



# EDISON ELECTRIC INSTITUTE

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November 15, 2010

*Electronically Filed*

David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
1155 21st Street, N.W.  
Washington, DC 20581

**Re: Comments of Edison Electric Institute, 17 CFR Part 44, Interim Final Rule  
for Reporting Pre-Enactment Swap Transactions  
75 Fed. Reg. 63,080 (October 14, 2010)**

Dear Mr. Stawick:

The Edison Electric Institute (“EEI”) respectfully submits these comments in response to the Commodity Futures Trading Commission’s (“Commission” or “CFTC”) Interim Final Rule for Reporting Pre-Enactment Swap Transactions (“Interim Final Rule”) published October 14, 2010 in the Federal Register. In the Interim Final Rule, the Commission invited public comment on provisions seeking to implement new statutory provisions introduced by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).<sup>1</sup>

EEI appreciates the opportunity to submit comments on this important rule that should ultimately serve to improve the Commission’s knowledge and oversight of the market for swaps. However, despite these potentially useful outcomes, EEI and its members are concerned that the Interim Final Rule creates significant legal and regulatory uncertainty. This is largely due to the fact that the complex and inter-related nature of the various rulemakings leaves a number of issues relevant to compliance with the Interim Final Rule unresolved. For example, although the Interim Final Rule became effective immediately upon issuance, the definition of “swap” as set forth in new Commodity Exchange (“CEA”) Section 1a(47) does not become effective until 360 days from the enactment date of the Dodd-Frank Act. In addition, Section 712(d) of the Dodd-Frank Act requires the CFTC and the Securities Exchange Commission to undertake a joint rulemaking to further define “swap.” This lack of clarity on the definition of “swap” in addition to the definitions of “swap dealer” and “major swap participant” coupled with the broad

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<sup>1</sup> Pub. L. No. 111-203 (2010) (to be codified as an amendment to the Commodity Exchange Act in scattered sections of 7 U.S.C. ch. 1 (the “Commodity Exchange Act” (“CEA”)) (“Dodd-Frank Act”).

language in the Interim Final Rule requires market participants to make a good faith determination as to the definitions and then proceed with satisfying ambiguous and potentially costly retention and reporting requirements.

Due to this ambiguity, EEI proposes that the counterparties subject to the Interim Final Rule rely on the applicable provisions of the CEA, CFTC regulations, guidance and precedent in effect prior to the enactment of the Dodd Frank Act in determining what is a pre-enactment swap. This would provide certainty while clarifying that the forward contract exception in the CEA<sup>2</sup> which was codified in the Dodd – Frank Act for inclusion in future rules<sup>3</sup> applies to the Interim Final Rule. This interpretation would also be consistent with the comments filed by EEI in response to the Commission’s August 20, 2010 Advanced Notice of Proposed Rulemaking on Definitions.<sup>4</sup> EEI also respectfully requests further guidance regarding recordkeeping for such transactions. Specifically, in order to reduce uncertainty and minimize costs while continuing to achieve the goals of transparency and oversight, and to be consistent with the Commission’s representation that the Interim Final Rule “does not require any counterparty to a pre-enactment unexpired swap to create or retain new records with respect to transactions that occurred in the past,”<sup>5</sup> EEI requests that the Commission issue guidance clarifying that information required to be retained is limited to pre-enactment unexpired swap transaction final confirmations, modifications thereto and related master agreements, if any.

## **I. Description of EEI and its Interest in the Interim Final Rule**

EEI is the association of U.S. shareholder-owned electric companies. EEI’s members serve 95 percent of the ultimate customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members.

Organized in 1933, EEI works closely with all of its members, representing their interests and advocating equitable policies in legislative and regulatory arenas. EEI provides public policy leadership, critical industry data, market opportunities, strategic business intelligence, conferences and forums covering all aspects of the electricity industry, and various products and services to serve the needs of our members and other participants in the electricity industry.

