Via Electronic Service at comments.cftc.gov

May 27, 2014

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

Re: Comments of the American Gas Association, *Review of Swap Data Recordkeeping and Reporting Requirements, Request for Comment,* 79 Fed. Reg. 58, RIN 3038-AE14 (March 26, 2014)

Dear Ms. Jurgens:

The American Gas Association ("AGA") submits the following comments in response to the Commodity Future Trading Commission ("CFTC" or "Commission") interdivisional staff working group ("Working Group") notice requesting comment on swap data recordkeeping and reporting requirements.[1] AGA respectfully requests that the Commission issue a limited re-proposal of the Part 45 final rule to provide non-reporting end-users a safe harbor to reasonably rely on their reporting counterparties to accurately report swap transaction terms to Swap Data Repositories. AGA believes that in the absence of such a safe harbor, the significant technological and procedural challenges for non-reporting end-users attempting to comply with the Part 45 rule create a regulatory burden that is contrary to the Commission's intent to limit end-user costs and risks associated with Part 45 compliance. As part of this re-proposal, AGA requests that the Commission also reconsider the extent of reporting end-user counterparties' obligations to ensure

[1] *Review of Swap Data Recordkeeping and Reporting Requirements, Request for Comment*, 79 Fed. Reg. 58, RIN 3038-AE14 (March 26, 2014) [hereinafter "Notice"].

Swap Data Repository ("SDR") database accuracy, given that these entities do not have the ability to determine database controls.

In addition, AGA reiterates its request that the Commission provide final guidance and rules addressing comments regarding embedded volumetric optionality and commodity trade options reporting. In the absence of final rules on these issues, there continues to be significant uncertainty in the energy industry about the regulatory treatment of physical gas supply agreements with volumetric optionality as excluded forward contracts or reportable trade options or swaps. Given the current regulatory uncertainty on these issues, AGA also notes the continuing challenges of reporting natural gas commodity trade options under Part 45 or Form TO, and respectfully requests that the Commission reconsider in a Part 45 rulemaking whether it is necessary for commodity trade options to be reported, by any counterparty, to an SDR.

I. Communications

All pleadings, correspondence and other communications filed in this proceeding should be served on the following:

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II. Identity and Interests

AGA represents more than 200 local energy companies that deliver clean natural gas throughout the United States. More than 65 million residential, commercial and industrial natural gas customers, or more than 175 million Americans, receive their gas from AGA members. AGA member companies provide natural gas service to retail customers under rates, terms and conditions that are regulated at the local level by a state commission or other regulatory authority with jurisdiction. They use financial and non-financial tools to hedge the commercial risks

associated with providing continuous, uninterrupted natural gas service to customers every day of the year, such as commodity cost volatility. Financial tools may include futures contracts traded on CFTC-regulated exchanges and over-the-counter energy derivatives. In the physical natural gas market, AGA members participate in and contract for pipeline transportation, storage and asset management services in order to procure and deliver affordable, reliable natural gas to their customers. AGA members have an interest in transparent and efficient financial markets for energy commodities, so that they can engage in risk management activities at reasonable cost for the benefit of America's natural gas consumers. Under CFTC rules, AGA member companies are classified as non-financial entities, or "end-users" of futures and swaps.

III. Comments

AGA's comments raise some specific problems that non-reporting end-user counterparties have experienced due to the regulatory uncertainty associated with their obligations under the Part 45 rule. Some AGA member local distribution companies ("LDCs") have noted a drop-off in energy swaps with end-user counterparties that either do not agree that certain transactions are "swaps" or "commodity trade options" under CFTC interim final rules and guidance, are not sophisticated enough to manage potential obligations as a reporting party, or are unprepared to manage obligations as a non-reporting counterparty. While some LDCs have adopted policies specifying that energy swaps can only be completed with counterparties that are prepared from a technological standpoint to engage in SDR reporting if required, others have migrated to exclusively contracting with counterparties that are either non-end-users or that have contractually assumed reporting obligations.

