December 19, 2016

Via Electronic Submission

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments of the American Gas Association Re: Proposed Rule – Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants – RIN 3038–AE54

Dear Mr. Kirkpatrick:

Pursuant to the notice of proposed rule and request for comments, the American Gas Association ("AGA") respectfully provides these comments on the Commodity Futures Trading Commission's ("CFTC" or "Commission") Proposed Rule regarding Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants (the "Proposed Rule").

AGA files these comments expressing concern over the Proposed Rule because, to the extent member companies have overseas subsidiaries that are consolidated for tax or other business purposes unrelated to their derivatives activities, and whose swaps are not guaranteed by their U.S. parent, such members would be impacted by the proposal to change the application of Swap Dealer and Major Swap Participant registration requirements to such subsidiaries – and their counterparties. Accordingly, as stated in these comments, AGA respectfully requests that the Commission address the concerns raised herein on any final rule.

I. Communications

All correspondence in regard to this proceeding should be delivered to the following:

Susan Bergles
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
sbergles@aga.org | 202.824.7090

Michaela Burroughs
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
mburroughs@aga.org | 202.824.7311

II. Identity and Interests

The AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 72 million residential,

commercial and industrial natural gas customers in the U.S., of which 95 percent – just under 69 million customers – receive their gas from AGA members. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international gas companies and industry associates. Today, natural gas meets more than one-fourth of the United States' energy needs.[1]

AGA member companies provide natural gas local distribution services to residential, commercial and industrial customers under rates, terms and conditions that are regulated at the local level by a state utility commission or other regulatory authority with jurisdiction. In most cases, this regards the procurement and provision of physical natural gas commodity for use by customers in equipment in their homes and businesses, and the distribution of that natural gas commodity to such homes and businesses. AGA member companies hold capacity and are shippers on interstate natural gas pipelines that are subject to the regulation of FERC. To ensure reasonable rates for the natural gas commodity that is provided to natural gas utility customers, AGA's members engage in financial risk management transactions in markets regulated by the Commission. Many gas utilities also use a variety of financial tools, such as futures contracts traded on Commission-regulated exchanges and over-the-counter energy derivatives, to hedge the commercial risks associated with providing safe, reliable and cost-effective natural gas service to their customers.

III. Background

On October 18, the Commission published the Proposed Rule for public comment proposing rules and interpretations addressing the cross-border application of certain swap provisions of the Commodity Exchange Act (''CEA''). Specifically, the Proposed Rule, among other things, defines key terms for purposes of applying the CEA's swap provisions to cross-border transactions and addresses the cross-border application of the registration thresholds for Swap Dealers and Major Swap Participants.[2]

Primarily, the Proposed Rule would: (1) Require overseas subsidiaries that are consolidated with the U.S. parent for tax or other business purposes unrelated to their derivatives activities (referred to as a "Foreign Consolidated Subsidiary" or "FCS"), to count all its swaps (even with non-U.S. counterparties) in determining whether it must register as a Swap Dealer ("SD") or Major Swap Participant ("MSP") because it has exceeded the de minimis SD threshold or the applicable MSP threshold; this is a change from the CFTC's current cross-border approach, which only counts swaps of an overseas subsidiary towards the SD and MSP registration thresholds if those swaps are guaranteed by the U.S. parent; and (2) Require a counterparty to an FCS to count all of its swaps with the FCS in determining whether that counterparty must register because it exceeds the de minimis SD threshold or applicable MSP threshold – even if the counterparty has no other connection to the U.S.

[1] For more information, please visit www.aga.org.

[2] The Proposed Rule also provides that where a non-U.S. SD arranges, negotiates, and/or executes swaps with non-U.S. counterparties, using personnel located in the U.S., the non-U.S. SD would not be subject to the CFTC's "external business conduct standards" (except for a duty of fair dealing and the prohibition against fraud, manipulation, and other abusive practices). AGA's concerns do not extend to this portion of the Proposed Rule.

IV. Comments

A. The Proposed Rule Would Create Unnecessary Regulatory Compliance Burdens

While AGA members appreciate the Commission's attempt to create a bright-line rule to assist in Dodd-Frank cross border compliance, the proposed Foreign Consolidated Subsidiary portion of the rule will burden AGA's members by requiring them to put into place, for regulatory compliance purposes, calculations of the notional swap value of FCS swaps where those swaps are not guaranteed by the U.S. parent and thus do not pose risk to the U.S. financial system or markets. Under the Proposed Rule, not only would the FCS be subject to the SD/MSP registration regime, but any non-U.S. counterparty to the FCS also would be subject to it and thus would also be subject to the burden of having to make these registration calculations. This could have serious competitive consequences for the FCS and its U.S. parent company since non-U.S. counterparties may stop trading with them and trade with other non-U.S. companies that do not expose them to Dodd-Frank risk instead.

