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December 19, 2016

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Filed Electronically: http://www.cftc.gov

Re: Proposed Rule; Interpretations: *Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants*, 81 Fed. Reg. 71946 (published on October 28, 2016), RIN 3038-AE54

Dear Mr. Kirkpatrick:

The International Energy Credit Association ("IECA") respectfully submits these comments to the Commodity Futures Trading Commission (the "CFTC") on its Proposed Rule; Interpretations entitled ***Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants*** ("Proposed Cross-Border Rule") issued in the above-captioned proceeding.

Support of Other Comments

The IECA questions the expansion of the CFTC's jurisdiction under the Proposed Cross-Border Rule with respect to its proposed treatment of "foreign consolidated subsidiaries" ("FCSs"). In this regard, the IECA wishes to support and hereby endorses: (A) the comments on this Proposed Cross-Border Rule submitted jointly today by American Bankers Association, Coalition for Derivatives End-Users, Financial Services Roundtable, the International Swaps and Derivatives Association, National Association of Corporate Treasurers, Securities Industry and Financial Association, and the U.S. Chamber of Commerce Center for Capital Markets Competitiveness ("Joint Comments"), and (B) the comments on this Proposed Cross-Border Rule submitted today by the Commodity Markets Council ("CMC Comments"). Both these Joint Comments and the CMC Comments respectfullyquestion and object to the proposed treatment of FCSs in the Proposed Cross-Border Rule.

Additional Comments of the IECA on the Proposed Cross-Border Rule.

In addition, the IECA wishes to highlight its objection to proposed new sections of the CFTC's regulations, namely:

> Section 1.3(ggg)(7)(i)(B), which states that for purposes of determining whether an entity engages in more than a de minimis quantity of swap dealing activity, and is therefore required to register as a Swap Dealer ("SD"), a person that is a FCS must now include all swaps connected with the dealing activity in which such person engages; and
>
> Section 1.3(ggg)(7)(i)(D), which states that for purposes of determining whether an entity engages in more than a de minimis quantity of swap dealing activity, and is therefore required to register as a SD, a person that is not a U.S. person, that is not an FCS, and its obligations are not guaranteed by a U.S. person, must now include all of certain qualifying swaps connected with dealing activity in which such person engages, including "swaps with a counterparty that is a Foreign Consolidated Subsidiary."

Similarly, the Proposed Cross-Border Rule includes comparable new regulations requiring the inclusion of such swaps for purposes of determining whether a person is a Major Swap Participant ("MSP").

Finally, Section 1.3(aaaa)(1) defines a "Foreign Consolidated Subsidiary" as a "non-U.S. person in which an ultimate parent entity that is a U.S. person ("U.S. ultimate parent entity") has a controlling financial interest, in accordance with U.S. generally accepted accounting principles, such that the U.S. ultimate parent entity includes the non-U.S. person's operating results, financial position and statement of cash flows in the U.S. ultimate parent entity's consolidated financial statements, in accordance with U.S. generally accepted accounting principles."

Many non-financial US entities have a "controlling financial interest" and treat their subsidiaries in a "consolidated" fashion for accounting purposes. As a consequence, those US entities that have a FCS are now required to count their swap activity with non-US persons along with the US parent's swaps for purposes of determining if the entity or entities breach the swap dealing de-minimis threshold of $8 billion gross notional (to be reduced to $3 billion in the first part of 2018).

Moreover, not only is an FCS that transacts swaps with non-US companies being forced to count its swaps in its calculation of whether it may breach the de-minimis threshold (the "Swap Count"), but now Non- US entities that have absolutely no "direct and significant connection with US commerce" will also be forced to conduct a Swap Count if they transact with an FCS.

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In other words, the new Proposed Cross-Border Rule forces both parties who were previously considered under CFTC guidance to be Non-US Persons to conduct a Swap Count if one of the parties is a FCS.

The IECA believes this extension of the CFTC's rulemaking authority exceeds the congressional intent associated with ensuring the safety and soundness of the US financial system. The CFTC's Proposed Cross-Border Rule expressly references "large financial institutions" in its analysis of why it should include FCSs in its definition for purposes of the Swap Count. (See, para II B Foreign Consolidated Subsidiary Definition page 71950). However, the Proposed Cross-Border Rule does not simply apply the FCS expansion to large financial institutions, but instead captures all companies, including US commercial enterprises (i.e., non-financial institutions) with a FCS, which will include anyone that might transact swaps in the agricultural or energy markets globally.

