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VIA ELECTRONIC SUBMISSION

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

RE: *Project KISS*, Request for Information, RIN 3038-AE55

Dear Secretary Kirkpatrick:

I. INTRODUCTION.

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Eversheds Sutherland (US) LLP hereby submits this comment letter in response to the Commodity Futures Trading Commission's (the "**CFTC**" or "**Commission**") Request for Information, *Project KISS*,[1] which requests suggestions on how the Commission's rules and regulations can be applied in a simpler, less burdensome, and less costly manner. The Working Group appreciates the opportunity to provide the comments set forth 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 producers, processors, merchandisers, and owners of energy commodities. Among the members of the Working Group are some of the largest users of energy derivatives in the United States and globally. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

[1] *Project KISS*, Request for Information, 82 Fed. Reg. 21,494 (May 9, 2017).

II. COMMENTS.

As active participants in commodity derivatives markets, the Working Group supports appropriately tailored regulations that preserve market integrity. Project KISS represents a laudable effort by the CFTC to review the entire body of its regulations and interpretations and determine where improvements could be made to eliminate unnecessary costs and burdens borne by market participants, the market itself, and the CFTC in overseeing unnecessary regulations. After several years of extensive rulemaking under the Dodd-Frank Act, it is a reasonable time to assess the CFTC's regulations.

The Working Group urges the CFTC to complete Project KISS before launching any new rulemaking initiatives, except for those rules that the CFTC must finalize pursuant to Congress's directive in the Commodity Exchange Act ("**CEA**").[2] Under Project KISS, the CFTC ultimately should adopt final rules or amendments to both harmonize and streamline the CFTC's existing rules and interpretations. Additionally, while the CFTC has the difficult task of dovetailing its regulations with the efforts of foreign regulators, the CFTC should pursue policies, rules, and amendments to its existing rules that promote uniformity among international regulations for derivatives trading. As many members of the Working Group have trading operations outside of the United States, they incur significant costs in having to comply with regulations in multiple jurisdictions with varying regulatory requirements.

A. Overarching Objectives in CFTC Rulemaking.

As the CFTC reviews its rules and regulations in an attempt to simplify them under Project KISS, it should consider the following overarching objectives, as the Working Group believes they will help reduce the unnecessary burdens imposed upon market participants under the CFTC's regulations:

- To the maximum extent practicable, principles-based rules and regulations should be substituted for overly prescriptive rules.

- The CFTC's rules and regulations should accommodate current marketplace operations and technology and provide market participants with the flexibility to operate in the ordinary course of their businesses without incurring significant costs or altering business strategies merely to comply with new regulatory requirements.

- To ensure compliance with and enforcement of the CFTC regulations are uniform and workable, definitions and concepts used throughout various CFTC

[2] Any new rules or regulations the CFTC considers adopting in the future (*e.g.*, regulation of automated trading, position limits) should keep in line with the goals of Project KISS to "keep it simple" and avoid unnecessary and unworkable rules.

regulations should be harmonized, such as the definition of "hedging," the method for calculating notional value, and the control and ownership standards for affiliate status.

- Cost-benefit analyses of the CFTC's regulations should account for costs (a) incurred by derivatives markets, such as loss of liquidity, and (b) borne by market participants that will be indirectly affected by final rules (*e.g.*, the cost of the swap dealer capital requirements that are passed through to end-users).

B. Registration

1. Swap Dealing.

The CFTC's "swap dealer" designation has major legal and regulatory ramifications. An entity meeting the definition is subject to registration requirements, mandatory swaps clearing and exchange execution, swaps reporting and recordkeeping requirements, internal and external business conduct standards, and increased capital and margin requirements. Because of these significant requirements, the CFTC should provide more regulatory clarity and reduce unnecessary complexity in its swap dealer requirements and definition.

First, absent Commission action, on January 1, 2019, market participants will be required to register as a swap dealer if certain of their swaps transactions exceed a *de minimis* threshold of $3 billion (reduced from the current threshold of $8 billion).[3] While the CFTC Staff's Swap Dealer *De Minimis* Exception Preliminary Report ("**Preliminary Report**")[4] provided valuable insights, more comprehensive data and further analysis are needed before the CFTC modifies the current *de minimis* threshold or allows it to automatically decrease. Accordingly, the Working Group recommends that the Commission issue an interim final rule to prevent the current *de minimis* threshold of $8 billion from automatically decreasing, so that the Commission may adequately assess the swap markets to determine whether an increase or reduction in the current *de minimis* threshold is appropriate.

Second, regulatory certainty on the calculation of notional amount is crucial, as the determination of whether a market participant is a swap dealer requires the calculation of an aggregate notional amount of applicable swaps. To date, the CFTC has provided limited guidance on the calculation of notional amount for swaps denominated in commodity units. While the CFTC provided guidance on the calculation of notional amount for locational

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[3] *See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant*," Joint Final Rule; Interim Final Rule; Interpretations, 77 Fed. Reg. 30,596 (May 23, 2012) ("**Swap Dealer Final Rule**").

[4] *See* Swap Dealer *De Minimis* Exception Preliminary Report: A Report by Staff of the Commodity Futures Trading Commission Pursuant to Regulation 1.3(ggg) (Nov. 18, 2015), http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis_1115.pdf.

basis swaps in the Swap Dealer Final Rule, there are a number of other issues with respect to calculation of notional amount where market participants have had to operate with limited regulatory guidance and where other regulatory bodies have begun to introduce competing and potentially inconsistent models.[5]

The Working Group supports the methodology for calculating "notional amount" for certain basic transactions, which was proposed by the American Petroleum Institute, Commodity Markets Council, Edison Electric Institute, Electric Power Supply Association, Independent Petroleum Association of America and Natural Gas Supply Association (collectively, the "**Coalition**") in a letter submitted to the CFTC on September 20, 2012. The Working Group believes the Coalition's methodology memorializes acceptable conversion methods that are consistent with current CFTC guidance and general industry practice.

Accordingly, the Working Group requests that the Commission codify the Coalition's proposed methodologies and confirm that, where a market participant applies a methodology for calculating notional value that is consistent with and based upon the market participant's understanding of industry practice or another commercially reasonable method if there is no accepted industry practice, it is acceptable to employ such methodologies absent other guidance from the Commission.

Finally, to provide additional protection to special entities[6] that are not utility special entities, the CFTC established a separate $25 million *de minimis* threshold

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[5] As the Commission likely is aware, there is an ongoing effort by CPMI-IOSCO to harmonize derivatives transaction reporting data fields. Among those data fields is a data field for "notional amount." The proposed CPMI-IOSCO approach to the calculation notional amount is inconsistent with the CFTC's approach to the issue. First, there is no data field "notional amount" in the CFTC's swap reporting requirements. Second, the proposed CPMI-IOSCO approach is inconsistent with existing CFTC guidance. For additional discussion of the flaw of the proposed CPMO-IOSCO approach to the calculation of notional amount, see the Working Group's comments on the Committee on Payments and Market Infrastructures and the Board of the International Organization of Securities Commissions' Consultative Report, Harmonisation of Critical OTC Derivatives Data Elements (Other Than UTI and UPI) – Third Batch, available at http://www.bis.org/cpmi/publ/comments/d160/tcewg.pdf.

[6] "Special entity" means:

(i) A Federal agency;

(ii) A State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State;

(iii) Any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974;

(iv) Any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974; or

(v) Any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.

See Commission Regulation 23.401(c), 17 C.F.R. § 23.401(c) (2017).

applicable to swaps with special entity counterparties. As a result, however, many commercial market participants have stopped transacting with special entities to avoid registration as a swap dealer and mitigate the compliance costs associated with monitoring calculations under two separate *de minimis* thresholds. Thus, contrary to the CFTC's intent, special entities have found their ability to hedge commercial risks in the swap markets hindered, as the availability of counterparties has been severely reduced. The Commission previously has recognized the need to ensure an adequate pool of potential counterparties for certain special entities, so that they may obtain competitive pricing for their hedging products and thereby produce more competitive and stable energy prices for consumers.[7] While such relief was an improvement, it left out many special entities that could benefit from a higher *de minimis* threshold.

Given the $25 million special entity *de minimis* threshold is not required by the CEA, the Working Group requests that the Commission streamline the swap dealer definition to apply one $8 billion *de minimis* threshold for all swaps even if the counterparty is a special entity. Special Entities are sophisticated market participants who do not need additional protection through a separate *de minimis* threshold, which actually harms them. An $8 billion threshold would (i) ensure a robust pool of counterparties for special entities to meet their hedging needs and (ii) reduce the regulatory costs borne by market participants in attempting to comply with two separate *de minimis* thresholds.

2. Registration Requirements.

If the $8 billion *de minimis* threshold is reduced to $3 billion, or if the CFTC determines to adopt its proposed rule, *Regulation Automated Trading*,[8] many commercial end-users could be required to register as a swap dealer or floor trader, respectively. In addition to the burden of completing the registration process, which can be lengthy and involved, such firms would become subject to the onerous substantive requirements applicable to swap dealers, as described above. Further, new floor traders would incur mandatory margin and enhanced recordkeeping requirements, an unintended consequence for firms that would become floor traders [9] as a function of their use of technology to trade orderly in evolving markets. Also, commercial end-users would be required to become members of the National Futures Association ("**NFA**"). Thus, commercial firms would incur substantial costs and burdens not only associated with the process to register, which

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[7] *See Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Thresholds for Swaps with Special Entities*, Final Rule, 79 Fed. Reg. 57,767 (Sept. 26, 2014).

[8] *Regulation Automated Trading*, Supplemental Notice of Proposed Rulemaking, 81 Fed. Reg. 85,334 (Nov. 25, 2016); *Regulation Automated Trading*, Notice of Proposed Rulemaking, 80 Fed. Reg. 78,824 (Dec. 17, 2015) (collectively, "**Reg AT**").

[9] A new floor trader would be subject to enhanced recordkeeping standards under CFTC Regulation 1.35 only if it is a "member" of a registered entity (*e.g.*, a swap execution facility or designated contract market), as defined in CFTC Regulation 1.3(q).

requires an application and fingerprinting, but also complying with NFA requirements for its members, including:

- Attesting on an annual basis that the member's operations and procedures comply with all applicable NFA requirements.
- Undergoing periodic onsite examinations or audits by NFA.
- Adhering to certain standards in the member's communication with the public, including promotional material.
- Implementing enhanced supervisory requirements designed to prevent sales practice abuses if the member has a sales force.[10]

Accordingly, if the CFTC determines to (i) reduce the $8 million *de minimis* threshold or allow it to decrease automatically, or (ii) adopt Reg AT as proposed, the Working Group requests that the CFTC exempt commercial firms required to become new registrants from the fingerprinting requirement and the NFA member requirements.

C. Other Significant Issues.

1. Cross-Border.

Under the CFTC's 2013 cross-border guidance,[11] a market participant's compliance with "essentially identical" foreign regulations may constitute compliance with the corollary U.S. regulations. However, an "essentially identical" determination must be made by Commission action or staff no-action relief.[12] Because several foreign jurisdictions have mandatory clearing and reporting regimes, cross-border compliance with all the regulations is costly for global companies that trade swaps. To reduce these compliance burdens, the CFTC should review these foreign jurisdictions' regimes and issue "essentially identical" determinations where appropriate.

Additionally, the Working Group recommends that the CFTC revert to its 2013 Cross-Border Guidance on determining whether a person has sufficient nexus to the United States to be subject to U.S. swap regulations and abandon the unworkable paradigm for

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[10] For further information on these NFA member compliance requirements, *see* https://www.nfa.futures.org/NFA-compliance/NFA-general-compliance-issues/index.HTML.

[11] *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, Interpretive Guidance and Policy Statement, 78 Fed. Reg. 45,292, at 45,318-19 (July 26, 2013) ("**2013 Cross-Border Guidance**").

[12] On July 11, 2013, the Commission issued its first no-action letter of this nature, regarding certain risk mitigation requirements for U.S. or European Union-based swap dealers and major swap participants entering into certain swap transactions, based on a determination that certain provisions of Article 11 of the European Market Infrastructure Regulation are essentially identical to portions of CEA section 4s. *See* CFTC Letter No. 13-45, *No-Action Relief for Registered Swap Dealers and Major Swap Participants from Certain Requirements under Subpart I of Part 23 of Commission Regulations in Connection With Uncleared Swaps Subject to Risk Mitigation Techniques Under EMIR* (Jul. 11, 2013).

Foreign Consolidated Subsidiaries ("**FCS**") provided in the CFTC's 2016 proposed rule on cross-border.[13] More specifically, while the presence of a U.S. person guarantee may trigger inclusion of a swap in a non-U.S. person's *de minimis* determination, the mere fact that an entity has a U.S. Ultimate Parent Entity should not trigger the same inclusion.

The 2016 Cross-Border Proposal defines a "Foreign Consolidated Subsidiary" as a Non-U.S. Person[14] 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 ("**U.S. GAAP**"), 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. GAAP.[15] As further described in its comments to the 2016 Cross-Border Proposal,[16] which the Working Group incorporates herein by reference, the CFTC's proposed treatment of FCSs[17] will disadvantage U.S. companies' foreign subsidiaries when transacting in non-U.S. derivatives markets and provide little, if any, benefit to U.S. markets. Requiring Other Non-U.S. Persons to treat any swap with an FCS as a potential swap dealing transaction will likely cause many Other Non-U.S. Persons to avoid transacting with FCSs rather than implementing costly compliance procedures to track their swap dealing activity. Such a result would be disadvantageous for U.S. interests overseas, as counterparties available to FCSs would be severely limited and increase the cost of hedging for FCSs.

