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**Via Electronic Submission**

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Center  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

**Re: Comments on Further Proposed Guidance Regarding Compliance With  
Certain Swap Regulations (RIN 3038–AD85)**

Dear Mr. Stawick:

EDF Trading Ltd, London (“**EDFT London**”) respectfully submits these comments in response to the Commodity Futures Trading Commission’s (the “**Commission**”) Further Proposed Guidance Regarding Compliance With Certain Swap Regulations (the “**Further Proposed Guidance**”),<sup>1</sup> issued on January 7, 2013 under Section 722(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank Act**”).<sup>2</sup>

EDFT London strongly supports the Commission’s effort to establish a comprehensive regulatory regime for the swap market in the United States and agrees that the goal of reducing systemic risk, increasing transparency, and promoting market integrity in the swap market requires that the Commission clearly establish the extent to which it will apply the swap provisions of the Commodity Exchange Act (“**CEA**”) to swap activities outside the United States.<sup>3</sup> EDFT London offers these comments in furtherance of those goals and commends the Commission and other U.S. regulatory authorities who are working in close coordination with the EU Commission and regulators, as well as other jurisdictions, with the aim of agreeing on consistent and strong standards to limit risks in the derivatives market.<sup>4</sup>

**I. Summary of EDFT London’s Comments**

EDFT London believes that non-U.S. persons such as EDFT London should not be required to include the swap dealing activities of “commonly controlled” U.S. affiliates when evaluating whether

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<sup>1</sup> *Further Proposed Guidance Regarding Compliance With Certain Swap Regulations*, 78 Fed. Reg. 909 (January 7, 2013).

<sup>2</sup> Pub. Law No. 111-203, 124 Stat. 1376 (2010).

<sup>3</sup> 7 U.S.C. Sec. 1 *et seq.*

<sup>4</sup> *See* 78 Fed. Reg. at 910 (recognizing “the critical role of international cooperation and coordination in the regulation of derivatives in the highly interconnected global market where risks are transmitted across national borders and market participants operate in multiple jurisdictions.”).

the swap dealing activities of their non-U.S. person affiliates require such entities to register as a swap dealer. EDFT London believes that such an aggregation rule may:

- Require non-U.S. persons that maintain minimal contacts with the United States to register as a swap dealer, which is inconsistent with the Jurisdictional Limitation in the CEA;
- Result in the duplicative and potentially inconsistent regulatory requirements of multiple jurisdictions applying to the same swap activity; and
- Incentivize commercial firms to cease potential swap dealing activity in the United States, resulting in reduced U.S. swap market liquidity and fragmentation of the global swap markets.

EDFT London supports the Commission's Basket Approach to aggregation, which permits a non-U.S. person to exclude the swap dealing activity of its U.S. affiliates when evaluating whether it is engaged in activities that may require it to register as a swap dealer. EDFT London also supports the Commission's determination in the Cross-Border Exemption that provides that a non-U.S. person that is an affiliate of a registered swap dealer is not required to include in its *de minimis* calculations the swap dealing transactions of any of its non-U.S. affiliates that engage in swap dealing activities, so long as each such excluded affiliate is either (i) engaged in swap dealing activities with U.S. persons as of December 21, 2012, or (ii) registered as a swap dealer.<sup>5</sup>

## II. Description of EDFT London and Its Interest in the Further Proposed Guidance

EDFT London's headquarters are based in London. It is a 100% owned subsidiary of Électricité de France, SA ("**EDF Group**") and operates throughout the international energy markets. EDFT London is active in power, natural gas, coal, freight, environmental products and derivatives. As the EDF Group's interface to these markets, and with physical and financial market capabilities, EDFT London optimises the assets owned or operated by the EDF Group and third party customers. The EDF Group is one of the world's leading energy companies, active in all aspects of the energy value chain from source to supply.

## III. The Commission's Jurisdictional Limitation As Applied To The Swap Dealer Registration Requirement

Generally speaking, when evaluating an entity's swap activities to determine if it meets the definition of "swap dealer," the final rule further defining the term "swap dealer" (the "**Final Entities Definitions**") requires an entity to aggregate its own swap activities with the swap activities of affiliates that control, are controlled by, or are under common control with the entity (the

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<sup>5</sup> 78 Fed. Reg. at 868.

“**Aggregation Rule**”).<sup>6</sup> For these purposes, “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether through the ownership of voting securities, by contract or otherwise.<sup>7</sup> Accordingly, under the Final Entities Definitions, a corporate group is required to aggregate the swap dealing activities of all “commonly controlled” affiliates to determine whether any individual entity within the corporate group meets the definition of “swap dealer.”

However, Section 2(i)(1) of the CEA, as amended by Section 722(d) of the Dodd-Frank Act, provides that the swap provisions of the CEA do not apply to swap activities “outside the United States” that do not have a “direct and significant connection with activities in, or effect on, commerce of the United States” (the “**Jurisdictional Limitation**”).<sup>8</sup> The Commission’s Further Proposed Guidance is an attempt to interpret the Jurisdictional Limitation.

