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

VIA ELECTRONIC MAIL

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

Dear Secretary Jurgens:

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Sutherland Asbill & Brennan LLP hereby submits this letter in response to the request for comment in the Commodity Futures Trading Commission's (the "**CFTC**" or "**Commission**"), *Review of Swap Data Recordkeeping and Reporting Requirements* ("**Request for Comment**"), published in the *Federal Register* on March 26, 2014,[1] which seeks public comment on market participants' challenges in complying with the reporting regulations adopted under the CFTC's Part 45 regulations.[2]

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 public comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

The Working Group submits below some general recommendations and responses to certain questions set forth in the Request for Comment, which are intended to inform the

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1 *See Review of Swap Data Recordkeeping and Reporting Requirements*, Request for Comment, 79 Fed. Reg. 16,689 (Mar. 26, 2014).

2 17 C.F.R. § 45 (2012).

Commission's record, so that it may amend or eliminate certain regulations to better facilitate the reporting and utilization of swap data. Over the past several years, the Working Group has been actively involved with the Commission and staff in the Division of Market Oversight ("**DMO**") to promote an appropriately tailored framework for swap data reporting that provides price discovery and transparency to the swaps markets without unnecessarily burdening commercial end-users. The Working Group appreciates the Commission's formation of an interdivisional working group to address challenges facing market participants in their efforts to comply with the reporting rules and the opportunity to present concerns through the Request for Comment.

I. DISCUSSION.

A. General Concerns with the Reporting Requirements under Part 45.

The Part 45 reporting requirements have imposed significant challenges on market participants, including commercial end-users. For example, they have required many market participants to implement new data capture systems and business practices for their commodities and derivatives trading. While the Working Group supports the goals of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") to bring transparency and price discovery to the swaps markets, the value of certain Part 45 reporting requirements is questionable in supporting the CFTC's market oversight function.[3] The Working Group believes that some of the Part 45 requirements require further clarification and other requirements simply are unworkable operationally and technically.

A reporting system for swaps should be well designed, wherein the Commission has defined clear objectives and adopted regulations to efficiently meet those objectives. A well-designed reporting system also should promote consistency in interpretation and practical implementation. The current Part 45 reporting requirements do not meet this standard. Moreover, certain concepts presented in the Request for Comment will not improve the current reporting system.

The Commission should define specific objectives for swap data reporting. Such objectives must be more pragmatic than a generic reference to increasing transparency. In setting these objectives the Commission should identify specific needs as part of a larger, well-designed reporting system. Once specific objectives are known, the Commission can then promulgate rules to efficiently achieve such objectives. Quite importantly for the commercial end-user community, such objectives also can measure whether some rules impose requirements that do not necessarily achieve benefits. Such rules are, almost by definition, unnecessary and do

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[3] *See* Swift's Standards Forum Commissioner O'Malia Speech (Mar. 25, 2014), *available at* http://www.waterstechnology.com/sell-side-technology/analysis/2336452/cftc-unable-to-perform-basic-analysis-of-swap-data ("Over a year has passed since swap data reporting began in the U.S. Yet the CFTC still cannot crunch the data in SDRs to identify and measure risk exposures in the market. Lack of automation, inconsistent reporting, technical challenges, and poor validation and normalization have crippled our utilization of swaps data."); Interview with Commissioner Scott O'Malia, John Lothian News (Dec. 3, 2013), *available at* http://www.johnlothiannews.com/2013/12/scott-omalia-cftc-swap-data/#.U0geMfldW7k (stating "Our data is a mess. . . . This has really comprised our ability to effectively use this data.")

not serve any real regulatory purpose. Simply receiving more data may not further the Commission's mission, but might actually constrain it. For example, requiring end-users to report stale valuations does not serve such an effective monitoring objective. By way of another example, requiring market participants to report nearly the same data under both real-time reporting and confirmation data reporting does not further the Commission's regulatory purpose. Such redundancy begs the question "to what end?" Moreover, such objective would allow the marketplace to provide more informed comments to the Commission. The Working Group submits the Request for Comment has many questions about the "what are the specific requirements" and "how burdensome is . . . ," but is far short on questions of "why is certain information reported and why is the methodology (*e.g.*, short deadlines) important."

The other hallmark of a well-designed reporting system is uniformity, such that there are clear standards and processes. Said differently, when commercial end-users report to swap data repositories ("**SDR**s"), they should have a uniform method and process for doing so to meet the CFTC requirements. While differences may exist between SDRs, the differences should be commercially driven and should not be the result of different requirements, interpretations, or guidance provided by the Commission (particularly in conversations in which SDR customers did not participate). As further described herein, examples of such disparities include differences in valuation and confirmation reporting. In examining the swap data reporting paradigm that has developed, the Commission should prioritize the elimination of such differences. If the SDRs struggle with such variations, then their customers might be additionally burdened in trying to meet the requirements of more than one SDR, sometimes building different systems to handle different reporting protocols and methods. The Working Group notes that not all end-users have the resources necessary to meet these variations. The Working Group submits that, if the Commission were to create uniformity of process and protocols among all SDRs, it would address many technical implementation issues that market participants have faced and with which they continue to struggle.

The Commission should focus its efforts on addressing issues presented under its current regulations before it attempts to expand the scope of the reporting requirements. Acting Chairman Wetjen, Commissioner O'Malia, and former Commissioner Chilton have stated that the CFTC currently is unable to utilize effectively the data reported to SDRs.[4] Data fields and requirements across the SDRs still are not standardized, making it difficult for (i) market participants attempting to comply with multiple SDR protocols and requirements and (ii) the

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[4] *See* CFTC Press Release, *CFTC to Form an Interdivisional Working Group to Review Regulatory Reporting* (Jan. 21, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6837-14; *Acknowledging Mistake, U.S. Regulators Still Struggle to Oversee Derivatives Market, The Wall Street Journal* (May 1, 2014), *available at* http://online.wsj.com/news/articles/SB10001424052702303948104579536251048387342?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702303948104579536251048387342.html (due to "technical coding issues" by DTCC, the CFTC received inaccurate data on certain swaps); *CFTC Seeks Comment on Improving Swaps Data Stream, The Wall Street Journal* (Mar. 19, 2014), *available at* http://online.wsj.com/news/articles/SB10001424052702304026304579449552899867592 (Acting Chairman Wetjen stated at a U.S. Chamber of Commerce conference that the data the CFTC receives on the swaps market "hasn't been clean enough" to do its job the commission must have accurate data and a clear picture of swaps market activity).

CFTC in assessing the data in a meaningful way. For example, Part 45 requires a reporting counterparty to submit multiple streams of data on a swap-by-swap basis, including (i) primary economic terms ("**PET**"), (ii) confirmation data, (iii) life cycle event or state data, and (iv) valuation data. The Working Group recommends that the Commission narrow the scope of the PET data to cover only the material economic terms of a swap[5] and eliminate the requirement to report confirmation data in addition to the PET data. As discussed more thoroughly below, confirmation data is largely redundant and thus unnecessarily burdensome if the CFTC collects the proper PET data.