2. Financial Entity Definition.

Being a Financial Entity under the CEA and the CFTC's regulations has both commercial and regulatory consequences, including:

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13 *Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants*, Proposed Rule; Interpretations, 81 Fed. Reg. 71,946 (Oct. 18, 2016) ("**2016 Cross-Border Proposal**").

14 As used herein, "Non-U.S. Person" means a person that is not a "U.S. Person," as defined in proposed CFTC Regulation 1.3(aaaaa)(5) of the 2016 Cross-Border Proposal.

15 *See* Proposed CFTC Regulation 1.3(aaaaa)(1).

16 *See* The Commercial Energy Working Group, *Comments Re: Proposed Rule; Interpretations, Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants*, RIN 3038-AE54 (Dec. 19, 2016).

17 The Cross-Border NOPR defines "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 ("**U.S. GAAP**"), 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. GAAP. *See* Proposed CFTC Regulation 1.3(aaaaa)(1). As used herein, "**Non-U.S. Person**" means a person that is not a "U.S. Person," as defined in proposed CFTC Regulation 1.3(aaaaa)(5) of the Cross-Border NOPR.

- the inability to utilize the end-user exception from mandatory clearing;[18]

- the greater likelihood of being a reporting counterparty under Parts 43 and 45 of the CFTC's regulations;

- the application of more stringent standards under the major swap participant definition; and

- more onerous documentation and swap reconciliation requirements.

CEA Section 2(h)(7)(C) defines the term "financial entity" to be, among other things, "a person predominantly engaged in activities that are in the business of banking, or in activities that are *financial in nature*, as defined in [S]ection 4(k) of the Bank Holding Company Act of 1956."[19] In interpreting CEA Section 2(h)(7)(C), the Working Group believes the Federal Reserve's interpretation of the phrase "financial in nature"—which was developed in the context of banking law to allow banks to engage in certain trading activities that generally were not viewed as financial in nature (*i.e.*, permissible nonbanking activities)—should not be relied upon.[20]

Specifically, given the cross-reference to Bank Holding Company Act ("**BHCA**") Section 4(k) in the CEA's "financial entity" definition, the Working Group is concerned that certain types of common physical energy transactions, which historically have been treated by the CFTC as physical forward contracts excluded from regulation as futures or swaps (*i.e.*, forward contracts that net settle or book-out and transactions that involve an instantaneous title transfer), could be considered as transactions that are "financial in nature." As a result, commercial energy end-users that enter into these types of physical commodity transactions could be regulated as "financial entities."[21]

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[18] *See End-User Exception to the Clearing Requirement for Swaps*, Final Rule, 77 Fed. Reg. 42,560 (July 19, 2012) ("**End-User Exception**"). Under the End-User Exception, Financial Entity status is determined at the entity level—it is not based upon the nature or character of the larger corporate group.

[19] CEA Section 2(h)(7)(C)(i)(VIII) (emphasis added).

[20] BHCA Section 4(k) lists activities that are considered to be financial in nature, which includes activity that is "closely related" activity (as in effect prior to November 12, 1999). 12 U.S.C. § 1843(k)(4)(F). Such "closely related" activity includes certain trading activities. *See* 12 C.F.R. § 225.28; *see also* 12 C.F.R. § 225.86 (noting that such "closely related" activity is listed in 12 C.F.R. § 225.28).

[21] Additionally, notwithstanding the CFTC's determination not to regulate financial transmission rights as swaps, the Working Group is concerned that a commercial energy firm trading such transactions, which are integral to the operation of organized electricity markets, could be regulated as a "financial entity" as a result of such transactions being treated as "financial in nature." *See Final Order Regarding Southwest Power Pool, Inc. Application to Exempt Specified Transactions; Amended to the Final Order Exempting Specified Transactions of Certain Independent System Operators and Regional Transmission Organizations*, Final Order, 81 Fed. Reg. 73,062 (Oct. 24, 2016).

While the Working Group appreciates that the Federal Reserve has robust precedent implementing BHCA Section 4(k), the CFTC is not bound to follow that precedent wholesale; doing so potentially would capture the very entities that were intended to be exempt from regulation as a financial entity.

Accordingly, the Working Group requests the CFTC to provide guidance stating that physical commodity trading is not "financial in nature." That guidance should apply only to entities that are commercial market participants so that Congress's intent with respect to CEA Section 2(h)(7) is properly reflected.

3. Affiliate Use of the End-User Exception.

On December 18, 2015, the CEA was amended in an attempt to address a shortcoming in the availability of the end-user exception.[22] Specifically, amended CEA Section 2(h)(7)(D) allowed certain entities (*i.e.*, central treasury units ("**CTUs**")) to utilize the end-user exception on behalf of non-financial affiliates while entering into transactions as principal, subject to certain conditions.[23]

Those amendments, however, introduced their own interpretive issues. Under amended CEA Section 2(h)(7)(D), "an affiliate of a person that qualifies for an exception under subparagraph (A) [the end-user exception] . . . may qualify for the exception only if the affiliate enters into the swap to hedge or mitigate the commercial risk of the person or other affiliate of the person that is not a financial entity." A plain reading of this provision suggests that any affiliate of a non-financial entity, regardless of whether that affiliate qualified for the end-user exception on its own, would not be permitted to exercise the end-user exception on its own behalf, notwithstanding Congress's intent to the contrary.[24]

In amending CEA Section 2(h)(7)(D), Congress intended to set the parameters under which a financial entity may elect the end-user exception on behalf of qualifying non-financial affiliates. This intent is reflected by the statements in the Congressional Record made by Congresswoman Gwendolynne Moore. Congresswoman Moore stated that "central treasury units . . . are financial affiliates of commercial companies" and that the "bill permits the CTU to transact hedging transactions under the Dodd-Frank end-user exemption as principal and as an agent, which is the logic that the CFTC agrees with."[25] The amendments were not intended to place limitations on non-financial entities acting on their own behalf or the behalf of their affiliates where the relevant transactions are hedges that qualify for the end-user exception.

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22 *See* H.R.2029, Pub. L. No. 114-113 (Dec. 18, 2015).

23 *See* House Congressional Record H8219-H8221 (Nov. 16, 2015) (discussing H.R.1317), https://www.congress.gov/crec/2015/11/16/CREC-2015-11-16-pt1-PgH8219-2.pdf. The language of H.R.1317 was included in H.R.2029.

24 *See generally* House Congressional Record at H8221 (Nov. 16, 2015).

25 House Congressional Record at H8221 (Nov. 16, 2015).

Therefore, the Working Group requests that the CFTC provide guidance on its interpretation of CEA Section 2(h)(7)(D) to clarify that this section does not affect the ability of a non-financial entity to use the end-user exception (i) on its own behalf or (ii) on behalf of a non-financial entity affiliate. That guidance could read as follows:

> Given the ambiguity in the amended language of CEA Section 2(h)(7)(D) and the Congressional intent underlying H.R. 1317, the Commission interprets the relief provided by that section to allow financial entities to exercise the end-user exception on behalf of its affiliates, subject to certain conditions. The Commission does not view CEA Section 2(h)(7) as limiting in any way the ability of a non-financial entity to exercise on its own behalf or on behalf of any qualifying affiliate the end-user exception.

4. Financial End-User.

The CFTC's final margin rule[26] subjects "financial end-users" to margin requirements. Under the Final Margin Rule, a "financial end-user" is defined as:

> An entity, person or arrangement that is, or holds itself out as being, an entity, person, or arrangement that…uses its own money **primarily** for the purpose of **investing or trading or facilitating the investing or trading** in…swaps…or other assets for resale or other disposition or otherwise trading in…swaps…or **other assets**.[27]

As described in comments submitted to the CFTC and incorporated herein by reference,[28] the Working Group recommends that the Commission:

- Confirm that the phrase "investing or trading or facilitating the investing or trading" does not include transactions or financial assets (*e.g.*, futures) that hedge or mitigate commercial risk.[29]

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[26] *See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, Final Rule and Interim Final Rule, 81 Fed. Reg. 636 (Jan. 6, 2016) ("**Final Margin Rule**").

[27] Final Margin Rule at 696 (emphasis added).

[28] *See* The Commercial Energy Working Group, *Comments Re: Interim Final Rule, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, RIN 3038-AC97 (Feb. 5, 2016).

- Confirm that the phrase "other assets" refers to "other financial assets," as the current phrase "other assets" could be interpreted broadly to include not only other financial assets, but also physical commodities and storage and transportation capacity, which could cause non-financial commercial entities that are engaged in physical commodity-related businesses to be considered financial end-users and subject to margin requirements.

- Replace the term "primarily" with the term "predominately" to align the threshold for being a financial end-user with the threshold that Congress established in the CEA for entities to be considered financial entities.[30]

D. Reporting and Recordkeeping.

1. Swap Data Repository Reporting.

In March 2014, December 2015, and July 2017, in an attempt to resolve reporting challenges and reduce burdens on market participants, the CFTC requested public comments on its swap data repository ("**SDR**") reporting regulations and its draft technical specifications for swap data elements ("**SDR Requests**").[31] In response to the SDR Requests, the Working Group submitted comments and offered several recommendations to simplify the CFTC's SDR reporting requirements and reduce burdens on market participants. The Working Group incorporates by reference its comments submitted in

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[29] The CFTC has recognized the difference between hedging and trading and investing, stating "swaps executed for the purpose of speculating, investing, or trading are not being used to hedge or mitigate commercial risk." *See End-User Exception to the Clearing Requirement for Swaps*, Final Rule, 77 Fed. Reg. 42,560, 42,574 (July 19, 2012); *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant,"* CFTC and SEC Joint Final Rule, Joint Interim Final Rule, and Interpretations, 77 Fed. Reg. 30,596, 30,676 (May 23, 2012).

[30] The last prong of the definition of "financial entity" in the CEA includes ". . . a person **predominantly** engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in [S]ection 4(k) of the Bank Holding Company Act of 1956." *See* CEA Section 2(h)(7)(C)(i)(VIII) (emphasis added). Because the CFTC has not provided guidance on what it means to be "predominantly engaged," market participants have looked to the definition of "predominantly engaged" in Section 102(a)(6) of Title I of the Dodd-Frank Act. That definition views an entity to be predominantly engaged in activity that is financial in nature if at least 85 percent of its assets or revenue is financial in nature.

[31] *See Review of Swap Data Recordkeeping and Reporting Requirements*, Request for Comment, 79 Fed. Reg. 16,689 (Mar. 26, 2014); *Draft Technical Specifications for Certain Swap Data Elements*, A Request for Comment by Staff of the U.S. Commodity Futures Trading Commission (Dec. 22, 2015), http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/specificationsswapdata122215.pdf; CFTC Letter 17-33, *Division of Market Oversight Announces Review of Swap Reporting Rules in Parts 43, 45, and 49 of Commission Regulations* (July 10, 2017).

response to those SDR Requests, which are provided in Attachments A, B, and C, and reiterates below some of its key recommendations.[32]

First, the CFTC should require the standardization of appropriately tailored swap data fields and requirements across all SDRs and provide specific clarity on what the data fields require. Because the SDRs have adopted different approaches in implementing the SDR reporting requirements (*e.g.*, reporting of confirmation and valuation reports) market participants have had to develop different protocols and systems in trying to meet the varying requirements of the SDRs. If the Commission created uniformity across the SDRs, it would reduce the burdens of market participants in meeting the variations across the SDRs, address many technical implementation issues, and provide the CFTC with more consistent and complete data. While the Working Group generally supports the CFTC's efforts to harmonize the SDR data fields with foreign regulators' requirements, it does not believe the CFTC should expand the current data fields to align with any foreign regulatory requirements, including any data fields addressing margin.[33]

Second, the CFTC should entirely exempt inter-affiliate swaps, including those between affiliates that are not majority or wholly owned, from the SDR reporting requirements.[34] Inter-affiliate swaps represent intra-corporate allocations of risk and would not provide any transparency or price discovery benefits to the swap markets or assist the Commission in reducing systemic market risk. While the Working group appreciates the Commission's efforts to provide no-action relief for inter-affiliate swaps under No-Action Letters ("**NALs**") 13-09,[35] the conditions to receive the relief have limited such relief in many instances.

Third, the Working Group believes that certain regulatory burdens could be alleviated if the CFTC's reporting requirements reflected marketplace operations and technology such that commercial energy firms may function in the ordinary course of their businesses. As stated in the 2014, 2016, and 2017 SDR Comments, certain SDR reporting

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[32] *See* Commercial Energy Working Group, *Comments Re: Review of Swap Data Recordkeeping and Reporting Requirements*, RIN 3038-AE12 (May 27, 2014) ("**2014 SDR Comments**"), provided as Attachment A hereto; Commercial Energy Working Group, *Comments Re: Draft Technical Specifications for Certain Swap Data Elements – A Request for Comment by Staff of the U.S. Commodity Futures Trading Commission* (Feb. 22, 2016) ("**2016 SDR Comments**"), provided as Attachment B hereto; Commercial Energy Working Group, *Comments Re: CFTC Letter 17-33, Division of Market Oversight Announces Review of Swap Reporting Rules in Parts 43, 45, and 49 of Commission Regulations* (Aug. 21, 2017) ("**2017 SDR Comments**"), provided as Attachment C hereto. Attachment A provides the Working Groups 2014 SDR Comments but eliminates any comments on issues that have since been resolved.