In guidance previously issued by the Commission (the “**Proposed Cross-Border Guidance**”),<sup>9</sup> the Commission interpreted the Jurisdictional Limitation as modifying the Aggregation Rule to require the aggregation of swap activities of affiliated entities that are “U.S. persons” separately from the swap activities of affiliated entities that are “non-U.S. persons” – meaning that, for purposes of the Aggregation Rule, the corporate group would establish two separate “baskets” of swap activities: (A) one basket would include: (i) the aggregated swap dealing activities of all “U.S. person” affiliates facing all swap counterparties, and (ii) the aggregated swap dealing activities of all “non-U.S. person” affiliates facing “U.S. person” counterparties (the “**U.S. Basket**”); and (B) a separate basket would include only the swap dealing activities of the affiliates identified in (ii) above (the “**Non-U.S. Basket**” and, together with the U.S. Basket, the “**Basket Approach**”).

Consistent with the Basket Approach, under the Final Exemptive Order Regarding Compliance With Certain Swaps Regulations (“**Cross-Border Exemption**”), a non-U.S. person that was engaged in swap dealing activities with U.S. persons as of December 21, 2012 is not required to include, in its determination of whether its swap dealing activities exceed the applicable *de minimis* threshold, the swap dealing activities of its U.S. affiliates.<sup>10</sup>

Under the Commission’s Further Proposed Guidance, the Commission proposes a departure from the Basket Approach. Specifically, the Further Proposed Guidance offers an alternative interpretation of the Jurisdictional Limitation on the Aggregation Rule (the “**Alternative Aggregation Approach**”) that would require a non-U.S. person to include the swap dealing activity of U.S. person

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<sup>6</sup> See Rule 1.3(ggg)(4); *Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,”* 77 Fed. Reg. 30596, 30361, fn. 437 (May 23, 2012).

<sup>7</sup> The “control” analysis under Rule 1.3(ggg)(4)(i) adopts the Securities and Exchange Commission’s definition of “control” under SEC Rule 12b-2. See 77 Fed. Reg. at 30361, fn. 437.

<sup>8</sup> 7 U.S.C. Sec. 2(i).

<sup>9</sup> *Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act*, 77 Fed. Reg. 41214 (July 12, 2012).

<sup>10</sup> See *Final Exemptive Order Regarding Compliance With Certain Swap Regulations*, 78 Fed. Reg. 858, 868-869 (Jan. 7, 2013).

affiliates (regardless of whether such affiliates are registered as a swap dealer) in the non-U.S. person's calculation of whether its swap dealing activity exceeds the *de minimis* threshold. However, the Alternative Aggregation Approach would exclude from aggregation the swap dealing activity of any affiliated non-U.S. person that is registered as a swap dealer.

#### **IV. The Alternative Aggregation Approach Does Not Further The Goals Of The Dodd-Frank Act And Increases Potential Conflicts With Non-U.S. Requirements**

EDFT London respectfully suggests that the Commission should not adopt the Alternative Aggregation Approach. Section 752(a) of the Dodd-Frank Act requires the Commission to seek consistent international standards for regulating swaps,<sup>11</sup> and the Commission has indicated that it is guided by principles of international comity in implementing the Jurisdictional Limitation.<sup>12</sup> Because swap markets are global in nature, regulatory authorities in many jurisdictions face a complex task in crafting rules that reduce systemic risk, increase transparency, and promote market integrity in the swap market while still remaining true to principles of international comity.

The Commission indicated in the Further Proposed Guidance that the Alternative Aggregation Approach is intended to prevent entities that are engaged in swap dealing activities from engaging in *de minimis* swap dealing activities through several non-U.S. person affiliates. The Commission appears to believe that the Alternative Aggregation Approach would, in effect, require that dealing activities be concentrated in a single legal entity if the aggregated swap activity of the corporate group, including U.S. and non-U.S. person affiliates worldwide, were to exceed the *de minimis* level.<sup>13</sup> At the same time, the Commission acknowledges that once a corporate group engages in swap dealing activities that are, in the aggregate, beyond the *de minimis* threshold, each individual entity that engages in any swap dealing activity within the corporate group would be required to register as a swap dealer.<sup>14</sup> The Commission suggests that, by preventing an entity from distributing non-*de minimis* swap dealing activities among several non-U.S. person affiliates, the Alternative Aggregation Approach would further reduce systemic risks to U.S. swap market participants.<sup>15</sup>

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<sup>11</sup> Dodd-Frank Act Sec. 752.

<sup>12</sup> See 77 Fed. Reg. at 41218 (“Section 2(i) does not, however, require the Commission to extend its reach to the outer bounds of that authorization. Rather, in exercising its authority with respect to swap activities outside the United States, the Commission will be guided by consideration of international comity principles.”).

<sup>13</sup> Note that, under the Alternative Aggregation Approach, the swap dealing activity of a non-U.S. person affiliate would only count against such entity's or its U.S. person affiliates' swap dealer *de minimis* thresholds to the extent such activity is facing U.S. person counterparties. See 78 Fed. Reg. at 911, fn. 22.

