



EDF TRADING

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September 20, 2010

Via Email: dfdefinitions@cftc.gov

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: “Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act,” 75 Fed. Reg. 51429 (August 20, 2010)

Dear Mr. Stawick:

EDF Trading North America, LLC (“EDF Trading”) respectfully submits these comments in response to the advance notice of proposed rulemaking (the “ANOPR”) issued by the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”).¹ The ANOPR encourages interested persons to address aspects of key definitions including qualitative and quantitative factors, analogous areas of law, economics, or industry practice, and factors specific to the commenter’s experience. EDF Trading appreciates the opportunity to provide input regarding key definitions contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“*Dodd-Frank*”). In particular, EDF Trading provides the CFTC with its position on the impact that the definitions of “swap,” “swap dealer,” and “major swap participant” will have on the business operations of EDF Trading and other commercial energy end users and energy producers (particularly small producers of electrical energy and natural gas).

INTEREST OF EDF TRADING

EDF Trading is a Texas limited liability company with its principal place of business in Houston, Texas. EDF Trading is a wholly-owned direct subsidiary of EDF Trading North America, Inc., which itself is a wholly-owned indirect subsidiary of Électricité de France, SA. EDF Trading is a natural gas and power marketer authorized by the Federal Energy Regulatory Commission (“FERC”) to engage in the sale at wholesale of natural gas and electricity and related services at market-based rates. EDF Trading also (through its wholly-owned subsidiaries) acts as a competitive retail energy service supplier to commercial and heavy industrial energy consumers as well as providing supply and risk management services to other energy retailers.

¹ 75 Fed. Reg. 51429 (August 20, 2010).



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EDF Trading engages in physical and financial transactions in various areas of operation for purposes of managing the risk of a producer or end use customer, as well as for the purpose of managing risks associated with its own contracted assets. Often the risk management that EDF Trading provides stems from the need for a bespoke arrangement that addresses the risk unique to EDF Trading's customers. Moreover, it offers customers whose financial position may not coordinate with the financial markets the ability to enter into hedging transactions by taking on such risk, providing an invaluable risk management service to its end use customers.

EDF Trading provides a variety of risk management functions to its customers. For example, EDF Trading has recently expanded its presence in the retail energy markets. Through wholly-owned subsidiaries acting as competitive retail electric suppliers, EDF Trading engages in retail sales of electric energy and related services at market-based rates to customers in Texas, New York and Illinois. EDF Trading's subsidiaries buy power and/or natural gas from EDF Trading and resell that to their end use customers, and in turn enter into power and/or natural gas hedge transactions to mitigate price risk.

EDF Trading also provides risk management services to non-affiliated energy retailers of electricity and natural gas and for generation owners, providing such services typical of those provided by "energy management services providers." In this role, EDF Trading routinely enters into contracts with third party asset owners to assist the owner in its efforts to manage risks arising from volatile prices in the natural gas, coal or fuel oil and electricity markets, and to optimize the owner's generation assets. Where EDF Trading is engaged to provide these services, the owners of such generators retain control over the power plants and EDF Trading provides services for the owner, which include: managing and/or procuring fuel supplies through standard purchase and sale arrangements, providing scheduling and dispatch services at the request and direction of the owner, and providing other logistical services that may be unique to the generation entity involved. In each of these cases, the services are provided to the generation owner and energy retailer in a manner tailored to fit the customer's needs. Many of the asset owners for which EDF Trading provides these services are firms that seek to obtain economies of scale by out-sourcing physical management capabilities and expertise to providers like EDF Trading. In exchange for these services, EDF Trading is paid a services fee by the owner. In a similar fashion, EDF Trading provides risk management services to entities serving natural gas and electrical load, such as retail energy service companies. In those cases, EDF Trading assists its customers by identifying and procuring wholesale supplies of natural gas and electricity, and optimizing those supplies with the actual needs of the consumers. EDF Trading also has a fully integrated coal and freight business and is a major participant in the U.S. gas market, with a network of contracted physical assets. Through lease and other contractual arrangements, it is active in transportation, storage, and wholesale trading, offering customized products and transacting across markets.

In any of these cases, its marketing, operations and management services require EDF Trading to maintain standard energy trading functions and platforms. EDF Trading's trading business executes transactions, manages the associate risk of originated transactions and optimizes EDF Trading's proprietary



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market position. The trading operations are conducted in a manner consistent with EDF Trading's internal business policies, its market-based rate authorizations, its internal risk management procedures and policies, and the other laws and regulations applicable to EDF Trading's business throughout the United States.