[33] *See* 2017 SDR Comments at 2-3; 2016 Comments; 2014 SDR Comments at 2-4, 14-15 (answer to Q28).

[34] *See* 2017 SDR Comments at 3; 2014 SDR Comments at 13-14 (answer to Q24).

[35] CFTC Letter No. 13-09, *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* (Apr. 5, 2013).

requirements are redundant, serve no regulatory benefit, and do not reflect market participants' normal course of business.

For example, Part 45 of the CFTC's regulations requires a market participant to report primary economic terms ("**PET**") data that reflect the economic terms of a swap as well as confirmation data that simply confirms and effectively duplicates the PET data. Before the SDR reporting requirements became final, market participants utilized confirmations to memorialize the terms of a transaction and allow each counterparty's back office (*e.g.*, compliance or legal departments) to capture the transaction terms in their systems. However, none of these systems were set up to turn a confirmation into reportable data fields. Consequently, market participants have had to modify their business processes and systems to report confirmation data that is redundant to the PET data and provides no additional transparency.[36]

By way of another example, Part 45 requires end-users, when acting as the reporting party, to report valuation data for uncleared swaps on a quarterly basis even though such valuation reporting is not required under the Dodd-Frank Act. Further, because end-users have 30 days to submit the valuation data after the swap is valued, the reported information often is outdated or no longer relevant. The SDRs also have taken different approaches in implementing the requirements for valuation data reporting.[37]

Accordingly, the Working Group urges the Commission to standardize the reporting requirements across the SDRs and streamline the SDR reporting requirements to eliminate the redundancies and unnecessary burdens that provide no additional regulatory benefit. Given the technical and operational difficulties commercial energy firms continue to face in meeting the SDR reporting requirements, the Working Group also requests that the Commission revert back to the phased-in reporting timeline of 48 hours for end-users to report PET data and allow end-users to report all SDR data on an end-of-day basis.[38]

The Working Group recommends that the Commission eliminate CFTC regulation 45.8(e), which currently provides that if (a) both counterparties to a swap are not swap dealers or major swap participants, and (b) only one counterparty is a U.S. Person, then the U.S. Person would be the reporting counterparty. Currently, this regulation disadvantages U.S. commercial firms when facing non-U.S. counterparties, even if the non-U.S. Person is a financial entity or has a branch office in the United States. Removal of this regulation would allow the parties to negotiate and agree upon a reporting counterparty designation. At a minimum, a non-U.S. financial institution that is not registered as a swap dealer but coordinates swaps out of offices in the United States should bear the swap reporting obligation relative to a U.S. non-financial end-user.

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[36] *See* 2017 SDR Comments at 3; 2014 SDR Comments at 2-4, 5-6 (answer to Q1).

[37] *See* 2017 SDR Comments at 3; 2014 SDR Comments at 8-9 (answer to Q8).

[38] *See* 2017 SDR Comments at 3; 2014 SDR Comments at 2-5.

2. Ownership and Control Reporting.

The Working Group supports the reporting relief for ownership and control reporting ("**OCR**") that the Division of Market Oversight provided in a recent no-action letter.[39] The CFTC should engage in another rulemaking with respect to its OCR requirements to consider, among other things, making permanent much of the relief provided under the no-action letter, particularly for CFTC Form 40 and CFTC Form 40S.

The Working Group recently submitted comments to the CFTC in another proceeding that addressed the unnecessary burdens borne by commercial energy firms under the OCR requirements ("**OCR Comments**"). The Working Group adopts by reference the OCR Comments, which also are provided as Attachment D,[40] and requests the Commission to review them and adopt the recommendations set forth therein, namely:

- Question Nos. 12, 14, 17, 18, and 19 on new Form 40/40S should be eliminated, as they lack clarity on the specific information being requested by such questions and have little regulatory value to the CFTC;

- The Commission should revert to the Legacy Form 40 as the Working Group believes it was sufficient for the CFTC's oversight function and less costly to commercial energy firms; and

- If the Commission retains new Forms 40/40S and 102, the Commission should clarify that only one representative from a large trader, such as a desk head or manager, may be identified as a "natural person controller."

3. Recordkeeping.

The Working Group appreciates the Commission's continued efforts to reduce commercial end-users' recordkeeping burdens.[41] In the 1.31 Final Rule, the Commission determined to apply the Final Rule's relief to both existing and future records. However, because the 1.35 Final Rule did not make the same clarification, the Working Group requests that the Commission confirm that the relief provided in the 1.35 Final Rule similarly applied to records in existence at the time of the 1.35 Final Rule's effective date

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[39] CFTC Letter No. 17-45, *Conditional Time-Limited No-Action Relief from Filing Certain Ownership and Control Reports (OCR) Required by Parts 17, 18 and 20 of the Commission's Regulations.* (Sep. 25, 2017).

[40] *See* Commercial Energy Working Group, *Comments on the CFTC's Notice, Agency Information Collection Activities: Notice of Intent to Renew Collection 3038-0103, Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 (Trader and Account Identification Reports),* OMB Control No. 3038-0103 (May 8, 2017).

[41] *See Recordkeeping*, Final Rule, 82 Fed. Reg. 24,479 (May 30, 2017) ("**1.31 Final Rule**"); *Records of Commodity Interest and Related Cash or Forward Transactions*, Final Rule, 80 Fed. Reg. 80,247 (Dec. 24, 2015) ("**1.35 Final Rule**").

(*i.e.*, December 24, 2015), such that pre-execution records (*i.e.*, emails and instant messages) that were being kept prior to December 24, 2015, may be purged. As described below, keeping records pursuant to several varying record retention standards under the CFTC's regulations is overly burdensome and, in this case, is unnecessary as indicated by the CFTC's elimination of the requirement for Unregistered Members to keep pre-execution records under CFTC regulation 1.35 after December 24, 2015.

The CFTC's regulations include several recordkeeping standards, which vary based on different factors, such as a market participant's regulatory entity status (*e.g.*, swap dealer or end-user), transaction type (*e.g.*, futures, swap, or cash transaction), or record medium (*e.g.*, oral communication or email). For example, commercial end-users could be subject to the following recordkeeping requirements:

- General recordkeeping under CFTC regulation 1.31;
- Swaps recordkeeping under Parts 20, 43, 45, and 46 of the CFTC's regulations;
- Futures (and related cash commodity transactions) recordkeeping under Parts 18 and 150 of the CFTC's regulations; and
- Recordkeeping of commodity interests and related cash and forward transactions under CFTC regulation 1.35.

Complying with several varying recordkeeping standards is overly burdensome and contrary to the Commission's objectives under Project KISS. Thus, the CFTC should streamline and harmonize the recordkeeping standards (*e.g.*, the retention periods, retrievability and production, and form and manner, for swaps, futures, and cash transactions) applicable to end-users by providing end-users with a single, workable standard for all recordkeeping with guidance on the specific documents the CFTC ordinarily would expect end-users to keep. In this regard, the CFTC should (i) subject all required records, including swaps, to a five-year retention period from the record's creation date rather than its termination date, which will allow a more scheduled and workable process for deleting data after the applicable retention period ends, and (ii) clarify emails and instant messages with swap transaction terms do not need to be kept under Part 45 if they are followed by a final written transaction record (*e.g.*, confirmation), as the CFTC clarified under the 1.35 Final Rule for Unregistered Members.

4. Documentation of Book-Out Agreements.

In the CFTC's final rule further defining the term "swap" ("**Final Swap Rule**"),[42] the Commission confirmed that the safe harbor provided under the Brent Interpretation

[42] *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps ; Security-Based Swap Recordkeeping*, Final Rule, 77 Fed. Reg. 48,208 (Aug. 13, 2012).

would allow initial forward contracts to remain excluded forward contracts even if parties to the contract subsequently agreed to book-out or extinguish a party's delivery obligation under the contract.[43] In the case of oral book-out agreements, the Commission requires such to be followed in a commercially reasonable time by a written or electronic confirmation.[44]

Energy markets, including those in wholesale electricity, natural gas, oil and refined products, frequently engage in "net scheduling" or "schedule compressions," where, for operational or scheduling convenience, and often without the knowledge of the counterparties, third-party schedulers or operators will cancel the counterparties' delivery obligations and direct them to a non-contracting party. For example, in a string of trades where Party A sells to Party B, who then sells to Party C, who then sells to Party D, the respective pairs of parties will settle their trades resulting in delivery from Party A to Party D.

Because this type of compression occurs frequently and at a rapid pace in energy markets, creating a written or electronic confirmation for every contract that is net scheduled or compressed is very burdensome and inefficient. The Working Group believes that the important distinction under the Brent safe harbor should be the existence of a subsequent, separately negotiated agreement to effectuate a book-out, regardless if it is in writing or conducted orally. Accordingly, the Working Group requests that the Commission clarify that contracts that are booked-out orally or net scheduled will qualify for the forward contract exclusion under the Brent safe harbor even if the oral book-outs are not memorialized in a written or electronic confirmation.

E. Clearing and Executing.

In response to the CFTC's request for comment on swap clearing requirement submissions by various derivatives clearing organizations ("**DCOs**"), the Working Group submitted comments on certain energy-related swaps submissions[45] and incorporates them herein by reference. Members of the Working Group are active participants in the cleared swaps and futures markets, including markets administered by the DCOs that made Energy-Related Swap Submissions. As active participants in these markets, the Working Group supports liquid and robust markets. However, given the swaps listed in the Energy-Related Swap Submissions do not have sufficient liquidity to support mandatory clearing, a mandatory clearing determination with respect to the Energy-Related Swap Submissions

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43 Final Swap Rule at 48228-29.

44 Final Swap Rule at 48,230.

45 The "**Energy-Related Swap Submissions**" include: (i) CME 8-1-12 Commodity Index Submission; (ii) 11-6-13 CME Energy Submission; (iii) SGX-DC 2-28-14 Coal Swaps Submission; (iv) SGX-DC 2-28-14 Freight Submission; (v) SGX-DC 5-26-14 Coal Swap Submission; (vi) SGX-DC 9-23-14 Petrochemical Swaps Submission; (vii) SGX-DC 2-7-15 Oil Swap Submission; (viii) SGX-DC 8-3-15 Freight Swap Submission; and (ix) SGX-DC 10-1-15 Liquefied Natural Gas Submission.

will harm liquidity in such cleared swaps markets and related over-the-counter markets. Further, a mandatory clearing determination for the swaps listed in the Energy-Related Swap Submissions would not benefit the Commission's efforts in mitigating systemic risk. Therefore, the Working Group recommends that the Commission refrain from issuing a mandatory clearing determination for any of the swaps listed in the Energy-Related Swap Submissions.

III. CONCLUSION.

The Working Group requests that the Commission consider the comments set forth herein. The Working Group expressly reserves the right to supplement these comments as deemed necessary and appropriate.

Please contact the undersigned with questions.

Respectfully submitted,

/s/ David T. McIndoe
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ATTACHMENT A

2014 SDR COMMENTS

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May 27, 2014

Ms. Melissa Jurgens
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Commodity Futures Trading Commission
Three Lafayette Centre
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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.

[9/30/17 – Q4 and Working Group answer to Q4 omitted as no longer relevant **]**

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 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.[7] 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.[8] For 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?

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[7] 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.

[8] 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 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.

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 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.[9] 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 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.[10] 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.

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[9] 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.

[10] *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.

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.

[9/30/17 – Q20 and Working Group answer to Q20 omitted as no longer relevant **]**

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 no-action relief, and one condition, "Condition 6,"[11] 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.

[11] 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.

The Working Group incorporates by reference herein its letter submitted on May 10, 2013.[12] 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[13] 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 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

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

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

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").[14] 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.

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

[14] 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."

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.[15] SDRs may not

[15] *See* CFTC regulation 49.16(a)(1).

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
The Commercial Energy Working Group

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"):[16] (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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[16] *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[17] and No-Action Letter No. 13-08 ("NAL 13-08").[18]

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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[17] *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").

[18] *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.[19]

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.[20] 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.[21] 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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[19] *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.

[20] 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).

[21] 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.[22] 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.[23] 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.[24] 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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[22] 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 . . . .").

[23] *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).

[24] *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,[25] 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

David T. McIndoe
Meghan R. Gruebner

Counsel for The Commercial Energy Working Group

[25] 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

ATTACHMENT B

2016 SDR COMMENTS

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DAVID T. MCINDOE
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March 7, 2016

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
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Washington, D.C. 20581

VIA ELECTRONIC MAIL

Re: Draft Technical Specifications for Certain Swap Data Elements – A Request for Comment by Staff of the U.S. Commodity Futures Trading Commission

Dear Secretary Kirkpatrick:

I. INTRODUCTION.

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Sutherland Asbill & Brennan LLP submits this comment letter in response to the December 22, 2015 request for comment by staff of the Commodity Futures Trading Commission (the "**CFTC**" or "**Commission**") on draft technical specifications for certain swap data elements under Part 45 of the CFTC's regulations ("**Request for Comment**").[1] The Working Group appreciates Commission staff's consideration of the comments set forth 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.

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[1] *See Draft Technical Specifications for Certain Swap Data Elements,* A Request for Comment by Staff of the U.S. Commodity Futures Trading Commission (Dec. 22, 2015), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/specificationsswapdata122215.pdf.