AGA does not advocate for the extraterritorial application of Dodd Frank, and instead urges the Commission to rely on substituted compliance – particularly to defer to home country regulators where there is a compliance regime in effect in the jurisdiction in which the swaps are transacted (such as EMIR in Europe). But, if the Commission is determined to continue the extraterritorial application of Dodd Frank, AGA submits that it should adhere to its current approach (which the Proposed Rule does not claim has caused any problems) and count towards the SD and MSP thresholds only those swaps with U.S. persons or that are guaranteed by a U.S. parent.

B. The Proposed Rule Does Not Reflect Real-World Counterparty Credit Review

The Proposed Rule justifies the attribution of swaps entered into by an FCS by incorrectly equating the FCS's nature with that of a guaranteed party.[3] The Proposed Rule states that an FCS's counterparties "generally look to both the FCS and its U.S. ultimate parent for the fulfillment of the FCS's obligations under the swap, even without any explicit guarantee." This statement, however, does not comport with the business reality, which is that swap counterparties weigh the creditworthiness of a counterparty in determining whether payment assurance, such as a corporate parent guarantee, is to be required. If the mere existence of a U.S. parent was in fact equivalent to a guarantee, there would be no need to obtain counterparty guarantees or evaluate the creditworthiness of a counterparty. This conflation of consolidated financial statements with guaranteed swap obligations ignores the reality of swap transactions. It also fails to take into account the corporate form of these companies. The entire purpose of having separately incorporated subsidiaries is to limit the liability of the corporate parent. The Commission acknowledges this when it states that, "the U.S. ultimate parent entity does not have a legal obligation to fulfill the obligations of the FCS."[4] Absent such a legal obligation, there is no basis for imposing the Dodd-Frank SD and MSP registration regime with respect to FCSs – let alone their counterparties.

[3] See Proposed Rule, 81 Fed Reg 71946, 71950 (Oct. 18, 2016).
[4] Id. at 71950 n. 40.

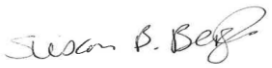
C. Non-Financial Commercial End Users Should Not Be Covered

AGA believes that non-financial commercial end users, such as AGA members, should not be covered by the Proposed Rule. Instead, it should be limited to financial institutions, or at least financial entities. However, the Proposed Rule does not contain an exclusion for non-financial end users who engage in hedges to mitigate their commercial risk and whose subsidiaries as well, hedge to mitigate commercial risk. In the "Current Market Structure" discussion in Section I.B of the Proposed Rule[5] the Commission discusses financial groups, financial institutions, and financial services firms. But while the Commission's concern appropriately focuses on the financial sector, the text of the Proposed Rule would apply across the board and sweep in commercial end-users like AGA members with FCSs – without justification for doing so since they are not financial entities and do not pose risk to the U.S. financial system or markets.[6] Without providing for an end-user exception, the Proposed Rule will place an additional compliance burden on these entities that were not a cause of the financial crisis of 2008. And the burden of monitoring and tracking swap activity by affiliated entities will be substantial even if an AGA member with an FCS does not, in fact, exceed an SD or MSP registration threshold. At least with respect to its imposition on AGA members, the Proposed Rule would provide no regulatory benefit in terms of protecting the U.S. financial system or markets.

V. Conclusion

AGA acknowledges the Commission's attempt to adopt rules to assist in Dodd-Frank cross border compliance, however, believes that the SD and MSP registration portion of the Proposed Rule would create unnecessary regulatory compliance burdens on non-financial commercial end users and does not reflect current business creditworthiness practices. For the reasons stated herein, AGA believes that any final rule should retain the Commission's current approach of looking to U.S. parent guarantees rather than consolidated financial statements or, at a minimum, contain a specific exception for non-financial commercial end users.

Respectfully submitted,



Susan Bergles
American Gas Association
400 N. Capitol St., NW
Washington, DC 20001
Email: sbergles@aga.org

[5] Id. at 71947-48.

[6] The Proposed Rule justifies its approach as being consistent with the Commission's recent rules regarding the cross-border application of margin requirements for uncleared swaps. See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Applications of the Margin Requirements, 81 Fed. Reg. 34,818 (May 31, 2016). The margin rules, however, limit the definition of an FCS to registered SDs and MSPs – and, therefore, have a much narrower scope than the expansive Proposed Rule that would apply to non-financial end-users as well.