

May 27, 2014

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

Re: Review of Swap Data Recordkeeping and Reporting Requirements, RIN 3038-AE12

Dear Secretary Jurgens:

By way of a request for comment captioned “Review of Swap Data Recordkeeping and Reporting Requirements” (the “Request”),¹ the Commodity Futures Trading Commission (“CFTC” or “the Commission”) has sought feedback from industry participants regarding its reporting requirements for swaps under the Commission’s Part 45² reporting rules promulgated pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).³ The Coalition of Physical Energy Companies (“COPE”) hereby responds to the Commission’s Request.

The Coalition of Physical Energy Companies (“COPE”)⁴ is comprised of physical energy companies in the business of producing, processing, and merchandizing energy commodities at retail and wholesale. COPE members generally use swaps (including options and trade options) in conjunction with their physical businesses, most typically for hedging.

With respect to reporting, COPE members span the spectrum of end-user swap counterparties, including those who: do not report any swaps; report a limited amount of swaps; and report a

¹ 79 Fed. Reg. 16689 (March 26, 2014).

² 17 CFR Part 45 (2014).

³ Public Law 111–203, 124 Stat. 1376 (2010).

⁴ The members are: Apache Corporation; EP Energy LLC; Enterprise Products Partners, L.P.; Iberdrola Renewables, Inc.; Kinder Morgan; MarkWest Energy Partners, L.P.; Noble Energy, Inc.; Shell Energy North America (US), L.P.; SouthStar Energy Services LLC; and Targa Resources.

significant number of swaps. As is the case with physical end-users in general, there are more COPE members who report no swaps than there are those who report a significant amount of swaps.

Through the Request, the Commission seeks comment on specific swap data reporting and recordkeeping requirements under Dodd-Frank to determine how its rules are being applied and what clarifications, enhancements, or guidance may be appropriate. As end-users of swaps that are engaged in physical businesses, COPE members understand that they have regulatory obligations stemming from Dodd-Frank. However, COPE believes that those regulatory obligations should be as limited as possible while still meeting the Commission's regulatory goals. COPE requests that the Commission use this inquiry to find ways to make its processes more efficient and less burdensome for physical end-users. In no event should the Commission, as a result of this review process, impose any additional burdens on physical end users that are not absolutely necessary and are not first proposed in a rulemaking.

Overview

As a general matter, the architecture of swap data reporting has been somewhat difficult for end-users, including COPE members, to navigate. Rather than report to a single standardized location, there are multiple Swap Data Repositories ("SDR"). While required to implement the same set of regulations, each SDR has its own rules and processes. Such processes do not always appear to be in sync with the Commission's regulations. Further, the SDRs have differing business models and interface with reporting entities with differing levels of customer-facing guidance and assistance. Finally, unlike other government reporting requirements, end-users must pay for the ability to report to an SDR and incur software costs to do so. Of course, in order to report all swap types (no matter how few swaps of each type), an end-user may have to sign up with more than one SDR.

COPE believes that the current SDR model for reporting swap transaction data is inefficient and poorly designed. It is particularly challenging for physical end-users that, unlike swap dealers or financially-oriented entities, are focused more on their physical business than putting in place material IT systems and associated staff to robustly record and administer financial contracts such as swaps. For example, one COPE member has had the experience of having to devote significant resources to get set up to report commodity swaps at one SDR and then, due to the need to report a single one-off interest rate swap with a non- US counterparty, spending the better part of a week getting set up to report that single swap with a different SDR.

COPE also understands that the existence of multiple SDRs with individually bespoke processes and rules has also created issues for the CFTC, due to differences in the way data is collected and provided to the Commission. Finally, COPE understands that certain of the discrepancies between the Commission's regulations and SDR processes stem from CFTC staff requirements imposed on SDRs that are inconsistent with regulatory text (see, for example, the discussion of the valuation process below).