EDF Trading's operations include most of the hallmarks typical of energy trading and marketing companies that are focused on the purchase and sale of wholesale energy in the various regional power markets of the United States. EDF Trading's wholesale energy strategies have been historically accompanied by EDF Trading's energy management services business, where EDF Trading provides various services to third-party generation owners, electric retailers, natural gas distributors, and energy transmission, storage and transportation operators. EDF Trading does not otherwise own or control any franchised utilities in North America, nor does EDF Trading own or control any electric generation or transmission assets, or any physical natural gas or coal transportation facilities or other physical assets related to energy production or transportation. EDF Trading's business functions as an extension of the risk management services provided for prudent management of those operations.

EDF Trading's wholesale marketing business focuses on low-risk arbitrage of locational opportunities and the capture of wholesale product opportunities that are primarily driven by its customers' and counterparties' business needs and product requirements. EDF Trading typically purchases and sells wholesale energy products with customer classes that include generators, producers, transporters, municipalities, investor-owned utilities, governmental and quasi-governmental entities. EDF Trading's wholesale marketing operations also involve a wide variety of transactions with other energy marketers that possess market-based rate authority and that conduct wholesale energy marketing operations that are similar to those of EDF Trading.

The nature of EDF Trading's business renders it difficult to definitively differentiate between transactions entered into for varying discrete areas of its business, as it may be managing the risk of a customer or risk stemming from its own activities and assets. For example, in order to manage a customer's risk, EDF Trading may transact to purchase a generator's output at a fixed price, and concomitantly transact for offsetting physical and/or financial positions. In order to manage an asset, EDF Trading may inject gas into subscribed storage capacity at a fixed price and sell the gas in the future at an agreed price. Transactions entered into as hedges for such physical management transactions would be intended to settle physically, but may ultimately be settled financially depending on the market view of its customers. Accordingly, EDF Trading will be affected by the Commission's disposition of the rulemaking at issue in the ANOPR.

DEFINITION OF "SWAP"

Under *Dodd-Frank*, Congress excluded from the definition of swap any "sale of a nonfinancial commodity or security for deferred shipment or delivery, *so long as the transaction is intended to be physically*



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settled” (emphasis added).² EDF Trading submits that the CFTC should construe the statutory exclusion provided in the definition of “swap” under *Dodd-Frank* in a consistent manner with the forward contract exclusion under the Commodity Exchange Act (the “CEA”). Specifically, for the reasons set forth here and in the myriad of comments by other similarly situated market participants, EDF Trading submits that substantial cause exists for the CFTC to clarify that physically-settled forward contracts will not be characterized as swaps solely because the parties to such contracts subsequently “book-out” delivery obligations for commercial convenience.³

The CFTC recognized that an evolving commercial landscape necessitates more sophisticated forward contracts that “serve the same commercial functions as did those forward contracts which originally were the subject of the [forward contract exclusion] notwithstanding the fact that, in specific cases and as separately agreed to between the parties, the transactions may ultimately result in performance through payment of cash as an alternative to actual physical transfer or delivery of the commodity.”⁴ In a 1990 Statutory Interpretation, the CFTC explained that, so long as the original contract is entered into between commercial participants in connection with their businesses and imposes specific delivery obligations on the parties, the exclusion would apply.⁵ Moreover, the CFTC emphasized the creation of an enforceable delivery obligation, noting that “any party that is in a position in a distribution chain that provides for the opportunity to book-out with another party or parties in the chain is nevertheless entitled to require delivery of the commodity to be made through it, as required under the contracts.”⁶ The CFTC has maintained that such obligation, and the fact that the subsequent book-out transactions are individually-negotiated, separate agreements, excluded book-out transactions from CFTC jurisdiction.

A significant amount of uncertainty and instability in the physical commodity markets would result in the event the CFTC does not interpret the statutory exclusion provided in the definition of “swap” under *Dodd-Frank* to include book-out transactions. If book-out transactions were categorized as swaps under *Dodd-Frank*, this would affect which market participants were considered to be swap dealers and major swap participants. Such an interpretation lacks any basis in the Congressional record and would conflict with widespread

² Commodity Exchange Act (CEA) §1a (47)(B)(ii), 7 U.S.C. §1 *et seq.* (1999) (as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203, effective July 21, 2010).

