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VIA ELECTRONIC SUBMISSION

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

Re: Notice of Proposed Rulemaking, *Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants* (RIN 3038-AE84)

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 on the Commodity Futures Trading Commission's (the "**CFTC**" or "**Commission**") Notice of Proposed Rulemaking, *Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants* (the "**Proposed Rule**").[1] The Working Group appreciates the opportunity to provide comments on the Proposed Rule and looks forward to working with the Commission while it continues the process of formalizing the cross-border application of its swaps-related rules.

As the Working Group's members generally are not directly impacted by the potential cross-border application of the Commission's swap dealer or major swap participant requirements, the focus of this comment letter is on the Proposed Rule's approach to the cross-border application of the registration thresholds.

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 advocates

[1] *See* Notice of Proposed Rulemaking, *Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants*, 85 Fed. Reg. 952 (Jan. 8, 2020), https://www.cftc.gov/sites/default/files/2020/01/2019-28075a.pdf.

regarding regulatory, legislative, and market developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

II. COMMENTS OF THE WORKING GROUP

1. The Definition of Significant Risk Subsidiary Should Be Amended to Exclude Non-Financial Entities

Under the Proposed Rule, certain non-U.S. persons must include all of their swap dealing transactions within their determination of whether they exceed the *de minimis* exception from the definition of "swap dealer" regardless of the domicile of the counterparty. Among others, a significant risk subsidiary (each, an "**SRS**") would be required to do so.

The proposed definition of SRS is a multifactor test where a non-U.S. person would be considered an SRS if:

- the non-U.S. person is a "significant subsidiary" of an "ultimate U.S. parent entity";
- the "ultimate U.S. parent entity" has more than $50 billion in global consolidated assets, as determined in accordance with U.S. GAAP at the end of the most recently completed fiscal year; and
- the non-U.S. person is not subject to either:
  - consolidated supervision and regulation by the Federal Reserve System as a subsidiary of a U.S. bank holding company; or
  - capital standards and oversight by the non-U.S. person's home country regulator that are consistent with Basel III and margin requirements in a jurisdiction for which the CFTC has issued a comparability determination with respect to uncleared swap margin requirements.

Where a "significant subsidiary" would be defined as a subsidiary, including its subsidiaries, that constitutes a certain portion of its ultimate U.S. parent entity's equity, revenue, or assets,[2] and an "ultimate U.S. parent entity" is essentially the top U.S. entity in a potential SRS's ownership chain.[3]

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[2] Specifically, the Proposed Rule defines "significant subsidiary" to mean a subsidiary, including its subsidiaries, where:

- the 3 year rolling average of the subsidiary's equity capital is equal to or greater than 5% of the 3 year rolling average of its ultimate U.S. parent entity's consolidated equity capital, as determined under U.S. GAAP at the end of the most recently completed fiscal year;
- the 3 year rolling average of the subsidiary's revenue is equal to or greater than 10% of the 3 year rolling average of its ultimate U.S. parent entity's consolidated revenue, as determined under U.S. GAAP at the end of the most recently completed fiscal year; or

According to the Proposed Rule, the SRS concept is intended to address the risk that a non-U.S. subsidiary's swaps activity "may pose to the U.S. financial system" balanced against "the ability of large global entities to efficiently operate outside the United States."[4] However, in the case of non-financial entities, the proposed SRS definition would impose an undue burden on those entities by requiring them to continually monitor the status of a potentially large number of non-U.S. subsidiaries under a complex set of criteria. The Commission itself acknowledges that the systemic risk to U.S. financial markets associated with non-financial entities "is mitigated because…a non-financial entity['s]…business activities are not related to financial products and such activities primarily occur outside the U.S. financial sector."[5] The Working Group therefore requests that the application of the SRS definition be limited to subsidiaries of ultimate U.S. parent entities that qualify as financial entities.

2. The Definition of Ultimate U.S. Parent Entity Should Be Amended to Only Capture True Ultimate Parents

The proposed definition of "ultimate U.S. parent entity" is drafted in manner such that the definition does not preclude an ultimate U.S. parent entity from having a non-U.S. parent entity. As such, the definition would capture a U.S. entity that has non-U.S. subsidiaries even if that entity were consolidated into the financial statements of a non-U.S. person.

This outcome is contrary to the Commission's baseline justification for the SRS concept. As the Commission states in the Proposed Rule, "consolidated non-U.S. subsidiaries of U.S. persons may appropriately be subject to Commission regulation due to their direct and significant relationship to their U.S. parent entities" because "[t]hrough consolidation, non-U.S. subsidiaries of U.S. persons may permit U.S. persons to accrue risk through the swap activities of their non-U.S. subsidiaries that, in aggregate, may have a significant effect on the U.S. financial system."[6]

Therefore, the Working Group respectfully requests that the Commission amend the definition of "ultimate U.S. parent entity" to only capture U.S. entities that are not consolidated into the financial statements of non-U.S. persons.

- the 3 year rolling average of the subsidiary's assets are equal to or greater than 10% of the 3 year rolling average of its ultimate U.S. parent entity's consolidated assets, as determined under U.S. GAAP at the end of the most recently completed fiscal year.

Proposed Rule at 965; Proposed CFTC Regulation 23.23(a)(13).

[3] The Proposed Rule defines "ultimate U.S. parent entity" to mean the U.S. parent entity that is not a subsidiary of any other U.S. parent entity. Proposed CFTC Regulation 23.23(a)(18).

[4] Proposed Rule at 964.

[5] Proposed Rule at 972.

[6] Proposed Rule at 964

3. Proper Recognition of Capital Standards and Oversight by Other Regulators Is Necessary

As noted above, the SRS definition excludes non-U.S. persons that are subject to oversight by the non-U.S. person's home country regulator and capital standards consistent with Basel III. The Commission proposes to do so because "the Commission preliminarily believes that the potential risk that the entity might pose to the U.S. financial system would be adequately addressed through these capital...requirements" and because "such an approach is consistent with the Commission's desire to show deference to non-U.S. regulators whose requirements are comparable to the CFTC's requirements."[7]

The Working Group agrees that this approach is proper and appropriate. In application, the Commission should grant due deference to relevant home country regulators in a holistic manner and avoid a piecemeal approach. Therefore, to the extent a regulator has deemed it appropriate to exempt a particular type of entity in whole or in part from capital requirements otherwise consistent with Basel III, the CFTC should defer to such exemption and still consider the relevant entities as being subject to comparable capital requirements and therefore excluded from the SRS definition.

III. CONCLUSION

The Working Group appreciates this opportunity to comment on the Proposed Rule and respectfully requests that the Commission consider the Working Group's comments when finalizing the Proposed Rule.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ Alexander S. Holtan
Alexander S. Holtan

Counsel to The Commercial Energy Working Group

[7] Proposed Rule at 966.