II. DISCUSSION.

A. General Concerns with Swap Data Reporting Requirements.

Over the past several years, the Working Group has been actively involved with the Commission and staff in the Division of Market Oversight 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. However, the swap data reporting requirements have imposed significant challenges on market participants, including commercial end-users, requiring them to implement new data capture systems and business practices for their commodities and derivatives trading. The Working Group supports the Commission's continued efforts to address swap data reporting issues but believes the draft technical specifications only raise further questions and concerns.

As an initial matter, the Working Group believes the Commission should focus its efforts on addressing issues presented under its current regulations before it attempts to expand the scope of the swap data reporting requirements. Currently, due to the lack of standardization among the swap data repositories ("**SDRs**"), (i) market participants face technical and operational difficulties in complying with multiple SDR protocols and requirements,[2] and (ii) the CFTC is unable to utilize and assess the SDR data in any meaningful way.[3] There is "considerable variation" in the data reported to SDRs by market participants as well as the data transmitted to the CFTC by the SDRs.[4] In this regard, the Commission should ensure existing swap data fields and requirements across SDRs are standardized before the CFTC increases the amount of detail submitted to an SDR.[5] Equally as important, before expanding existing SDR

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[2] In a comment letter responding to the CFTC's 2014 Request for Comment on SDR reporting requirements, the Working Group provides several examples of the differences in SDR protocols, requirements, and processes. *See* The Commercial Energy Working Group, Comment Letter regarding the Review of Swap Data Recordkeeping and Reporting Requirements, RIN 3038-AE12 (May 27, 2014) ("**May 27 Comment Letter**"). The Working Group also notes that the technical and operational difficulties in swaps and derivatives reporting are magnified for global companies required to comply with multiple data reporting regimes across various jurisdictions.

[3] *See* Statement of Commissioner Bowen before the Technology Advisory Committee Meeting (Feb. 23, 2016), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/bowenstatement022316 (indicating that the CFTC's Dodd-Frank regulatory regime is incomplete until key data is standardized and easily usable for analytics and surveillance); Opening Statement of Commissioner J. Christopher Giancarlo before the CFTC Technology Advisory Committee Meeting (Feb. 23, 2016), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement022316 (stating SDRs still cannot provide accurate visibility into the global swaps counterparty exposure that the Dodd-Frank Act promised to provide); *see also* Swap Dealer *De Minimis* Exception Preliminary Report (Nov. 18, 2015); May 27 Comment Letter.

[4] *See* Opening Statement of Chairman Timothy Massad before the CFTC Technology Advisory Committee Meeting (Feb. 23, 2016), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement022316 ("Currently there is considerable variation in how different participants report the same fields to SDRs, and in how the SDRs themselves transmit information to the CFTC."); Opening Statement of Commissioner J. Christopher Giancarlo before the CFTC Technology Advisory Committee Meeting, *supra* n.3.

[5] In a speech at a Treasury Department conference, CFTC Chairman Massad admitted that the CFTC must do more to standardize swap data reporting. *See* Andrew Ackerman, *CFTC Head Timothy Massad Says Swap Industry Shares Blame for Lack of Clear Data*, THE WALL STREET JOURNAL, Feb. 5, 2016 ("We didn't really think

data fields and requirements, the Commission also should ensure that it is able to receive data from the SDRs in a harmonized manner so that the data can be analyzed efficiently.[6]

The Working Group recognizes that some of the draft technical specifications revise certain existing data fields in an attempt to improve their usefulness. However, most of the draft technical specifications relate to a new, expanded set of swap data elements that are either unworkable or unnecessary to the Commission's oversight function or the Dodd-Frank goals of transparency and price discovery in swaps markets. Consequently, the adoption of these new data elements will impede the resolution of existing SDR issues and simply increase trade capture and processing costs for commercial end-users without producing any real benefit. If the Commission established uniformity in existing SDR processes, requirements, and data elements, it would address many technical implementation issues that market participants have faced under the SDR reporting requirements. At that time, market participants would be better equipped to assess and comply with any new swap data elements or requirements.

Accordingly, the Working Group recommends that the Commission focus on improving swap data quality, including by standardizing and harmonizing swap data element and standards across the SDRs and global repositories, and refrain from adopting any new swap data elements or reporting requirements until the existing SDR reporting requirements and data elements are standardized.[7] If the Commission declines to adopt this recommendation and proceeds in adopting new data elements, it must (i) evaluate the costs to market participants in modifying existing, or adopting new, data capture systems and processes, business practices, and compliance measures to implement the new data elements and (ii) determine whether the proposed data elements are necessary in light of the related costs of reporting the data elements.[8]

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we had to tell you exactly how to spell it, and how to do it, but I guess we do."); *see also* Statement of Commissioner Bowen before the Technology Advisory Committee Meeting, *supra* n.3 (stating that the CFTC's rules cannot work without accurate data, which requires robust, widely-accepted data standards, and the need to improve data accuracy still remains).

[6] *See* Remarks of Chairman Timothy Massad before the 2016 P.R.I.M.E. Finance Annual Conference (Jan. 25, 2016), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-38 ("[T]here is more to do. Creating a system to collect and effectively use data is a significant project. Currently, for example, there is considerable variation in how different participants report the same fields to [SDRs], and in how the SDRs themselves transmit information to the CFTC.").

[7] This recommendation was supported by participants at the February 23, 2016 Technology Advisory Committee ("**TAC**") meeting and witnesses at the February 25, 2016 Public Hearing convened by the Subcommittee on Commodity Exchanges, Energy, and Credit, House. In fact, participants suggested a working group of CFTC staff, SDRs, and market participants be formed to address swap data reporting issues and the standardization of swap data being reported in the United States and abroad. *See* Webcast of the CFTC's TAC Meeting Rescheduled for February 23, 2016, Panel II: Swap Data Standardization and Harmonization (Feb. 23, 2016), *available at* https://www.youtube.com/watch?v=qTu-FIPCtcw&feature=youtu.be; Webcast of the Subcommittee on Commodity Exchanges, Energy, and Credit Public Hearing, House Committee on Agriculture (Feb. 25, 2016), *available at* https://www.youtube.com/watch?v=Bfq-H_M42nc.

[8] *See* Opening Statement of Commissioner J. Christopher Giancarlo before the CFTC Technology Advisory Committee Meeting, *supra* n.3 (noting that the CFTC must be cognizant of the burdens place on market participants, especially end-users, when requesting more data); *see also* Testimony of J. Rogers, Director of the CFTC Office of

For example, even though margin requirements exist under the CFTC's margin rules,[9] the new proposed data elements related to margin and collateral would require new compliance measures extending beyond simply reporting the new data element, including resolving valuation disputes.

Additionally, after CFTC staff determines how best to standardize the systems, requirements, and data elements among SDRs with respect to interest rate ("**IRS**"), credit default ("**CDS**"), and foreign exchange ("**FX**") swaps,[10] it should propose any new requirements and data elements for commodity swaps pursuant to a separate request for comment followed by a proposed rulemaking that includes a full cost-benefit analysis rather than simply adopting and broadly applying the requirements and data elements that work best for IRS, CDS, and FX swaps to all swap asset classes, including commodity swaps. Commodity swaps are distinctly different and can be more complex than IRS, CDS, and FX swaps, which makes the reporting of them uniquely challenging. Further, commercial firms engaged in the core business of providing physical commodities to end-users do not have enhanced systems and large numbers of staff dedicated to reporting swap data. In this regard, if the Commission determines to adopt new data elements for commodity swaps, commercial firms must be given a substantial amount of time to modify their trade capture systems and business processes to meet the new requirements.

B. Specific Concerns with the Proposed Swap Data Technical Specifications.

If the Commission proceeds in adopting the draft technical specifications provided in the Request for Comment without first addressing current swap data reporting issues, the Working Group requests that the Commission consider the following specific comments on the proposed data element technical specifications.

1. Counterparty-Related Data Elements.

i. Counterparty Dealing Activity Exclusion Type.

In the Request for Comment, Commission staff proposes draft technical specifications for a new swap data element designed to allow the CFTC to identify swap dealing transactions (*i.e.*, "Counterparty Dealing Activity Exclusion Type"). The Working Group recognizes the CFTC's collection of such information facilitates its assessment of the current swap dealer ("**SD**") *de minimis* threshold, but finds this new swap data element problematic. Specifically, the data element constructs a reporting requirement that is not congruent with the definition of "swap dealer" in the Commodity Exchange Act ("**CEA**") and the CFTC's regulations. Indeed, the

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Data and Technology, Public Hearing, House Agriculture Subcommittee on Commodity Exchanges, Energy, and Credit, House Committee on Agriculture, at 4 (Feb. 25, 2016) (stating that the Commission intends to eliminate reporting obligations that are not necessary), *available at* http://agriculture.house.gov/uploadedfiles/rogers_testimony.pdf.

[9] *See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, Final Rule, 81 Fed. Reg. 636 (Jan. 6, 2016).

[10] Notably, the Request for Comment focuses primarily on IRS, CDS, and FX swaps. *See* Request for Comment at 7.

proposed data element appears to assume that each swap transaction is a "dealing" swap, which is not the case in commodity swaps markets. In the same vein, the draft technical specifications fail to include an allowable reporting value for a "trading" swap.[11] If the Commission determines to adopt this new data element, it cannot assume every swap transacted in the commodity swaps market is a dealing swap and ought to expand the allowable values for this data element to include an exclusion for a trading swap. The Working Group submits that the Commission may collect this information in a less burdensome manner by striking this proposed data element and instead require reporting counterparties to submit this information to the CFTC on an annual basis as the CFTC has not explained why it would need this information on a real-time transactional basis.

ii. Special Entity/Utility Special Entity Indicator.

The Working Group submits that the new swap data element for "Special Entity/Utility Special Entity Indicator" is problematic and will prove to be unnecessarily costly. Specifically, if a reporting counterparty must accurately identify and report to an SDR its special entity and utility special entity counterparties, the reporting counterparty must require from the special entity/utility special entity counterparties a representation that they are indeed special entities/utility special entities and verify the accuracy of such representation. This verification process will significantly increase compliance costs for both counterparties. Additionally, based on the experience of Working Group members, interpretational issues on a counterparty's regulatory status often arise and lead to minor disagreements, which become more material if a counterparty must report the other counterparty's entity status.

Accordingly, the Working Group recommends that the Commission consider whether there is a less burdensome manner in collecting this information, for example, through the Legal Entity Identifier ("**LEI**") registration process. If the Commission determines to adopt this new data element, the Working Group requests that the Commission confirm that the guidance provided in the utility special entity final rule extends to a reporting counterparty in the context of SDR reporting. That is, a reporting counterparty reasonably may rely upon the representation from its special entity/utility special entity counterparty that it is a special entity/utility special entity for purposes of reporting this information to an SDR.[12]

iii. Ultimate Parent and Ultimate Guarantor.

CFTC staff states in the Request for Comment that the data elements for "Ultimate Parent" and "Ultimate Guarantor" will help staff (i) identify entities involved or impacted by a swap transaction, (ii) identify inter-affiliate swaps, and (iii) properly aggregate volume measures

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[11] *See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant,"* Joint Final Rule, 77 Fed. Reg. 30,596 (May 23, 2012) (providing distinction between "swap dealing" and "trading").

[12] *See Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities*, Final Rule, 79 Fed. Reg. 57,767, at 57,776 (Sept. 26, 2014).

across counterparties.[13] The Working Group submits that the Commission currently may collect this type of affiliate information through other regulatory vehicles, such as ownership and control reports ("**OCR**").[14] In other words, collecting this type of data in the SDR reports is duplicative and provides no additional benefit to the Commission. Accordingly, the Working Group recommends that, before the Commission expands existing SDR data fields, the Commission assess whether this type of information is currently available to the Commission through other regulatory frameworks (*e.g.*, through OCR) or could be collected in a less burdensome manner, such as through the LEI registration process.

If the Commission determines to expand the existing data fields to include the proposed "Ultimate Guarantor" data element, the Working Group recommends that the Commission confirm that a guarantee of a swap should ***not*** be reported as a separate swap, as a simple identification of the guarantee should be sufficient for the Commission's oversight function.[15] Importantly, in the CFTC's final rule further defining the term "swap," the Commission stated it would issue a separate release dealing with the practical implications of treating guarantees as swaps, including the reporting of them, and indicated that the reporting of a related guaranteed swap could satisfy the requirements applicable to the guarantee. Further, the Working Group notes that the application of a single "Ultimate Guarantor" data element as proposed is impracticable where a particular swap has a complicated structure and is guaranteed by multiple guarantors or one guarantee covers multiple things.

iv. Counterparty Financial Entity Data Indicator.

The Working Group understands that the data element for "Counterparty Financial Entity Data Indicator" is a data field currently reported to SDRs. However, the Working Group submits that the Commission can collect this information through a less burdensome manner. That is, similar to the data elements for Special Entity/Utility Special Entity Indicator, Ultimate Parent, and Ultimate Guarantor, the Working Group recommends that the Commission should collect this data through the LEI registration process.

2. Price.

The Working Group recognizes that the draft technical specifications primarily focus on IRS, CDS, and FX swaps. However, if the Commission determines to apply these data elements

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[13] *See* Request for Comment at 10.