If the CFTC's intent is to ensure the safety and soundness of the US financial system, then we strongly encourage the CFTC to consider eliminating the FCS expansion altogether or restricting the FCS expansion to only subsidiaries of those entities that qualify as "large financial institutions."

For the Commission to include a FCS that is a subsidiary of a non-financial institution under its Proposed Cross-Border Rule just because such entity runs a global business that may treat subsidiaries in a consolidated fashion for accounting efficiency purposes, seems to be contrary to the policy objectives established by the Dodd Frank Act.

Additionally, subsidiaries of non-financial institutions that are not domiciled in, or do not do business in, the United States are in many cases bankruptcy remote from the US and have no way to create or otherwise impact any type of systemic risk within the US. As such, to treat a non-US subsidiary of a multi-national agricultural or energy business in the same fashion as a non-US subsidiary of a large US bank is simply contrary to principles of international comity and should be left to the regulatory regimes in their home jurisdictions.

The Commission has also noted in its Proposed Cross-Border Rule that Non-US persons that execute swaps on a SEF, DCM or FBOT and clear such swaps through a registered or exempt DCO would not have to include such swaps in their Swap Count. Although this may appear to be a form of relief for the Non-US persons effected by the Proposed Cross-Border Rule, it misses the mark in two respects. First, the cleared markets for swaps are entirely focused in today's market place on interest rate swaps and credit default swaps. The market for cleared commodity swaps is entirely non-existent. As a result, this so-called relief for cleared swaps really offers no practical relief whatsoever for a non-US subsdiary of a global agricultural or energy business that may have need to execute swaps with its non-US counterparts.

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Second, allowing Non-US persons to execute a cleared swap via a CFTC registered entity to avoid the need to conduct the Swap Count results in forced de facto registration since the non-US person would be subjecting itself to the authority, jurisdiction and scrutiny of the CFTC via the CFTC regulation of a facility registered with the CFTC. The forced usage of a CFTC registrant again falls far short of supporting international comity.

Should the Proposed Cross-Border Rule become a final rule as proposed, the CFTC will also cause a chilling effect for those FCSs that presently transact swaps with other non-US entities. This is because a Non-US entity that does not otherwise touch the US, other than to transact a swap with a FCS, will now be likely to choose to trade away from any FCS. Such Non-US entities will want to avoid the risk of being forced to monitor, and classify as dealing or non-dealing, their swaps with any FCS and potentially subject themselves to the US Swap Dealer regime thereby exposing themselves to the risk of costly recordkeeping and reporting obligations, capital set aside obligations, and business conduct rules that are not being administered in the same fashion in their home jurisdictions.

For all the above reasons, the IECA respectfully requests that the CFTC eliminate the treatment of FCSs as set forth in the Proposed Cross-Border Rule, or at least limit such treatment to an FCS that is a subsidiary of a large US financial institution.

About the IECA

The IECA is an association of over 1,400 credit, risk management, legal and finance professionals that is dedicated to promoting the education and understanding of credit and other risk management-related issues in the energy industry. For over ninety years, IECA members have actively promoted the development of best practices that reflect the unique needs and concerns of the energy industry. Following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and its amendments of the Commodity Exchange Act, the IECA has filed numerous comments with the CFTC.

The IECA seeks to protect the rights and advance the interests of the buyside community of commercial energy companies and other energy market participants, representatives of which make up the majority of the IECA's membership. These entities produce, sell, and/or purchase for resale substantial quantities of various physical energy commodities, including electricity, natural gas, oil and other energy-related physical commodities necessary for their commercial energy businesses. Many of these commercial energy companies and other energy market participants rely on futures contracts and swaps to help them mitigate and manage (i.e., hedge) the risks of physical energy commodity price volatility to their commercial energy businesses, which millions of Americans and the American economy rely on for safe, reliable and reasonably-priced energy supplies.

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Conclusion.

The IECA appreciates the opportunity to provide these Comments and would welcome the opportunity to discuss these comments further should you require any additional information on any of the topics discussed herein.

Please direct correspondence concerning these comments to:

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Yours truly,
INTERNATIONAL ENERGY CREDIT ASSOCIATION

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