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VIA ELECTRONIC SUBMISSION

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:

On behalf of Hess Corporation and its subsidiaries and affiliates (collectively "Hess"), we hereby submit comments in response to the Notice of Proposed Rulemaking ("Proposed Rule")[1] issued by the U.S. Commodity Futures Trading Commission ("Commission" or "CFTC") 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] Hess appreciates the opportunity to comment on the potential extraterritorial application of the swap dealer registration process. Hess believes that the perspective of an international participant in the global commodities and derivatives markets may be useful to the Commission and Staff in determining how and under what circumstances the swap dealer designation and related obligations should apply to non-U.S. entities.

I. DESCRIPTION OF HESS AND ITS INTEREST IN THE PROPOSED RULE

Headquartered in New York, Hess is a fully integrated energy company engaged in the exploration for and the development, production, purchase, transportation and sale of crude oil and natural gas, and the manufacturing, purchase, transportation, and marketing of refined petroleum, natural gas, and electricity. Hess is listed on the New York Stock Exchange.

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1 75 Fed. Reg. 71,379.

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

Hess's subsidiaries are involved in exploration and production operations located in the United States, United Kingdom, Norway, Denmark, Equatorial Guinea, Algeria, Malaysia, Thailand, Russia, Gabon, Azerbaijan, Indonesia, Libya and Egypt. Hess's international portfolio has also recently grown to include new licenses in Australia, Egypt, Ghana, Norway, Ireland, Russia, Brazil and Peru.

Hess's Energy Marketing division markets refined oil products, natural gas, and electricity to a vast array of utilities and other industrial and commercial customers located from the Ohio Valley to the East Coast. Hess enters into derivatives contracts to manage the fixed price risk associated with this activity. In addition, Hess operates a network of strategically located petroleum storage terminals that support its marketing operations. Through subsidiaries and joint venture agreements, Hess also operates a fluid catalytic cracking unit in Port Reading, New Jersey, and the Hovensa Refinery in the U.S. Virgin Islands.

Hess's Supply, Trading and Transportation division markets several hundred thousand barrels per day of crude oil and gas liquids, and trades (purchases and sells) hundreds of thousands of physical barrels per day of refinery feedstocks, intermediates, and finished petroleum products. Hess also enters into derivatives contracts to manage the price risk associated with this activity.

Hess Energy Trading Company, LLC ("HETCO") is a Delaware limited liability company established in 1997. HETCO recently organized branches in Paris and the Dubai International Financial Center and operates with three United Kingdom corporations, two of which are registered with the Financial Services Authority, a Cayman Islands exempted company, and a corporation organized in Singapore. All of these entities are used in the continually evolving development and implementation of a worldwide energy trading strategy effectuated by a series of spot and forward purchase and sales agreements, equity, foreign exchange, physical oil storage and chartered vessel transactions from time to time, swaps and other derivative transactions in crude oil, petroleum products, natural gas, and power, and freight transactions.

As a commercial participant in the commodity markets, Hess Corporation does not expect that it will be required to register with the CFTC as a swap dealer or a major swap participant. However, Hess's subsidiaries and affiliates are engaged in a range of activities that may not cleanly fit into the various categories of participants defined by Congress. Given the considerable uncertainty as to how the Commission will define what constitutes a "swap" or "swap dealing," Hess, on its own and on behalf of its subsidiaries and affiliates, has an interest in the Proposed Rule.

II. EXTRATERRITORIAL APPLICATION OF THE SWAP DEALER REGISTRATION REQUIREMENT

A. Section 2(i) of the CEA and the Proposed Rule.

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—
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> (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]

As the Commission noted in the Proposed Rule, 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 entities and activities located outside the United States.

The Proposed Rule identifies certain categories of non-U.S. entities that "generally" will be excluded from the CFTC's jurisdiction under Section 2(i), and therefore, not subject to any registration requirements under Section 4s, including:

- An entity whose *only* connection to the U.S. is the use of a U.S.-registered swap execution facility ("SEF"), derivatives clearing organization or designated contract market ("DCM") in connection with swap dealing activities;
- An entity whose *only* connection to the U.S. is the use of a U.S.-registered swap data repository in connection with swap dealing activities; 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]

Hess agrees with the CFTC that these entities are appropriately excluded because in each instance their activities are either not directly connected to a U.S. market *or*, if somehow linked, the connection is not significant (*e.g.*, transactions on a U.S.-registered DCM or, going forward a SEF, are cleared and thus do not pose counterparty credit risk or a systemic risk to the U.S. financial system). However, in other parts of the Proposed Rule, the language used by the CFTC at least invites the possibility that certain swap dealing activity involving non-U.S. entities or non-U.S. markets could be found to meet the "direct and significant" connection with / effect on standard merely because of an affiliation with a U.S. person or an impact, whether direct or indirect, of any kind on U.S. commerce. As discussed herein, Hess believes that such a broad application of Section 2(i) would be inconsistent with the intent of Congress and potentially disruptive to the effective functioning of the global energy markets.