[14] *See Ownership and Control Reports, Forms 102/102S, 40/40S, and 71*, Final Rule, 78 Fed. Reg. 69,178 (Nov. 18, 2013).

[15] *See Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, Final Rule, 77 Fed. Reg. 48,208, at n.189 (Aug. 13, 2012) ("Briefly, in the separate CFTC release the CFTC anticipates proposing reporting requirements with respect to guarantees of swaps under Parts 43 and 45 of the CFTC's regulations and explaining the extent to which the duties and obligations of swap dealers and major swap participants pertaining to guarantees of swaps, as an integral part of swaps, are already satisfied to the extent such obligations are satisfied with respect to the related guaranteed swaps.").

set forth in the Request for Comment to commodity swaps, the Working Group recommends that the data element for "par spread" be modified to "spread," as "par spread" is not appropriate in the context of commodity swaps.

3. Notional Amount.

The data elements for "notional amount" and "notional currency" would be new data elements for commodity swaps reporting. It is unclear whether the CFTC intends to adopt these proposed data elements for commodity swaps given the draft technical specifications focus primarily on IRS, CDS, and FX swaps. However, the Working Group recognizes the importance of data on the notional amounts of swaps in each asset class, for instance, for purposes of determining whether the current SD *de minimis* threshold is appropriate. Because commodity swaps often are denominated in commodity units rather than currency amounts, the Working Group recommends that allowable values for the notional amount data element include the number of commodity units and the type of commodity units (*e.g.*, barrels or metric tons). Further, the Working Group submits that the "notional currency" data element should not be adopted for commodity swaps, as it is inapplicable in this context.

4. Additional Fixed Payments.

Many commodity swaps include complicated fee structures, which often have components that are immaterial to the terms of the swap and do not align with the reporting of the data element for "Additional Fixed Payments." For example, a counterparty could be required to pay one fee that would apply to the novations of ten different swaps. The data element for Additional Fixed Payments would appear to require the reporting counterparty to calculate the fee per swap for purposes of reporting this data element. Such a process would only increase compliance burdens and costs for the reporting counterparty. In this light, the Working Group recommends that the Commission confirm that the data element for Additional Fixed Payments does not include service fees or miscellaneous fees that are not included in a confirmation and any fees the reporting counterparty deems to be immaterial to the terms of the swap.

5. Options.

i. Option Style.

The Working Group submits that "Asian" should be added to the list of allowable values for the data element "Option Style."

ii. Embedded Option Indicator.

The Working Group submits that the data element for "Embedded Option Indicator" is unnecessary for the Commission's oversight function or for price discovery and transparency in swaps markets. Additionally, the description for such data element is unduly vague. The Working Group submits that the reporting of whether the transaction is or is not an option should be sufficient for purposes of providing transparency and price discovery to the swaps markets and aiding the Commission's regulatory obligations. Accordingly, the Working Group

recommends that the proposed data element for "Embedded Option Indicator" should not be adopted and used to expand the existing data fields for SDR reporting. Even if the Commission were to adopt such a swap data element, it should be explicitly limited to options embedded in host transactions that are themselves reportable (*e.g.*, not in forward transactions for physical delivery).

6. Clearing.

The Working Group submits that, if a non-financial end-user avails itself of the end-user clearing exemption and annually reports to an SDR the relevant criteria required under the end-user exception, the reporting counterparty will not possess the specific information needed for the data element "Clearing Exemption Type." However, given the Commission may obtain this information through an end-user's annual filing to the SDRs, collecting this type of data in the SDR reports is duplicative and provides no additional benefit to the Commission. If a reporting counterparty were required to report this data element, the benefits provided to end-users by the annual end-user exception filing would be significantly reduced. Accordingly, the Working Group recommends that the Commission decline to adopt this data element in its SDR reporting requirements.

7. Periodic Reporting.

i. Reconciliation.

a. Part 43/45/46.

The Working Group questions the regulatory value of the proposed swap data element for "Part 43/45/46," wherein a reporting counterparty would be required to identify under which part of the CFTC's regulations swap data is being reported. Significantly, under the final rule adopting the Part 45 SDR reporting requirements, the Commission stated that it was permitting reporting counterparties to comply with the regulatory data reporting requirements of Part 45 and the real time reporting requirements of Part 43 by submitting a single report, as this allowance would reduce reporting burdens while still fulfilling the objectives of the Dodd-Frank Act.[16] In this regard, the Commission aligned the reporting deadlines under Part 45 with the public dissemination delays provided in Part 43 to achieve this goal.[17] Market participants using certain SDRs, such as ICE Trade Vault and DTCC Global Trade Repository, indeed are able to submit their swap data for purposes of Parts 43 and 45 in one trade report. To require reporting counterparties to identify which part of the CFTC's regulations would be burdensome on reporting counterparties and undo the benefit the Commission sought to achieve under the Regulatory Reporting Final Rule. Accordingly, the Working Group recommends that the Commission determine not to adopt this proposed data element in its SDR reporting requirements. If the Commission instead determines to collect this data element in SDR reports,

[16] *See Swap Data Recordkeeping and Reporting Requirements*, Final Rule, 77 Fed. Reg. 2136, at 2150 (Jan. 13, 2012) ("**Regulatory Reporting Final Rule**").

[17] *See id.*

Commission staff should identify the benefit it derives under this data element and require the SDRs to populate this data field automatically if the reporting counterparty submits one trade report.

b. Data Accuracy Confirmation by Counterparty.

The Working Group submits that the data element "Data Accuracy Confirmation by Counterparty" will prove costly for end-users, as each reporting counterparty will be required to confirm with the non-reporting counterparty whether they actively affirmed, disputed, or failed to affirm SDR swap data reports. Given counterparties do not otherwise ascertain whether their counterparties have confirmed the data provided in SDR reports in the normal course of business, reporting counterparties would become obligated to send letters to all their counterparties or take other affirmative steps in an attempt to acquire the necessary information to report this data element. These efforts would prove to be extremely costly and provide little benefit, given market participants generally confirm their swap transactions and report any errors or omissions discovered in the SDR reports. Accordingly, the Working Group recommends that the Commission not adopt this data element in its SDR reporting requirements and instead require the SDRs to populate this data element, as they will have the necessary information in their records pursuant to CFTC Regulation 49.11.

c. Date and Time of Last Open Swaps Reconciliation with CP/SDR.

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. Accordingly, the Working Group recommends that the Commission not adopt the data fields for "Date and Time of Last Open Swaps Reconciliation with CP and SDR" or specifically exempt end-user reporting counterparties from reporting such data elements. With respect to reconciliation with the SDR, the Commission could require the SDRs to populate this data element, as the SDRs would have the relevant information needed to fulfill this data point.

8. Collateral/Margin.

As a general matter, the proposed data elements related to margining and collateral will increase the compliance burdens and costs associated with SDR reporting for market participants as such data elements require information that is nuanced, legal in nature, and subject to interpretation. The calculation of net margin involves some judgments about the effectiveness of netting, which often entail legal conclusions. SDR reporting could be complicated by issues related to netting, including whether there are (a) swaps of various asset classes (*e.g.*, interest rates and commodity swaps) and (b) non-swap trades (*e.g.*, repurchase transactions and security lending trades). Further, parties would be required to create, trade match, and identify which

trades might be netted. The proposed data elements related to margining and collateral seem to require affirmation by the counterparties regarding such legal and numerical determinations.

Moreover the value of margin collateral, except where a counterparty is using cash as collateral, could be subject to dispute and miscalculation. These proposed swap data elements effectively would drive other compliance measure related to collateral management that extend beyond reporting.

The Working Group fails to understand the benefit in collecting this type of information and believes it will add no value to the Commission's oversight function or transparency in swaps markets. Rather, it will serve only to increase a market participant's compliance costs. Accordingly, the Working Group recommends that the Commission not adopt these data elements associated with collateral and margin.

If the Commission wishes to receive information related to collateral and margin, the Working Group recommends that such information be collected quarterly or annually through a process independent of Parts 43 and 45 reporting, and that non-financial end-users be relieved of any such reporting responsibility given only SDs, MSPs, and financial end-users are required to collect or post initial margin and collateral under the CFTC's margin rules. In this regard, collecting these data elements from non-financial end-users provides no benefit to the CFTC's regulatory oversight function.

9. Events.

The proposed data element "Event Type" includes several allowable values that are vague and need further clarification. For example, the Commission should clarify the difference between (i) "TERMINATION" and "TERMINATION/VOID" and (ii) "ERROR/CORRECTION_EVENT" and "ERROR/CANCEL_EVENT." Further, the Working Group fails to understand why an allowable value for "Event Type" would include "OPTION/EXERCISE." A life cycle event is an event that would result in a change to a primary economic terms ("**PET**") data. However, the exercise of an option is contemplated in the original PET data field submitted, and thus, should not be reported as a life cycle event. Accordingly, the Working Group recommends that the Commission provide more clarity on the allowable values for the data element "Event Type" and eliminate the allowable field for "OPTION/EXERCISE."

Moreover, other allowable values for the data element "Event Types" include information that is reported in original PET data, such as the maturity date. The Working Group submits that the Commission receives no additional benefit in receiving an explicit message report stating the swap has matured when the information previously has been reported. This requirement only unnecessarily burdens reporting counterparties. Accordingly, unless a life cycle event message modifies a particular PET term, such as the maturity date, the Working Group recommends that there be no requirement to report such.

III. CONCLUSION.

The Working Group appreciates the opportunity to provide the comments set forth herein and requests the Commission's consideration of them. Please contact the undersigned with any questions.

Respectfully submitted,

/s/ David T. McIndoe
David T. McIndoe
Meghan R. Gruebner

Counsel for The Commercial Energy Working Group

ATTACHMENT C

2017 SDR COMMENTS

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August 21, 2017

VIA ELECTRONIC SUBMISSION

Christopher Kirkpatrick
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RE: CFTC Letter 17-33, Division of Market Oversight Review of Swap Reporting Rules in Parts 43, 45, and 49 of Commission Regulations

Dear Secretary Kirkpatrick:

I. INTRODUCTION.

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Eversheds Sutherland (US) LLP hereby submits this comment letter in response to the Commodity Futures Trading Commission (the "**CFTC**" or "**Commission**") Letter 17-33, announcing the CFTC Division of Market Oversight's ("**DMO**") review of swap data reporting requirements under Parts 43, 45, and 49 of the CFTC's regulations, releasing DMO's "Roadmap to Achieve High Quality Swaps Data" ("**Roadmap**"), and soliciting public comment to aid such review.[1]

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 producers, processors, merchandisers, and owners of energy commodities. Among the members of the Working Group are some of the largest users of energy derivatives in the United States and globally. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

[1] CFTC Letter 17-33, *Division of Market Oversight Announces Review of Swap Reporting Rules in Parts 43, 45, and 49 of Commission Regulations* (July 10, 2017) ("**Request for Comment**").

As participants in the swaps markets, the Working Group supports DMO's efforts to streamline the swap reporting requirements while ensuring the quality of the reported data and appreciates this opportunity to provide comments.

II. COMMENTS.

The Working Group has been actively engaged with the CFTC over the past several years to ensure swap data reporting requirements meet the two identified goals presented in the Request for Comment: (a) to ensure that the CFTC receives accurate, complete, and high quality data on swaps transactions for its regulatory oversight role; and (b) to streamline reporting, reduce messages that must be reported, and right-size the number of data elements that are reported to meet the agency's priority use-cases for swaps data.[2] For example, in March 2014 and December 2015, in an attempt to resolve reporting challenges and reduce burdens on market participants, the CFTC requested public comments on its swap data reporting regulations as well as its draft technical specifications for swap data elements.[3] In response to these requests, the Working Group submitted comments and offered several recommendations to simplify the CFTC's swap data reporting requirements and reduce burdens on market participants.[4]

Because the Request for Comment and Roadmap highlight the same issues addressed by the Working Group in its Comments, the Working Group incorporates by reference such Comments (and provides them as Attachments A and B appended hereto) rather than repeating herein every recommendation provided in the Comments. However, the Working Group reiterates below some of the key recommendations from the Comments separated by their responsiveness to the Roadmap's tranches, and provides citations to particular portions of the Comments that address such recommendations more thoroughly:

Tranche 1

- The CFTC should require standardization of swap data fields and requirements across all swap data repositories ("**SDRs**").[5] Variation in the required swap data fields among SDRs may be reflected in the information an SDR publicly disseminates and may create a preference in a market participant's selection of an SDR. In other words, variation in the SDR requirements could produce

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2 *See* Request for Comment at 1.

3 *See Review of Swap Data Recordkeeping and Reporting Requirements*, Request for Comment, 79 Fed. Reg. 16,689 (Mar. 26, 2014); *Draft Technical Specifications for Certain Swap Data Elements*, A Request for Comment by Staff of the U.S. Commodity Futures Trading Commission (Dec. 22, 2015), http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/specificationsswapdata122215.pdf.

4 *See* Commercial Energy Working Group, *Comments Re: Review of Swap Data Recordkeeping and Reporting Requirements*, RIN 3038-AE12 (May 27, 2014) ("**2014 Comments**"); Commercial Energy Working Group, *Comments Re: Draft Technical Specifications for Certain Swap Data Elements – A Request for Comment by Staff of the U.S. Commodity Futures Trading Commission* (Feb. 22, 2016) ("**2016 Comments**," and together with the 2014 Comments, "**Comments**").

