

November 29, 2013

VIA ELECTRONIC MAIL

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

Re: Request for Public Comment on Certifications to Implement Available-to-Trade Determinations for Certain Interest Rate Swaps from Javelin SEF, LLC (IF 13-004), TW SEF LLC (IF 13-007) and MarketAxess SEF Corporation (IF 13-008)

Dear Ms. Jurgens:

I. INTRODUCTION.

On behalf of The Commercial Energy Working Group (the “**Working Group**”), Sutherland Asbill & Brennan LLP respectfully submits this letter in response to the certification requests from Javelin SEF, LLC (“**Javelin**”),¹ TW SEF LLC (“**Tradeweb**”),² and MarketAxess SEF Corporation (“**MarketAxess SEF**”)³ to implement Available-to-Trade Determinations (together the “**MAT Determinations**”) for certain interest rate swaps pursuant to Commission regulations 37.10 and 40.6 filed with the Commodity Futures Trading Commission (the “**CFTC**” or “**Commission**”).

The Working Group appreciates the Commission providing a comment period on the MAT Determinations as swap execution facilities (each a “**SEF**”) and market participants move towards the implementation of the initial set of MAT Determinations. To that end, the Working

¹ Javelin MAT Determination Amended 10-31-13, *available at:* <http://sirt.cftc.gov/sirt/sirt.aspx?Topic=%20SwapsMadeAvailableToTradeDeterminationAD&Key=26422>

² TW SEF LLC MAT Determination, submitted 10-28-13 *available at:* <http://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/corpg5twmatdeter101813.pdf>

³ MarketAxess SEF Corporation MAT Determination submitted 10-30-13, *available at:* <http://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/marketaxessmatsub103013.pdf>

Group is primarily providing comments regarding the process for MAT Determinations and mandatory clearing designations, as the CFTC may soon move to implement mandatory clearing and execution in energy swap markets.

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 are energy producers, marketers, and utilities. 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.

II. COMMENTS OF THE WORKING GROUP.

A. Contracts that are Made Subject to the Mandatory Trade Execution Requirement Must Be Contracts the CFTC Has Designated for Mandatory Clearing.

Section 2(h)(2) of the Commodity Exchange Act (the “CEA”) provides the Commission with the authority to designate certain “swap[s], or any group, category, type, or class of swaps” to mandatory central clearing. If, and only if, a swap is (i) subject to mandatory central clearing and (ii) has been “made available to trade” (“MAT”) by a designated contract market (“DCM”) or swap execution facility (“SEF”), will that swap be subject to the mandatory execution requirement set forth in Section 2(h)(8) of the CEA. As such, the scope of any MAT Determinations submitted to the CFTC necessarily must be limited to swaps that are already subject to mandatory clearing.⁴

Javelin’s MAT Determination submission follows the CFTC’s December 13, 2012 decision to subject particular classes of “vanilla” interest rate swaps (“IRS”) to mandatory central clearing.⁵ Specifically, the Clearing Determination applied to certain swaps within the following classes: (i) fixed-to-floating; (ii) basis swap; (iii) forward rate agreement; and (iv) overnight index. Accordingly, Javelin’s submission must only cover swaps within those four classes.

⁴ Javelin’s MAT Determination request implies that swaps not subject to mandatory clearing can be MAT and thus subjected to the mandatory execution requirement. The Javelin’s submission states “At least initially, the Commission has stated that it will only review MAT submissions for swaps that it has first determined to be subject to the clearing requirement under Section 39.5 of the commission’s regulations.” (Javelin MAT Determination Request at 5.

As discussed in Section II. A. hereof, the mandatory trade execution requirement in Section 2(h)(8) of the CEA clearly only can apply to swaps subject to mandatory clearing under Section 2(h)(2) of the CEA. Javelin’s confusion may stem from the fact that Section 5h(b)(1) of the CEA states that a SEF may “make available for trading any swap.” The Commission should make clear that only swaps subject to mandatory clearing can be “made available to trade,” and thus subjected to the mandatory trade execution requirement, pursuant to CFTC Regulation 37.10.

⁵ *Clearing Requirement Determination Under Section 2(h) of the CEA*, (the “**The Clearing Determination**”) 77 Fed Reg. 74, 284 (Dec. 13, 2012).

However, the Javelin MAT Determination request would also “make available to trade” some swaps that are not clearly subject to mandatory clearing. For example, the scope of the Javelin MAT Determination includes forward starting IRS with a start date of up to ten months in the future. Notably, there is disagreement among market participants on whether (i) forward starting swaps should be considered a separate class of swaps that was expressly not covered by the Clearing Determination or (ii) if a forward start date is a specification (*e.g.*, currency, floating rate index) that is not relevant in determining whether a swap is within one of the four enumerated classes subject to mandatory clearing.

This question should not be answered in the MAT Determination process. Instead, it is a question of scope that is more appropriately addressed in a mandatory clearing determination. While the Commission cannot anticipate every issue or question that may arise under a new mandatory clearing determination, the Commission should strive to establish clear, bright lines that allow participants to easily determine whether a swap is subject to mandatory clearing. Given the consequences associated with failing to clear a swap subject to mandatory clearing, the Working Group requests that the Commission provide an efficient mechanism for market participants to receive Commission guidance as to whether a swap is subject to mandatory clearing. This clarity is necessary if end users are expected to determine whether a contemplated swap would be subject to mandatory clearing and possibly mandatory exchange execution.

