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August 13, 2018

VIA ELECTRONIC SUBMISSION

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

Re: Commodity Futures Trading Commission's Notice of Proposed Rulemaking, *De Minimis Exception to the Swap Dealer Definition*, RIN 3038-AE68

Dear Mr. Kirkpatrick:

By notice of proposed rulemaking published in the Federal Register on June 12, 2018, the Commodity Futures Trading Commission ("CFTC" or the "Commission") proposed new and revised regulations to address the "De Minimis Exception to the Swap Dealer Definition" ("NOPR").¹ In the NOPR, the Commission proposed, *inter alia*, to permanently establish the level of the de minimis exception to swap dealer registration and regulations requirements at a gross notional amount of eight billion dollars (measured over the most recent rolling twelve month period) and to better define the categories of transactions which are not considered swap dealing and, therefore, are not counted towards the threshold. The Coalition of Physical Energy Companies ("COPE")² supports the key aspects proposed in the NOPR.

The members of the COPE are physical energy companies in the business of producing, processing, and merchandizing energy commodities at retail and wholesale. COPE members generally use swaps, futures, options, and trade options in conjunction with their physical businesses, most typically for hedging. The market uncertainty that would be relieved by the proposals in the NOPR and the clarity regarding the scope and characteristics of the hedging transactions which would be exempted from consideration as swap dealing positions would be beneficial to COPE members.

¹ *De Minimis Exception to the Swap Dealer Definition*, Notice of Proposed Rulemaking, 83 Fed. Reg. 27444, RIN 3038-AE68 (June 12, 2018).

² The members of COPE are: Apache Corporation; Avangrid Renewables, LLC; Kinder Morgan, Inc.; Shell Energy North America (US), L.P.; SouthStar Energy Services LLC; and Targa Resources Partners LP.

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Gross Notional Amount Threshold of Eight Billion Dollars

The Commission initially set the de minimis threshold at a gross notional amount of eight billion dollars, reverting to a gross notional amount of three billion dollars at a time certain absent CFTC action.³ Over time, the Commission has extended the period covered by the eight billion dollar threshold pending further review,⁴ including a staff study.⁵ In the NOPR, the CFTC proposes to set the threshold for exclusion from the swap dealer calculation at a permanent figure eight billion dollars (gross notional amount of swap dealing activity).

COPE supports the Commission's proposal. The eight billion dollar figure has proven to be a useful filter for requiring the registration of true "dealers" without inadvertently catching those who are not in the business of swap dealing and who therefore do not need to be registered. The staff study bears this out.⁶

Further, by making the threshold permanent, the uncertainty as to the size of a business that can be conducted without requiring registration is removed allowing those that wish to engage in limited swap dealing to do so without concern that they will have to significantly scale back their business to meet a changing lower threshold.

While the NOPR asks a set of questions regarding the propriety of the eight billion dollar proposal,⁷ COPE observes that, unlike other proposals, we have had the benefit of having had experience with the eight billion dollar figure for a number of years. It is COPE's experience that the resulting scope of counterparty options for hedging and the regulatory structure of the marketplace is working well. Thus, 'if it ain't broke, don't fix it.'

As hedgers, COPE members benefit from stability and predictability with respect to the the universe of counterparties they can choose to transact with. The gross notional amount of eight billion dollars accords them a significant group of Swap Dealer counterparties, as well as a smaller group of energy market

³ *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. 30596 at 30634, Release No. 34-66868 (May 23, 2012).

⁴ *Order Establishing De Minimis Threshold Phase-In Termination Date*, 81 Fed. Reg. 71605 (Oct. 18, 2016); *Order Establishing a New De Minimis Threshold Phase-In Termination Date*, 82 Fed. Reg. 50309 (Oct. 31, 2017).

⁵ NOPR at 27449-27457; see also *Swap Dealer De Minimis Exception Final Staff Report* (Aug. 15, 2016) ("Final Staff Report"), available at http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis081516.pdf; *Swap Dealer De Minimis Exception Preliminary Report* (Nov. 18, 2015), available at http://www.cftc.gov/idc/groups/public/@swaps/documents/file/dfreport_sddeminis_1115.pdf.