5 *See* 2016 Comments at 2-4; *see also* 2014 Comments at 2-4.

commercial advantages for both the SDR that has less onerous requirements and the reporting entities that have aligned their systems and practices with such SDR. Standardization of the data fields and requirements across all SDRs will eliminate such unnecessary commercial advantages.

- In standardizing the data fields and requirements of the SDRs, the Commission should ensure that the data fields publicly disseminated by the SDRs are the same and reflect only those data fields specified in Part 43. Any optional data fields or additional data fields required by Part 45 of the Commission's regulations should not be disseminated in real-time by the SDRs, as such information serves little market value and might be harmful to the counterparties.
- The Commission should not require periodic reconciliation between SDR data sets and data held by a reporting counterparty.[6] If the Commission does adopt such reconciliation, it should require the reconciliation of only position data (not a full audit trail of swap data).

Tranche 2

- The Working Group generally supports the CFTC's efforts to harmonize the SDR data fields with foreign regulators' requirements but does not believe the CFTC should expand the current list of data fields to align with any foreign regulatory requirements, including expanding the list of data fields to cover margin movements.
- Inter-affiliate swaps, which represent intra-corporate allocations of risk, should be entirely exempt from SDR reporting requirements under Part 45 of the CFTC's regulations.[7]
- The CFTC should more appropriately narrow the primary economic terms ("**PET**") data and provide more clarification on what information is required by particular PET data fields.[8]
- The CFTC should eliminate confirmation reporting since PET data is reported.[9]
- The CFTC should eliminate an end-user's requirement to report valuation data for uncleared swaps and instead apply the daily mark from any designated contract market, swap execution facility, derivatives clearing organization, or other public pricing source, as available.[10]

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6 *See* 2014 Comments at 9-10 (answer to Q11).

7 *See* 2014 Comments at 13-14 (answer to Q24).

8 *See* 2016 Comments; *see also* 2014 Comments at 14-15 (answer to Q28).

9 *See* 2014 Comments at 2-4, 5-6 (answer to Q1).

10 *See* 2014 Comments at 8-9 (answer to Q8).

- The CFTC should eliminate reporting requirements for virtual power purchase agreements ("VPPAs"), which financially settle but trade like a physical power purchase agreement. Reporting the quantity and notional value of VPPAs is burdensome, if not impractical, given the quantity is initially unknown and varies on a daily basis where the output is produced by a renewable energy generation resource (*e.g.*, a wind or solar resource) and the energy requirements of the offtaker are not consistent.
- The reporting timeframes for end-user reporting counterparties should revert back to at least 36 hours, if not 48 hours.[11] The reporting timeframes also should be an end-of-day requirement, such that reporting counterparties may report all swaps at the end of the day on the day the 36th or 48th hour from execution occurs.

If the Commission adopts any changes to the swap data reporting requirements, the Working Group recommends that they be applied only to swaps executed after the effective date of the rule change; provided that any changes providing relief from prior regulatory requirements be applied to all swaps even if they were executed before the rule change. To the extent the Commission adopts any rule changes other than those that provide regulatory relief, it should provide market participants sufficient time to implement any necessary operational and technical modifications to come into compliance.

III. CONCLUSION.

The Working Group requests that the Commission consider the comments set forth herein. The Working Group expressly reserves the right to supplement these comments as deemed necessary and appropriate.

Please contact the undersigned with questions.

Respectfully submitted,

/s/ David T. McIndoe
David T. McIndoe
Meghan R. Gruebner

Counsel to The Commercial Energy Working Group

[11] *See* 2014 Comments at 2-5.

ATTACHMENT A

2014 SDR COMMENTS

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May 27, 2014

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

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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

David T. McIndoe
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

ATTACHMENT B

2016 SDR COMMENTS

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March 7, 2016

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
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VIA ELECTRONIC MAIL

Re: Draft Technical Specifications for Certain Swap Data Elements – A Request for Comment by Staff of the U.S. Commodity Futures Trading Commission

Dear Secretary Kirkpatrick:

I. INTRODUCTION.

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Sutherland Asbill & Brennan LLP submits this comment letter in response to the December 22, 2015 request for comment by staff of the Commodity Futures Trading Commission (the "**CFTC**" or "**Commission**") on draft technical specifications for certain swap data elements under Part 45 of the CFTC's regulations ("**Request for Comment**").[1] The Working Group appreciates Commission staff's consideration of the comments set forth 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.

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[1] *See Draft Technical Specifications for Certain Swap Data Elements,* A Request for Comment by Staff of the U.S. Commodity Futures Trading Commission (Dec. 22, 2015), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/specificationsswapdata122215.pdf.

II. DISCUSSION.

A. General Concerns with Swap Data Reporting Requirements.

Over the past several years, the Working Group has been actively involved with the Commission and staff in the Division of Market Oversight 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. However, the swap data reporting requirements have imposed significant challenges on market participants, including commercial end-users, requiring them to implement new data capture systems and business practices for their commodities and derivatives trading. The Working Group supports the Commission's continued efforts to address swap data reporting issues but believes the draft technical specifications only raise further questions and concerns.

As an initial matter, the Working Group believes the Commission should focus its efforts on addressing issues presented under its current regulations before it attempts to expand the scope of the swap data reporting requirements. Currently, due to the lack of standardization among the swap data repositories ("**SDRs**"), (i) market participants face technical and operational difficulties in complying with multiple SDR protocols and requirements,[2] and (ii) the CFTC is unable to utilize and assess the SDR data in any meaningful way.[3] There is "considerable variation" in the data reported to SDRs by market participants as well as the data transmitted to the CFTC by the SDRs.[4] In this regard, the Commission should ensure existing swap data fields and requirements across SDRs are standardized before the CFTC increases the amount of detail submitted to an SDR.[5] Equally as important, before expanding existing SDR

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[2] In a comment letter responding to the CFTC's 2014 Request for Comment on SDR reporting requirements, the Working Group provides several examples of the differences in SDR protocols, requirements, and processes. *See* The Commercial Energy Working Group, Comment Letter regarding the Review of Swap Data Recordkeeping and Reporting Requirements, RIN 3038-AE12 (May 27, 2014) ("**May 27 Comment Letter**"). The Working Group also notes that the technical and operational difficulties in swaps and derivatives reporting are magnified for global companies required to comply with multiple data reporting regimes across various jurisdictions.

[3] *See* Statement of Commissioner Bowen before the Technology Advisory Committee Meeting (Feb. 23, 2016), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/bowenstatement022316 (indicating that the CFTC's Dodd-Frank regulatory regime is incomplete until key data is standardized and easily usable for analytics and surveillance); Opening Statement of Commissioner J. Christopher Giancarlo before the CFTC Technology Advisory Committee Meeting (Feb. 23, 2016), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement022316 (stating SDRs still cannot provide accurate visibility into the global swaps counterparty exposure that the Dodd-Frank Act promised to provide); *see also* Swap Dealer *De Minimis* Exception Preliminary Report (Nov. 18, 2015); May 27 Comment Letter.

[4] *See* Opening Statement of Chairman Timothy Massad before the CFTC Technology Advisory Committee Meeting (Feb. 23, 2016), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement022316 ("Currently there is considerable variation in how different participants report the same fields to SDRs, and in how the SDRs themselves transmit information to the CFTC."); Opening Statement of Commissioner J. Christopher Giancarlo before the CFTC Technology Advisory Committee Meeting, *supra* n.3.

[5] In a speech at a Treasury Department conference, CFTC Chairman Massad admitted that the CFTC must do more to standardize swap data reporting. *See* Andrew Ackerman, *CFTC Head Timothy Massad Says Swap Industry Shares Blame for Lack of Clear Data*, THE WALL STREET JOURNAL, Feb. 5, 2016 ("We didn't really think

data fields and requirements, the Commission also should ensure that it is able to receive data from the SDRs in a harmonized manner so that the data can be analyzed efficiently.[6]

The Working Group recognizes that some of the draft technical specifications revise certain existing data fields in an attempt to improve their usefulness. However, most of the draft technical specifications relate to a new, expanded set of swap data elements that are either unworkable or unnecessary to the Commission's oversight function or the Dodd-Frank goals of transparency and price discovery in swaps markets. Consequently, the adoption of these new data elements will impede the resolution of existing SDR issues and simply increase trade capture and processing costs for commercial end-users without producing any real benefit. If the Commission established uniformity in existing SDR processes, requirements, and data elements, it would address many technical implementation issues that market participants have faced under the SDR reporting requirements. At that time, market participants would be better equipped to assess and comply with any new swap data elements or requirements.

Accordingly, the Working Group recommends that the Commission focus on improving swap data quality, including by standardizing and harmonizing swap data element and standards across the SDRs and global repositories, and refrain from adopting any new swap data elements or reporting requirements until the existing SDR reporting requirements and data elements are standardized.[7] If the Commission declines to adopt this recommendation and proceeds in adopting new data elements, it must (i) evaluate the costs to market participants in modifying existing, or adopting new, data capture systems and processes, business practices, and compliance measures to implement the new data elements and (ii) determine whether the proposed data elements are necessary in light of the related costs of reporting the data elements.[8]

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we had to tell you exactly how to spell it, and how to do it, but I guess we do."); *see also* Statement of Commissioner Bowen before the Technology Advisory Committee Meeting, *supra* n.3 (stating that the CFTC's rules cannot work without accurate data, which requires robust, widely-accepted data standards, and the need to improve data accuracy still remains).

[6] *See* Remarks of Chairman Timothy Massad before the 2016 P.R.I.M.E. Finance Annual Conference (Jan. 25, 2016), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-38 ("[T]here is more to do. Creating a system to collect and effectively use data is a significant project. Currently, for example, there is considerable variation in how different participants report the same fields to [SDRs], and in how the SDRs themselves transmit information to the CFTC.").

[7] This recommendation was supported by participants at the February 23, 2016 Technology Advisory Committee ("**TAC**") meeting and witnesses at the February 25, 2016 Public Hearing convened by the Subcommittee on Commodity Exchanges, Energy, and Credit, House. In fact, participants suggested a working group of CFTC staff, SDRs, and market participants be formed to address swap data reporting issues and the standardization of swap data being reported in the United States and abroad. *See* Webcast of the CFTC's TAC Meeting Rescheduled for February 23, 2016, Panel II: Swap Data Standardization and Harmonization (Feb. 23, 2016), *available at* https://www.youtube.com/watch?v=qTu-FIPCtcw&feature=youtu.be; Webcast of the Subcommittee on Commodity Exchanges, Energy, and Credit Public Hearing, House Committee on Agriculture (Feb. 25, 2016), *available at* https://www.youtube.com/watch?v=Bfq-H_M42nc.

[8] *See* Opening Statement of Commissioner J. Christopher Giancarlo before the CFTC Technology Advisory Committee Meeting, *supra* n.3 (noting that the CFTC must be cognizant of the burdens place on market participants, especially end-users, when requesting more data); *see also* Testimony of J. Rogers, Director of the CFTC Office of

For example, even though margin requirements exist under the CFTC's margin rules,[9] the new proposed data elements related to margin and collateral would require new compliance measures extending beyond simply reporting the new data element, including resolving valuation disputes.

Additionally, after CFTC staff determines how best to standardize the systems, requirements, and data elements among SDRs with respect to interest rate ("**IRS**"), credit default ("**CDS**"), and foreign exchange ("**FX**") swaps,[10] it should propose any new requirements and data elements for commodity swaps pursuant to a separate request for comment followed by a proposed rulemaking that includes a full cost-benefit analysis rather than simply adopting and broadly applying the requirements and data elements that work best for IRS, CDS, and FX swaps to all swap asset classes, including commodity swaps. Commodity swaps are distinctly different and can be more complex than IRS, CDS, and FX swaps, which makes the reporting of them uniquely challenging. Further, commercial firms engaged in the core business of providing physical commodities to end-users do not have enhanced systems and large numbers of staff dedicated to reporting swap data. In this regard, if the Commission determines to adopt new data elements for commodity swaps, commercial firms must be given a substantial amount of time to modify their trade capture systems and business processes to meet the new requirements.

B. Specific Concerns with the Proposed Swap Data Technical Specifications.

If the Commission proceeds in adopting the draft technical specifications provided in the Request for Comment without first addressing current swap data reporting issues, the Working Group requests that the Commission consider the following specific comments on the proposed data element technical specifications.

1. Counterparty-Related Data Elements.

i. Counterparty Dealing Activity Exclusion Type.

In the Request for Comment, Commission staff proposes draft technical specifications for a new swap data element designed to allow the CFTC to identify swap dealing transactions (*i.e.*, "Counterparty Dealing Activity Exclusion Type"). The Working Group recognizes the CFTC's collection of such information facilitates its assessment of the current swap dealer ("**SD**") *de minimis* threshold, but finds this new swap data element problematic. Specifically, the data element constructs a reporting requirement that is not congruent with the definition of "swap dealer" in the Commodity Exchange Act ("**CEA**") and the CFTC's regulations. Indeed, the

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Data and Technology, Public Hearing, House Agriculture Subcommittee on Commodity Exchanges, Energy, and Credit, House Committee on Agriculture, at 4 (Feb. 25, 2016) (stating that the Commission intends to eliminate reporting obligations that are not necessary), *available at* http://agriculture.house.gov/uploadedfiles/rogers_testimony.pdf.

[9] *See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, Final Rule, 81 Fed. Reg. 636 (Jan. 6, 2016).

