January 24, 2011

VIA ELECTRONIC SUBMISSION

Shell Energy North America
Two Houston Center
909 Fannin, Plaza Level 1
Houston, TX 77010
www.shell.com/us/energy

Mr. David A. Stawick
Secretary
U.S. Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Registration of Swap Dealers and Major Swap Participants (RIN Number 3038-AC95)

Dear Mr. Stawick:

Shell Trading (US) Company and Shell Energy North America (US), L.P. (collectively, "Shell Trading") respectfully submit the following comments in response to the Notice of Proposed Rulemaking ("Proposed Rule")[1] issued by the U.S. Commodity Futures Trading Commission ("Commission") regarding the registration of swap dealers and major swap participants under Section 4s of the Commodity Exchange Act ("CEA"), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[2] Shell Trading's comments are directed specifically to the potential extraterritorial application of the registration requirement to entities that are located outside the United States. In conjunction with its international affiliates, Shell Trading is an active participant in global commodities and derivatives markets. Shell Trading believes that it can provide an important perspective that hopefully will assist the Commission in the development of rules implementing the extraterritorial application of the swap dealer and major swap participant designations and related obligations.

I. DESCRIPTION OF SHELL TRADING AND ITS INTEREST IN THE PROPOSED RULE

Shell Trading (US) Company ("STUSCO") and Shell Energy North America (US), L.P. ("Shell Energy") are indirect subsidiaries of Royal Dutch Shell, plc ("Shell"), a global, integrated oil company. STUSCO trades various grades of crude oil, refinery feedstocks, bio-components and finished oil-related products, including such commodities that are produced, manufactured or imported by affiliates. Shell Energy markets and trades natural gas, electricity and environmental products, including the natural gas produced by its affiliates. Both entities actively participate in the U.S. energy derivatives markets. Together they manage risk and optimize value across physical and financial, exchange-traded and over the counter markets.

---

1 75 Fed. Reg. 71,379.

2 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Like many commodity merchants, Shell Trading uses "trading desks" to manage the entity's overall physical position by understanding the risk to which the entity is exposed through its overall physical and financial position. Given the dynamic nature of physical supply and demand positions coupled with price volatility, a trading desk is best situated to limit the risk to the entity's portfolio as a whole, rather than try to match physical supply to financial hedges on a transaction by transaction basis. Much like a trading desk in a commodity merchant firm, STUSCO and Shell Energy are available to provide supply and hedging functions for affiliated companies in the United States. When called upon, STUSCO and Shell Energy centralize and manage the risk that otherwise resides in the various Shell end user subsidiaries.

In addition to STUSCO and Shell Energy, Shell has trading operations around the world through its subsidiaries that are in place to support and facilitate Shell's global, commercial operations. These non-U.S. entities are available to act as central trading desks for Shell's commercial operations outside the United States. While these non-U.S. trading entities are affiliated with STUSCO and Shell Energy, their businesses are driven largely by physical operations located outside the United States, and their trading is largely conducted in non-U.S. markets. To the extent that these entities enter into swap transactions that arguably touch a U.S. market, these activities are always or virtually always undertaken through STUSCO or Shell Energy, and they are consistent with Shell's broad goal to minimize transaction costs and help to focus the company's risk management function for each commodity into a single legal entity.

Shell Trading does not believe that the hedging activities of its non-U.S. affiliates are swap dealing activity or that these activities are directly and significantly linked to U.S. commerce. However, in an effort to confirm that the Commission shares this view, Shell Trading submits these comments and its rational for why it believes this conclusion comports with Congress' intent to provide a clearly marked and legally certain boundary around the extraterritorial reach of the CEA.