Several questions in the Request for Comment inquire whether the CFTC should expand certain reporting requirements or collect additional information, effectively increasing compliance burdens and costs. The suggestion of expanding the reporting regulations is troubling as the current regime for collecting swap data still faces several implementation issues that need to be addressed. Given the current swap data reporting regime is burdensome on market participants and has proven to be of little benefit to the Commission, the Working Group does not support any proposal to expand the scope of the reporting requirements at this time.

The timelines for reporting swap data should ***not*** be shortened, especially given the Commission currently cannot efficiently utilize the data being collected by the SDRs. For swaps not executed on a trading platform and not subject to mandatory clearing, a swap dealer ("**SD**") reporting counterparty must submit PET data within two hours of execution, and a market participant that is neither an SD nor a major swap participant ("**MSP**") (also known as an "end-user") must submit this data within 36 hours of execution. On April 10, 2015, this timeframe will drop down to 24 business hours for an end-user reporting counterparty. While the Working Group appreciates the Commission's determination to phase in the timeframes by which reporting counterparties must submit swap data to facilitate the compliance and implementation efforts of market participants, the Working Group submits that a 2-hour timeframe is difficult to meet for an SD, and likewise, a 24-hour timeframe will be difficult to meet for end-users.

Market participants continue to face technical and operational issues in swap data reporting across all the SDRs as described throughout this comment letter. Because the systems, interface, protocols, and processes are different at each SDR, it is very challenging for market participants to adopt systems and processes to comply with all of the various SDR requirements and systems. The Commission should appreciate the time, costs, and efforts employed by market participants in addressing these challenges given the Commission itself cannot make sense of the data collected across the SDRs. Further, reporting counterparties must devote significant resources to monitoring SDR submissions to determine whether any are rejected. Because the timelines for submitting swap data are so short, there is little room for any technical or operational errors, be it with the reporting counterparty's internal systems or the SDRs' systems.

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[5] For example, the Working Group believes PET data fields, such as "indication of collateralization" and "execution timestamp" to the nearest minute are unnecessary. *See* Comment to Q28, *infra*.

Until the Commission can begin utilizing the data and determines those purposes for which it needs the data, the Working Group suggests that the Commission issue no-action relief allowing SD counterparties to report PET data within 4 hours of execution and end-user counterparties to continue to report PET data within 36 hours of execution even after April 10, 2015. Additionally, the CFTC should require the SDR systems and requirements to be harmonized and standardized in accordance with the practice that works best at a particular SDR before any timelines for submitting data shorten.

B. Specific Concerns with the Reporting Requirements under Part 45.

The Working Group provides the following comments to the specific questions the Commission presents in the Request for Comment.

Q1. What information should be reported to an SDR as confirmation data? Please include specific data elements and any necessary definitions of such elements.

The Working Group recommends that the Commission eliminate the requirement to report confirmation data. Should the Commission decline to adopt the Working Group's recommendation, the Working Group submits that confirmation data should not be expanded to include more data fields than those of the PET data fields.

Under Part 45, a reporting counterparty is required to submit PET data fields, which generally reflect the economic terms of a swap. In addition to the PET data, a reporting counterparty must submit confirmation data, essentially confirming all the PET data fields. While the Working Group supports the Commission's goal in ensuring that complete data concerning the swaps market is maintained at the SDRs and available to regulators, reporting confirmation data in addition to the PET data is highly redundant and consequently serves little value in fulfilling this objective.[6]

Confirmations have been utilized in the industry to serve two purposes: (i) memorialize the terms of a transaction and (ii) enable each counterparty's back offices (*e.g.*, compliance or legal department) to capture and reflect the terms of the trade in their systems. Each counterparty may have different business processes and IT systems to capture and reflect the terms of a trade, but before Part 45 requirements became effective, none of the systems and processes were set up to turn a confirmation into reportable data fields. Requirements on market participants to pull data from confirmations and then submit the information in reportable data fields has resulted in those market participants implementing costly changes to their IT systems and business processes. These costs result in little to no added benefit given that PET data is reported to an SDR. If the Commission is concerned about the accuracy of the data reported to the SDRs, the Working Group notes that both the reporting and non-reporting counterparty have an affirmative obligation to report errors or omissions that they discover in the data reported to

[6] Indeed, confirmation data simply includes all the PET data matched and agreed to by the counterparties. *See* CFTC regulation 45.1.

the SDRs, and the Commission may always seek further data and information from any swap counterparty.

Q1.a. For confirmations that incorporate terms by reference (*e.g.*, ISDA Master Agreement; terms of an Emerging Markets Trade Association ("EMTA")), which of these terms should be reported to an SDR as confirmation data?

See Q1., above, and corresponding answer. Should the Commission decline the Working Group's recommendation proposed above under Q1, the Working Group submits that the CFTC should not impose any additional requirement upon reporting counterparties to report terms beyond the information provided on the actual confirmation. Implementing systems that would capture terms beyond the actual confirmations would unnecessarily impose significant costs upon reporting counterparties. Many of the terms of a master agreement are not necessary to understand the business terms of the trades or even the material legal terms.

Q4. More generally, please describe any operational, technological, or other challenges faced in reporting confirmation data to an SDR.

Generally, market participants are facing significant challenges in having to interface with different SDRs that have different systems and different requirements, including different confirmation reporting requirements as explained below.

Commodity Exchange Act ("**CEA**") Section 21(c)(2) requires an SDR to confirm with both counterparties the accuracy of the swap data submitted to it. CFTC regulation 49.11(b)(1)(i) requires an SDR to notify both counterparties of the data that was submitted and receive from both counterparties acknowledgement of the accuracy of the swap data and correction for any errors. Pursuant to this regulation, ICE Trade Vault ("**ICE TV**") requires a reporting counterparty, including a non-SD/MSP reporting counterparty, to upload a fully executed confirmation or agreement for single sided or exotic trades.[7] This confirmation submission is in addition to a reporting counterparty's obligation to report confirmation data electronically in normalized data fields. DTCC, on the other hand, deems a swap as accurate if neither counterparty has notified it of any inaccuracies within 48 hours.

As noted in the Working Group's August 6, 2013 letter, which is attached hereto as Appendix A, the CEA and CFTC regulations do not require a reporting counterparty to upload an

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[7] "Single sided trades" are "[t]rades submitted to ICE eConfirm when only one party is an ICE eConfirm Participant. Electronic confirmation matching is not possible when only one counterparty participates; however, these trade records may be submitted for SDR reporting purposes only, and deals bypass the electronic confirmation matching engine." *See* ICE TV Participant Implementation Guide at p. 7 (Jan. 21, 2013).