[10] Notably, the Request for Comment focuses primarily on IRS, CDS, and FX swaps. *See* Request for Comment at 7.

proposed data element appears to assume that each swap transaction is a "dealing" swap, which is not the case in commodity swaps markets. In the same vein, the draft technical specifications fail to include an allowable reporting value for a "trading" swap.[11] If the Commission determines to adopt this new data element, it cannot assume every swap transacted in the commodity swaps market is a dealing swap and ought to expand the allowable values for this data element to include an exclusion for a trading swap. The Working Group submits that the Commission may collect this information in a less burdensome manner by striking this proposed data element and instead require reporting counterparties to submit this information to the CFTC on an annual basis as the CFTC has not explained why it would need this information on a real-time transactional basis.

ii. Special Entity/Utility Special Entity Indicator.

The Working Group submits that the new swap data element for "Special Entity/Utility Special Entity Indicator" is problematic and will prove to be unnecessarily costly. Specifically, if a reporting counterparty must accurately identify and report to an SDR its special entity and utility special entity counterparties, the reporting counterparty must require from the special entity/utility special entity counterparties a representation that they are indeed special entities/utility special entities and verify the accuracy of such representation. This verification process will significantly increase compliance costs for both counterparties. Additionally, based on the experience of Working Group members, interpretational issues on a counterparty's regulatory status often arise and lead to minor disagreements, which become more material if a counterparty must report the other counterparty's entity status.

Accordingly, the Working Group recommends that the Commission consider whether there is a less burdensome manner in collecting this information, for example, through the Legal Entity Identifier ("**LEI**") registration process. If the Commission determines to adopt this new data element, the Working Group requests that the Commission confirm that the guidance provided in the utility special entity final rule extends to a reporting counterparty in the context of SDR reporting. That is, a reporting counterparty reasonably may rely upon the representation from its special entity/utility special entity counterparty that it is a special entity/utility special entity for purposes of reporting this information to an SDR.[12]

iii. Ultimate Parent and Ultimate Guarantor.

CFTC staff states in the Request for Comment that the data elements for "Ultimate Parent" and "Ultimate Guarantor" will help staff (i) identify entities involved or impacted by a swap transaction, (ii) identify inter-affiliate swaps, and (iii) properly aggregate volume measures

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[11] *See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant,"* Joint Final Rule, 77 Fed. Reg. 30,596 (May 23, 2012) (providing distinction between "swap dealing" and "trading").

[12] *See Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities*, Final Rule, 79 Fed. Reg. 57,767, at 57,776 (Sept. 26, 2014).

across counterparties.[13] The Working Group submits that the Commission currently may collect this type of affiliate information through other regulatory vehicles, such as ownership and control reports ("**OCR**").[14] In other words, collecting this type of data in the SDR reports is duplicative and provides no additional benefit to the Commission. Accordingly, the Working Group recommends that, before the Commission expands existing SDR data fields, the Commission assess whether this type of information is currently available to the Commission through other regulatory frameworks (*e.g.*, through OCR) or could be collected in a less burdensome manner, such as through the LEI registration process.

If the Commission determines to expand the existing data fields to include the proposed "Ultimate Guarantor" data element, the Working Group recommends that the Commission confirm that a guarantee of a swap should ***not*** be reported as a separate swap, as a simple identification of the guarantee should be sufficient for the Commission's oversight function.[15] Importantly, in the CFTC's final rule further defining the term "swap," the Commission stated it would issue a separate release dealing with the practical implications of treating guarantees as swaps, including the reporting of them, and indicated that the reporting of a related guaranteed swap could satisfy the requirements applicable to the guarantee. Further, the Working Group notes that the application of a single "Ultimate Guarantor" data element as proposed is impracticable where a particular swap has a complicated structure and is guaranteed by multiple guarantors or one guarantee covers multiple things.

iv. Counterparty Financial Entity Data Indicator.

The Working Group understands that the data element for "Counterparty Financial Entity Data Indicator" is a data field currently reported to SDRs. However, the Working Group submits that the Commission can collect this information through a less burdensome manner. That is, similar to the data elements for Special Entity/Utility Special Entity Indicator, Ultimate Parent, and Ultimate Guarantor, the Working Group recommends that the Commission should collect this data through the LEI registration process.

2. Price.

The Working Group recognizes that the draft technical specifications primarily focus on IRS, CDS, and FX swaps. However, if the Commission determines to apply these data elements

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[13] *See* Request for Comment at 10.

[14] *See Ownership and Control Reports, Forms 102/102S, 40/40S, and 71*, Final Rule, 78 Fed. Reg. 69,178 (Nov. 18, 2013).

[15] *See Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, Final Rule, 77 Fed. Reg. 48,208, at n.189 (Aug. 13, 2012) ("Briefly, in the separate CFTC release the CFTC anticipates proposing reporting requirements with respect to guarantees of swaps under Parts 43 and 45 of the CFTC's regulations and explaining the extent to which the duties and obligations of swap dealers and major swap participants pertaining to guarantees of swaps, as an integral part of swaps, are already satisfied to the extent such obligations are satisfied with respect to the related guaranteed swaps.").

set forth in the Request for Comment to commodity swaps, the Working Group recommends that the data element for "par spread" be modified to "spread," as "par spread" is not appropriate in the context of commodity swaps.

3. Notional Amount.

The data elements for "notional amount" and "notional currency" would be new data elements for commodity swaps reporting. It is unclear whether the CFTC intends to adopt these proposed data elements for commodity swaps given the draft technical specifications focus primarily on IRS, CDS, and FX swaps. However, the Working Group recognizes the importance of data on the notional amounts of swaps in each asset class, for instance, for purposes of determining whether the current SD *de minimis* threshold is appropriate. Because commodity swaps often are denominated in commodity units rather than currency amounts, the Working Group recommends that allowable values for the notional amount data element include the number of commodity units and the type of commodity units (*e.g.*, barrels or metric tons). Further, the Working Group submits that the "notional currency" data element should not be adopted for commodity swaps, as it is inapplicable in this context.

4. Additional Fixed Payments.

Many commodity swaps include complicated fee structures, which often have components that are immaterial to the terms of the swap and do not align with the reporting of the data element for "Additional Fixed Payments." For example, a counterparty could be required to pay one fee that would apply to the novations of ten different swaps. The data element for Additional Fixed Payments would appear to require the reporting counterparty to calculate the fee per swap for purposes of reporting this data element. Such a process would only increase compliance burdens and costs for the reporting counterparty. In this light, the Working Group recommends that the Commission confirm that the data element for Additional Fixed Payments does not include service fees or miscellaneous fees that are not included in a confirmation and any fees the reporting counterparty deems to be immaterial to the terms of the swap.

5. Options.

i. Option Style.

The Working Group submits that "Asian" should be added to the list of allowable values for the data element "Option Style."

ii. Embedded Option Indicator.

The Working Group submits that the data element for "Embedded Option Indicator" is unnecessary for the Commission's oversight function or for price discovery and transparency in swaps markets. Additionally, the description for such data element is unduly vague. The Working Group submits that the reporting of whether the transaction is or is not an option should be sufficient for purposes of providing transparency and price discovery to the swaps markets and aiding the Commission's regulatory obligations. Accordingly, the Working Group

recommends that the proposed data element for "Embedded Option Indicator" should not be adopted and used to expand the existing data fields for SDR reporting. Even if the Commission were to adopt such a swap data element, it should be explicitly limited to options embedded in host transactions that are themselves reportable (*e.g.*, not in forward transactions for physical delivery).

6. Clearing.

The Working Group submits that, if a non-financial end-user avails itself of the end-user clearing exemption and annually reports to an SDR the relevant criteria required under the end-user exception, the reporting counterparty will not possess the specific information needed for the data element "Clearing Exemption Type." However, given the Commission may obtain this information through an end-user's annual filing to the SDRs, collecting this type of data in the SDR reports is duplicative and provides no additional benefit to the Commission. If a reporting counterparty were required to report this data element, the benefits provided to end-users by the annual end-user exception filing would be significantly reduced. Accordingly, the Working Group recommends that the Commission decline to adopt this data element in its SDR reporting requirements.

7. Periodic Reporting.

i. Reconciliation.

a. Part 43/45/46.

The Working Group questions the regulatory value of the proposed swap data element for "Part 43/45/46," wherein a reporting counterparty would be required to identify under which part of the CFTC's regulations swap data is being reported. Significantly, under the final rule adopting the Part 45 SDR reporting requirements, the Commission stated that it was permitting reporting counterparties to comply with the regulatory data reporting requirements of Part 45 and the real time reporting requirements of Part 43 by submitting a single report, as this allowance would reduce reporting burdens while still fulfilling the objectives of the Dodd-Frank Act.[16] In this regard, the Commission aligned the reporting deadlines under Part 45 with the public dissemination delays provided in Part 43 to achieve this goal.[17] Market participants using certain SDRs, such as ICE Trade Vault and DTCC Global Trade Repository, indeed are able to submit their swap data for purposes of Parts 43 and 45 in one trade report. To require reporting counterparties to identify which part of the CFTC's regulations would be burdensome on reporting counterparties and undo the benefit the Commission sought to achieve under the Regulatory Reporting Final Rule. Accordingly, the Working Group recommends that the Commission determine not to adopt this proposed data element in its SDR reporting requirements. If the Commission instead determines to collect this data element in SDR reports,

[16] *See Swap Data Recordkeeping and Reporting Requirements*, Final Rule, 77 Fed. Reg. 2136, at 2150 (Jan. 13, 2012) ("**Regulatory Reporting Final Rule**").

[17] *See id.*

Commission staff should identify the benefit it derives under this data element and require the SDRs to populate this data field automatically if the reporting counterparty submits one trade report.

b. Data Accuracy Confirmation by Counterparty.

The Working Group submits that the data element "Data Accuracy Confirmation by Counterparty" will prove costly for end-users, as each reporting counterparty will be required to confirm with the non-reporting counterparty whether they actively affirmed, disputed, or failed to affirm SDR swap data reports. Given counterparties do not otherwise ascertain whether their counterparties have confirmed the data provided in SDR reports in the normal course of business, reporting counterparties would become obligated to send letters to all their counterparties or take other affirmative steps in an attempt to acquire the necessary information to report this data element. These efforts would prove to be extremely costly and provide little benefit, given market participants generally confirm their swap transactions and report any errors or omissions discovered in the SDR reports. Accordingly, the Working Group recommends that the Commission not adopt this data element in its SDR reporting requirements and instead require the SDRs to populate this data element, as they will have the necessary information in their records pursuant to CFTC Regulation 49.11.

c. Date and Time of Last Open Swaps Reconciliation with CP/SDR.

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. Accordingly, the Working Group recommends that the Commission not adopt the data fields for "Date and Time of Last Open Swaps Reconciliation with CP and SDR" or specifically exempt end-user reporting counterparties from reporting such data elements. With respect to reconciliation with the SDR, the Commission could require the SDRs to populate this data element, as the SDRs would have the relevant information needed to fulfill this data point.

8. Collateral/Margin.

As a general matter, the proposed data elements related to margining and collateral will increase the compliance burdens and costs associated with SDR reporting for market participants as such data elements require information that is nuanced, legal in nature, and subject to interpretation. The calculation of net margin involves some judgments about the effectiveness of netting, which often entail legal conclusions. SDR reporting could be complicated by issues related to netting, including whether there are (a) swaps of various asset classes (*e.g.*, interest rates and commodity swaps) and (b) non-swap trades (*e.g.*, repurchase transactions and security lending trades). Further, parties would be required to create, trade match, and identify which

trades might be netted. The proposed data elements related to margining and collateral seem to require affirmation by the counterparties regarding such legal and numerical determinations.

Moreover the value of margin collateral, except where a counterparty is using cash as collateral, could be subject to dispute and miscalculation. These proposed swap data elements effectively would drive other compliance measure related to collateral management that extend beyond reporting.

The Working Group fails to understand the benefit in collecting this type of information and believes it will add no value to the Commission's oversight function or transparency in swaps markets. Rather, it will serve only to increase a market participant's compliance costs. Accordingly, the Working Group recommends that the Commission not adopt these data elements associated with collateral and margin.

If the Commission wishes to receive information related to collateral and margin, the Working Group recommends that such information be collected quarterly or annually through a process independent of Parts 43 and 45 reporting, and that non-financial end-users be relieved of any such reporting responsibility given only SDs, MSPs, and financial end-users are required to collect or post initial margin and collateral under the CFTC's margin rules. In this regard, collecting these data elements from non-financial end-users provides no benefit to the CFTC's regulatory oversight function.

9. Events.

The proposed data element "Event Type" includes several allowable values that are vague and need further clarification. For example, the Commission should clarify the difference between (i) "TERMINATION" and "TERMINATION/VOID" and (ii) "ERROR/CORRECTION_EVENT" and "ERROR/CANCEL_EVENT." Further, the Working Group fails to understand why an allowable value for "Event Type" would include "OPTION/EXERCISE." A life cycle event is an event that would result in a change to a primary economic terms ("**PET**") data. However, the exercise of an option is contemplated in the original PET data field submitted, and thus, should not be reported as a life cycle event. Accordingly, the Working Group recommends that the Commission provide more clarity on the allowable values for the data element "Event Type" and eliminate the allowable field for "OPTION/EXERCISE."