In addition to the existence of multiple SDRs and their idiosyncratic components, COPE members have had concerns about the manner in which the Commission has administered the reporting regime. For example, end-users struggled to meet the Commission's reporting start date, only to have it changed after close of business the day before reporting was to begin in April 2012. COPE member have also found the Part 45 regulations to be confusing and at times inconsistent with SDR practices and rules. Finally, the Commission staff has frequently issued no action letters seemingly at random, containing irrelevant conditions and criteria (*i.e.* the \$1 billion trade options email discussed below).

It is COPE's hope and expectation that the process resulting from the Request will bring clear and less burdensome reporting requirements with more uniformity. It makes sense at this time to step back and enhance the efficiency and "user friendliness" of the reporting regime.

Reporting Topics

Confirmation Data

In the Request, the Commission asks what terms of a confirmation of a swap should be reported to an SDR as "confirmation data."⁵ COPE believes that the substantive commercial swap information needed by the Commission can be found in the primary economic terms ("PET") data reported by the reporting counterparty pursuant to CFTC Regulation 45.3.⁶ As such, only in the case where specific categories of information needed by the Commission are not captured by the PET data should any additional confirmation data be required to be provided.

To prevent reporting parties from having to provide redundant and unnecessary information, the Commission should specify categories of information specifically needed by it to carry out its regulatory duties, beyond PET data, and give examples. The Commission should also ensure the reporting parties have a role in establishing the manner in which SDRs design this element of their systems.

Unless the Commission simply wants PDF copies of transaction confirmations for "completeness" in lieu of confirmation data entries, it should make known the information beyond PET data it needs and establish a clear and user-friendly process to report that additional information. Otherwise, the current requirement to report both PET data and confirmation data is likely to be redundant and lead to unnecessary cost and inefficiency.

⁵ See Request at 16691.

⁶ 17 C.F.R. § 45.3.

Valuation Data

The Commission asked in the Request how valuation data can most effectively be reported to SDRs.⁷ In response to the Commission's notice of proposed rulemaking setting forth the proposed Part 45 reporting rules in 2011, COPE advocated that valuation data reporting not be required of end-users.⁸ Beyond the burdensome nature of such reporting, COPE did not see then and does not see today any regulatory value in the reporting of such data.

As the process has evolved since the proposed rulemaking, rather than a daily valuation reporting requirement, end-users now have a quarterly requirement.⁹ The quarterly reporting requirement can be burdensome and, as applied by the SDR, appears inconsistent with the regulations.

The regulations require the valuation of a swap transaction.¹⁰ However, as COPE understands it, the SDR values a consolidated position of like swaps as of a point in time.¹¹ If a swap was initiated after the last report and terminated before the position valuation, it is not included. If two swaps perfectly offset each other, they are effectively not included. Further, the date the position is fixed (end of quarter) and the valuation data reporting date is different (the submission date, within 30 days of the end of the quarter). While this may yield interesting data in some manner, it is not what the regulations require.

Aside from not tracking the regulations and reporting data that is not specific to a particular swap, COPE believes the information provided to the SDRs is of questionable value and irrelevant to the reporting of a swap of an unregistered entity. While the Commission has a regulatory interest in such information with respect to its registrants for regulatory oversight purposes, physical end-users are not regulated by the Commissions and the valuations of their swap positions are beyond the regulatory purpose of swap reporting as required by Dodd-Frank. As a result, end-users should not have to report valuation data.

Form TO

The Request asks commenters to describe any challenges associated with the reporting of commodity trade options.¹² As the Commission is aware, it is COPE's view that physical commodity options were not intended by the drafters of Dodd-Frank to be included within the

⁷ See Request at 16691.

⁸ Comments of COPE – Swap Data Recordkeeping and Reporting Requirements, at 5 (Feb. 7, 2011).

⁹ See 17 C.F.R. § 45.4 (c)(2)(ii).

¹⁰ *Id.* (“[T]he reporting counterparty must report the current daily mark of the transaction as of the last day of each fiscal quarter.”).

¹¹ COPE understands this approach was required of the SDRs by the Commission staff.