In general, more AGA members are seeing their swaps business move to larger and more sophisticated market participants that have the considerable resources needed to financially

support the substantial initial and ongoing investments required for reporting of complex and bespoke energy transactions to one or more SDRs. By contrast, LDCs are rate-regulated utilities that must receive state regulatory approvals for any initial expenditures on preparedness for SDR reporting. Given the limited number of "swaps" that an LDC may actually report now or in the future, and given the regulatory uncertainty of how many of its future forward risk management transactions may even be reportable swaps, it may be difficult for the LDC to demonstrate to its state regulatory authority that these are prudent regulatory expenditures that should be incurred and passed on to ratepayers.

A. Part 45 Compliance Requirements for Non-Reporting Entities are Unclear.

Given the trends described above, AGA members are increasingly assuming the role of non-reporting counterparties. In this role, they face significant uncertainty as to whether their duty to verify and confirm transactions may require their active engagement with SDRs to verify initial trade terms, subsequent changes in Primary Economic Terms ("PET") data, or other events for their over-the-counter energy swaps, options and commodity trade options that are reported by a reporting counterparty to an SDR. Specifically, AGA is concerned that although the current Part 45.14 rule does not explicitly require swap counterparties to monitor data in an SDR, [2] it does require registered entities and all swap counterparties that report swap data to an SDR, or to any other registered entity or swap counterparty, to report any errors or omissions in the data they report, as soon as technologically practicable after discovery of any error or omission.[3] The rule also does not provide a safe harbor for reporting entities' good-faith mistakes in reported data, and the Commission notes that it is the reporting party's responsibility to report data accurately and

[2] Swap Data Recordkeeping and Reporting Requirements, Final rule, 17 C.F.R. 45, 77 Fed. Reg. 2136, 2170 (January 13, 2012) [hereinafter "Part 45 Final Rule"].
[3] Part 45 Final Rule, at 2170.

develop processes to achieve this goal.[4] In addition, CFTC Core Principle 49.11 notes that SDRs must obtain acknowledgements from both counterparties as to the accuracy of trade data initially reported, and also requires that SDRs transmit information to both parties regarding errors or omissions that are subsequently reported.[5] The Part 49 rule also permits all counterparties to access information in SDRs concerning their own swaps, and provides for voluntary supplemental reporting to any SDR by any counterparty to the swap.[6] Part 45 further requires SDRs to provide both counterparties with a Unique Swap Identifier for an off-facility transaction with an end-user counterparty– and yet, SDRs are not necessarily able to identify and provide this information to a counterparty that is registered as a participant on their facilities.

AGA contends that the Part 45 and Part 49 requirements are inconsistent and difficult to implement because these requirements do not clearly describe what non-reporting entities are definitively required to do under the regulations to ensure reporting accuracy. The current regulations do not address how non-reporting entities can protect themselves against compliance exposure associated with the risk that reporting counterparties' reports are inconsistent with, or unknown to, the non-reporting entities. While the Commission has created a reporting hierarchy and SDR access rules that contemplate a limited burden on non-reporting end-user counterparties, it has provided avenues for non-reporting counterparties to access SDR data concerning swaps reported on their behalf, and imposed an affirmative obligation on all non-reporting counterparties to report any discovered errors and omissions. This obligation can impose significant costs, for example, on a non-reporting entity whose counterparties choose to report as little as one swap to each of the three SDRs over an unspecified period of time, particularly if the SDRs require fee-

[4] *Id.*
[5] Swap Data Repositories: Registration Standards, Duties and Core Principle, Final rule, 17 C.F.R. § 49.11, 76 Fed. Reg. 54538, 54579 (September 1, 2011).
[6] Part 45 Final Rule, at 2169.

based participation in order to communicate trade verifications and receive acknowledgements. Further, whether or not access to the SDRs is free or fee-based, the very fact that a non-reporting entity can access an SDR raises the potential question, both in the context of contractual due diligence and the regulatory obligation to verify data accuracy, as to why that entity did or did not routinely screen for trades reported on its behalf. Not only does the Part 45 rule expressly disavow a safe harbor for good-faith errors by reporting counterparties, it does not contain any guidance to assure non-reporting entities that their obligations are limited to good-faith negotiation, execution, confirmation and reconciliation of trade data solely with their counterparties.