"Exotic Trades" are "[t]rades submitted to ICE eConfirm where the trade details cannot be specified completely using available electronic data fields. Participants are able to upload attachments to fully describe the trade. Traditionally, these deals have not been eligible for ICE eConfirm submission, but it is now possible to submit key economic details about the trade record with an attached document describing the complete trade terms." *See id.*

executed confirmation, and in fact, CFTC regulation 49.11 merely requires an SDR to provide a correction period to receive from counterparties acknowledgement of the accuracy of data. The CFTC also does not require an SDR to affirmatively communicate with both counterparties in all circumstances and specifically does not require an SDR to communicate directly with both counterparties when a SEF, DCM, DCO, or third-party service provider submits swap data to an SDR.[8] Because the risk of data inaccuracy when a SEF, DCM, or third-party service provider performs the SDR reporting is not less than when an actual counterparty to the swap performs the SDR reporting, the Working Group believes affirmative communication with both counterparties to verify swap data submitted by a reporting counterparty is unnecessary as well.

Further, requiring market participants to generate and upload executed confirmations for single sided and exotic trades is unnecessarily burdensome and inconsistent with market practice. Within energy markets, many participants transact one-day or inter-affiliate swaps for which no formal confirmation process exists and no paper confirmation is generated. A formal confirmation process generating a paper confirmation is impractical for one-day swaps given that they are fully performed prior to any reasonable process for full execution.[9]

The Working Group submits that the costs of this requirement outweigh the benefits, if any, especially given this is not required under the Dodd-Frank Act or CFTC regulations adopted thereunder. Accordingly, the Working Group recommends that the CFTC permit a rule change by ICE TV either to (i) adopt a process like DTCC's or (ii) allow its member participants to verify on behalf of both counterparties the accuracy of the SDR reports.[10]

Please refer to the Working Group's answers to Question 8 regarding valuation reporting, another aspect of swap data reporting in which market participants have incurred significant challenges. Please also refer to the Working Group's answers to Question 14 regarding the reporting of swaps executed on a SEF.

Q5. What processes and tools should reporting entities implement to ensure that required swap continuation data remains current and accurate?

Each market participant should have the flexibility to customize its own IT systems and

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[8] *See Swap Data Repositories: Registration Standards, Duties and Core Principles*, Final Rule, 76 Fed. Reg. 54,538, 54,547 (Sept. 1, 2011).

[9] In addition, if paper confirmations are generated, commercial market participants typically do not upload copies of these confirmations, which, in some cases, may be many pages long (and can be many in number on any day) into their trade management systems that are used to report swap data to ICE TV. In some cases, confirmations may be too large to upload in accordance with ICE TV's permitted file size. As a result, ICE TV participants have been required to compress files and do additional programming to ensure they meet the limited file size.

[10] Should the Commission decline to adopt the Working Group's recommendation and require ICE TV participants to upload a confirmation for single-sided and exotic swaps, the Working Group submits that the counterparties be permitted to (a) contract such that, if no counterparty communicates an objection within 48-72 hours, the terms as originally confirmed will be deemed accurate or (b) use electronic signatures on the confirmation.

business processes, so long as it is able to comply with the CFTC's regulations. Market participants use a variety of different trade capture and accounting systems, some of which have been modified to meet the needs of individual companies. They also have different business models and internal policies that drive the way in which they meet their regulatory burdens. Thus, a one-size-fits-all model for reporting continuation data would be inappropriate. Further, market participants already have implemented new systems and processes to comply with the CFTC's reporting regulations. To require them to modify these systems and processes could result in new pragmatic challenges and significant costs. Finally, the SDRs have adopted different systems and procedures to facilitate regulatory reporting, which make it even more difficult to impose the same processes and tools upon reporting counterparties, as they must modify their internal procedures and processes at times to comply with a particular SDR's requirements.

Q8. How can valuation data most effectively be reported to SDRs to facilitate Commission oversight? How can valuation data most effectively be reported to SDRs (including specific data elements), and how can it be made available to the Commission by SDRs?

As a preliminary matter, the Working Group notes that commercial energy firms have little need to create "valuation" for individual swaps in the normal course of business. Rather, they manage their portfolios by tracking and adjusting exposures. Because the production of valuations is performed solely for purposes of reporting, the Commission should be cognizant of the efforts involved, especially when various rules require different formulations of valuations for the same swap.

Under CFTC regulation 45.4(c)(2)(ii), for an uncleared swap, an end-user reporting counterparty must submit to an SDR the current daily mark as of the last day of each fiscal quarter. The Working Group recommends that the Commission eliminate the quarterly valuation data reporting requirement for end-user counterparties, given this particular requirement is not required under the Dodd-Frank Act and does not provide the Commission with any useful data. More specifically, because end-user reporting counterparties are not required to submit the daily mark of a swap until thirty days after the swap is valued, the information might be outdated or no longer relevant by the time it is submitted.[11] Further, the valuation data submitted will not allow the CFTC to develop an accurate picture of market risk or make valid comparisons because counterparties have their own methodologies in calculating the daily mark. The Working Group notes that several CFTC regulations, including SDR reporting, large swap trader reporting, and the external business conduct standards, require the valuation of a swap to be calculated differently, which often times produces significant divergences in valuation data.[12] For

[11] An end-user remains in compliance with the current valuation data reporting regulations so long as it submits the data within the specified time period, regardless of how aged such data might be. The Commission should acknowledge this delay to provide regulatory certainty.

[12] For example, valuations used for SDR reporting and a SD's disclosure of the daily mark under the external business conducts standards generally are similar where a contract settles on a single date. In contrast, valuations can diverge considerably where a contract includes multiple settlement dates. This occurs because SDR reporting

uncleared swaps that have an equivalent cleared product, the Working Group recommends that the SDRs should supply the daily mark from any DCM, SEF, DCO, or other public pricing source and eliminate any reporting obligation of the end-user reporting counterparty. Comparability is enhanced if identical swaps in an SDR receive the same valuation.

The current regulations for reporting valuation data under Part 45 have resulted in several practical and interpretational issues. For example, DTCC and ICE TV have adopted different practices for collecting valuation data of swaps with multiple settlement periods. Specifically, DTCC will accept one value for these swaps (*e.g.*, swap X has a price of $100), whereas ICE TV requires prices for various elements of the swaps (*e.g.*, a price for each settlement date of the swap, as if it were a basket of bullet swaps). The lack of harmonization and standardization among the SDRs in this regard has significantly increased the compliance burdens for counterparties that must submit valuation data to both SDRs. Should the Commission decline to adopt the Working Group's recommendation to eliminate the end-user requirement to report daily marks for swaps, the Commission should ensure that the SDRs harmonize and standardize their protocols and requirements to allow reporting counterparties to adopt more efficient business practices and systems. Standardization of the data across the SDRs also will facilitate the Commission's ability to analyze data collected across the SDRs.

Q10.b. Should reporting entities and/or SDRs be required to take any actions upon the termination or maturity of a swap so that the swap's status is readily ascertainable and, if so, what should those requirements be?