II. SWAP DEALER REGISTRATION REQUIREMENT PURSUANT TO THE DODD-FRANK ACT

Section 2(i) of the CEA, added by Section 722(d) of the Dodd-Frank Act, provides that:

> The provisions of [the CEA] relating to swaps that were enacted by the [Dodd-Frank Act] (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—
>
> (1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or

> (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the CEA, as amended by the Dodd-Frank Act].[3]

The Commission notes in the Proposed Rule that Section 2(i) "sets a floor that must be met" before the swap provisions of the CEA, including the swap dealer registration requirement in Section 4s, apply to activities occurring, and entities located, outside the United States. As non-specific examples of conduct that does not meet this minimum threshold requirement, the Commissions describe, in the Preamble to the Proposed Rule, certain types of non-U.S. entities that "generally" will not be subject to the registrations requirements under Section 4s, including:

- An entity whose "*only* connection to the U.S. was that the person uses a U.S.-registered swap execution facility, derivatives clearing organization or designated contract market in connection with their swap dealing activities";
- An entity whose *only* connection to the U.S. is that such person "reports swaps to a U.S.-registered swap data repository"; and
- An entity whose swap dealing activity "has *no* connection or effect *of any kind*, direct *or indirect*, whether through affiliates or otherwise, to U.S. commerce."[4]

Shell Trading agrees with the Commission that these entities are appropriately excluded from the swap dealer registration requirements because the activities being described are either not directly connected to a U.S. market *or*, if somehow linked, the connection is not significant and therefore does not pose a systemic risk to the U.S. financial system. Shell Trading respectfully suggests that a swap transaction between a non-U.S. person and its U.S. affiliate, without more, also should not be subject to the registration requirements under CEA Section 4s, as amended by the Dodd-Frank Act. As the Commission recognizes in the Proposed Rule, the "activities" to which Section 2(i) refers are "swap dealing activities."[5] The Commission previously acknowledged that swap transactions among affiliated entities often "represent an allocation of risk within a corporate group . . . [and] may not involve the interaction with unaffiliated persons that [the Commission] believe[s] is a hallmark of the elements of the definition that refer to holding oneself out as a dealer or being commonly known as a dealer."[6] Thus, to the extent that a swap transaction between a non-U.S. person and its U.S. affiliate, arguably, does not represent swap dealing activity, this conduct should not give rise to a requirement that the non-U.S. person register as a swap dealer under the CEA.

However, the language the Commission uses in the third example in the preamble raises an issue of whether the CFTC is considering extending its extraterritorial reach to swap dealing activity

---

3 Dodd-Frank Act § 722(d) (to be codified as CEA § 2(i)).

4 75 Fed. Reg. 71,382 (emphasis added).

5 *See id.*

6 75 Fed. Reg. 80,174 at 80,183 (Dec. 21, 2010).

involving non-U.S. entities that has only a minimal and indirect connection with or effect on U.S. commerce. Were the CFTC to go this far, the threshold for the swap dealer designation could be met merely because an entity is affiliated with a U.S. person or such entity's conduct has an impact of any kind on U.S. commerce regardless of the nature and scope of the entity's swap business. As discussed herein, Shell Trading believes that such a broad application of Section 2(i) would be inconsistent with the intent of Congress as expressed in the statutory language of Section 2(i) and potentially disruptive to the effective functioning of the global energy markets.

III. CONGRESS INTENDED TO LIMIT THE EXTRATERRITORIAL APPLICATION OF THE SWAP DEALER REGISTRATION REQUIREMENT

A. The Commission Should Apply the Swap Dealer Registration Requirement in a Manner Consistent with Section 2(i) of the CEA.

1. *The Plain Language of Section 2(i) Should Guide the Extraterritorial Application of the Swap Dealer Designation.*

Section 2(i) provides, in pertinent part, that the provisions of the CEA relating to swaps and any Commission regulations implementing the same shall not apply to swap dealing activities outside the United States unless those activities have a "direct and significant" connection with activities in, or effect on, U.S. commerce.[7] From the plain language of the statute, it is evident that Congress intended for the CFTC to measure both the nature of the connection to U.S. commerce – direct, not indirect – as well as the significance of the connection – significant, not an impact of any kind. For the CFTC to exercise its authority extraterritorially, Congress mandated that the link to U.S. commerce must satisfy *both* criteria.