³ A “book-out transaction” is a power forward transaction in which the parties agree to financially settle their delivery obligations to one another, recognizing a “paper” gain or loss, rather than actually making or taking physical delivery of the power. Prior to the passage of the Dodd-Frank Act, the CFTC made clear that the forward contract exclusion applied to book-out transactions. *See Statutory Interpretation Concerning Forward Transactions (1990 Statutory Interpretation)*, (1990-1992 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 24,925 (Sept. 25, 1990); *Exemption for Certain Contracts Involving Energy Products*, (1992-1994 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 25,633 (Apr. 20, 1993).

⁴ *In re Bybee*, 945 F.2d 309, 314 (9th Cir. 1991).

⁵ *1990 Statutory Interpretation*.

⁶ *Id.*



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commercial practice. Congress has stated that it “encourages the CFTC to clarify through rulemaking that the exclusion from the definition of swap for ‘any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled’ is intended to be consistent with the forward contract exclusion that is currently in the CEA and the CFTC’s established policy and orders on this subject, including situations where commercial parties agree to “book-out” their physical delivery obligations under a forward contract.”⁷

In addition, FERC has defined a book-out transaction as “the offsetting of opposing buy-sell transactions” where [t]he buyer, seller, price, quantity and other agreement details in such agreements are indistinguishable from those in any other [physical] power sale agreement.”⁸ FERC has noted that, unlike “purely financial transactions,” the transactions underlying book-outs are agreements that “obligate the parties to deliver power at a specified price and, but for the subsequent offsetting power sales, transmission of power would be made.”⁹ FERC therefore requires all sellers of wholesale power to report booked out transactions on their Electronic Quarterly Reports.¹⁰ In other words, the transactions that are booked out are wholesale power forward contracts that are excluded from the CFTC’s jurisdiction.

Interpreting the statutory exclusion provided in the definition of “swap” under *Dodd-Frank* consistently with the forward contract exclusion will increase legal certainty in the industry—avoiding the increase in transaction costs typically associated with increased risk. Moreover, clarifying that the swap exclusion encompasses all forward contracts, including those in which the parties later agree to book-out their physical delivery obligations, will ensure that such contracts continue to be excluded from the definition of a swap in accordance with long-standing CFTC policy and precedent.

DEFINITION OF “SWAP DEALER”

EDF Trading submits that the CFTC should define “swap dealer” to exclude commercial end users that predominantly use swaps to hedge commercial risk, as do EDF Trading’s customers and/or EDF Trading in order to service its customers. The CEA, as amended by *Dodd-Frank*, broadly defines a swap dealer to include any entity that (i) holds itself out as a dealer in swaps, (ii) makes a market in swaps, (iii) regularly enters into swaps with counterparties in the ordinary course of business for its own account, or (iv) is commonly known as a swap dealer.¹¹

⁷ 156 Cong. Reg. H5249 (daily ed. Jun. 30, 2010) (Dodd-Lincoln Letter),

⁸ *Revised Pub. Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 at 31,062, FERC Stats. & Regs. ¶ 31,127 (2002).

⁹ *Id.*

¹⁰ *Id.*

¹¹ CEA § 1a(49)(A).



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EDF Trading urges the CFTC to clarify the statutory definition. First, an entity that “holds itself out” as a dealer should qualify as a swap dealer *only* if it consistently and systematically markets itself as a dealer to third parties. EDF Trading does not hold itself out as a swap dealer or as a market maker. Although EDF Trading enters into transactions as a service to third parties, these transactions are entered into as part of EDF Trading’s energy management services and do not constitute traditional “dealing” activities. To interpret the phrase “hold itself out” to include entities that provide such risk management services as those offered by EDF Trading would place companies like EDF Trading into the category of “swap dealer.” Such an overly-expansive interpretation lacks support in the record, conflicts with past industry practice and industry needs, and acts at cross-purposes to the fundamental nature of EDF Trading’s business of providing risk management services to third parties seeking to out-source that function in order to benefit from economies of scale and expertise.

Second, an entity should qualify as “making a market” *only* if it regularly and consistently holds itself out as ready, willing and able to make two-way markets in swaps. The fact that an entity is willing to either buy or sell a commodity at the same time should not be sufficient to treat such an entity as “making a market.”