Under Part 45 of the CFTC's regulations, reporting counterparties must submit PET data, including key economic terms such as pricing dates, and must submit life cycle event data if there is any change to a reported PET data field, such as early termination or amendments. The CFTC thus has the relevant information to determine the maturity or scheduled termination of a swap. Reporting counterparties already have had to implement significant and costly changes to their IT systems and business processes to comply with these requirements. Imposing additional requirements on them will result in increased costs and burdens for reporting counterparties as they must once again modify these IT systems and processes while providing little, if any, additional benefit given swaps should terminate automatically in an SDR's database if they terminate according to the original PET data submitted to an SDR.

Q11. Should the Commission require periodic reconciliation between the data sets held by SDRs and those held by reporting entities?

The Commission should ***not*** require periodic reconciliation between data sets held by the SDRs and those of the reporting counterparties given the CFTC has not initially determined that much of the data reported to the SDRs is inaccurate. The Working Group supports the goals of

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captures the value of both the settled and unsettled portions of a transaction while the daily mark provided by SDs typically includes only the value of the unsettled part of the transaction. The Working Group submits that there may be regulatory benefit in standardizing valuation methods.

the Commission to validate and ensure the accuracy of the swap data reported to and kept at the SDRs, but this requirement would be essentially redundant and unnecessarily burdensome on reporting counterparties. The Commission has other tools and regulations in place that will help ensure the data reported to the SDRs is accurate.

Further, Part 45 requires reporting counterparties to submit confirmation and valuation data and requires any counterparty discovering errors or omissions in the swap data to report such errors or omissions either to the reporting counterparty (if the non-reporting counterparty discovers the error or omission) or the SDR (if the reporting counterparty discovers or is notified of the error or omission), which help to ensure the accuracy of the data. Notably, because many market participants have systems that facilitate both execution and record retention, the risk for producing errors in the data reported to an SDR is greatly diminished.

While SDs are required under Part 23 of the CFTC's regulations to establish policies and procedures to ensure portfolio reconciliation is performed with its counterparties, the CFTC specifically determined not to subject end-user counterparties to the same requirement to reduce their regulatory obligations. To require an end-user reporting counterparty to engage in an entirely new requirement such as portfolio reconciliation with the SDR would contradict the CFTC's general policy and specific determinations to exempt end-users from these types of burdens. Working Group members have found that comparing their PET data to the SDRs is very time consuming. Further, the reconciliation of valuation data would be especially burdensome because SDR valuations might be different than the marks kept internally on a company's books. Finally, the CFTC has the authority to make inquiries into any market participant's books and records under Part 45 to verify any swap data reported to the SDRs.

With or without a reconciliation requirement, the Commission should require SDRs to accommodate corrections to their data. Some reporting counterparties have found it difficult to get the SDRs to make corrections in a timely manner. SDRs could implement certain functions to assist reporting counterparties attempting to ensure the accuracy of data in the SDRs. For example, SDRs could send out alerts when a transaction should have been flagged as an Exotic Trade because the total volumes do not match the volumes by month. Currently, ICE TV will mark the trade with a "Red X," but there is no report or way to efficiently query those "Red X" items. Rather, reporting counterparties must manually parse through the SDR data to find these issues.

Q12. Commission regulation 45.8 establishes a process for determining which counterparty to a swap shall be the reporting counterparty. Taking into account statutory requirements including the reporting hierarchy in CEA section 4r(a)(3), what challenges arise upon the occurrence of a change in a reporting counterparty's status, such as a change in the counterparty's registration status? In such circumstances, what regulatory approach best promotes uninterrupted and accurate reporting to an SDR?

CFTC regulation 45.8(c) requires that a financial entity must be the reporting counterparty when it transacts a swap with a non-financial end-user. Importantly, however, CFTC regulation 45.8(e) states that notwithstanding this provision, among others, if both

counterparties are non-SD/MSPs, and only one counterparty is a U.S. person, the U.S. person must be the reporting counterparty. The Working Group requests the Commission to confirm that these provisions taken together require a U.S. non-financial end-user to be the reporting counterparty in a swap transaction between a U.S. non-financial end-user and a non-U.S. financial entity.

At the center of this issue is a very important concept largely absent from the Commission's reporting regulations and the rules of various SDRs – customer flexibility. The utility of default rules is clear. However, consenting financial entity and non-financial end-user counterparties should be permitted to allocate and negotiate responsibilities among themselves, especially since the definition of the term "financial entity" is still unclear. So long as the swap data is being reported accurately, such flexibility should be promoted.

ICE TV's system configurations impose default reporting counterparty designations, generally corresponding to the CFTC's Part 45 regulations providing for the reporting counterparty hierarchy. In the scenario described above, ICE TV's system configurations automatically designate the non-U.S. financial entity to be the reporting counterparty. Should the Commission confirm that the U.S. non-financial end-user has the reporting obligation in a swap with a non-U.S. financial entity, the Working Group requests the CFTC to direct ICE TV to reconfigure its default settings accordingly.

As a general matter, the Working Group believes the CFTC should amend its Part 45 regulations to provide market participants the flexibility they need to fulfill the Commission's objective to collect data on all swaps. In this regard, counterparties should be provided the opportunity to negotiate the reporting counterparty designation according to their commercial needs and override any SDR default configurations accordingly.[13] So long as the Commission receives the swaps data, the Working Group submits that the particular counterparty reporting the data should not be of any consequence. Accordingly, the Working Group recommends the CFTC to direct SDRs to eliminate any default reporting counterparty designation settings or permit counterparties to override any default designation.

Q14. Please identify any Commission rules outside of Part 45 that impact swap data reporting pursuant to Part 45. How do such other rules impact Part 45 reporting?

Large Trader Reporting ("**LTR**"). Under the CFTC's Final LTR Rule for Physical Commodity Swaps and Part 20 regulations, an SD must report certain swaps and swaptions if, in any one futures equivalent month, it has a position comprised of 50 or more futures equivalent paired swaps or swaptions. Given SDs must report all swaps to an SDR under Part 45 within two business hours, the Working Group submits that it is very burdensome for SDs to monitor and report swap and swaption positions under Part 20 in addition to Part 45 reporting. The

[13] If the Part 45 requirements permit a counterparty to use a third-party agent to perform its reporting obligation, which could include the other counterparty to a swap, counterparties should be permitted to negotiate and directly designate a reporting counterparty.

Working Group recommends that the CFTC modify its LTR reporting conventions and data points to align with the data fields of SDR reporting to alleviate the burdens of SDs in verifying the accuracy of all swap data and positions for purposes of reporting under Parts 45 and 20.[14] Additionally, the Working Group submits that SDs should be permitted to report data on all swap and swaption positions even if they are not paired swaps or swaptions as defined in Part 20 and even if such positions do not meet the 50 futures equivalent threshold. Requiring SDs to pull and separate data on paired swaps and swaptions from other swap data and positions increases compliance costs as well as opportunities for error in the data.

