



Shell Energy North America (US), L.P.
1000 Main Street, Level 12
Houston, TX 77002
Tel +1 713-230-3340

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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: Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants, Proposed Rule, RIN 3038-AF33

Dear Mr. Kirkpatrick:

Shell Energy North America (US) L.P., Shell Trading Risk Management, LLC and their affiliates (collectively, "**Shell Energy**") hereby submits this letter in response to the request for public comment on the Commodity Futures Trading Commission's (the "**CFTC**" or "**Commission**") proposed rule to amend certain of the Commission's regulations that impose minimum capital requirements and financial reporting obligations on swap dealers ("**SDs**") and major swap participants ("**MSPs**").¹

The Proposed Rule seeks to accomplish this by codifying parts of staff interpretive letter 21-15 to SDs addressing the Tangible Net Worth Capital Approach for calculating capital under the applicable Commission Regulation and No-Action Letter 21-18 (and its successor No-Action Letter 23-11), which discuss alternative financial reporting by SDs subject to the capital requirements of a prudential regulator (together, "**CFTC Letters**").² Additionally, the Proposed Rule seeks to amend certain of its regulations applicable to SDs, in areas including

¹ Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants, Proposed Rule, 89 Fed. Reg. 2554 (Jan. 16, 2024) (the "**Proposed Rule**"). Shell Energy North America (U.S.) LLP is a commercial energy firm and end-user whose primary activity is the physical delivery of energy commodities to others. Shell Trading Risk Management, LLC is registered with the CFTC and National Futures Association as a swap dealer that operates exclusively in the energy sector and part of a corporate family that is predominantly engaged in non-financial activities.

² Proposed Rule at 2554; See CFTC Staff Letter 21-15 (June 29, 2021) (providing interpretative guidance regarding tangible net worth net capital computation and financial reporting for swap dealers and major swap participants); CFTC Staff Letter No. 21-18 (Aug. 31, 2021) (providing time-limited relief for bank swap dealers from certain financial reporting requirements); CFTC Staff Letter No. 23-11 (July 10, 2023) (extending time-limited no action relief for bank swap dealers from certain CFTC financial reporting requirements).

the required timing of certain notifications, the process for approval of subordinated debt for capital, and the revision of financial reporting forms to conform to the rules. The proposed amendments are intended to make it easier for SDs to comply with the Commission's financial reporting obligations and demonstrate compliance with minimum capital requirements.³

Shell Energy appreciates the work the Commission has done over the past decade with respect to the development and implementation of the swap dealer rules.⁴ Further, it applauds the Commission's efforts to provide regulatory certainty and consistency through the Proposed Rule's codification of the CFTC Letters and amendments to the Tangible Net Worth Capital Approach ("**TNW Approach**") for swap dealers that are part of a broader enterprise that are predominately engaged in non-financial activities ("**Non-Bank SDs**").

For the reasons discussed herein, Shell Energy requests that the Commission utilize this rulemaking proceeding or commence another formal process for purposes of creating a regulatory pathway to address an issue that is critical to the ongoing operational viability of Non-Bank SDs. Specifically, Shell Energy requests that the Commission allow for the development of an approved capital model designed to reflect (i) the ownership and operation of a substantial (and often a multinational) portfolio of hard, physical energy assets and infrastructure; (ii) specific elements of a Non-Bank SD's ownership structure; and (iii) the limited systemic risk to the market posed by these entities.⁵

Capital requirements imposed by the TNW Approach on Non-Bank SDs that do not rely on capital models are well in excess of any reasonable measure of risk presented by those swap dealers. The costs imposed on affected Non-Bank SDs by holding capital well in excess of the size of the current business or exposure to the market can result in the swap dealer (i) passing through its costs to counterparties, (ii) requiring margin to be posted by end-users and other market participants and, (iii) perhaps most significantly, limiting the customers with which it does business. In the energy sector, these outcomes have resulted in higher prices and lower liquidity for smaller end-users and other market participants that rely on Non-Bank SDs to hedge their energy risk. Such outcomes would not exist (or would be substantially mitigated) through the use of an appropriately-tailored capital model for Non-Bank SDs.

³ Proposed Rule at 2554.

⁴ Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020); See Proposed Rule, <https://www.cftc.gov/sites/default/files/2020/09/2020-16492a.pdf>; Reopening of Comment Period; Request for Additional Comment, *Capital Requirements of Swap Dealers and Major Swap Participants*, 84 Fed. Reg. 69,664 (Dec. 19, 2019), <https://www.cftc.gov/sites/default/files/2019/12/2019-27116a.pdf>; See Notice of Proposed Rulemaking, *Capital Requirements of Swap Dealers and Major Swap Participants*, 81 Fed. Reg. 91,252 (Dec. 16, 2016), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2016-29368a.pdf>; See Notice of Proposed Rulemaking, *Capital Requirements of Swap Dealers and Major Swap Participants*, 76 Fed. Reg. 27,802 (May 12, 2011), <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2011-10881a.pdf>.

⁵ In the energy sector, Shell Trading Risk Management, LLC and other Non-Bank SDs are corporate affiliates of global energy companies that have substantial hard, physical asset portfolios that range from their ownership of an array of traditional and renewable or clean energy production facilities to refinery and processing operations, shipping and logistics functions and, in certain circumstances, pipeline operations.