¹² See Request at 16693.

definition of “swap,”¹³ and that the Commission’s embedded optionality tests are in need of revision.¹⁴ That being said, to the degree commodity options are considered swaps and can be defined as trade options and must be reported, COPE believes that the use of Form TO is the most efficient and best way to accomplish that goal.

COPE requests, however, that the Commission better codify the use of Form TO in its regulations. Currently, the use of Form TO is prescribed by both regulation¹⁵ and a supplemental no-action letter defining who can use Form TO and when;¹⁶ the no-action letter also modifies the regulation regarding the need for certain parties to determine the reporting status of their counterparties. Rather than using a no-action letter (with somewhat random criteria for Form TO qualification, such as the \$1 billion notional value email described in footnote 16 below), the Commission should unambiguously make clear in its regulations that physical end-users may report any trade options they may have on Form TO. Physical end-users with limited CFTC interactions should not have to navigate a confusing path and piece together contradictory regulations and supplemental no-action relief to understand their regulatory obligations.

Data Reconciliation

The Request asks whether “the Commission [should] require periodic reconciliation between data sets held by SDRs and those held by reporting entities.”¹⁷ The answer to this question from the perspective of physical end-users is an unambiguous “no.”

¹³ Comments of COPE – Commodity Options and Agricultural Swap, at 3 (Apr. 4, 2011). . See Dodd-Frank Section 721(a)(21) (adding a new Section 1a(47) to the Commodity Exchange Act, defining “swap” to exclude “any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled”).

¹⁴ See COPE Follow Up Comments on End-User Roundtable, at 3-4 (Apr.17, 2014) (explaining that the “[s]eventh prong of the [Commission’s] test regarding forward contracts with embedded optionality should be eliminated or clarified”).

¹⁵ 17 C.F.R. § 32.3(b) (providing that Form TO may be used to report any trade option for any counterparty where the trade option does not involve a counterparty that has become obligated to comply with the reporting requirements of Part 45 as the reporting counterparty for a non-trade option during the year prior to the date on which the trade option is entered into).

¹⁶ See CFTC Letter No. 13-08, *Staff No-Action Relief from the Reporting Requirements of § 32.3(b)(1) of the Commission’s Regulations, and Certain Recordkeeping Requirements of § 32.3(b), for End Users Eligible for the Trade Option Exemption*, at 3-4 (Ap. 5, 2013) (stating that no action will be recommended against any end-user trade option counterparty for not complying with the Part 45 reporting requirements for trade options, where the end-user reports the trade option using Form TO, and sends an email notification to staff no later than 30 days after entering into trade options having an aggregate notional value in excess of \$1 billion during any calendar year).

¹⁷ See Request at 16692.

As noted above, COPE is hopeful that the Request will lead to changes resulting in a less burdensome and more efficient process for the scope of today's reporting regime, not the addition of wholly new requirements.

The Commission should be aware that the complexity of its requirements has led many end-users to only transact swaps with Swap Dealers, due to their obligation to report swaps with non-Swap Dealers, or to abandon swaps entirely for futures transactions. Markets are made less efficient and can be distorted when regulatory burdens rather than commercial considerations drive the market participants' choices.¹⁸

Data Confidentiality and Ownership

In the Request, the Commission asks if "the regulatory reporting of a swap transaction to an SDR implicitly or explicitly provides 'consent' to further distribution or use of swap transaction data for commercial purposes by the SDR."¹⁹

The answer to this question is an **unambiguous "no."** COPE is hopeful that this question does not evidence any view by the Commission that its regulations provide otherwise. COPE has always understood that the legally required reporting of data belonging to swap counterparties (beyond certain public disclosure relating to real-time reporting under Part 43) was to be maintained confidentially by the SDRs.²⁰ If the Commission believes otherwise, or if the rules need to be made more explicit, COPE requests that this issue be immediately identified publically such that it can be fully and finally resolved.