As end users of commodity swaps for the hedging of commercial risk, EEI’s members have a significant interest in the record retention requirements in the Interim Final Rule. Further guidance clarifying swap transaction record retention and reporting requirements

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<sup>2</sup> CEA § 1a(19) (2010). The CEA grants the Commission exclusive jurisdiction over, among other contracts, “transactions involving contracts of sale of a commodity for future delivery.” *Id.* § 2(a)(1)(A). However, the CEA limits the Commission’s jurisdiction by defining the term “future delivery” to exclude forward contracts.

<sup>3</sup> Dodd-Frank Act § 723 and 721(a)(21)

<sup>4</sup> Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51429 (August 20, 2010), EEI Comments (filed September 20, 2010) (“ANOPR on Definitions”).

<sup>5</sup> *Interim Final Rule* at 63,083.

will reduce our members' and other market participants' uncertainty and costs while continuing to support the Commission's use of relevant data for the purposes of market transparency and oversight.

## II. Comments on the Interim Final Rule

EEI supports the Commission's decision to limit the reporting requirements to transactions entered into before July 21, 2010 whose terms had not expired as of that date ("pre-enactment swaps"). EEI agrees that structuring the reporting requirements to exclude expired swaps avoids significant operational difficulties and costs.<sup>6</sup> However, EEI is concerned about the ambiguous language of the Interim Final Rule in relation to recordkeeping and reporting requirements for pre-enactment swaps.

Proposed Rule 44.02 states in part that:

- (a) A counterparty to a pre-enactment unexpired swap transaction shall:
  - (1) Report to a registered swap data repository or the Commission by the compliance date established in the reporting rules required under Section 2(h)(5) of the Commodity Exchange Act, or within 60 days after a swap data repository becomes registered with the Commission and commences operations to receive and maintain data related to such swap, whichever occurs first, the following information with respect to the swap transaction:
    - (i) A copy of the transaction confirmation, in electronic form if available, or in written form if there is no electronic copy; and
    - (ii) The time, if available, that the transaction was executed; and
  - (2) Report to the Commission on request, in a form and manner prescribed by the Commission, any information relating to the swap transaction.

This proposed Rule and its associated Note<sup>7</sup> create several legal and regulatory uncertainties for EEI's members. Therefore, EEI proposes the following clarifications to promote certainty and to aid in compliance.

First, the Rule and associated Note provide a list of documents that should be retained in their existing format. Some of the listed documents are readily accessible. These include: "a copy of the transaction in electronic form, if available;" "the time, if available, that the transaction was executed;" "any modification(s) to the terms of the transactions" and "the final confirmation of the transaction." However, the language of the Rule and the associated Note also create ambiguity about the information that may need to be retained by stating that "any information relating to the swap transaction" (44.02(a)(2)) includes "any information necessary to identify and value the transaction" and "information relevant to the price of the transaction." The Rule and associated Note also requires retention of information that may not be retained in the regular course of business such as "the date and time of execution of the transaction." This

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<sup>6</sup> *Interim Final Rule* at 63,082.

<sup>7</sup> *Interim Final Rule* at 64,083.

broad language requires significant interpretation by EEI members and other market participants and creates uncertainty as to what needs to be retained.

For purposes of this rule, EEI suggests that final confirmations, related master agreements and any modifications or annexes thereto are sufficient to fulfill the requirements of the Dodd-Frank Act and the Commission's overarching goals of market transparency and oversight. These documents identify all the key commercial terms of the transaction and provide the transactional information necessary for the Commission to value or determine the price of the transaction. This clarification would greatly assist EEI members in determining which documents need to be retained while eliminating uncertainty. This proposal is consistent with the Commission's representation that the Interim Final Rule "does not require any counterparty to a pre-enactment unexpired swap to create or retain new records with respect to transactions that occurred in the past," and that it requires retention only "to the extent and in such form as they presently exist."<sup>8</sup> EEI respectfully requests that the Commission adopt this clarification.