SEF Registration and Operation. Under Part 45, SEFs are required to report PET data for swaps executed on their facility, and to the extent the swap is not cleared, the reporting counterparty must report the continuation data for such swaps. For over-the-counter, bilateral swaps, the reporting counterparty is obligated to report the PET data as well as the continuation data. Because many voice brokers are submitting swaps for "execution" to SEFs to which they are associated, the creation data for these swaps is being reported by such SEF as a swap executed on or subject to the rules of a SEF. Market participants, however, implemented reporting systems anticipating that they would be obligated to report the swap data for voice-brokered swaps, as they considered these swaps bilateral and over-the-counter. As a result, voice-brokered swaps are being reported by both the SEF and the reporting counterparty, effectively creating duplicative reports in the SDRs.

While counterparties have attempted to reconfigure their systems and suppress existing data flows to the SDRs for voice-brokered transactions, some systems cannot be modified easily and would result in significant costs. Further, many SEFs are reporting PET data to SDRs to which reporting counterparties are not connected, making continuation data reporting additionally burdensome and costly to market participants. Accordingly, the Working Group recommends the Commission to allow market participants to report all data on voice-brokered swaps rather than the SEFs.

Q20. Under Commission regulation 32.3(b)(1), swap counterparties generally are required to report trade options pursuant to the reporting requirements of Part 45 if, during the previous twelve months, they have become obligated to report under Part 45 as the reporting counterparty in connection with any non-trade option swaps. Under Commission regulation 32.3(b)(2), trade options that are not otherwise required to be reported to an SDR under Part 45 are required to be reported to the Commission by both counterparties to the transaction through an annual Form TO filing. Please describe any challenges associated with the reporting of commodity trade options, whether reported to an SDR or to the Commission on Form TO.

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[14] *See* discussion under Q8., *supra* (noting that valuations required for LTR and SDR reporting vary substantially). The Working Group's first request as discussed under Q8., above, is that the Commission eliminate valuation data reporting for end-user counterparties. For SDs, however, attempting to comply with valuation reporting under Part 45 and LTR, will be less burdensome if the Commission harmonizes the conventions and data points between the two rules.

As a threshold matter, it has been difficult to report trade options because market participants are uncertain about what constitutes a trade option, specifically, whether physical forward contracts with embedded volumetric optionality constitute trade options.[15]

Reporting PET data for trade options under Part 45 is impractical given trade options may be exercised on a very frequent or real-time basis. Further, the PET data fields contemplate financial swaps. Given their bespoke nature, price discovery and transparency are greatly diminished with respect to trade options. Accordingly, the Working Group submits that all trade options (even those entered into with an SD counterparty) should be permitted to be submitted on an annual Form TO, as it sufficiently achieves transparency but in a less burdensome manner.

Further, the Working Group appreciates the CFTC's efforts to relieve the trade option reporting obligations of end-users under No-Action Letter No. 13-08 ("**NAL 13-08**") by requiring both end-user counterparties to submit trade option data on an annual Form TO rather than in real-time on a transactional basis. But the Working Group believes only one counterparty should be required to report a trade option, as it is unnecessarily burdensome and duplicative to require both counterparties to report the same trade option. At a minimum, the CFTC should not require a non-U.S. non-SD/MSP counterparty to report an annual Form TO when transacting with a U.S. counterparty.

Q24. In order to understand affiliate relationships and the combined positions of an affiliated group of companies, should reporting counterparties report and identify (and SDRs maintain) information regarding inter-affiliate relationships? Should that reporting be separate from, or in addition to, Level 2 reference data set forth in Commission regulation 45.6? If so, how?

Inter-affiliate swaps, which represent intra-corporate allocations of risk, should not be required to be reported under Part 45. The CFTC's objectives in requiring SDR reporting (*i.e.*, transparency and price discovery) are not well served by collecting data on inter-affiliate swaps. That is, reporting of inter-affiliate swaps will not provide any transparency benefits to swap markets, nor would it assist the Commission in addressing systemic risk concerns. Information about transactions among affiliates, especially valuation data, would be of little value, if any, to persons outside the parent company, and reporting of such transactions would create an unnecessary burden. Additionally, the LEI/CICI database stores such data on affiliate relationships, so the CFTC does not need to collect redundant data through the reporting of inter-affiliate swaps.

The Working Group appreciates the CFTC's efforts to provide no-action relief pursuant to No-Action Letter No. 13-09 ("**NAL 13-09**") to end-users with respect to reporting inter-affiliate swaps. However, NAL 13-09 requires certain conditions be met in order to utilize the

[15] Please see the Working Group's April 17, 2014 comments in connection with the CFTC's roundtable on end-user issues.

no-action relief, and one condition, "Condition 6,"[16] without further clarification, severely limits the no-action relief. On May 10, 2013, the Working Group submitted a letter requesting interpretive guidance clarifying that the following affiliates are exempt from "Condition 6" of NAL 13-09: (i) affiliates reporting on Form TO their market-facing trades options with unaffiliated counterparties; (ii) affiliates who are at risk of violating foreign privacy laws when reporting their market-facing swaps with unaffiliated non-U.S. counterparties; and (iii) non-U.S. affiliates whose market-facing swaps with non-U.S. unaffiliated counterparties otherwise would not be subject to SDR reporting but for the requirement provided in Condition 6.

The Working Group incorporates by reference herein its letter submitted on May 10, 2013.[17] The Working Group requests the Commission's consideration of this letter and requests the CFTC to grant the Working Group's specific request for interpretive guidance as it is in the public interest.

Q28. Please describe any challenges (including technological, logistical or operational) associated with the reporting of required data fields, including, but not limited to:

a. Cleared status;
b. Collateralization;
c. Execution timestamp;
d. Notional value;
e. U.S. person status; and
f. Registration status or categorization under the CEA (*e.g.*, SD, MSP, financial entity).

The Working Group submits that technical issues occurring as a result of the SDR systems and processes should not serve as the basis for a violation of the CFTC's reporting regulations. For example, at times, Working Group members have attempted to upload to ICE eConfirm[18] PET data of a swap transaction within the applicable timeline and have received a failure message because a standard value does not exist within eConfirm for a particular new product or a particular data field, such as for a price index. Although market participants immediately request ICE TV to add the new standard value in eConfirm, it can take up to three days before such value is added. Because end-user reporting counterparties have only 36 hours to submit PET data successfully, they technically might become non-compliant as a consequence of the delay in eConfirm. The Working Group requests the Commission to confirm a reporting counterparty would not be in violation of its reporting regulations as a result of delay by an SDR

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[16] Condition 6 states: "All swaps entered into between either one of the affiliated counterparties and an unaffiliated counterparty (regardless of the location of the affiliated counterparty) must be reported to an SDR registered with the CFTC, pursuant to, or as if pursuant to, parts 43, 45, and 46 of the CFTC's regulations." *See* No-Action Letter No. 13-09.

[17] The Commercial Energy Working Group, Request for No-Action Relief under CFTC Regulation 140.99 (submitted May 10, 2013).

[18] ICE eConfirm is an electronic trade confirmation service that allows counterparties to match terms of a trade.

to implement the appropriate systems to allow a reporting counterparty to comply with the CFTC's requirements. The Working Group notes that, as discussed in Section I.A, above, until these types of technical and operational "glitches" of the current reporting framework and infrastructure are addressed, the timelines for reporting counterparties should be returned to 4 business hours for a SD and maintained at 36 business hours for an end-user reporting counterparty.