B. Not All Swaps that are Subject to Mandatory Clearing Should Be Made Available to Trade.

Congress, in drafting Dodd-Frank, and the Commission, in implementing the mandatory clearing and trade execution requirements, recognized that the universe of contracts that could safely be subjected to mandatory clearing is larger than the set of contracts that would be appropriate to subject to the mandatory execution requirement. The construction of Section 2(h) of the CEA and the related regulations make this plain; only classes of swaps that satisfy the criteria set forth in Section 2(h)(2)(D) of the CEA can be subjected to mandatory clearing and only the subset of swaps that satisfy those criteria and are MAT under CFTC Regulation 2(h)(8) are subject to the mandatory execution requirement.

The MAT approach taken by Javelin concerns the Working Group. The approach is potentially over inclusive in that it would apply to not only the most liquid benchmark tenors, but also swaps of less liquid tenors. Javelin argues that because swaps with less liquid tenors can be constructed “synthetically” by creating baskets of benchmark tenors to achieve the same risk management objective using more liquid products then such less liquid tenors should be subject to the mandatory execution requirement. Although Javelin states that the same risk management objective associated with a less liquid swap could be achieved by constructing a “synthetic” basket of more liquid swaps, in its amended MAT Certification, Javelin concedes that the liquidity characteristics of an off-the run 3.6yr swap is “never exactly equal” as that of a basket hedge derived by “synthetically” combining more liquid 3yr and 4yr swaps.⁶

⁶ Javelin MAT Determination Amended Request at 13.

If the CFTC were to follow the line of reasoning put forth by Javelin, it would have significant implications. The line of reasoning opens the door, contrary to Congress's design, for the mandatory exchange execution of illiquid contracts. Moreover, it assumes people will assemble primitive contracts at tremendous expenses to replicate a liquid contract based on theory without the support of evidence. It would also present market participants with two suboptimal choices: (i) transact in less liquid tenors on a SEF and expose themselves to all the risks attendant in trading in thinly-traded, exchange executed contracts or (ii) spend resources to enable them to synthesize contracts to achieve the desired risk profile.

Moreover, the variety of products in the interest rate market, and the high level of customization which takes place in this space is reason to be cautious when designating swaps as MAT. The same concern exists in energy swap markets. The CFTC should prohibit SEFs from subjecting an entire class of swaps to a "made available to trade" designation and should allow only those benchmark tenors, grades, or locations in a particular class of swaps that are sufficiently liquid to be designated as MAT.

In the energy context, a contract-by-contract analysis will be necessary to take into account the unique characteristics of many energy swaps. The liquidity of swaps with the same underlying commodity will vary greatly depending on the delivery location, quality grade, and tenor of the swap. For example, the volume of trading for an outright Henry Hub natural gas contract in the front-month will likely be significantly more robust than the volume for the same contract out 72 months. In addition, a natural gas locational basis swap between Henry Hub and Mid-Continent will likely be more liquid than a locational basis swap between Henry Hub and TETCO South Texas.

The Working Group respectfully requests that the Commission pay careful attention to the meaningful variations in energy derivatives when considering subjecting energy-based swaps to mandatory clearing and when SEFs make related MAT Determination applications. Said another way, blanket judgments should not be made with respect to all swaps that reference a particular commodity, for example, natural gas for delivery at Henry Hub or all crude oil swaps that reference the price of WTI.

The most appropriate approach to the application of the mandatory trade execution requirement would be to designate particular listed contracts or contracts with very explicit characteristics as "made available to trade" rather than approving MAT determinations for classes of economically equivalent or similar swaps. The Commission acknowledged the wisdom of this approach in its final rule setting forth the MAT Determination process where it stated "the Commission has determined that it is not feasible, for purposes of determining which swaps are available to trade, to define "economic equivalent" with sufficient precision and clarity."⁷ A contract-by-contract determination rather than a class or group determination would ensure that only swaps with appropriate liquidity are subjected to mandatory exchange execution.

⁷ *Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act*, 78 Fed. Reg.33,606 (Jun. 4, 2013) at 33,614.

C. The CFTC Should Provide a Significant Compliance Period with Respect to MAT Determinations.

The current compressed timeframe for compliance with a MAT Determination is a risk to market integrity. *First*, market participants must have adequate time to adapt their systems to (i) identify swaps subject to a MAT Determination and (ii) be able to execute the relevant swaps on a SEF. For markets such as energy markets that rely heavily on brokers, this will be a significant change.

Second, SEFs other than the SEF making the MAT Determination request should have time to list the relevant swaps. A short compliance period may provide temporary monopoly power to the requesting SEF. Market participants may be forced to transact on that SEF, at least until other SEFs list the contracts. Market participants may have to become enabled with the requesting SEF in a short period of time, allowing the SEF to dictate legal and economic terms. In short, a compressed MAT compliance period may limit market access. As such, the Working Group requests a practical solution to address the logistic and market share issues. If the swap subject to a MAT Determination is listed on several SEFs, thus reducing the potential impact to market access, then the compliance period for that determination should be 30 days. However, when a swap subject to a MAT Determination is only available on one SEF, then a 180 day compliance period would maintain competition between SEFs and not limit the market's access to just one platform.

III. CONCLUSION.

The Working Group appreciates this opportunity to comment and supports appropriate regulation that brings transparency and stability to the swap markets worldwide. The Working Group respectfully requests that the Commission consider the comments set forth herein and grant the requested relief.

If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

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