<sup>14</sup> *Id.* at 911.

<sup>15</sup> See *id.* (“The Commission is concerned that permitting such affiliates whose swap dealing activities individually fall below the *de minimis* level, but whose swap dealing activities in the aggregate exceed the *de minimis* level, to avoid registration as SDs would provide an incentive for firms to spread their swap dealing activities among several unregistered affiliates rather than centralize their swap dealing in registered firms. Such a result would increase systemic risks to U.S. market participants and impede the Commission's ability to protect U.S. markets.”).

EDFT London respectfully submits that the Alternative Aggregation Approach will yield no significant reduction in systemic risk as compared to the Basket Approach. This is the case because, under the Basket Approach, if the Non-U.S. Basket includes swap dealing activities beyond the *de minimis* threshold, each entity within the Non-U.S. Basket that is engaged in swap dealing activities facing U.S. person counterparties would be required to register as a swap dealer. The same result is obtained under the Alternative Aggregation Approach, with the exception that, under the Alternative Aggregation Approach, if the corporate group has a U.S. Basket of swap dealing activities, the corporate group may be compelled to transfer swap dealing activities residing in its U.S. Basket to a non-U.S. person affiliate that is registered as a swap dealer. Such a transfer of swap dealing activities to non-U.S. person affiliates may be a reasonable response to the Alternative Aggregation Approach because the Alternative Aggregation Approach excludes from aggregation all swap dealing activity of a registered swap dealer that is a non-U.S. person, but provides no such exclusion for the swap dealing activity of a registered U.S. person affiliate.

As the Commission has acknowledged, requiring the registration of multiple entities within a corporate group is burdensome and may not advance the Commission's regulatory interests. Neither approach is likely to have any direct impact on the aggregate amount of swap dealing activity that actually occurs in the market – the approaches merely change the relative economic and regulatory burdens faced by a corporate group that may engage in potential swap dealing activity through numerous affiliates globally.<sup>16</sup>

EDFT London respectfully submits that such a modification of the relative economic and regulatory burden by switching from the Basket Approach to the Alternative Aggregation Approach merely increases the economic and regulatory burden without achieving economic or regulatory goals. EDFT London believes that it is speculative whether an incremental increase in Commission-regulated activities outside the United States would reduce systemic risk; indeed, the Alternative Aggregation Approach may result in increased concentration of swap activity into non-U.S. person entities, which may increase systemic risk to U.S. persons and reduce the Commission's oversight over global swap market activity. At the same time, it is clear that the Alternative Aggregation Approach disregards principles of international comity by unnecessarily interfering in the way commercial firms organize their business and interact with customers outside the United States.

To the extent that the Commission is concerned that market participants may redistribute swap activities that are conducted outside the United States to limit the impact the Commission's new requirements may have on swap activities outside the United States, EDFT London would note that the Commission's counterparts internationally are currently moving forward in establishing regulations that are comparable to requirements under the Dodd-Frank Act.

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<sup>16</sup> Most market participants would generally agree that establishing numerous registered entities that engage in very little activity subject to regulation may be cost prohibitive. Accordingly, the *de facto* outcome of the Basket and Alternative Aggregation Approaches arguably may be that market participants will confine non-*de minimis* swap dealing activity to a single entity (in the case of the Alternative Aggregation Approach) or, perhaps, two entities (in the case of the Basket Approach).

For example, the European Market Infrastructure Regulation (“**EMIR**”) imposes clearing and margining requirements on financial firms and non-financial firms for whom the aggregate notional value of their derivative activities (excluding hedging) exceed certain thresholds and applies risk mitigation and reporting requirements to all firms. In light of these requirements and the fact that other regulations that are similar to the requirements of the Dodd-Frank Act exist in many non-U.S. jurisdictions, any benefits derived from the implementation of the Alternative Aggregation Approach would be minimal compared to the compliance costs and administrative burdens faced by market participants.

To the extent the Commission may continue to be concerned that the reorganization of market participants’ swap activities outside the United States may constitute “evasion” of U.S. regulatory requirements, EDFT London would suggest that the Commission await implementation of comparable and potentially complementary non-U.S. regulatory regimes before imposing requirements that may compel an entity such as EDFT London to reorganize its swap activity globally to conform to the requirements of U.S. law, standing alone.

## V. Conclusion

EDFT London appreciates the Commission’s consideration of its comments on the Further Proposed Guidance. For the reasons stated herein, we respectfully suggest that the Commission should not adopt the Alternative Aggregation Approach which would require a non-U.S. person to include the swap dealing activity of its U.S. affiliates in the calculation of whether the non-U.S. person’s swap dealing activity exceeds the *de minimis* threshold. Such an expansion of the aggregation requirement is not consistent with the Commission’s goal of coordinated international regulation of swaps markets.

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Please contact us at the number listed below if you have any questions regarding these comments.

Respectfully submitted,



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