With respect to the specific data fields the Commission seeks comment on, the Working Group provides the comments below.

Collateralization. The Working Group submits that this data point is not relevant to the Commission's oversight function. Additionally, many market participants have credit agreements in place that require collateral on a portfolio basis, so they cannot determine how much an individual swap is collateralized.

Execution Timestamp. The Working Group submits that over-the-counter transactions are not marked by the minute. Accelerated deal entry practices and time-consuming coordination of execution times with counterparties are costly and provide little, if any, corresponding regulatory benefit. Accordingly, it requests that the CFTC permit the execution timestamp of these transactions to be reported to the nearest half hour.

Q33.c. For swaps that are not subject to the clearing requirement, but are intended for clearing at the time of execution, do commenters believe that the Part 45 reporting requirements with respect to alpha swaps should be modified or waived, given that the beta and gamma swaps will also be reported.

The Commission should eliminate any requirement to report an alpha swap and a swap that cancels out the position in the alpha swap (a "closing swap").[19] Alpha swaps exist only until the closing, beta and gamma swaps are entered into that offset and replace the alpha swap, which occurs automatically when the swap is accepted for clearing. Often, little time passes between (a) the execution of the alpha swap and (b) entry into the closing, beta and gamma swaps. Counterparties enter into the alpha swap with the expectation that it will be cleared almost immediately thereafter. Further, closing swaps exist to offset the alpha swap and terminate immediately after being entered into. In light of the above, the Working Group submits that there is little, if any, benefit that results from reporting the alpha or the closing swap. A requirement that all of the alpha, closing, beta and gamma swaps be reported to an SDR might result in parties reporting various related swaps to different SDRs.

[19] The process by which parties transform positions in an OTC swap into positions in centrally-cleared swaps is understood generally to entail four components: an initial OTC swap; the closing swap by which the parties entered into a second OTC swap to take equal and opposite positions relative to the first OTC swap; and two cleared swaps, each between one counterparty and the DCO. The initial swap is often referred to as the "alpha swap," the "closing swap" is often referred to as the "beta swap," and the two cleared swaps with the DCO often are referred to as the "gamma swaps."

For swaps intended to be cleared at the time of execution, should the Commission determine that the alpha and closing swaps must be reported, the Working Group submits that Part 45 should be interpreted to require the DCO to report creation and continuation data for the initial alpha swap and resulting closing, beta and gamma swaps. Indeed, CFTC regulation 45.3 states that if a swap is accepted for clearing by a DCO before the reporting counterparty reports any PET data to an SDR, then the reporting counterparty is excused from reporting swap creation data for the swap. The Working Group recommends that the Part 45 regulations be amended to make clear that the DCO has the reporting obligations (creation and continuation data) for the original alpha swap and resulting positions, as it has all the necessary data to report such information and is in the best position to report the beta and gamma swaps. This allocation of responsibility generally would align with DCOs' proposed applications of the CFTC's rules. For example, CME Rule 1001 would require CME Clearing, CME's DCO, to report creation and confirmation data for the original alpha swap even if the original swap was not accepted for clearing by CME Clearing before the applicable reporting deadlines for PET data and before the reporting counterparty has reported any PET data to an SDR.

Q36. What steps should reporting entities and/or SDRs undertake to verify the absence of duplicate records across multiple SDRs for a single cleared swap transaction?

The reporting counterparty should ***not*** be required to verify the absence of duplicate records across multiple SDRs for a single cleared swap transaction. To maintain connectivity with multiple SDRs to fulfill this type of requirement would be unnecessarily costly to a reporting counterparty and provide little, if any, benefit. Further, a reporting counterparty could not require the SDRs to work together to make corrections or consolidate the data for a single cleared swap into one SDR.

CFTC regulation 45.10 requires that all swaps data for a particular swap be reported to one SDR, which shall be the SDR to which the first report of required swap creation data is made. Further, CFTC regulation 45.3 states that if a swap is accepted for clearing by a DCO before the reporting counterparty reports any PET data to an SDR, then the reporting counterparty is excused from reporting swap creation data for the swap. Thus, for a cleared swap transaction, the DCO should fulfill the entire reporting obligation associated with the cleared swap transaction, including the terminated original swap and the two resulting swaps. If the DCO reports all data associated with the cleared swap, no duplicate reports would result.

Q66. Does the regulatory reporting of a swap transaction to an SDR implicitly or explicitly provide "consent" to further distribution or use of swap transaction data for commercial purpose by the SDR?

No. Proprietary swap data, such as a counterparty's curves and valuation data reported to an SDR should be kept confidential and private by the SDR and should *not* be made available to the general public or counterparties for commercial or any other purpose. Part 43 of the Commission's regulations impose upon an SDR that receives swap transaction data a duty to publicly disseminate such data as soon as technologically practicable, unless the transaction is subject to a time delay under CFTC regulation 43.5. Appendix A to Part 43 provides all the relevant swap data fields that must be reported to an SDR by a reporting counterparty and

publicly disseminated by the SDR in real time. Significantly, the data fields listed in Appendix A generally relate to swap transaction terms and pricing data not valuation data or the daily mark of a swap. Thus, an SDR is not required under Part 43 to publicly disseminate any information relating to valuation data or the daily mark of a swap. Additionally, Part 49 of the CFTC's regulations require that each SDR establish, maintain, and enforce written policies and procedures to protect the privacy and confidentiality of any information in its possession that is not subject to the real-time public dissemination requirements under Part 43.[20] SDRs may not require the waiver of the privacy rights of reporting counterparties as a condition for accepting swap data.

II. CONCLUSION.

The Working Group appreciates the opportunity to provide these comments set forth herein and the Commission's consideration of them. If you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ David T. McIndoe

David T. McIndoe
Meghan R. Gruebner

Counsel for
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[20] *See* CFTC regulation 49.16(a)(1).

APPENDIX A

MAY 10, 2013 LETTER TO CFTC REQUESTING INTERPRETIVE GUIDANCE ON CFTC NO-ACTION LETTER NO. 13-09 ON INTER-AFFILIATE SWAPS REPORTING

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May 10, 2013

17 C.F.R. Parts 32; 43; 45; 46

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

VIA ELECTRONIC MAIL

Re: CFTC No-Action Letter No. 13-09 on Inter-Affiliate Swaps Reporting

Dear Ms. Jurgens:

I. INTRODUCTION.

On behalf of The Commercial Energy Working Group ("Working Group"), Sutherland Asbill & Brennan LLP respectfully submits this letter requesting that the Commodity Futures Trading Commission ("Commission" or "CFTC") under CFTC Regulation 140.99 provide the interpretive guidance described herein or take other action it deems appropriate, such as providing no-action relief. Specifically, the Working Group requests that the Division of Market Oversight ("DMO") issue an interpretive letter clarifying that the following affiliates are exempt from "Condition 6" of CFTC No-Action Letter No. 13-09 ("NAL 13-09"):[21] (i) affiliates reporting on Form TO their market-facing trade options with unaffiliated counterparties; (ii) affiliates who are at risk of violating foreign privacy laws when reporting their market-facing swaps with unaffiliated non-U.S. counterparties; and (iii) non-U.S. affiliates whose market-facing swaps with non-U.S. unaffiliated counterparties otherwise would not be subject to swap data repository ("SDR") reporting but for the requirement provided in Condition 6. Granting the requested relief is in the public interest.