Systematic Improvements

In the Request, the Commission references an "interdivisional staff working group" established to "review its swap data reporting rules and related provisions set forth in part 45."²¹ COPE believes that such an internal process is welcome and can counteract the "siloing" of responsibilities at the CFTC which can prevent staff and the Commission from appreciating the confusion that end-users experience from conflicting and confusing Commission regulations across the spectrum of Dodd-Frank regulated activities.

¹⁸ By way of example, it is COPE's view that the Commission's overly vague Entity Definition rules, which provide that a person trading cleared swaps with anonymous counterparties intermediated by an exchange could be classified as "Swap Dealers" because of such activity, was the primary factor leading to the "futuresization" of commodity swaps that we have seen since October 2012. It is COPE's understanding that the Commission did not intend this outcome in adopting its Dodd-Frank rules.

¹⁹ Request at 16697.

²⁰ 17 CFR § 49.16.

²¹ Request at 16689.

COPE believes that the Commission should not limit its efforts to part 45. At a minimum, the Commission should place all transaction reporting-related issues under one umbrella. For example, the Commission should consider the apparently differing treatment of similar topics in its Entity Definitions rules related to the Swap Dealer *de minimis* calculation of gross notional amount, the Form TO \$1 billion gross notional amount threshold, and the Swap Large Trader and Swap Reporting gross notional amount calculations.

Simply stated, the Commission should step back, revisit the regulations and processes that appear to have been developed in a siloed and expedited “hothouse environment,” identify similar and related items across various parts of its regulations, and attempt to reconcile differences into a common process where possible. In doing so, the Commission should also take particular care with respect to physical end-users to avoid, where possible, requiring the reporting or recordkeeping of data that is not otherwise typically retained or required in the normal course of business. The Commission and its staff should ensure that the results of such a process will not create adverse market impacts, and it can do so by ensuring that the process is transparent and includes market participant feedback, much like it has done with the Request.

Further, as set forth above, the SDRs themselves are also varied and inconsistent in their application of the Commission’s swap reporting rules. The Commission should try to ensure that regulated entities performing the same data collection function subject to CFTC review do so in as uniform a manner as possible. COPE is not aware of any regulatory reason that this cannot or should not be a significant component of the CFTC’s regulatory regime for reporting. Swap data reporting should be a straightforward ministerial activity, not a confusing project involving complex calculations, conflicting and confusing regulations and staff pronouncements, and burdensome information technology investments.

Recordkeeping

COPE members are subject to the Commission’s Part 45 recordkeeping requirements for swaps, and as such, must interpret the meaning of the phrase “full, complete, and systematic records, together with all pertinent data and memoranda,” in determining the scope of their recordkeeping obligations.²² Beyond the words of the foregoing phrase, the Commission has provided virtually no guidance as to its intended scope. Like other physical end-users, COPE members have found that this phrase is too broad to be meaningfully operationalized in an ongoing business, such that companies can be certain that their efforts to achieve full, complete and systematic recordkeeping are resulting in compliance with Commission requirements.

The Commission should clarify its vague and overbroad requirement and make clear what records are included within the scope of a market participant’s recordkeeping obligations under Section 45.2(b) of its regulations; effectively, what is intended by “pertinent”, “systematic” and “full/complete.” The ambiguity of the Commission’s language has placed each physical end-

²² 17 C.F.R. § 45.2(b) (Recordkeeping by non-SD/MSP counterparties).

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user market participant in a position where it must make its own interpretation resulting in a variety of practices all of which could reasonably be said to meet the requirements.

Since the Commission's requirement can be seen as reaching beyond the records needed for commercial purposes, the Commission should specifically define any information retention requirements it imposes which exceed the information otherwise maintained in the normal course of business. On the other hand, the Commission could clarify that its policies and regulations do not require changes to internal recordkeeping practices, as COPE members and similarly situated market participants already have robust internal recordkeeping requirements, mandated in many cases by other regulatory agencies.

Conclusion

COPE appreciates the Commission's inquiry into the current state of its part 45 swap data reporting process. COPE requests that the Commission use the information it receives in response to the Request to improve the efficiency of its processes and lessen burdens on physical end-users.

Very truly yours,

/s/ David M. Perlman

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