

October 18, 2013

Ms. Melissa Jurgens
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street NW
Washington, DC 20581

VIA ELECTRONIC MAIL

Re: *CME / CBOT / NYMEX / COMEX / KCBT Submission No. 13-381: Amendments to Rule 538 and the Issuance of Market Regulation Advisory Notice RA1311-5 Regarding Exchange for Related Position Transactions*

Dear Ms. Jurgens:

On behalf of The Commercial Energy Working Group (the “**Working Group**”), Sutherland Asbill & Brennan LLP hereby submits these comments in response to the Chicago Mercantile Exchange Inc., Board of Trade of the City of Chicago, Inc., New York Mercantile Exchange, Inc., Commodity Exchange, Inc., and the Board of Trade of Kansas City, Missouri, Inc. (collectively, the “**Exchanges**” or “**CME Group**”) request for approval from the Commodity Futures Trading Commission (the “**CFTC**” or “**Commission**”) to amend Rule 538 (the “**Proposed EFRP Rule Amendment**”) in each Exchange’s rulebook and to issue Market Regulation Advisory Notice RA1311-5 (the “**Proposed EFRP FAQ**”) applicable to each of the Exchanges.¹ The central feature of the Proposed EFRP Rule Amendment is to eliminate exchange for related position (“**EFRP**”) transactions utilizing “contingent swaps,” which are swaps that parties enter into with the express condition that the effectiveness of the swap is subject to central clearing of the related positions as futures. The Working Group appreciates the opportunity to provide the comments set forth herein and the Commission’s consideration of such comments.

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group

¹ See CFTC Regulation 40.5(a) Request for Approval: Amendments to Rule 538 and the Issuance of Market Regulation Advisory Notice RA1311-5; CME / CBOT / NYMEX / COMEX / KCBT Submission No. 13-381 (Sept. 12, 2013); available at: <http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul091213cmecbotnymexcomandkcl.pdf>.

are energy producers, marketers and utilities, and all members regularly transact in derivatives contracts on at least one of the CME Group Exchanges. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

I. COMMENTS OF THE WORKING GROUP.

A. The Commission Should Wait to Consider the Proposal Until Market Participants Are Given a Full View of, and Opportunity to Comment on, All of the Pending Issues That Will Impact Market Structure.

For the Working Group to respond to the Proposed EFRP Rule Amendment and FAQ in constructive manner (and for the Commission to make reasoned determinations), it must first have insight into the numerous pending issues that will impact whether an instrument is traded as a futures contract or a swap and the consequences of those determinations. The elimination of contingent EFRPs, the establishment of a methodology for determining appropriate block sizes for futures and the finalization of designated contract market (“**DCM**”) Core Principle 9² are inextricably intertwined. The Commission should allow market participants to consider them holistically before considering whether to eliminate market features such as contingent EFRPs.

In many cases, a futures contract and a swap contract are identical and have the same economic consequences and have the same economic functions. Nothing illustrates this better than the transition from swaps to futures of the ICE Henry Hub natural gas contract over the weekend of October 12 to 15, 2012 without a single change in material terms. That being the case, the Commission should carefully consider rules that might drive the product to one market or the other and thereby avoid opportunities for regulatory arbitrage or picking “winners” or “losers” among competitors that offer trading platforms.

Eliminating contingent EFRPs, raising block sizes for futures and adopting provisions in DCM Core Principle 9 that establish minimum central limit order book trading thresholds for continued DCM listing of a product all have the potential to drive transactions from the futures market to the swaps market. This may be positive, it may be negative (and we hope to have the opportunity to comment on this in the future), but in either event market participants should be

² See 7 U.S.C. 7(d)(9); 17 C.F.R. § 38.500; *Core Principles and Other Requirements for Designated Contract Markets*, 77 Fed. Reg. 36,611, 36,642-43 (Jun. 19, 2012); and *Core Principles and Other Requirements for Designated Contract Markets*, 75 Fed. Reg. 80,572, 80,588 and 80,616 (proposed Dec. 22, 2010). For example, if DCM Core Principle 9 results in many futures contracts being converted into listed swaps, but the net effect would be increased costs for commercial firms, such an outcome would be deleterious to commercial interests.

The Commission must also consider the market design and any substantive differences between executing a swap on an SEF and a swap on a DCM. If differences exist, then the Commission must evaluate the propriety of any of its rules that forces trading on either SEFs or DCMs. The Working Group recognizes that Congress created these two types of organized markets. However, Congress also entrusted their design to the CFTC and made very few requirements that such exchanges be different. The Working Group believes that the entire marketplace will be best served if trade execution and clearing terms were nearly identical for both exchanges. Differences will only reflect higher transaction prices for one exchange relative to the other.

given an opportunity to understand what the Commission proposes in each regard, and the Commission should consider the wisdom of the proposals in light of public comment upon them, rather than offering and considering them piecemeal. There is a lot at stake in terms of the efficiency of U.S. energy markets, and the Commission has a historic opportunity to “get it right,” which will be greatly enhanced by a full and considered analysis of all aspects of the market structure issue.

B. The Commission Should Ensure that Market Participants, Where Necessary, Have the Ability to Enter Into Derivatives to Most Effectively Hedge Against Risk.

Without arguing the merits or demerits of a contingent EFRP specifically, there is no question that market participants require some flexibility in futures execution methodology in order to appropriately hedge against risk, particularly in less liquid contracts. The contingent EFRP has served that purpose for over ten years. It allowed clearing of bilaterally negotiated transactions beginning in the post-Enron environment – a time when market liquidity critically depended on limiting counterparty credit risk by offering a clearing solution. In finalizing its Dodd-Frank rulemakings and determining whether to approve or deny CME Group’s Proposed EFRP Rule Amendment and FAQ, the Commission should ensure that a variety of execution methodologies remain available to DCMs (it has already done so for swaps, by providing complete flexibility to swaps that are not “made available to trade” on a SEF, permitted transactions and, to some extent to required transactions).

Congress expressly recognized the benefits of providing flexibility to futures exchanges when, in 1993, it amended the Commodity Exchange Act by adding into Section 4(c) the authority of the Commission to exempt from certain of the exchange trading requirements various agreements, contracts, or transactions “in order to promote responsible economic or financial innovation and fair competition.”³ Accordingly, if the Commission deems it appropriate, directly or indirectly, to prohibit contingent EFRPs, it should expressly permit a form of DCM trading that fosters bilateral and brokered transactions, particularly for illiquid contracts and contract months.

II. CONCLUSION.

The Working Group supports appropriate regulation that brings transparency and stability to the swap and futures markets worldwide. The Working Group appreciates this opportunity to provide comments on the CME Group’s Proposed EFRP Rule Amendment and FAQ, and respectfully requests that the Commission consider the comments set forth herein as it determines whether (and when) to grant or deny the CME Group’s request for approval.

If you have any questions, please contact the undersigned.

³ See 7 U.S.C. 6(a) and (c). Under these provisions, the Commission is authorized to exempt derivatives contracts from the on-exchange trade execution requirement.

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Respectfully submitted,

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Working Group*