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February 6, 2013

Via Email Submission

Ms. Sauntia Warfield
Assistant Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Further Proposed Guidance Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013), RIN 3038-AD85

Dear Ms. Warfield:

The European Federation of Energy Traders ("EFET") respectfully submits the following comments on the Commodity Futures Trading Commission's ("CFTC" or "Commission") further proposed guidance concerning compliance with certain swap regulations.[1]

EFET, headquartered in the Netherlands and with operations in various countries throughout Europe, is an industry trade association of more than 100 energy trading companies from 27 European countries. EFET is dedicated to improving the operation of the European wholesale energy markets and supports both the functioning of those markets and the market participants. It should be noted in the first instance that a large majority of EFET's members do not conduct the type of activities that the Commission has deemed to be swap dealing. EFET members primarily use swaps to hedge or mitigate commercial risk, either at the entity or group level. This also is true with respect to commonly controlled US affiliates.

[1] Further Proposed Guidance Regarding Compliance With Certain Swaps Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013) ("Further Proposed Guidance").

Nevertheless, there continues to exist in the markets a large amount of uncertainty around the exact definition of swap dealing. This is particularly the case with respect to market participants which are not based in the United States. Until there is further clarity as to this definition, most of EFET members, out of an abundance of caution, are taking an over-inclusive approach and establishing the costly infrastructure and a monitoring regime for internal compliance with the Commission's aggregation/registration rules. Thus, EFET and its members have a direct interest in the Commission's Further Proposed Guidance.

I. Background

On July 12, 2012, the Commission contemporaneously issued its Exemptive Order Regarding Compliance With Certain Swap Regulations,[2] and the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act.[3] The Proposed Order was intended to assist in the transition to the new swaps regulatory regime and provide greater certainty to the market and market participants concerning their obligations during that transition period. The Proposed Guidance set forth the manner in which the Commission proposed to interpret section 2(i) of the Commodity Exchange Act ("CEA") as it applied to cross-border swap activities and provided for a 30 day comment period. In its Proposed Guidance, the Commission explained how it proposed to apply the Final Entities Rules to cross-border swap activities, including in particular, with respect to newly added categories of registration.[4]

The Commission issued the Further Proposed Guidance in response to comments that the Commission received on its Proposed Guidance.[5] EFET submits these comments to provide additional information to the Commission on the impact of its proposal concerning the aggregation of swaps activities for purposes of determining the need to register as a Swap Dealer.[6]

II. Overview of Aggregation Proposal

The Commission's regulations require that, when determining whether a person's swap dealing activities exceed the *de minimis* threshold, a person must aggregate the notional value of

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2 77 Fed. Reg. 41110 (Jul. 12, 2012) (the "Proposed Order").
3 77 Fed. Reg. 41214 (Jul. 12, 2012) (the "Proposed Guidance").
4 Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30596 (May 23, 2012) ("Final Entities Rules").
5 Further Proposed Guidance, 78 Fed. Reg. at 911.
6 *Id.* at 911-912.

the swap dealing activities of its affiliates under common control.[7] Pursuant to the Proposed Guidance, a non-US person would have been required to include the aggregate notional value of swap dealing transactions entered into by its non-US affiliates under common control, but not the same transactions entered into by its US affiliates.[8]

In the Further Proposed Guidance, the CFTC is proposing an alternative approach to the aggregation rule.[9] Under this approach, in determining whether its swap dealing transactions exceed the *de minimis* threshold, a non-US person would be required to include the aggregate notional amount of swap dealing activity entered into by both non-US and US affiliates under common control, but exclude those aggregate notional amounts of swap dealing transactions: (1) entered into by any non-US affiliate under common control that is registered as a Swap Dealer; and (2) entered into with another non-US person counterparty.[10]

III. Comments on Aggregation Proposal

EFET and its members believe that this proposed alternative interpretation of the aggregation rule requiring aggregation of both non-US and US affiliates' swap dealing transactions should be rejected. First, the cost of establishing the infrastructure and operating systems to comply with such an aggregation requirement would be substantial – especially for non-financial firms such as energy trading firms. Second, the relative benefits of the Commission's aggregation proposal are small considering the costs and the fact that equivalent regulation already applies, or will soon apply, within the various non-US jurisdictions. Finally, the Commission's goal of protecting the United States financial system by preventing market participants from evading swap regulation under the CEA can be met by allowing for aggregation on a jurisdictional level as proposed in the Proposed Guidance.