These regulatory uncertainties are compounded by the practical and technological limitations on the ability of non-reporting end-users to access any confirmation or life cycle data that may or may not have been reported by their counterparties to SDRs. By example, in a typical fixed-price over-the-counter swap transaction between an LDC and its Swap Dealer counterparty, the parties bilaterally agree to trade terms pursuant to a master agreement. The counterparty then sends the LDC a simple trade confirmation that allows the parties to verify the specific transaction. As the LDC has entered into this contract to hedge price risk over a specified period of time, it is very unlikely to "trade in" or "trade out" of the contract during the life of the swap transaction, even as PET data for this swap may change for the purposes of counterparty reporting to an SDR. In fact, the reporting counterparty may not be required to provide the LDC any further data about swap events until a liquidation event occurs many months later. Over this swap life cycle, there is no specific mechanism for the non-reporting LDC to verify whether the parties' bilateral trade terms and confirmation were identical to the trade terms and confirmation that were reported to the SDR, nor for the LDC to receive notice that the counterparty is maintaining a record of changes in PET data which are reported to the SDR. During the liquidation of the fixed-price swap, the

LDC does not know whether the specific terms of the liquidation have been accurately reported, or reported at all, to the SDR.

B. Part 45 Creates Regulatory Uncertainty for Natural Gas Local Distribution Companies because the Regulatory Status of Certain Physical Energy Contracts is Unclear.

In the event that the LDC enters into a trade option with a Swap Dealer, the reporting counterparty is obligated under the Commodity Trade Option and Part 45 rules to report the trade option to an SDR, which poses additional compliance risks for the LDC. The main concern is that counterparties to a physically-settled agreement may disagree on whether a transaction is a trade option. Therefore, one party may report that transaction on Form TO, or not report it, while the other may respectively not report it to an SDR or include it with other swaps reports to an SDR. In either case, the end-user counterparty does not have specific knowledge about how the transaction is reported to an SDR, and is left with the uncertainty of regulatory compliance exposure associated with this inconsistent reporting. Again, if the non-reporting LDC believes it must insulate itself against this exposure, and Part 45 does not provide a reasonable reliance standard or a safe harbor for either counterparty, the burden of verifying the accuracy of trade options falls equally on both counterparties to the trade option.

The Commission states in the Part 45 final rule preamble that it "does not believe it is necessary or appropriate for the final rule to further address potential disputes between reporting and non-reporting counterparties, which could involve legal disputes between counterparties affecting the validity or terms of a swap."[7] AGA urges the Commission to consider, however, that the presence or absence of a contractual dispute between counterparties as to the reporting status

[7] Part 45 Final Rule, at 2170.

of a transaction does not change how each individual party views its own regulatory risk. The question of regulatory risk is a compliance issue that can and should be addressed through Commission action. If a non-reporting entity does not receive notice from its counterparty of the complete or accurate details of what has been reported on its behalf by the counterparty, the regulatory scheme inappropriately defaults to requiring the reporting counterparty and non-reporting entity to bear equal verification obligations under the Part 45 rule.

AGA is also concerned that if the Commission, SDRs, or reporting counterparties were to expect non-reporting entities to receive, verify or provide voluntary correction to data reflected in an SDR, such entities would be required to invest significant resources in this process without having any input concerning the format in which their counterparties or SDRs use to reflect and characterize trade terms on their reports, or have any say in how the SDRs implement fee structures for utilizing SDR facilities. Also, given that natural gas LDCs can have a very limited swap portfolio, and that the choice of SDR is the reporting entity's decision, reporting counterparties effectively control the resources that non-reporting LDCs must expend for very limited reporting of swaps across any or all three SDRs, such as preparedness to interact with their unique technologies and data formats, and different communication methods and fee structures. AGA members that do report as end-users to swaps, also note that while they may have myriad controls to mitigate swap database inaccuracy for their own databases, they have no way of knowing what kinds of controls are in place over the SDR database.

C. AGA Requests that the Commission Issue a Part 45 Proposal to Clarify Obligations of Non-Reporting Entities and Implement a Safe Harbor Provision.

