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February 6, 2013

Melissa Jurgens  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street NW  
Washington, DC 20581

**Re: Further Proposed Guidance Regarding Compliance With Certain Swap Regulations – CFTC RIN 3038-AD85 (“Further Proposed Guidance”)**

Dear Ms. Jurgens:

Peabody Energy Corporation (“Peabody”) is pleased to submit the following comments on the Commission’s Further Proposed Guidance Regarding Compliance with Certain Swap Regulations.<sup>1</sup> We appreciate the Commission’s and its Staff’s efforts in formulating the Further Proposed Guidance and the opportunity to comment on the commercial impact that it would cause. The Further Proposed Guidance seeks additional comment upon the cross-border application of certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Peabody filed a comment letter in response to the Commission’s initial proposed interpretive guidance on cross-border transactions,<sup>2</sup> which is incorporated herein by reference and we trust will be considered by the Commission in developing final guidance in this area.

For the reasons explained below, Peabody respectfully requests that the Commission’s final guidance:

1. Clarify that Dodd-Frank requirements will not apply to swaps of commercial end users booked outside the United States to hedge or mitigate commercial risks in commerce outside the United States, including (a) any such swaps entered into by a foreign affiliate controlled by a U. S. Person organized under United States law, (b) any such swaps that are guaranteed in any respect by a U. S. Person organized under United States law; and (c) any such swaps between affiliates of a commercial end user organized under United States law;

2. Adopt the definition of “non-U.S. person” that the Commission applied for its Final Exemptive Order Regarding Compliance with Certain Swap Regulations (“Final

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<sup>1</sup> 78 Fed. Reg. 909 (January 7, 2013).

<sup>2</sup> 77 Fed. Reg. 41214 (July 12, 2012).

Melissa Jurgens, Secretary  
Commodity Futures Trading Commission  
February 6, 2013  
Page 2

Exemptive Order”)<sup>3</sup>, specifically to include, as provided in the Final Exemptive Order, non-U.S. entities that are guaranteed by a U.S. person;

3. Adopt the standards now embodied in the Final Exemptive Order as permanent standards as applied to commercial end users; and

4. Clarify that, for purposes of the *de minimis* calculation to determine whether a person meets the definition of a swap dealer, a U.S. commercial end user is not required to aggregate the gross notional amount of swaps connected with the swap dealing activity of its non-U.S. affiliates under common control.

#### **A. Impact on Peabody and Other Commercial End Users**

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 uses swaps to hedge or mitigate the commercial risks related to its global coal mining and marketing operations, which are extensive.

For the reasons set forth below, the Commission’s Further Proposed Guidance can adversely impact the use of swaps by global commercial companies to hedge and mitigate commercial risks in their commerce outside the United States. Such swaps typically are entered into outside the United States with the non-U.S. affiliate that conducts the non-U.S. business operations acting as the swap counterparty, although the swaps may be guaranteed by a U.S. corporate parent or affiliate.

#### **B. The Definition of Non-U.S. Person as Applied to Commercial End Users Should Include All Foreign Affiliates of U.S. Commercial End Users, Including Those Guaranteed by a U.S. Parent or Affiliate**

Applying the Dodd-Frank requirements to swaps entered into or booked outside the United States to hedge or mitigate commercial risks of activities outside the United States will create an overlapping (and potentially inconsistent) tangle of international regulation that will increase the costs and potential liabilities associated with such swaps, materially undermining their utility and risk mitigation benefits. Further, foreign entities wishing to avoid becoming subject to Dodd-Frank requirements will decline to enter into swaps with such affiliates. These consequences would decrease market liquidity, increase market risk concentration, impose higher commercial costs, and result in higher prices for customers and

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<sup>3</sup> 78 Fed. Reg. 858, 879 (January 7, 2013). The Final Order became effective on December 21, 2012 and is set to expire on July 12, 2013.

downstream consumers. It also will place U.S. businesses at a competitive disadvantage in global markets.