Moreover, other allowable values for the data element "Event Types" include information that is reported in original PET data, such as the maturity date. The Working Group submits that the Commission receives no additional benefit in receiving an explicit message report stating the swap has matured when the information previously has been reported. This requirement only unnecessarily burdens reporting counterparties. Accordingly, unless a life cycle event message modifies a particular PET term, such as the maturity date, the Working Group recommends that there be no requirement to report such.

III. CONCLUSION.

The Working Group appreciates the opportunity to provide the comments set forth herein and requests the Commission's consideration of them. Please contact the undersigned with any questions.

Respectfully submitted,

/s/ David T. McIndoe
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Meghan R. Gruebner

Counsel for The Commercial Energy Working Group

ATTACHMENT D

OCR COMMENTS

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May 8, 2017

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Re: Comments on the CFTC's Notice, *Agency Information Collection Activities: Notice of Intent to Renew Collection 3038-0103, Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 (Trader and Account Identification Reports)* (OMB Control No. 3038-0103)

Dear Mr. Kirkpatrick:

I. INTRODUCTION

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Eversheds Sutherland (US) LLP submits this letter in response to the request for public comment set forth in the Commodity Futures Trading Commission's (the "**CFTC**" or "**Commission**") Notice, *Agency Information Collection Activities: Notice of Intent to Renew Collection 3038-0103, Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 (Trader and Account Identification Reports)* (the "**OCR Notice**").[1]

The Working Group welcomes the opportunity to respond to the OCR Notice because of the uncertainty inherent in some of the new regulatory requirements under the CFTC's Final Rule, *Ownership and Control Reports, Forms 102/102S, 40/40S, and 71* (the "**OCR Final Rule**").[2] Specifically, this comment letter focuses on New Form 40 (which is also used for the 40S filing), and respectfully requests that the CFTC revisit the OCR Final Rule. The Working Group has a direct interest in the OCR Final Rule because Working Group members may be recipients of special calls from the CFTC and required to submit a New Form 40 in response to a special call.

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[1] *See* Notice, *Agency Information Collection Activities: Notice of Intent to Renew Collection 3038-0103, Ownership and Control Reports, Forms 102/102S, 40/ 40S, and 71 (Trader and Account Identification Reports)*, 82 Fed. Reg. 12,944 (Mar. 8, 2017), http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2017-04538a.pdf.

[2] *See* Final Rule, *Ownership and Control Reports, Forms 102/102S, 40/40S, and 71,* 78 Fed. Reg. 69,178 (Nov. 18, 2013), http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-26789a.pdf.

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 producers, processors, merchandisers, and owners of energy commodities. Among the members of the Working Group are some of the largest users of energy derivatives in the United States and globally. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

II. COMMENTS OF THE WORKING GROUP

The Working Group respectfully requests that the CFTC revisit the OCR Final Rule to eliminate certain questions on the New Form 40 that are confusing, not supported by adequate guidance, and possibly serve little or no additional value to the CFTC's pursuit of its market oversight and enforcement functions. These ill-styled questions force commercial firms to expend additional resources on new compliance measures and often seek legal counsel, costs which are not sufficiently accounted for in the OCR Final Rule. In addition, New Form 40's requirement for continual updates is a new requirement that, again, is not sufficiently accounted for in the OCR Final Rule. Moreover, certain of the information that the CFTC seeks in New Form 40 is redundant with information provided to the CFTC through Form 102 submissions.

Given the underweighting of costs and uncertain benefits of the New Form 40, the CFTC's cost-benefit analysis in the OCR Final Rule is not accurate. The Working Group recommends that CFTC make certain revisions to the New Form 40, which, if adopted, should result in the proper balance between regulatory benefits and costs borne by market participants.

A. The CFTC should eliminate certain new questions in New Form 40 that result in unwarranted and unaccounted costs borne by market participants with little value to the CFTC.

The OCR Final Rule updates Form 40 (*i.e.*, New Form 40), which the CFTC would send by special call to individuals and other entities identified on New Form 102A, New Form 102B, or New Form 71.[3] Not only does the OCR Final Rule potentially increase the number of entities that may be required to submit a New Form 40, but it also expanded the scope of information that is required to be reported by adding questions in New Form 40.[4] However, the CFTC styled some of these questions with vague concepts and did not provide sufficient guidance. Accordingly, market participants must spend resources in arriving at interpretations and, as necessary, doing research and establishing compliance measures to respond to such questions. There is accompanying uncertainty with respect to such interpretations and the answers provided (or not), and this uncertainty is a form of inchoate cost not accounted for in the CFTC's cost-benefit analysis in the OCR Final Rule.

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3 OCR Final Rule at 69,188.

4 *See id*.

As discussed further below, the new questions from New Form 40 of greatest concern to the Working Group are as follows, and should be eliminated:

- New Form 40 Question 12;
- New Form 40 Question 14; and
- New Form 40 Questions 17-19.

i. New Form 40 Question 12 requests a list of the persons (natural persons and legal entities) that directly or indirectly influence, or exercise authority over, some or all of the trading of the reporting trader, other than those that "control" the reporting trader.

New Form 40 Question 12 should be eliminated for several reasons.

First, the utility of the information that the CFTC will collect in response to New Form 40 Question 12 is questionable. The request for a list of, and contact information for, natural persons and legal entities that "directly or indirectly influence, or exercise authority over, some or all of the trading of the reporting trader, but who do not exercise 'control'" is ambiguous, subjective, overly broad, and may continuously change. Notably, the CFTC does not appear to provide guidance as to the definition of "influence" or indicia that such influence exists and is of such an extent to be significant for regulatory purposes. In light of the aforementioned, the utility of the information is questionable, especially considering that the CFTC will have significant information regarding ownership, control, and interconnectedness from responses to other questions on New Form 40.

Second, the information the CFTC will collect in response to New Form 40 Question 12 is not necessary for the CFTC to properly perform its functions. Historically, the CFTC has focused on concepts of control. Questions 8 and 10 of New Form 40 already solicit this information. We also note that the CFTC receives information about natural person controllers through the Form 102 submissions that it receives. Arguably, such information is sufficient in itself for the CFTC to meet its regulatory objectives.

ii. New Form 40 Question 14 requests indication of whether the reporting trader is engaged in commodity index trading[5] and, if so, (i) whether the reporting trader is, in aggregate, pursuing long exposure or short exposure with respect to such commodities or commodity groups, and (ii) when the reporting trader first became engaged in commodities index trading.

New Form 40 Question 14 should be eliminated because the information the CFTC will receive in response to New Form 40 Question 14 is not necessary for the CFTC to

[5] "Commodity index trading" is defined on New Form 40 as an investment strategy that consists of (a) investing in an instrument (*e.g.*, a commodity index fund, exchange-traded fund for commodities, or exchange-traded note for commodities) that enters into one or more derivatives contracts to track the performance of a published index that is based on the price of one or more commodities, or commodities in combination with other securities; or (b) entering into one or more derivative contracts to track the performance of a published index that is based on the price of one or more commodities, or commodities in combination with other securities.

properly perform its market oversight function. The information regarding commodity index trading this question seeks to obtain appears to be too vague, potentially subject to frequent change, and too tenuous to be of any measurable benefit. While the CFTC has provided a definition of "commodity index trading," the definition is too broad and potentially captures far too many market participants, thus undermining whether the question has utility at all.

Specifically, many derivatives referencing commodities refer to indexes, and commercial firms use these instruments frequently for a variety of purposes. For example, a fixed for floating natural gas contract arguably "track[s] the performance of a published index that is based on the price of one or more commodities." Also, the CFTC may have believed "investment strategies" was a distinguishing term, but again did not provide sufficient guidance as to the meaning of the term or identifying criteria.

iii. New Form 40 Questions 17-19 request identification of (by selecting options from supplemental lists) (i) the business activities of the reporting trader, (ii) the commodity groups or individual commodities that the trader presently trades or expects to trade in the near future in derivatives markets, and (iii) for each individual commodity identified, the business purpose(s) for which the trader uses derivatives markets.

New Form 40 Questions 17-19 should be eliminated because the information the CFTC will collect in response may actually hinder the CFTC from properly performing its functions. The information the CFTC will receive in response to New Form 40 Questions 17-19, which pertain to business purpose and anticipated trading strategy, is complex, subjective, evolving, and may be subject to continuous updates. This is particularly concerning considering that the CFTC has indicated it will use this information in New Form 40 to compare it to subsequent market activity.[6] If they do not correspond, the CFTC may request additional information or "take other appropriate action."[7] Given the complex, evolving, and subjective nature regarding business purpose and anticipated trading strategy, there is significant potential that the CFTC may find a mismatch in reported information and subsequent market activity of a reporting trader. In other words, the mismatches are more likely to be a red herring that drains the CFTC's limited resources rather than an actual indicator of misconduct. Moreover, given the duty of a respondent to continually update information on its New Form 40 submission, New Form 40 Questions 17-19 add new regulatory requirements that may not be intuitive when a company begins trading in new commodity classes or begins using different strategies. Considering these issues, the information the CFTC will collect in response to New Form 40 Questions 17-19 may actually hinder the CFTC from properly performing its functions.

B. The prior regime for submissions on Form 40 was sufficient and less costly.

Legacy Form 40 provided significant market insight that adequately enabled the CFTC to perform its core function of fostering open, transparent, competitive, and financially-sound markets for the trading of derivatives. Even if the CFTC does find some

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6 OCR Final Rule at 69,213.

7 *Id*.

practical use of the new information collected under New Form 40, its limited utility will not justify the substantial burden on market participants.

Further, entities required to submit a New Form 40 now have a continuing obligation to update and maintain the accuracy of the information submitted on New Form 40.[8] This requires the design, implementation, and operation of new compliance measures, adding to the complex web of measures incurred by commercial firms following enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[9]

C. The CFTC should rely on the existing requirements for Form 102 submissions to gather information about natural person controllers.

The CFTC should eliminate the requirements in New Form 40 for reporting firms to submit any information about natural person controllers.[10] The CFTC should, for the most part, already have that information about a responding party in connection with receiving Form 102 submissions. Currently, many commercial firms already submit such information about natural person controllers to their futures commission merchants; however, there is currently no functionality whereby such information could also be submitted to update a company's Form 40 submission. Accordingly, commercial firms expend resources to submit information that is ultimately received by the CFTC through two different paths. This redundancy serves no reasonable purpose. Also, considering that such information may have to be updated daily, the redundancy can be time consuming. This unnecessary cost is particularly acute in large organizations where a daily new hire or employment cessation is frequent.

In the alternative to eliminating the requirement for natural person controller information in New Form 40, the CFTC might: (i) suspend the requirement until a technological solution allows reporting firms to efficiently enter natural person controller information in one path for both New Form 102 and New Form 40 purposes; (ii) clarify that, for New Form 40, only one natural person need be identified for each account, such as a compliance officer; or (iii) clarify that a reporting firm can update its natural person controller information on a monthly or less frequent basis.

D. The CFTC significantly underestimated the burden of the proposed collection of information in terms of both time and cost.

The CFTC estimated that the annualized burden per response for New Form 40 would be 3 hours at a cost of $70.07 per hour.[11] Considering the complexities involved in determining what must be reported under the New Form 40's ambiguously worded questions and taking into account the continuing obligations to update New Form 40, the CFTC has significantly underestimated the burden. The issues surrounding the OCR Final Rule are evidenced by the CFTC's no-action letters and monthly calls aimed at helping

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8 *Id*. at 69,188.

9 H.R.4173, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010), https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf.

10 *See* New Form 40 Questions 10-13.

11 *See* OCR Notice at 12,945.

market participants come into compliance with the new obligations under the OCR Final Rule.[12]

Notably, the CFTC did not consider several materially relevant factors in its cost-benefit analysis, which would particularly impact entities located in a larger corporate family. Factors the CFTC should have considered include: (i) the continuing obligations to update New Form 40; (ii) that multiple individuals from an entity are realistically going to be involved; (iii) outside counsel fees; (iv) internal counsel cost; (v) systems and other operational costs; and (vi) opportunity cost.

E. Suggestions for improvements that would increase efficiency and benefits with respect to New Form 40.

The Working Group respectfully offers additional suggestions with respect to New Form 40 that would increase efficiency and benefits.

First, the CFTC should revise New Form 40 to add the ability for respondents to include explanatory text. This is important as some respondents may need to clarify responses to certain questions that cannot adequately be answered in the format provided. This issue is particularly acute with respect to the "yes or no" questions included on New Form 40. Such explanatory text should provide greater clarity to the CFTC.

Second, the CFTC should revise the platform for New Form 40 to add a function that would allow a respondent to save its progress on partially completed responses. This is an important function since many responses may require the collective knowledge of multiple individuals, which may take time to both collect and obtain proper approval.

Third, the CFTC should revise the platform for New Form 40 to add a function that would allow a respondent to share preliminary responses internally before submitting a finalized version to the CFTC. This is an important function because the person filling out New Form 40 may not be the person with authority to submit the information.

III. CONCLUSION

The Working Group appreciates this opportunity to provide input on the OCR Notice and respectfully requests that the comments set forth herein are considered.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ David T. McIndoe
David T. McIndoe
Blair Paige Scott

[12] While compliance with the OCR Final Rule was set to become effective August 15, 2014, the CFTC issued a series of no-action letters providing certain relief from the OCR Final Rule. *See* Ownership and Control Reporting, CFTC.gov, http://www.cftc.gov/Forms/OCR/index.htm (last visited May 8, 2017).