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

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

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

1. *The Plain Language of Section 2(i) Contemplates a Balanced Approach to the Regulation of Swap Dealing Activities by Non-U.S. Entities.*

The plain language of Section 2(i) provides that, other than regulations tailored to prevent evasion of the Commission's regulatory authority, no provision of the CEA relating to swaps or any corresponding regulation will 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.[5] This unambiguous language evidences Congress' intent 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 Commission to exercise its authority extraterritorially, Congress mandated that the link to U.S. commerce must satisfy *both* criteria.

Hess believes that the Commission should apply the swap dealer registration requirement in a manner that is consistent with the balanced regulatory approach contemplated in Section 2(i). Although the Proposed Rule does not, in fact, articulate how the swap dealer registration requirement might be applied to swap dealing activities outside the United States, the language used to present questions for public comment suggests that the Commission is considering reading Section 2(i)'s limiting language narrowly and, thus, potentially requiring many non-U.S. swap counterparties to register as swap dealers.[6] Hess believes that such a reading would be difficult to reconcile with the plain language in Section 2(i). Equally important, it would risk creating conflicts between international regulators that could undermine the objectives of the Dodd-Frank Act.

Instead, Hess urges the Commission to establish a swap dealer registration requirement that imposes regulatory obligations on swap counterparties only when such entities engage in swap dealing activities that have a direct *and* significant connection with, or effect on, U.S. commerce. Hess appreciates that it may be difficult to draw a bright line between non-U.S. swap 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, Hess believes that a common sense approach, guided by the language in Section 2(i), will yield a reasonable result in most cases.

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

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

For example, a non-U.S. entity that engages in a non-*de minimis* amount of swap dealing activities involving swaps that are tied directly to a U.S. market (*e.g.*, ICE OTC crude oil swaps tied to the NYMEX WTI crude oil futures contract) could, depending on the extent of swap dealing and the size of the relevant market, have a sufficiently direct and significant connection with activities in, or effect on, U.S. commerce to justify regulating the entity as a swap dealer.[7] In contrast, an entity that predominantly deals in swaps that have no connection with activities in, or effect on, U.S. commerce (*e.g.*, ICE OTC swaps based on the Platts daily assessment price for 3.5% Fuel Oil Cargoes FOB Rotterdam Barges) would not anticipate being required to register as a swap dealer under Section 4s because its swap dealing activity does not have a direct *and* significant connection with activities in, or effect on, U.S. commerce. This is true whether or not the dealer or any of its counterparties are affiliated in some way with a U.S. entity.

Attempting to regulate *all* swap counterparties whose dealing activities *could* have a connection with or an effect on U.S. commerce, without regard as to whether the link is direct and the effect is significant, is inconsistent with Section 2(i) and unlikely to be the most effective means of implementing the registration requirement in Section 4s. Hess respectfully suggests that a regulatory approach that follows the language of Section 2(i) and refrains from regulating swap counterparties that engage in dealing that has only an indirect or insignificant affect on U.S. commerce will more effectively implement the objectives of the Dodd-Frank Act.[8] Such an approach will not only promote greater regulatory certainty for non-U.S. entities who may not otherwise have adequate notice that they could be subject to U.S. regulation, but also will conserve finite regulatory resources by focusing oversight on the market participants whose swap dealing activities have a direct and significant connection to U.S. markets and, therefore, actually have the potential to impact the stability and integrity of the U.S. financial system.

2. *The Scope of the Swap Dealer Registration Requirement is Implicitly Defined by the Limited Jurisdiction of the U.S. Courts.*

As a practical matter, the CFTC's ability to impose regulatory obligations on non-U.S. entities is implicitly restricted by the limited reach of a federal district court in the United States over conduct occurring in a foreign jurisdiction. It is, therefore, reasonable to assume that Congress would not have vested the CFTC with authority to impose regulatory obligations on non-U.S. swap dealers that, in practice, it would not be able to enforce through the judiciary.

Federal district courts have subject matter jurisdiction over a claim involving a non-U.S. entity when one of two tests is satisfied.

- The "conduct test." The conduct test focuses on the physical location of the non-U.S. entity's conduct. Under the conduct test, a federal district court has jurisdiction to decide a case involving a non-U.S. entity if "the conduct occurring in the United States is

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[7] This may be true even if a majority of the non-U.S. swap dealer's counterparties are not affiliated with U.S. entities.

[8] Hess respectfully suggests that the mere affiliation of a non-U.S. and U.S. entity is, without more, insufficient to establish "direct and significant" connection with, or effect on, U.S. commerce with respect to the non-U.S. entity.

material...."[9] For example, a court could conclude that a non-U.S. entity that regularly enters into swaps tied to a U.S. market, with U.S. counterparties, and assisted by U.S.-based voice brokers is materially within the U.S. and, therefore, exercise subject matter jurisdiction over a claim by the CFTC 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 only makes a market in bilateral Rotterdam fuel oil swaps 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 CFTC seeking to require the non-U.S. entity to register as a swap dealer.