Third, the qualification that an entity “regularly” enters into swaps in the “ordinary course of business for its own account” should be narrowed to specify that it applies to an entity’s primary business. Only an entity whose primary business is “dealing” in swaps, as such term is commonly known in the industry, should be considered to fall within the definition. An end user that enters into swap transactions as a mechanism to hedge or mitigate its own commercial risk and/or the commercial risk of its customers that participate in the physical market is not engaging in the dealing of swaps as its primary business. For example, given the variable, ever-changing nature of serving physical requirements, EDF Trading’s transactions may not in each instance perfectly match a customer’s hedge, but nevertheless EDF Trading undertakes such transactions to serve its principal business function—managing commercial risk for entities that own or supply physical resources or obligations.

If the definition were to apply to any entity that regularly enters into swaps, regardless of whether those swaps are used to mitigate commercial risk, virtually every end user would be forced to register as a swap dealer. Moreover, such an expansive interpretation would render other provisions of *Dodd-Frank*, such as the end user clearing exemption, meaningless. This interpretation of the statutory definition would interfere with EDF Trading’s (and other similarly situated entities’) ability to hedge against commercial and other risk through its asset management, energy management, and wholesale supply activities. This result would be inconsistent with Congressional intent. As Senators Dodd and Lincoln advised, “Congress expects the regulators to maintain through rulemaking that the definition of Major Swap Participant does not capture companies simply because they use swaps to hedge risk in their ordinary course of business. Congress does



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not intend to regulate end users as Major Swap Participants or Swap Dealers just because they use swaps to hedge or manage the commercial risks associated with their business.”¹²

Fourth, the qualification that an entity be “commonly known in the trade” as a swap dealer should be interpreted based upon the perception of persons who have substantial experience with and knowledge of the market for the applicable category of swaps, including dealers, market makers and other participants. If the “commonly known” standard is properly interpreted, few, if any, end users should be subjected to regulation as a swap dealer. While EDF Trading’s commodity risk management services require EDF Trading to have substantial experience with swaps, EDF Trading is primarily participating to manage end user and producer risks, and, therefore, should not be considered to be “commonly known” as a swap dealer.

Finally, EDF Trading recommends that the CFTC implement a *de minimis* exception that excludes entities from the definition of swap dealer that do not significantly increase systemic risk. As Senators Dodd and Lincoln explained, “Congress incorporated a *de minimis* exception to the Swap Dealer definition to ensure that smaller institutions that are responsibly managing their commercial risk are not inadvertently pulled into additional regulation.”¹³ The threshold to qualify for such an exception should be based on factors that are sufficiently flexible that the CFTC can exempt a variety of dealing-type activities that end users and other companies may engage in on behalf of their customers. The CFTC should consider, for example, measuring an entity’s customer-oriented dealing activity against such entity’s entire portfolio of swap transactions, including swaps used to mitigate commercial risk.

DEFINITION OF “MAJOR SWAP PARTICIPANT”

Dodd-Frank defines a Major Swap Participant, in part, to be a person who is not a swap dealer and who, “maintains a substantial position in swaps” (excluding positions held for hedging or mitigating commercial risk), whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets, or is a highly leveraged financial entity that holds a substantial position in swaps.¹⁴ The statute further provides that “the Commission shall define, by rule or regulation, the term ‘substantial position’ at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States.”¹⁵

¹² Dodd-Lincoln Letter.

¹³ Dodd-Lincoln Letter.

¹⁴ CEA § 1a(33)(A).

¹⁵ CEA § 1a(33)(B).



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EDF Trading submits that the CFTC should define “substantial position” to exclude transactions that are entered into for purposes of hedging and/or mitigating commercial risk. Congress has expressed its intent that swaps used to hedge or mitigate commercial risk be excluded from the determination of whether an entity holds a substantial position in swaps: “Few, if any, end users will be major swap participants, as we have excluded ‘positions held for hedging or mitigating commercial risk’ from being considered as a ‘substantial position’ under that definition.”¹⁶

Unlike an investment fund that elects to maintain a substantial position in swaps for purposes of investment gain, EDF Trading uses swaps for hedging and/or mitigating commercial risk. Transactions entered into to effectuate risk management services for an entity’s customers and/or manage an entity’s own assets should qualify as transactions to mitigate commercial risk. EDF Trading, whether entering into transactions to manage its own commercial risk or acting as a provider of such risk management services to its end user customers, is in either case acting for the purpose of mitigating and managing risk. This category of transactions may properly be excluded from regulation as such transactions do not present a risk of default if the position has been managed. Moreover, the term “commercial risk” appears in several places in the CEA, as amended by *Dodd-Frank*.¹⁷ The terms should be defined consistently through the statute.

