks the CFTC for the opportunity to provide comments on the Proposed Rule during this complex and transformative rule-making process. For the foregoing reasons, EDF Trading respectfully requests that the CFTC adopt an End-User Exception that recognizes and protects the hedging needs and abilities of energy end users, particularly energy marketers and suppliers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric Dennison", written over a horizontal line.

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