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[21] *See* CFTC, *"No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements Under Parts 45, 46, and Regulation 50.50(b) of the Commission's Regulations,"* Letter No. 13-09 (Apr. 5, 2013) ("NAL 13-09") (setting forth the conditions for the no-action relief provided therein). "Condition 6" of NAL 13-09 is set forth in Part II, below.

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 public comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities. The Working Group appreciates the CFTC's consideration of its requested relief.

II. DISCUSSION.

On April 5, 2013, DMO issued NAL 13-09, providing relief from the CFTC's swap reporting rules under Parts 45 and 46 of the CFTC's regulations and CFTC regulation 50.50(b) for inter-affiliate swaps meeting certain conditions. Condition 6 provided therein states:

> "All swaps entered into between either one of the affiliated counterparties and an unaffiliated counterparty (regardless of the location of the affiliated counterparty) must be reported to an SDR registered with the CFTC, pursuant to, or as if pursuant to, parts 43, 45, and 46 of the CFTC's regulations."

Generally, the Working Group supports and commends DMO's efforts to provide end-users relief from the swap data reporting rules for inter-affiliate transactions. Yet, without further clarification or relief from DMO, Condition 6 will undermine other guidance and relief provided to commercial firms in the CFTC's cross-border guidance[22] and No-Action Letter No. 13-08 ("NAL 13-08").[23]

First, any affiliate submitting its market-facing trade options with unaffiliated end-user counterparties on a Form TO would not meet Condition 6 given Form TO is submitted to the Commission rather than to a registered SDR pursuant to Part 45. *Second*, an affiliate prohibited from reporting to a registered SDR its market-facing swaps with unaffiliated non-U.S. counterparties under foreign privacy laws would not meet Condition 6. *Third*, a non-U.S. affiliate whose market-facing swaps with non-U.S. unaffiliated counterparties are not reported to an SDR because of (i) the relief provided by the CFTC's cross-border guidance or (ii) the non-jurisdictional nature of the transactions would not meet Condition 6.

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[22] *See Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act*, Proposed Interpretive Guidance and Policy Statement, 77 Fed. Reg. 41,214 (July 12, 2012) ("Cross-Border Proposal"); *see also Final Exemptive Order Regarding Compliance with Certain Swap Regulations*, Final Order, 78 Fed. Reg. 858 (Jan. 7, 2013); ("Final Exemptive Order"); *Further Proposed Guidance Regarding Compliance With Certain Swap Regulations*, Further Proposed Guidance, 78 Fed. Reg. 909 (Jan. 7, 2013) ("Further Proposed Cross-Border Guidance").

[23] *See* CFTC, *"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,"* Letter No. 13-08 (Apr. 5, 2013) ("NAL 13-08").

To harmonize the CFTC's regulatory guidance and relief, the Working Group requests DMO to issue interpretive guidance clarifying that these affiliates are exempt from Condition 6. Should DMO decline to clarify Condition 6 accordingly, the no-action relief under NAL 13-09 will be rendered illusory because, as further discussed below, the costs and burdens of complying with Condition 6 outweigh the benefits of the relief provided by NAL 13-09. The Working Group submits that the indirect regulatory objectives accomplished by Condition 6, such as the reporting of non-U.S. Persons' swaps or the reporting of trade options, are, and should be, addressed in other proceedings.[24]

If DMO declines to adopt the Working Group's recommendation, many end-users will be forced to report their inter-affiliate swaps on a near real-time basis under Part 45, which would be significantly burdensome and of little benefit to the CFTC given inter-affiliate swaps simply transfer risk within a corporate group to manage it more effectively.

A. Reporting on Form TO Should Satisfy Condition 6.

On April 5, 2013, DMO issued NAL 13-08 providing end-users certain relief from trade option reporting under Part 45.[25] More specifically, NAL 13-08 permits all end-user to end-user trade options to be reported annually to the CFTC on Form TO, provided that an end-user utilizing Form TO notify the Commission within thirty days, if applicable, that it has entered into trade options having an aggregate notional value of over $1 billion within a given calendar year.[26] As stated above, without clarification, reporting on Form TO does not satisfy Condition 6 set forth in NAL 13-09. Accordingly, Condition 6, perhaps unintentionally, prevents end-users from simultaneously utilizing the relief provided in NAL 13-08.

Additionally, the CFTC's Commodity Options Final Rule exempts qualifying commodity options from all portions of the Dodd-Frank Act and CFTC's implementing regulations other

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[24] *See Commodity Options*, Final Rule, 77 Fed. Reg. 25,320, (Apr. 12, 2012) ("Commodity Options Final Rule"); NAL 13-08; Cross-Border Proposal; Final Exemptive Order; Further Proposed Cross-Border Guidance.

[25] The Working Group notes that significant uncertainty exists under the CFTC's regulations about which contracts, particularly forwards with volumetric flexibility, might not fall within the forward contract exclusion and be characterized as swaps or trade options. Accordingly, until the Commission issues further guidance for these contracts, it should not require any reporting of physically settling forwards with embedded optionality if the transactions meet conditions 1-6 of the 7-part analysis for such contracts set forth in the swap definitional rule. *See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps, Security-Based Swap Agreement Recordkeeping*, Joint Final Rule, 77 Fed. Reg. 48,208, 48,238 (Aug. 13, 2012) (providing the seven-part analysis for forwards with embedded optionality).

[26] The Working Group submits that calculating the aggregate notional value of trade options entered into on or after January 1, 2013, to determine whether the $1 billion threshold has been exceeded will require significant time and resources. Thus, Working Group members request that the CFTC provide end-users until May 5, 2013, to determine whether their trade options entered into between January 1, 2013, and April 5, 2013, exceeded the $1 billion notional threshold.

than those sections specifically enumerated; this exemption includes Parts 43 and 46.[27] Absent clarification, NAL 13-09 could be interpreted to override the Commodity Options Final Rule as it appears to require trade options to be reported under Parts 43 and 46 of the CFTC's regulations even though the Commodity Options Final Rule states that these regulations shall not apply to such transactions. This interpretation would place end-users transacting trade options in an untenable position, requiring them to ignore a CFTC rule in order to obtain no-action relief.