⁶ NOPR at 27449, 27450, 27457; see also Final Staff Report at 20-24.

⁷ NOPR at 27458.

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counterparties. When futures are factored in, hedgers have a spectrum of counterparties and products to choose from without the risk of systemic failure due to regulation of the bulk of the market and the material participants.

The CFTC got it right the first time. The de minimis exemption threshold of a gross notional amount of eight billion dollars (calculated over the most recent rolling twelve month period) has proven to be a good measure and it should be made permanent as proposed.

Clarity Regarding Swaps Entered Into To Hedge Financial or Physical Positions

In the NOPR, the Commission has proposed to clarify the scope of swaps entered into to hedge financial or physical positions which need not be included in determining a person's aggregate gross notional amount of swap dealing positions.⁸ The current rule exempts the hedging of physical positions⁹ but does not include hedging financial positions.

Even though physical hedging was already exempted, the scope of swaps to be excluded has been a problematic issue for COPE members. It was understood that swaps that met the "hedging or mitigating commercial risk" test of the end user exemption¹⁰ alone may not qualify as "non-dealing" while those that met the bona fide hedge test of the (now vacated and re-proposed) Position Limits Rule¹¹ did qualify; this left the dividing line in a murky undefined location between them.

As hedgers, COPE members endorse the proposed language in the NOPR as appropriately capturing their hedging activity. In the NOPR, the Commission has proposed to establish clear, common sense standards that, in essence, provide that if a market participant is reasonably using the swap to hedge the risk of his/her business and the hedger does not receive "swap dealing" benefits such as receiving a fee or other compensation for doing so, the swap is excluded from the calculation.¹²

There should be no question that hedging is not dealing and this proposal makes that clear. This clarity is of great value to COPE members that use swaps for hedging. It will permit them to eliminate most, if not all swaps, from consideration in calculating a gross notional amount for de minimis calculation purposes.

⁸ NOPR at 27462-27463.

⁹ 17 C.F.R. § 1.3, Swap dealer, paragraph (6)(iii).

¹⁰ See 17 C.F.R. § 50.50(c).

¹¹ *Position Limits for Futures and Swaps*, Final Rule, 76 Fed. Reg. 71626 at 71645 n.179, RIN 3038-AD17 (Nov. 18, 2011).

¹² NOPR at 27463.

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Removing the current ambiguity is much appreciated by end-user/hedgers such as COPE members. COPE fully supports the proposal. It results in a regulatory focus on Swap Dealers, not end-users, as Dodd Frank regulation should.

COPE encourages the Commission to not only adopt this proposal, but to also provide further clarity to end-users in areas such as recordkeeping and the financial entity definition as part of its KISS process.¹³

Methodology for Calculating Notional Amounts

In the NOPR, the Commission proposes to delegate the Director of the Division of Swap Dealer and Intermediary Oversight (“DSIO”) or his/her delegate the “authority to determine the methodology to be used to calculate the notional amount for any group, category, type or class of swaps for purposes of whether a person exceeds the AGNA de minimis threshold.”¹⁴

COPE is concerned that, while this will provide “flexibility,”¹⁵ it will also permit staff, acting in good faith, to determine substantive and potentially critical policy determinations in some sort of informal process. COPE believes that the Commission should not implement an open ended delegation. If the Commission believes that a delegation of a technical nature is proper, it should limit it to clearly technical items and add safeguards such as an appeal to the CFTC coupled with a stay of any contested staff determination pending Commission action.

Conclusion

COPE appreciates the Commission’s action to improve and clarify the de minimis exception to the Swap Dealer Definition. As set forth above, the proposals contained NOPR are positive steps forward to improve the Commission’s Dodd Frank regulation.

¹³ See Letter from Coalition of Physical Energy Companies, *Comments for KISS Initiative Miscellaneous*, RIN 3038–AE55 (Sept. 29, 2017).

¹⁴ NOPR at 27465.

¹⁵ *Id.*

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Respectfully submitted,

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cc: COPE Members