Congress further directed the CFTC to consider a person’s relative position in uncleared as opposed to cleared swaps when determining whether a position is “substantial.” Uncleared transactions that are exempt from the clearing requirement because they involve an end user hedging or mitigating commercial risk should be counted differently than non-standard swaps that are impossible to clear. EDF Trading’s relative position, for example, should not be determined based on the uncleared swaps it has entered into for the purpose of providing risk management capabilities to its end user customers. Congress urged the CFTC to,

[C]onsider the person’s relative position in cleared versus the uncleared swaps and [to] take into account the value and quality of the collateral held against counterparty exposures. The committee wanted to make it clear that the regulators should distinguish between cleared and uncleared swap positions when defining what a “substantial position” would be. Similarly where a person has uncleared swaps, the regulators should consider the value and quality of such collateral when defining “substantial position.” Bilateral collateralization and proper segregation substantially reduces the potential for adverse effects on the stability of the market. Entities that are not excessively leveraged and have taken the necessary steps to segregate

¹⁶ Cong. Rec. H5248 (daily ed. Jun. 30, 2010) (statement of Rep. Peterson).

¹⁷ CEA § 1a(17) (definition of “excluded commodity”); CEA § 1a(17) (definition of “major swap participant”); CEA § 2(h)(7)(A) (general requirements of the end user clearing exception); and CEA § 2(h)(7)(D) (treatment of affiliates under the end user clearing exception).



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and fully collateralize swap positions on a bilateral basis with their counterparties should be viewed differently.¹⁸

A “substantial position” should be calculated by considering only the net number of speculative swaps because that is a more accurate way to measure exposure; offsetting positions do not create exposure to market risk.

Inter-affiliate transactions should be excluded when determining whether an entity as a “substantial position” in swaps, as many end users hedge their commercial risk through affiliated entities for operational convenience. The end user clearing exception expressly permits end users to trade through non-financial affiliated entities while relying on the clearing exception. If these hedging transactions are included when determining whether an entity (such as the trading affiliate of an end user) maintains a substantial position in swaps, the provision that expressly permits affiliates of end users to rely on the end user’s clearing exception would be rendered meaningless. As part of its risk management function, EDF Trading will execute inter-affiliate transaction to hedge, for example, the risk of EDF Trading’s retail subsidiaries face in servicing their customers or the risk that EDF Trading affiliates face in coal or natural gas or energy transactions. EDF Trading urges the CFTC to clarify that an entity’s inter-affiliate transactions and net swap position of uncleared swaps shall not be considered “substantial.”

In addition to defining “substantial position” the CFTC is tasked with determining what constitutes “substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets.”¹⁹ By definition, commercial end users are not systemically important and cannot significantly impact the U.S. financial system. Moreover, EDF Trading maintains strict internal risk management policies and procedures with respect to all swap transactions so as not to subject EDF Trading or the market to undue risk. Congressman Peterson noted that, “[i]n crafting the House bill and the conference report, we focused on creating a regulatory approach that permits the so-called end users to continue using derivatives to hedge risks associated with their underlying businesses, whether it is energy exploration, manufacturing, or commercial activities. End users did not cause the financial crisis of 2008. They were actually the victims of it.”²⁰ Accordingly, EDF Trading asks that the CFTC exempt end users from regulation as major swap participants.

¹⁸ 156 Cong. Rec. S5907 (daily ed. Jul. 15, 2010) (statement by Sen. Lincoln).

¹⁹ CEA § 1a(33)(A)(ii).

²⁰ 156 Cong. Rec. H5245 (daily ed. Jun. 30, 2010) (statement of Rep. Peterson).



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CONCLUSION

EDF Trading thanks the CFTC for the opportunity to provide advance comments on this complex and transformative rule-making process. For the foregoing reasons, EDF Trading respectfully requests that the CFTC considers Congress' expressly stated intent to offer relief to end users such as EDF Trading that engage in swaps for the purpose of mitigating the commercial risk of their customers and their own commercial business.

Respectfully submitted,

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