For these reasons, AGA requests that the Commission undertake a limited re-proposal of Part 45.12 and related sections, to clarify non-reporting entities' data verification obligations and streamline those provisions with the Part 49.11 data validation requirements. The Commission

should provide an explicit safe harbor in the Part 45 regulations, permitting non-reporting end-users to reasonably rely on their reporting counterparties or other Commission registrants to accurately report swap terms, confirmation, valuation or additional life cycle event data on their behalf to one or more SDRs. In the absence of a safe harbor, AGA does not believe that the Commission can minimize reporting burdens on non-reporting end-users as was intended by the Part 45 rule reporting hierarchy. Additionally, AGA believes the Commission should reconsider the extent of reporting counterparties' obligations to ensure SDR database accuracy, given that these entities do not have the ability to determine database controls.

AGA urges the Commission to consider these and any other changes to the Part 45 rule through a notice and comment rulemaking. Without a rulemaking proceeding, changes to SDR rules or changes in Part 45 reporting requirements would deny market participants a meaningful opportunity to comment on regulatory revisions that have significant and direct impact on their compliance obligations under CFTC regulations. A rulemaking comment period will also allow the Commission to hear directly from market participants about the additional costs, benefits or other critical information that only market participants can provide regarding the potential effects of Part 45 changes. Further, market participants seek revisions that implicate both the Part 45 and 49 rules, and require rule amendments so that the Commission can ensure that each of the SDRs interprets and implements CFTC rules consistently with respect to all market participants.

D. AGA Requests that the Commission Provide Final Rules regarding Volumetric Optionality and Trade Option Reporting.

AGA also urges the Commission to provide final guidance and rules addressing comments filed with regard to embedded volumetric optionality and commodity trade options reporting. In the absence of final rules on these issues, there continues to be significant uncertainty in the energy

industry about the regulatory treatment of physical gas supply agreements with volumetric optionality as excluded forward contracts or reportable trade options or swaps.

AGA members require clarity on the status of these transactions as soon as possible, because these transactions are integral tools in LDC supply portfolios, allowing for affordable and reliable service to customers in periods of peak demand and severe constraints, such as the record-setting 2013-2014 winter heating season. Even as AGA members are preparing for a demanding 2014 summer season, the physical natural gas market continues to experience counterparty migration away from flexible, long-term supply transactions because of uncertainty about Dodd-Frank applicability and potential obligations under Form TO or Part 45.

It is also imperative that the Commission clarify the status of these transactions because, according to the CFTC's proposed rules concerning position limits, commodity trade options count toward a market participant's overall position. Accordingly, AGA members must be able to clearly identify what constitutes a commodity trade option for purposes of the position limit rules. Alternatively, the AGA reiterates its request that the Commission exclude commodity trade options from position limits and aggregation requirements.

AGA further requests that the Commission reconsider in a Part 45 rulemaking whether it is necessary for commodity trade options to be reported, by any counterparty, to an SDR. Reporting trade options under Part 45 is unworkable in many cases because these contracts contain bespoke or complex provisions that reflect the counterparties' operational needs for physical delivery of underlying commodities. These terms are not associated with financially-settled options and cannot be readily captured in standardized electronic swap data fields. Thus, from a technology standpoint, at least one SDR is constantly modifying and adding more product fields and codes to facilitate the reporting of physical commodity trade options and other exotic trades

that characterize products in the energy delivery space, particularly electricity and natural gas. SDR users still experience problems submitting trade data because their contracts contain variable and highly-customized economic terms, (*e.g.* a physical energy contract with optionality in which PET data varies from month to month, or daily), and "notional amount" calculations cannot be accurately made or agreed upon by counterparties to the trade option. Such difficulties continue to dissuade end-users from entering into specific physical delivery transactions with optionality provisions that may or may not be "swaps" and would require complex negotiations, internal auditing and reporting.

For the aforementioned reasons, AGA respectfully requests that the Commission provide a future rulemaking opportunity and a meaningful public comment period to address these concerns and appropriately modify the Part 45 regulation. Thank you for the opportunity to provide comments on these issues.

Respectfully Submitted,

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