

# BRACEWELL

October 25, 2019

**VIA ELECTRONIC SUBMISSION**

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

Re: Commodity Futures Trading Commission's Notice of Proposed Rulemaking, *Certain Swap Data Repository and Data Reporting Requirements*, RIN 3038-AE32

Dear Mr. Kirkpatrick,

By a Notice of Proposed Rulemaking published May 13, 2019, the Commodity Futures Trading Commission ("CFTC" or "the Commission") sought comment on proposed rules relating to "Certain Swap Data Repository and Data Reporting Requirements"<sup>1</sup> ("Reporting Data NOPR"). The Coalition of Physical Energy Companies ("COPE") hereby offers comments on the proposal.

The members of COPE<sup>2</sup> 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 often for hedging.

As end-users/hedgers, most COPE members are typically not the reporting party to swap data repositories ("SDRs"). COPE members' reportable transactions most often include a swap dealer or financial entity counterparty. In fact, some COPE members do not report to SDRs at all, while others only do so in unusual cases when their counterparty is not credentialed to report. As a result, COPE is addressing the Reporting Data NOPR from the perspective of persons that have limited or no interactions with SDRs. COPE expects the Commission will not get a significant

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<sup>1</sup> *Certain Swap Data Repository and Data Reporting Requirements*, Notice of Proposed Rulemaking, 84 Fed. Reg. 21044, RIN 3038-AE32 (May 13, 2019).

<sup>2</sup> 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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number of comments representing this community, although it may be the largest of all groups that transact over-the-counter-swaps.

## **The Commission Should Not Impose Any New Obligations on Non-Reporting Parties & Limit New Burdens on Parties That Infrequently Report**

As COPE understands the Reporting Data NOPR, it does not place any new duties on non-reporting parties.<sup>3</sup> Since many COPE members have not had to expend resources to support reporting, any new requirements would necessarily cause an increase in regulatory obligations and burdens. COPE appreciates that the Commission has not proposed any new burdens on non-reporting parties and requests that the CFTC continue to avoid any new burdens in this process.

To the degree COPE members are reporting parties, the Reporting Data NOPR imposes a verification process for “open swaps.”<sup>4</sup> As proposed, the rule would have the SDR send an “open swaps” report to a non-registrant reporting party on a monthly basis<sup>5</sup> and such reporting party is required to verify the accuracy of the data within 96 hours.<sup>6</sup>

COPE understands that this verification process may lead to greater confidence in the integrity of SDR data. However, as noted above, COPE members that infrequently report do not have significant staff resources to perform verifications. In fact, staff that performs reporting also performs multiple other functions.

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<sup>3</sup> This is consistent with the Commission’s observation, “in designating reporting counterparties to report on behalf of non-reporting counterparties, Congress made a policy choice to place lesser burdens on non-reporting counterparties.” Reporting Data NOPR at 21052 n.84.

<sup>4</sup> Proposed Section 49.2(a) *Open swap*. The term “*open swap*” means an executed swap transaction that has not reached maturity or the final contractual settlement date, and has not been exercised, closed out, or terminated. Reporting Data NOPR at 21101.

<sup>5</sup> Proposed Section 49.11(b)(3). Reporting Data NOPR at 21103.

<sup>6</sup> Proposed Sections 45.14(a)(2)(ii) and 49.11(c). Reporting Data NOPR at 21098, 21103.

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The Commission has recognized these resource limitations, stating:

The Commission is aware that non-SD/MSP/DCO counterparties tend to be less active in the swaps markets with fewer resources to devote to regulatory compliance. The Commission understands that this is particularly true of swaps end-users that use swaps infrequently and are more likely to engage in swaps for hedging purposes. Non-SD/MSP/DCO counterparties are also the reporting counterparties for relatively few swaps; therefore, the Commission believes that there would not be a significant risk of errors associated with less frequent verification for these reporting counterparties.<sup>7</sup>

While the CFTC has recognized “Non-SD/MSP/DCO counterparties are . . . the reporting counterparties for relatively few swaps,”<sup>8</sup> even within that group some parties report more infrequently than others and have less resources devoted to the task. COPE requests that the Commission acknowledge this distinction and eliminate or lessen the proposed burden on such infrequent reporting parties.

Thus, COPE requests that the verification requirement be eliminated for reporting parties that report only small quantities of swaps. COPE believes that the additional burden on such parties does not justify the very limited benefit that may result from the proposed requirement. Accordingly, COPE proposes a reporting party that reports an average of 50 or less swaps per month<sup>9</sup> not be required to engage in the verification of open swaps.

Further, in the event, the Commission chooses to require reporting parties that report only small quantities of swaps to be subject to the proposed verification regime, COPE requests that the verification period be extended for such parties from the 96 hour verification period for all non-registrants.<sup>10</sup> In such case, COPE proposes a reporting party that reports an average of 50 or less

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<sup>7</sup> Reporting Data NOPR at 21054.

<sup>8</sup> *Id.* n.93, see *De Minimis Exception to the Swap Dealer Definition*, Final Rule, 83 Fed. Reg. 56666, 56674, RIN 3038–AE68 (Nov. 13, 2018) (finding that, during the examination period, 98 percent of swap transactions involved at least one SD/MSP counterparty).

<sup>9</sup> While COPE believes a trailing 12-month average would be a useful way to measure the 50 swaps or less average, any reasonable way to perform this calculation would be acceptable.

<sup>10</sup> Proposed Section 45.14(2)(ii). Reporting Data NOPR at 21098.

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swaps reported per month be afforded a verification period of 240 hours.<sup>11</sup> This way a verification can be performed inside the month and an infrequent reporting party will be able to meet the deadline without sacrificing other business needs or adding resources.

Therefore, COPE requests that the Commission eliminate any verification requirement for a reporting party that reports an average of 50 or less swaps reported per month; or if such a requirement is imposed on parties that infrequently report, a verification period of 240 hours be instituted.

## **Conclusion**

Therefore, COPE requests the Commission take care to implement any new requirements pursuant to the Reporting Data NOPR without imposing new obligations for non-reporting parties and avoiding or limiting any burdens on parties that report infrequently.

Respectfully submitted,

/s/ David M. Perlman

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cc: COPE Members

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<sup>11</sup> COPE believes 240 hours would be feasible assuming that, as requested by the Commission, SDRs create rules that are “accommodating for non-SD/MSP/DCO reporting counterparties.” Reporting Data NOPR at 21054.