A. Excessive Compliance Costs

It cannot be emphasized enough that aggregating the notional value of swap dealing activity across both non-US and US affiliates, even with the noted exclusions, would involve significant additional compliance costs for non-financial firms like energy traders. Most energy trading firms do not have the infrastructure necessary to aggregate the notional value of swap dealing transactions of all commonly held affiliates. Specifically, such firms would be required to invest substantial capital in building out IT and operational systems at the front end and then

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7 17 C.F.R. §1.3(ggg) (4) (2012).
8 Proposed Guidance, 77 FR at 41218-20.
9 Further Proposed Guidance, 78 Fed. Reg. at 911.
10 *Id.* at n.22.

incur ongoing costs to ensure such systems remain effective and operational. Moreover, monitoring the aggregate swap dealing activity across different affiliated entities would involve significant additional compliance costs. Again, most energy trading firms lack existing IT infrastructure and systems necessary to ensure compliance with the aggregation rules. Finally, excluding the non-US person's swap dealing transactions by any non-US affiliate that is a registered Swap Dealer and those with other non-US counterparties does not relieve these burdens. The non-US person would still have to aggregate across its commonly-held affiliates – something it most likely does not have the infrastructure to do right now – and then back out these excluded transactions.

B. The Costs of This Aggregation Interpretation Exceed the Relative Benefits

Aggregating swap dealing activity across both US and non-US affiliates would be of relatively little benefit in terms of meeting the G-20 commitments. The fact is that equivalent regulation in non-US jurisdictions also applies, or will soon apply, to energy trading firms and their various affiliates. For example, with respect to European-based firms, the mandatory clearing obligation and the bilateral margin requirements for non-cleared trades under the European Market Infrastructure Regulation ("EMIR") [11] apply or will apply to financial firms and to non-financial firms that exceed thresholds as low as EUR 1-3 billion measured over a 30 day period. Additionally, certain other risk mitigation and reporting requirements apply to all firms and all applicable trades irrespective of whether their trading activity falls above or below the EMIR threshold. Thus, the CFTC would obtain only a marginal benefit from requiring aggregated swap dealing information considering these firms already must comply with equivalent regulations.

Indeed, the aggregation rule seems to discount the fact that other jurisdictions to which energy trading firms are subject also have similar aggregation, margining, and reporting requirements. If firms are required to also comply with an aggregation requirement across all affiliates, the result could be a "pancaking" of the various jurisdictions' aggregation requirements. The costs for a firm to meet these various aggregation requirements and monitor compliance with the same are substantial. Simply put, the costs outweigh the benefits. This result will be more acute if other regulators take an uncoordinated approach. To that end, EFET urges the Commission to further work in conjunction with its European and other international counterparts with the goal of avoiding regulatory overlap that will lead to further unnecessary costs.

[11] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

C. The Commission Can Prevent Evasion of the Requirements Through Jurisdictional Aggregation

EFET and its members believe that the initial aggregation proposal in the Proposed Guidance sufficiently covers the Commission's concerns. Under this approach, a non-US person would aggregate all US affiliates' swap dealing transactions, irrespective of the location of jurisdiction of the swap counterparty, and then separately aggregate all of its non-US affiliates swap dealing transactions with US counterparties. First, this approach would ensure that all US-facing swap dealing activity would be captured. Second, many non-financial institutions, like energy trading firms, already aggregate their wholesale market activity on a regional basis under a limited number of trading entities. Therefore, the current US vs. non-US aggregation approach would most likely be easier and less expensive to implement. With that said, this approach would still necessitate significant new investment in IT infrastructure and operational systems in order to monitor trading activity across the relevant regions.

EFET and its members are also cognizant that a core rationale for the Commission's proposed interpretation of the aggregation rule is the Commission's desire to prevent swap market participants from engaging in evasion of swap dealer registration in such a way as to avoid US regulation while still subjecting the US financial system to potential harm from unregulated swaps activity. However, the commercial reality is that non-US persons who engage in swap dealing activity will not typically establish a presence in a foreign jurisdiction simply to avoid exceeding the *de minimis* threshold. This is especially true with respect to asset-backed traders of energy. Further, and particularly with respect to European-based traders, the relevant market participants and swap transactions will be subject to similar (and sometimes more extensive) regulation under their home jurisdictions; it is simply not the case that these activities will go unregulated.

As noted herein, the proposed aggregation rule does not match the cost to the market participants with the benefits of the additional regulation and compliance, especially in light of the true potential harm to the markets. On the other hand, while still imposing costs, the aggregation rule found in the Proposed Guidance that aggregates swap dealing transactions within a jurisdiction is less expensive to implement, captures the US-facing swap dealing activity of relevance to the Commission, and is more appropriately tailored to the actual threat posed by swap dealing activity. It is even more important that the Commission be careful about imposing costly and extensive regulation to prevent relatively limited harm that can be addressed through less burdensome regulation that comports with the Commission's goal of achieving international comity.

IV. Conclusion

EFET appreciates the Commission's consideration of these comments. For the foregoing reasons, EFET respectfully requests that the Commission adopt an interpretation of the aggregation rule that does not require aggregation of swap dealing activity across all affiliates, US and non-US, of a non-US person, but rather permits aggregation on a regional/jurisdictional basis as recommended herein.

EFET would be pleased to discuss these comments with the Commission or Commission Staff. Please direct any questions to Jan Haizmann, Member of the EFET Board and Chairman of the EFET Legal Committee (email: J.Haizmann@efet.org or tel.:+32 2737 1103).

Respectfully submitted,

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