- The "effects test." The effects test focuses on "whether foreign activities have 'caused foreseeable and substantial harm to interests in the United States.'"[10] For example, a court could conclude that the CFTC has jurisdiction over a non-U.S. entity that regularly enters into swaps with U.S. counterparties and that routinely trades U.S.-based products using CFTC-regulated exchanges and/or clearinghouses because such activities are directly and significantly connected to U.S. commerce such that the potential harm to interests in the U.S. is foreseeable and substantial. However, for many other categories of non-U.S. swap activity, it is difficult to see how a U.S. court could assert jurisdiction under the effects test, even if one of the parties to the swap is located in (or affiliated with an entity located in) the United States. For example, a non-U.S. entity that is only connected to the U.S. markets through an independently controlled corporate affiliate or that only maintains a small swap portfolio with U.S. counterparties would not, even under the most improbable and pessimistic scenarios, be capable of causing foreseeable and substantial harm to interests in the United States.

Hess respectfully suggests that the Commission apply the swap dealer registration requirement in a manner that does not exceed the limited extraterritorial jurisdiction of the U.S. courts. 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 swap counterparties and their U.S. affiliates. The Commission can, however, eliminate this uncertainty and help to effectuate the goals of the Dodd-Frank Act if it simply remains within its already sufficient jurisdictional bounds and does not attempt to subject entities that have only indirect or insignificant ties to U.S. commerce to regulation as swap dealers.

C. An Over-Broad Registration Requirement May Undermine Efforts to Improve International Regulatory Cooperation and the Fundamental Goals of the Dodd-Frank Act.

If the Commission applies the swap dealer registration requirement too broadly, it may inadvertently create conflict with comparable legal regimes in the European Union and other foreign jurisdictions under which market participants are currently required to register. For example, the European Union's Data Protection Act generally prohibits companies from transmitting certain types of common business information outside the European Economic

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

10 *See Pyrenee, Ltd. v. Wocom Commodities Ltd.*, 984 F. Supp. 1148, 1155 (N.D. Ill. 1997).

Area. Under the Dodd-Frank Act, swap dealers may be *required* to report swap transaction data, potentially including data that is protected under the Data Protection Act, on a continuous and timely basis to swap data repositories and/or third-party publishers. As a result, if non-U.S. entities are required to register as swap dealers, they could be subject to two irreconcilable sets of legal obligations: reporting data to a swap data repository, as required under the CEA; and maintaining the privacy of the same data, as required under the Data Protection Act. Such extraterritorial issues would present difficult questions of international comity that would distract from, and likely undermine, important efforts to improve cross-border regulatory cooperation and the fundamental goals of the Dodd-Frank Act.

Hess requests that the Commission carefully consider the potential effect that the swap dealer registration requirement may have on non-U.S. entities potentially subject to incompatible legal obligations. At a minimum, the Commission should provide flexibility to enable non-U.S. entities to comply with potentially competing legal obligations. If the Commission regulates swap market participants too rigidly, these entities could retreat from the U.S. markets to reduce the risk of enforcement actions that could have profound negative effects on their global businesses, whether justified or not. Whether by limiting business with U.S. counterparties, avoiding CFTC-regulated exchanges and clearinghouses, or seeking substitutes for products tied to a U.S. delivery point, any withdrawal from the U.S. derivatives markets due to regulatory uncertainty will stifle innovation and make U.S. entities and markets less competitive.

Over-broad regulation of swap counterparties may also trigger similar requirements from foreign regulators. Whether implemented in good faith or in retaliation, duplicative regulatory obligations are, at best, burdensome and inefficient. In the most pessimistic scenario, such regulations could even devolve into barriers to information and innovation.

The Dodd-Frank Act seeks to enhance transparency and reduce risk by opening markets that have historically been obscure and inaccessible. Accordingly, the Commission should take care to ensure that it does not undermine these goals through regulations that inadvertently dampen liquidity in U.S. products and markets, concentrate risk among a smaller number of less diverse domestic institutions, or provoke the balkanization of a market that today is dynamic and thriving. In particular, the Commission should attempt to address any concerns regarding non-U.S. swap activity through further cooperation with international regulators before it resorts to aggressive registration requirements or other potentially invasive regulations. A cooperative approach will not only protect market participants from uncertain and potentially incompatible legal obligations, but will also advance the goals of the Dodd-Frank Act in the most efficient means possible.

III. CONCLUSION

Hess welcomes the opportunity to discuss these issues further with the Commission and its Staff. Please contact us at (202) 756-8000 if you have any questions regarding Hess's comments.

Respectfully submitted,

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