Second, the Interim Final Rule requires retention of information related to the statutory term "swap," which has not yet been defined by the Commission. Additionally, the Rule assigns reporting responsibility related to the statutory terms "swap dealer" and "major swap participant." The lack of clarity on definitions causes additional uncertainty and requires good faith determinations by market participants. In the absence of final rules regarding the definition of "swap," EEI's members will act in good faith by interpreting "swap" in a manner consistent with the law prior to the enactment of the Dodd – Frank Act. With respect to reporting responsibilities, EEI's members will retain all final confirmations, related master agreements and any modifications or annexes thereto and await the Commission's issuance of final rules regarding the definitions of "swap dealer" and "major swap participant." EEI requests that the Commission acknowledge and support such good faith application of existing definitions until final rule changes in the definitions are made via the future rulemakings.

Third, EEI and its members note that the complexity and interrelated nature of the various rulemakings is highlighted by the uncertainty created by this Interim Final Rule. Due to this uncertainty, EEI petitioned the Commission for grandfather relief pursuant to subsections (1) and (2) of Section 723(c) of the Dodd-Frank Act.<sup>9</sup> EEI's members and other market participants would benefit from the additional time that such relief would provide. In the case of the Interim Final Rule, market participants await the further definition of "swap," "swap dealer" and "major swap participant." as well as the establishment of Swap Data Repositories, which EEI expects will eventually assist the Commission and market participants in validating which parts of a swap transaction or class of swap transactions can be reported in a standardized and useful manner. As indicated above, this uncertainty necessitates clarity on the documentation to be retained.

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<sup>8</sup> *Id.*

<sup>9</sup> Petition of the Edison Electric Institute to Remain Subject to Section 2(h) of the Commodity Exchange Act as in Effect on July 20, 2010 (September 20, 2010)

Fourth, EEI understands that the forward contracts and option contracts that contain an obligation for the physical delivery of a commodity are not reportable pre-enactment swaps. Due to its physical market structure, energy markets are unique. The importance of certain forwards and options transactions in the energy market has been recognized by both the CFTC and by Congress.<sup>10</sup> The Interim Final Rule does not affirmatively state that forward contract exclusion under the CEA applies when determining whether a transaction is a pre-enactment swap subject to the reporting requirement. Consistent with the applicable provisions of the CEA, the Dodd-Frank Act and EEI's comments on the ANOPR on Definitions, EEI suggests that the Commission explicitly state that that forward contract exclusion applies to the Interim Rule.

Fifth, if the Commission chooses not to provide the clarifications requested herein then EEI members and other market participants will need to individually make a determination as to what constitutes a "swap" and whether they qualify as a "swap dealer" or "major swap participant" until such terms are defined by the Commission. This uncertainty could increase compliance costs as market participants try to discern Commission intent. In light of this uncertainty, the Commission should provide a "safe harbor" for those market participants who make a good faith effort to comply with the Interim Final Rule.

### **III. Conclusion**

EEI appreciates the ability to comment on the Interim Final Rule and supports the goals of swap market transparency and regulatory oversight.. EEI respectfully requests that, in consideration of the significant ambiguity in the Interim Final Rule and its associated Note, the Commission issue guidance clarifying (1) that information required to be retained is limited to pre-enactment swap transaction: final confirmations, modifications thereto and related master agreements and (2) that forward contracts and option contracts that contain an obligation for the physical delivery of a commodity are not reportable pre-enactment swaps.

Please contact me at (202) 508-5571; Lopa Parikh, Director, Federal Regulatory Affairs for Energy Supply, at (202) 508-5098; or Aaron Trent, Manager, Financial Analysis, at (202) 508-5526, if you have any questions regarding EEI's comments.

Respectfully submitted,



Richard F. McMahon, Jr.  
Executive Director

**Dated: November 15, 2010**

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<sup>10</sup> See Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39,188-92 (Sept. 25, 1990), reprinted at [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,925.