Since the issuance of the 2020 Final Rule, Shell Energy has been involved in efforts with other Non-Bank SDs focused on seeking a time limited relief of 18 months during which the group of Non-Bank SDs would develop and submit for Commission approval a capital model.⁶ Such relief was pursued since it was not apparent from the rulemaking process that led to the issuance of the 2020 Final Rule that, in the absence of reliance on a capital model, the capital requirement under the TNW Approach would be inordinately high in comparison to the size of the affected Non-Bank SDs.⁷ Once it was determined that a capital model might be the only way to reach a rational capital requirement, there was no time to develop such a model for Commission review and approval within the 12 month compliance period provided by the 2020 Final Rule.⁸

Shell Energy respectfully submits that its request to utilize this rulemaking proceeding or commence another, formal regulatory process designated by the Commission is consistent with statements in the 2020 Final Rule that Non-Bank SDs should not be discouraged from providing liquidity to market participants. In relevant part, the 2020 Final Rule states:

The alternative capital approaches adopted by the Commission are intended to mitigate potential competitive disadvantages and unnecessary costs that might otherwise arise if the Commission were to impose a single capital approach in light of the existing different operating and corporate structures of the covered SDs. The Commission further believes that the *flexibility of the capital approaches will potentially benefit market participants by providing a tailored capital regime that encourages SDs that are not part of global financial firms to continue to provide liquidity in the swaps market, particularly to smaller financial or commercial end users that do not have relationships with the large financial SDs.*⁹

(Emphasis added).

As noted herein, it is Shell Energy's experience that compliance with the capital requirements adopted in the 2020 Final Rule has resulted in reduced liquidity, which has direct and significant consequences and implications on consumers of energy products, whether that product is gasoline purchased at the pump or solar energy delivered from the grid. When issuing the 2020 Final Rule, then-CFTC Chairman Tarbert emphasized this point when addressing the TNW Approach:

⁶ Further, during the 18-month period requested by the Non-Bank SDs, they would be subject to a reasonable capital requirement reflective of the risk posed by their business.

⁷ These efforts have been formally supported by various industry and trade groups. See *The Commercial Energy Working Group, Request for Temporary Capital Relief for Commercial Swap Dealers*, dated October 21, 2021 ("**WG Request for Capital Relief**"). The Working Group Request for Capital Relief was submitted to then-Acting Chairman Behnam and then sitting CFTC Commissioners Dawn Stump and Dan Berkovitz, as well as the respective Chairman and Ranking Member of the U.S. Senate Committee on Agriculture, Nutrition, and Forestry and U.S. House Committee on Agriculture.

⁸ Shell Energy and other Non-Bank SDs estimate that it could take almost two years to develop, test, approve and implement.

⁹ 2020 Final Rule at 57,468.

[S]ome swap dealers are not financial entities, but rather commercial businesses engaged in the agriculture and energy sectors. These swap dealers help American families put food on the table and gas in the car. Unlike financial entities, their balance sheets often contain significant physical assets, such as oil refineries, grain warehouses, and even railroad rolling stock. Net worth—inclusive of physical assets—is the appropriate measure to assess minimum capital for these commercial entities. In extending our analogy, capital for these swap dealers must be inclusive not just of cash or retirement account holdings, but one’s house and car—the assets that could be pledged as collateral in borrowing. *The final capital rule recognizes that commercial entities are fundamentally different from other swap dealers.*¹⁰

(Emphasis added).

In sum, without the ability to develop and submit for Commission approval a workable capital model, the Commission’s current capital regime effectively punishes Non-Bank SDs when compared to bank swap dealers. Such an outcome is an unintended consequence of the 2020 Final Rule and is clearly not in the public interest. As evidenced by the multitude of no-action letters and staff guidance issued by the CFTC, compliance with the CFTC capital rules within the given time frame set forth in the 2020 Final Rule has proven unworkable.¹¹

Shell Energy appreciates the opportunity to comment on the Proposed Rule and respectfully requests that the Commission utilize this rulemaking proceeding to establish a process that would allow for the development of a reasonable capital model for Non-Bank SDs that avoids the imposition of undue material costs and risks on these entities, as well as their customers and consumers.

If you have any questions, or if we can be of further assistance, please contact the undersigned.

Sincerely,

/s/ Matthew J. Picardi

Matthew J. Picardi
Regulatory Affairs, Vice President
Shell Energy North America (US), L.P.

¹⁰ Final 2020 Rule at 57,571.

¹¹ See generally, CFTC Advisory Letter 21-14 (June 22, 2021), <https://www.cftc.gov/csl/21-14/download>; CFTC No-Action Letter 21-18 (Aug. 31, 2021), <https://www.cftc.gov/csl/21-18/download>; CFTC No-Action Letter 21-20 (Sept. 30, 2021), <https://www.cftc.gov/csl/21-20/download>; CFTC No-Action Letter 21-21 (Sept. 30, 2021), <https://www.cftc.gov/csl/21-21/download>; CFTC No-Action Letter 21-22 (Sept. 30, 2021), <https://www.cftc.gov/csl/21-22/download>; CFTC No-Action Letter 21-23 (Sept. 30, 2021), <https://www.cftc.gov/csl/21-23/download>.