**C. Aggregation of Swap Dealing Transactions of Affiliates of Non-U.S. Persons**

CFTC Regulation 1.3(ggg)(4) requires that a person include, in determining whether its swap dealing activities exceed the *de minimis* threshold, the aggregate notional value of swap dealing transactions entered by its affiliates under common control. The Final Exemptive Order modifies the application of this regulation with respect to non-U.S. persons in the following ways:

**(1) Transactions of Non-U.S. Affiliates with Non-U.S. Persons.** A U.S. person is not required to count toward its *de minimis* threshold those swaps entered into by its non-U.S. affiliates with non-U.S. persons, even if the non-U.S. person affiliates are guaranteed by U.S. persons;

**(2) Transactions of U.S. Affiliates.** A non-U.S. person that is engaged in swap dealing activities with U.S. persons as of December 21, 2012 is not required to aggregate its swap dealing activity with any swap dealing transactions of its U.S. person affiliates under common control;

**(3) Transactions of Non-U.S. Person that is an Affiliate of a Registered Swap Dealer.** A non-U.S. person that is engaged in swap dealing activities with U.S. persons as of December 21, 2012 and that is an affiliate of a registered swap dealer is not required to aggregate its swap dealing transactions with those of any non-U.S. affiliate under common control that is either (a) engaged in swap dealing with U.S. persons as of December 21, 2012, or (b) is a registered swap dealer; and

**(4) Transactions in an Affiliate's Central Booking System.** A non-U.S. person, whether guaranteed or not by a U.S. person, may exclude from and not consider the aggregate notional value of any swap to which it is not a party because the swap is entered into by an affiliated central booking entity.

With these modifications, for purposes of determining whether a non-U.S. person's swap dealing activities exceed the *de minimis* threshold, a non-U.S. person must aggregate only the notional value of its and all of its non-U.S. affiliates' swap dealing transactions with (i) minority-owned U.S. affiliates, and (ii) unaffiliated U.S. persons.

Peabody respectfully recommends that the Commission permanently adopt these standards following the expiration of the Final Exemptive Order.

**D. Requiring U.S. Commercial End Users to Aggregate the Swaps of Foreign Affiliates in Determining the U.S. Commercial End User's *De Minimis* Amount Would Unnecessarily Increase Costs and Commercial Risks and Impede the Competitiveness of U.S. Companies**

**1. Increased Commercial Costs and Decreased Competitiveness.** Requiring a U.S. commercial end user to aggregate swaps that (1) are entered into by its non-U.S. affiliates and that (2) are entered into or booked outside the United States in its *de minimis* threshold calculation will increase the costs and potential liabilities associated with such swaps, materially undermining their utility and risk mitigation benefits. Further, it will cause non-U.S. affiliates of U.S. commercial end users to refrain from entering into swaps or to enter into swaps only with non-U.S. counterparties that are not guaranteed or affiliated with a U.S. Person. These consequences would decrease market liquidity, increase market risk concentration, impose higher commercial costs, and result in higher prices for customers and downstream consumers. It also will place U.S. businesses at a competitive disadvantage in global markets.<sup>4</sup>

**2. Reciprocal Treatment Needed.** The Commission has properly provided in section 3 of the Final Order that a non-U.S. person is not required to include, in the calculation of whether it must register as a swap dealer, the aggregate gross notional amount of swaps connected with the swap dealing activity of its U.S. affiliates under common control. Peabody believes that fairness and consideration of the impact on United States commerce compels reciprocal treatment of U.S. commercial end users, so that they need not include, in the calculation of whether they must register as a swap dealer, the aggregate gross notional amount of swaps connected with the swap dealing activity of their non-U.S. affiliates under common control. When Peabody and its affiliates enter into swaps, these transactions do not increase risks, they *mitigate* them and are backed by their diversified, physical businesses, which are separate from the United States financial system. Nor is there any countervailing material regulatory purpose or need to require U.S. commercial end users to aggregate the

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<sup>4</sup> The Further Proposed Guidance, as was the case with the initial proposed interpretive guidance published in July, does not cite any empirical data to support a conclusion that swaps of commercial end users or their non-U.S. affiliates entered into to hedge or mitigate commercial risks outside the United States would have any significant effect on United States commerce. The Commission's examples of significant effects on United States commerce from swap activity outside the United States are limited to the activity of very large international financial entities whose activities were of a nature that the parties would be classified as swap dealers or major swap participants. Swaps entered into by commercial end users and their affiliates did not create the financial crisis that led to the enactment of Dodd-Frank.

Melissa Jurgens, Secretary  
Commodity Futures Trading Commission  
February 6, 2013  
Page 5

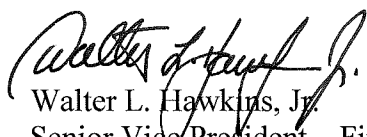
swaps of non-U.S. affiliates. Such swaps do not pose any threat to the U.S. financial system or economy.

**E. Conclusion**

Peabody appreciates this opportunity to comment on the Commission's Further Proposed Guidance and urges the Commission to issue final guidance such that U.S. commercial end users need not include, in the calculation of whether they must register as a swap dealer, the aggregate gross notional amount of swaps connected with the swap dealing activity of their non-U.S. affiliates under common control.

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, at (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