The Working Group respectfully requests that DMO exempt from Condition 6 affiliates reporting their trade options on Form TO pursuant to NAL 13-08. Should DMO decline to do so, many end-users will be forced to choose either reporting their trade options or reporting their inter-affiliate swaps pursuant to Parts 43, 45, and 46 of the CFTC's regulations. As stated in the Working Group's prior letters requesting no-action relief, reporting under Part 45 will be extremely burdensome on end-users who lack the necessary enterprise-wide IT systems and resources to comply with the requirements in Part 45.[28] Reporting trade options under Parts 43 and 46 would be equally burdensome (if not, unworkable).

B. Affiliates Prohibited under Foreign Privacy Laws from Reporting to a Registered SDR Certain Market-Facing Swaps with Non-U.S. Unaffiliated Counterparties Should be Exempt from Condition 6.

If an affiliate discloses identifying information about its non-U.S. swap counterparties when reporting swap data to an SDR, it might violate privacy laws of a non-U.S. jurisdiction. As noted in ISDA's August 27, 2012 letter, while some non-U.S. jurisdictions allow a counterparty to consent to the disclosure of identifying information, other non-U.S. jurisdictions require more than consent from a counterparty and do not allow a counterparty to waive the protections of the local privacy laws.[29] Thus, in certain non-U.S. jurisdictions, the privacy laws may prohibit affiliates from reporting to a registered SDR their market-facing swaps with non-U.S. unaffiliated counterparties, and consequently, will prevent these affiliates from satisfying Condition 6. The Working Group believes that DMO did not intend to issue no-action relief wherein compliance with a condition of the no-action relief would cause an end-user to violate foreign privacy laws.

Accordingly, the Working Group respectfully requests that DMO exempt from Condition 6 affiliates who would be at risk of violating foreign privacy laws prohibiting the disclosure of

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[27] Commodity Options Final Rule at 25,338 (stating "(a) subject to paragraphs (b), (c) and (d) of this section, the provisions of the Act, including any Commission rule, regulation, or order thereunder, otherwise applicable to any other swap, shall not apply . . . .").

[28] *See* The Commercial Energy Working Group, *Request for No-Action Relief Extending the Compliance Date for Reporting Trade Options* (submitted Mar. 1, 2013); The Commercial Energy Working Group, *Request for No-Action Relief Extending the April 10, 2013 Compliance Date for Reporting Swap Transactions under Parts 43, 45, and 46 of the Commission's Regulations* (submitted Mar. 1, 2013).

[29] *See* ISDA, *Comment Letter on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act* (submitted Aug. 27, 2012) (providing a list of non-U.S. jurisdictions wherein a single consent from a counterparty would not be sufficient to authorize disclosure of certain identifying information).

certain identifying information about non-U.S. counterparties to an SDR in accordance with Part 45. The Working Group notes that DMO has previously recognized that relief is necessary and appropriate where a counterparty is required to report to a registered SDR certain identifying information about its non-U.S. counterparty in violation of foreign privacy laws. Indeed, on December 7, 2012, DMO issued No-Action Letter No. 12-46, which granted time-limited relief permitting a reporting counterparty to omit certain identifying information about a non-reporting counterparty where reporting swap data to an SDR under Parts 45 or 46 might cause the reporting counterparty to violate foreign privacy laws.

C. Non-U.S. Affiliates Whose Swaps Are Not Otherwise Subject to SDR Reporting Should be Exempt from Condition 6.

Condition 6 requires all market-facing swaps, executed by non-U.S. affiliates, including those with non-U.S. unaffiliated end-users, to be reported to an SDR under Parts 43, 45, and 46. As further discussed below, this condition is inconsistent with the CFTC's cross-border guidance. Accordingly, the Working Group respectfully requests that non-U.S. affiliates whose market-facing swaps with non-U.S. unaffiliated counterparties are not otherwise subject to SDR reporting be exempt from Condition 6.

Market participants have largely structured their derivatives operations with the principle that swaps between two non-U.S. persons would not be subject to reporting under the Commissions regulations. The Commission introduced this principle in its initial proposed guidance on extraterritoriality and has not provided the market with any indication that it would reverse this principle. This operational structure lowered market participants' costs with respect to U.S. regulations and prepared firms to comply with regulation by the location of the host country or zone (*e.g.*, European derivatives rules applying to transactions among European counterparties). Importantly, these enterprise-wide operational structures often include U.S. persons who are end-users. Thus, Condition 6 diminishes relief for both U.S. and non-U.S. end-users.

To avoid reporting inter-affiliate swaps pursuant to NAL 13-09, non-U.S. affiliate end-users would be forced to report otherwise non-jurisdictional swaps with non-U.S. unaffiliated end-users to a registered SDR under Parts 43, 45, and 46, which would be extremely burdensome and costly. Non-U.S. end-user affiliates have neither built the infrastructure to report nor established counterparty documentation protocols necessary to determine who has the reporting counterparty responsibilities with other non-U.S. end-user counterparties, and they are not likely to do so. Accordingly, the costs incurred by complying with Condition 6 effectively render the relief under NAL 13-09 illusory and will force many end-users to report their inter-affiliate swaps.

III. CONCLUSION.

Given the Part 45 compliance dates for financial entities and non-financial end-users are quickly approaching,[30] the Working Group respectfully requests that the CFTC act expeditiously in granting the relief requested herein. Many commercial energy firms are making binding choices and incurring significant costs to come into compliance with their inter-affiliate swaps and trade option reporting requirements.

The Working Group respectfully requests DMO to clarify that, notwithstanding any contrary interpretation of Condition 6 set forth in NAL 13-09, a counterparty may utilize the relief afforded thereunder even if a swap is not reported to a registered SDR for the following reasons:

- The swap is exempt from SDR reporting under the Commodity Options Final Rule or NAL 13-08;
- Reporting the swap to a CFTC-registered SDR would result in a violation of a foreign law; or
- The swap is otherwise exempt from SDR reporting under the CFTC's cross-border guidance.

The Working Group believes that such clarification is necessary to harmonize the CFTC's regulatory guidance and relief afforded to end-users and to prevent the no-action relief provided in NAL 13-09 from being completely illusory to many end-users. Without clarification, Condition 6 conflicts with other Commission guidance. Many end-users have relied on such guidance and the relief provided therein and do not want to see such relief placed into jeopardy.

The Working Group appreciates the Commission's consideration of this letter. If you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ David T. McIndoe

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Meghan R. Gruebner

Counsel for The Commercial Energy Working Group

[30] CFTC No-Action Letter No. 13-10 requires financial entities and non-financial end-users to begin reporting their commodity swaps under Part 45 by May 29, 2013, and August 19, 2013, respectively.

Certification Pursuant to Commission Regulation 140.99(c)(3)(i)

As required by CFTC Regulation 140.99(c)(3)(i), I hereby certify that the material facts set forth in this letter, dated May 10, 2013, are true and complete to the best of my knowledge. Further, if at any time prior to the issuance of an exemptive no-action or interpretive letter any material representation made in this request ceases to be true and complete, I will ensure that Commission staff is informed promptly in writing of all materially changed facts and circumstances.

/s/ David T. McIndoe

David T. McIndoe
Sutherland Asbill & Brennan LLP
On behalf of The Commercial Energy Working Group