In addressing the scope of Section 2(i), the Commission does not identify examples of conduct that it believes could trigger the CFTC's exercise of its extraterritorial authority, Similarly, it does not describe the process by which it proposes to make such a determination. Rather, the preamble of the Proposed Rule articulates examples of activities by non-U.S. persons that would not implicate the CEA's swap dealer and major swap participant registration requirements. Shell Trading believes that the Commission's approach may unintentionally invite regulatory uncertainty. Indeed, the language in the Proposed Rule suggests that the Commission may be considering reading Section 2(i)'s limiting language narrowly and, thus, potentially requiring many non-U.S. swap counterparties to register as swap dealers.[8] Shell Trading does not believe

---

[7] Dodd-Frank Act § 722(d) (to be codified as CEA § 2(i)) (emphasis added).

[8] The Proposed Rule states that "a person whose swap dealing activity has no connection or effect of any kind, direct or indirect, whether through affiliates or otherwise, to U.S. commerce would not be required to register as a swap dealer." 75 Fed. Reg. at 71,382. This raises the question whether, from the CFTC's perspective, a person whose swap dealing activity has a connection of effect of any kind, direct or indirect, whether through affiliates or otherwise, to U.S. commerce would be required to register as a swap dealer. Added to this uncertainty, the Proposed Rule asks "to what extent do persons outside the U.S. who engage in swap dealing activity with non-U.S. affiliates of U.S. persons (such as the non-U.S. subsidiary of a corporate parent headquartered in the U.S.) engage in swap dealing activity that has a direct and significant connection with activities in, or effect on, U.S. commerce?" *Id.* This

(continued...)

that such a reading would comport with the language of Section 2(i). It would further risk creating conflicts between international regulators that could undermine the objectives of the Dodd-Frank Act.

The Commission should instead establish a swap dealer registration requirement that imposes regulatory obligations on non-U.S. entities only when such entities engage in swap dealing activities that have a direct *and* significant connection with, or effect on, U.S. commerce. Shell Trading appreciates that it may be difficult to draw a bright line between non-U.S. swap dealing activity that is sufficiently linked to U.S. commerce to warrant U.S. regulation and similar activity that is too remote to justify CFTC oversight. However, the Commission is in a position to provide market participants, and particularly those entities that are engaged in commercial operations around the world, with (i) a fulsome description of the process the Commission intends to employ to make this determination; (ii) examples of conduct that the Commission expects could trigger the extraterritorial application of the swap dealer and major swap participant requirements; and (iii) guidance regarding the Commission's rational underlying the conclusions it has reached. With regard to this last point, Shell Trading believes that this process should include a safe harbor that gives market participants an opportunity to structure their businesses in a manner that allows them to move activities into a US based swap dealer or major swap participant so that a foreign affiliate does not have to register and the activities are appropriately regulated in the US entity.

2. *The Limited Jurisdiction of the U.S. Courts Implicitly Delineates the Outside Scope of the Swap Dealer Registration Requirement.*

As a practical matter, the Commission should also be guided by the reach of the federal district courts in the United States over conduct occurring outside the United States. Arguably, Congress would not have vested the Commission with the authority to regulate swap dealing activities outside the United States beyond those activities for which a federal court has the ability to enforce in the event of non-compliance with such regulations. In order for a federal court to exercise jurisdiction over an action against a foreign national, the court must have subject matter and personal jurisdiction.[9] Subject matter jurisdiction can be established by applying the "conduct test" or the "effects test." The conduct test focuses on the non-U.S. entity's conduct in the United States and authorizes jurisdiction when "the conduct occurring in the United States is material...." The effects test considers "whether foreign activities have 'caused foreseeable and substantial harm to interests in the United States.'"[10]

---

question suggests that the CFTC considers it possible for some activity that is located wholly outside the U.S. in terms of both the parties and the underlying product, nonetheless, to directly and significantly affect U.S. commerce.

[9] *See Pyrenee, Ltd. v. Wocom Commodities Ltd. And Wocom Limited*, 984 F. Supp. 1148 (ND Ill. 1997); *Tamari v. Bache & Co (Lebanon) S.A.L.*, 730 F.2d 1103 (1984).

[10] *See Pyrenee, Ltd.* at 1154-1155.

