PEABODY ENERGY
Peabody Plaza
701 Market Street
St. Louis, MO 63101-1826
314.342.3400

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Office of the Secretariat

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David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

COMMENT

Re: Proposed Interpretive Guidance and Policy Statement Regarding Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act – CFTC RIN 3038-AD57 ("Proposed Guidance")

Dear Mr. Stawick:

Peabody Energy Corporation ("Peabody") is pleased to submit the following comments on the Commission's proposed Interpretive Guidance and Policy Statement Regarding Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act ("CEA" or "Act").[1] We appreciate the Commission's and its Staff's efforts in formulating the Proposed Guidance and the opportunity to comment on the commercial impact of the Proposed Guidance as written. For purposes of this comment, the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the CEA, and the Commission's rules relating to swaps will be referred to as "the Dodd-Frank requirements."

For the reasons explained below, Peabody respectfully requests that the Commission's final guidance clarify that Dodd-Frank requirements will not apply to swaps booked outside the United States to hedge or mitigate commercial risks in commerce outside the United States, including (a) any such swaps entered into by a foreign affiliate controlled by a person organized under United States law, (b) any such swaps that are guaranteed in any respect by a person organized under United States law; and (c) any such swaps between affiliates of a commercial end user organized under United States law.

A. Impact on Peabody and Other Commercial End Users

Peabody, which is headquartered in St. Louis, Missouri, is the world's largest private-sector coal company, supplying the world's thermal power and steel markets on six continents. Peabody uses swaps to hedge or mitigate the commercial risks related to its global coal mining and marketing operations, which are extensive.

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1 77 Fed. Reg. 41214 (July 12, 2012).

For the reasons set forth below, the Commission's Proposed Guidance can adversely impact the use of swaps by global commercial companies to hedge and mitigate commercial risks in their commerce outside the United States. Such swaps typically are booked outside the United States with the non-U.S. affiliate that conducts the non-U.S. business operations acting as the swap counterparty, although the swaps may be guaranteed by a U.S. corporate parent or affiliate.

B. The Proposed Guidance is Unclear and Internally Inconsistent with Respect to Commercial End Users

The Commission's Proposed Guidance seems to embrace certain conflicting principles of cross-border application of the Dodd-Frank requirements. On the one hand, in defining the term "non-U.S. person," the Proposed Guidance states that "a foreign affiliate or subsidiary of a U.S. person would be considered a non-U.S. person, even where the swaps of such an affiliate or subsidiary has its swap related obligations guaranteed by the U.S. person."[2] On the other hand, the Proposed Guidance states seemingly to the contrary that the term ''U.S. person'' would include, among others, any entity that is "either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States ('legal entity') or (B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person[.]" The last clause (B) would appear to include foreign affiliates whose swaps are guaranteed by a legal entity organized or incorporated under the laws of the United States or having its principal place of business in the United States. If that is correct, then such foreign affiliates would be U.S. persons, contrary the Commission's other statements described above.

In addition, the Proposed Guidance also takes a position seemingly contrary to the definition of the term "non-U.S. person" by proposing to apply the Transaction-Level Requirements to swaps in which (i) a non-U.S. entity is majority owned by a U.S. person regularly enters into swaps with U.S. affiliates, and its financials are consolidated with the

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[2] 77 Fed. Reg. at 41218. In addition, the Proposed Guidance states (a) "where a non-U.S. person enters into a swap with another non-U.S. person outside the United States, and where neither counter-party is required to register as a swap dealer or MSP, the Commission would not apply the Dodd-Frank Act requirements to such swaps[;]" and (b) "at this time, the Commission makes clear that such non-U.S. affiliate or subsidiary would not be subject to the Dodd-Frank swap provisions, except pur-suant to specific Dodd-Frank Act provisions (or Commission regulation adopted thereunder) or Commission orders." *Id.* at 41234. Appendix C also seems to confirm that Dodd-Frank requirements would not apply to swap transactions between any non-U.S. person and a non-U.S. person that is not an SD or an MSP even if it is guaranteed by a U.S. person. *Id.* at 41237.

U.S. person.[3] The Commission's proposed position arises from its notion that a foreign affiliate might be utilized by its United States parent or affiliate as a "conduit" to execute swaps outside the Dodd-Frank.[4]

C. Treating Foreign Affiliates of U.S. Commercial End Users as U.S. Persons and Applying the Commission's "Conduit" Theory to Such End Users Would Unnecessarily Increase Costs and Commercial Risks and Impede the Competitiveness of U.S.-Based Companies

1. Increased Commercial Costs and Decreased Competitiveness. Applying the Dodd-Frank requirements to swaps entered into or booked outside the United States to hedge or mitigate commercial risks of activities outside the United States will create an overlapping (and potentially inconsistent) tangle of international laws that will increase the costs and potential liabilities associated with such swaps, materially undermining their utility and risk mitigation benefits. Further, foreign entities wishing to avoid becoming subject to Dodd-Frank requirements will decline to enter into swaps with such affiliates. These consequences would decrease market liquidity, increase market risk concentration, impose higher commercial costs, and result in higher prices for customers and downstream consumers. It also will place U.S. businesses at a competitive disadvantage in global markets.[5]

2. The Commission's "Conduit" Theory. The Commission's theory that Dodd-Frank requirements should be applied to swaps of foreign affiliates can because, as "conduits," they increase the swap risk of their U.S. affiliates when they are guaranteed by a U.S person has no support as applied to swaps to hedge or mitigate commercial risk. By definition, such swaps do not increase risks, they *mitigate* them and are backed by their diversified, physical businesses, which are separate from the United States financial system. Moreover, the language in the Proposed Guidance could be interpreted to put more onerous regulation on foreign commercial end user entities compared to their United States affiliates. Surely this is not what the Commission intended.

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[3] *Id.* at 41229.

[4] *Id.* at 41218.

[5] The Proposed Guidance lacks any empirical data to support a conclusion that swaps of commercial end users entered into to hedge or mitigate commercial risks outside the United States would have any significant effect on United States commerce. The Commission's examples of significant effects on United States commerce from swap activity outside the United States are limited to the activity of very large international financial entities whose activities were those of SDs and MSPs.

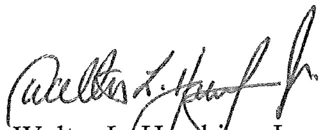
D. Conclusion

Peabody appreciates this opportunity to comment on the Commission's Proposed Guidance and policy statement and urges the Commission to issue final guidance such that (1) the definition of "U.S. person" does *not include* any foreign affiliate or subsidiary of a U.S. end-user regardless of whether it is guaranteed by that end-user or not and (2) transactions that involve end-users are excluded from the "conduit" concept.

To that end, we respectfully reiterate our requests that the Commission's final guidance clarify that Dodd-Frank requirements will not apply to swaps booked outside the United States to hedge or mitigate commercial risks in commerce outside the United States, including (a) any such swaps entered into by a foreign affiliate controlled by a person organized under United States law, (b) any such swaps that are guaranteed in any respect by a person organized under United States law; and (c) any such swaps between affiliates of a commercial end user organized under United States law.

Peabody would be pleased to discuss its comments in further detail with any of the Commissioners or their staffs. Please feel free to contact the undersigned or Robert Brandenburg (314) 342-7758 if you have any questions or we can be of assistance.

Very truly yours,



Walter L. Hawkins, Jr.
Senior Vice President – Finance