Under the conduct test, a federal court has jurisdiction to decide a case involving a non-U.S. entity if "the conduct occurring in the United States is material...."[11] For example, a court could potentially conclude that a non-U.S. entity that regularly enters into swaps with U.S. counterparties is materially within the U.S. and, therefore, exercise subject matter jurisdiction over a claim by the Commission that the non-U.S. entity is required to register as a swap dealer under the CEA. In contrast, a court could conclude that a non-U.S. entity that makes a market in swaps not tied to a U.S. delivery point and enters into such swaps with non-U.S. entities has no conduct in the U.S. that is material. Therefore, the court does not have subject matter jurisdiction over an action by the Commission seeking to require the non-U.S. entity to register as a swap dealer.

Under the effects test, it would be difficult for the Commission to demonstrate that activities between two non-U.S. entities, involving a swap tied to a market outside the United States, even where the conduct of one counterparty constituted swap dealing activities, caused a "foreseeable" harm to interests in the United States. The impact, if any, would simply be too indirect for either counterparty to anticipate the requisite causal link. Arguably, the same would be true for activities between two non-U.S. entities, involving a swap tied to a non-U.S. market, where the conduct of one counterparty constituted swap dealing activities and where one of the counterparties had a U.S.-based affiliate. Even if the Commission could show that the activities caused "substantial harm" to interests in the United States, it would be hard to demonstrate that the counterparties could foresee that the mere existence of an affiliation between one of the counterparties and a U.S.-based entity could give rise to Commission jurisdiction. In short, any effort by the Commission to link application of its extraterritorial jurisdiction to an impact "of any kind" whether "direct or indirect" would be difficult to establish as a matter of law.

Shell Trading encourages the Commission to look to the limited extraterritorial jurisdiction of the U.S. courts as guidance in the development of the appropriate extraterritorial application of the swap dealer registration requirement. A swap dealer registration requirement that attempts to go further and arguably exceeds the judiciary's authority to enforce compliance will create considerable uncertainty for non-U.S. swap counterparties and their U.S. affiliates, and potentially will be unenforceable in the U.S. courts.

B. An Overly Broad Extraterritorial Application of the Swap Dealer Designation May Undermine International Regulatory Cooperation.

In addition to the Commission's ability to enforce its authority under the Dodd-Frank Act to activities outside the United States, there is the issue of whether the agency's attempt to regulate non-U.S. entities for conduct occurring outside the United States will potentially undermine foreign laws and international cooperation in major regulatory issues, including financial reform. For example, all members of the European Union have implemented privacy laws that curtail the dissemination of personal data belonging to a person, absent the person's express consent. The

---

[11] *See Tamari v. Bache & Co.*, 730 F.2d 1103, 1108 (7th Cir. 1984).

European Union's Directive relating to Data Protection ("Dir 95/46/EC")[12] forbids, outside of specific circumstances, the transfer of certain personal data of individuals to a country or territory outside of the European Economic Area. Protected data under the Dir 95/46/EC would include, among other things, the identities of counterparties to a swap.

Under the Dodd-Frank Act, swap dealers and major swap participants will be required to maintain and report to the Commission information about their swap transactions. They will also be required to provide various streams of information pertaining to their uncleared swaps to swap data repositories ("SDR"). The SDR or a third party vendor will then disseminate certain of the information to the marketplace in "real time." Depending on the requirements imposed on swap dealers and major swap participants, the reporting of certain information about swap transactions to the Commission and the dissemination of other information to the public "real time" could be prohibited by data protection laws in various countries outside the United States. This, in turn, could cause non-U.S. entities who are so designated to violate the laws of their home states in order to comply with the laws of a foreign jurisdiction.

Further, Shell Trading respectfully suggests that the Commission recognize that a non-U.S. person can also be a regulated person registered and authorized by a foreign "competent authority" operating a substantially equivalent regulatory regime regarding conduct of business, transparency and reporting and with whom the Commission already has or could agree to enter into a Memorandum of Understanding and information sharing arrangement. This equivalence of regulatory oversight should be recognized as a specific exemption in the final rule from the requirements to register as a Swap Dealer or Major Swap Participant.

By limiting the Commission's extraterritorial reach to swap dealing activities that have a "direct and significant connection with activities in, or effect on, commerce in the United States," Congress struck a balance between its stated goal of regulating the swaps markets, which are not necessarily bounded by the geographical limits of the United States, and the legal limitations on the exercise of jurisdiction outside the United States. Shell Trading encourages the Commission to focus on, and be respectful of, the balance Congress defined.

C. Policy Considerations Merit the Development of Clear Jurisdictional Boundaries for the Application of the Dodd-Frank Act.

Separate and apart from the legal impediments to a broad interpretation of the Commission's extraterritorial jurisdiction, there are substantial policy concerns associated with broadly applying the Dodd-Frank Act's swap dealer and major swap participant designation and registration requirement to non-U.S. entities. Among other considerations are the risk that such entities, particularly those entities who are registrants of a regulator outside the United States, will find themselves subject to conflicting regulatory schemes; the potential negative impact the requirements under the Dodd-Frank Act may have on the liquidity of non-U.S. markets; and the international perception that the United States may be interfering in foreign nations' national

[12] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

interests. These potential issues could be mitigated or avoided by careful crafting of the rules in connection with regulation of non-U.S. entities.

In the Proposed Rule, the Commission recognizes the need to consider international comity in the determination of the appropriate application of the Dodd-Frank Act's extraterritorial jurisdiction. The importance of this principle is particularly acute in this instance. As an example, the Dodd-Frank Act requires the Commission to "establish limits on the amount of positions, as appropriate . . . that may be held by any person" with respect to futures contracts in exempt commodities.[13] On the same point, the FSA has stated publicly, "[w]e do not believe, nor have we seen evidence, that a blanket approach through specific position limits is necessarily the most effective way to monitor, detect and deter manipulative behavior in derivatives markets, whether they are on exchange or OTC."[14] The CFTC and regulators around the world are undertaking a wholesale review of the regulation of markets for commodities and derivatives. There is an opportunity for regulators to consider a uniform approach or, at the very least, to apply consistent principles to these global markets. In the interest of comity, the CFTC should allow this process to unfold before considering whether and to what extent to oversee participants located and conduct occurring outside the United States.

IV. CONCLUSION

The scope of the Dodd-Frank Act's application to non-U.S. entities must be carefully implemented through rules that clearly and unambiguously delineate the activities that will cause a non-U.S. entity to be designated as a swap dealer or major swap participant and thus subject to the Dodd-Frank Act's requirements. In light of the potential negative impacts discussed above, the Commission should avoid an overly broad application of the Dodd-Frank Act, with respect to the applicable of the swap dealer designation and corresponding obligations to non-U.S. entities. In particular, swap transactions between a non-U.S. entity and its U.S. affiliate, should not give rise to a requirement that the non-U.S. person register as a swap dealer under the CEA.

For these reasons, Shell Trading encourages the Commission to develop rules that implement the swap dealer registration requirements in a manner that unambiguously reflects the intent of Congress that the Dodd-Frank Act only apply to entities whose activities outside the U.S. "have *a direct and significant connection with activities in, or effect on*, commerce of the United States" or are designed to circumvent the Commission's rules.

Shell Trading appreciates the opportunity to provide these comments. We would be pleased to provide additional information regarding our views on the extraterritorial application of the swap dealer registration requirements and would welcome the opportunity to work with the

---

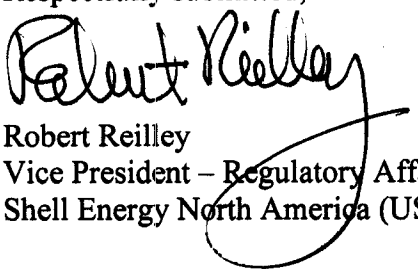
[13] *See* CEA Section 6a(a)(2).

[14] *See* Financial Services Authority and HM Treasury, "*Reforming OTC Derivative Markets, A UK Perspective*," at 31 (December 2009).

Commission to develop an approach to applying the swap dealer registration requirements extraterritorially in a manner consistent with statutory language of the Dodd-Frank Act.

Please contact me at (713) 767-5632, if you have any questions regarding these comments.

Respectfully submitted,



Robert Reilley
Vice President – Regulatory Affairs
Shell Energy North America (US), L.P.

cc: Chairman Gensler
Commissioner Dunn
Commissioner Chilton
Commissioner Sommers
Commissioner O'Malia
Daniel Berkovitz, General Counsel