EDISON ELECTRIC INSTITUTE

January 3, 2011

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 Chapter I, Antidisruptive Practices Authority Contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act
75 Fed. Reg. 67,301 (November 2, 2010)
RIN Number 3038-AD26

Dear Mr. Stawick:

The Edison Electric Institute ("EEI") respectfully submits these comments in response to the Commodity Futures Trading Commission's ("Commission" or "CFTC") Advanced Notice of Proposed Rulemaking on the Antidisruptive Practices Authority Contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("ANOPR") published November 2, 2010 in the Federal Register. In the ANOPR, the Commission invited public comment to assist the Commission in promulgating rules and regulations implementing section 747 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[1] which prohibits certain trading practices deemed disruptive of fair and equitable trading. Specifically, Section 747 amends Section 4c(a)(5) of the Commodity Exchange Act ("CEA") to make it unlawful for any person to engage in any trading, trading practice or conduct on or subject to the rules of a registered entity that –

(A) Violates bids or offers;
(B) Demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or
(C) Is, is of the character of, or is commonly known to the trade as "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).[2]

EEI appreciates the opportunity to submit comments on this important issue and supports the Commission's decision to seek stakeholder comment prior to issuing a notice of proposed rulemaking. EEI is the association of U.S. shareholder-owned electric companies. EEI's

[1] Pub. L. No. 111-203 (2010).
[2] ANOPR at 67,301

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. EEI's members are not financial entities. Rather, the typical EEI member is a medium-sized electric utility with relatively low leverage and a conservative capital structure.[3] EEI members are largely end users,[4] as contemplated by the Dodd-Frank Act, and they engage in swaps to hedge commercial risk. Additionally, EEI members have an established track record of using swaps in a manner that *reduces* systemic risk.

EEI is supportive of Commission regulations that protect the markets and allow its members to hedge their risks in a cost effective manner. However, EEI would caution the Commission not to rush into promulgating rules without careful consideration of the possible unintended consequences such rules would have on legitimate market trading. The terms and phrases in Section 747 of Dodd-Frank are vague. Specifically, there is no commonly understood meaning or judicial construction for the phrases "violates bids or offers," "orderly execution," or "spoofing." If the Commission does not provide clear and specific guidance for those phrases, the vagueness of Section 747 will discourage market participants from trading and the potentially adversely affect the liquidity and price discovery function of commodity markets.

Section 747 grants the Commission authority to promulgate such "rules and regulations as in the judgment of the Commission are reasonably necessary."[5] Unlike many other sections of the statute, there is no timeframe within which the rules for Section 747 must be promulgated. EEI would request that the Commission allow for an ample period of time to ensure that the Commission and the marketplace are certain as to what conduct is prohibited.

EEI would also ask the Commission to clarify the standard of intent that will be required for each of the prohibited activities in parts (A), (B) and (C) of Section 747. Currently, the unlawful activity under (A) appears to indicate that the misconduct could be *per se* illegal (although it is unclear as to what prohibited activity actually constitutes the violating of bids or offers). In contrast, the intent standard for part (B) under Section 747 appears to be recklessness, whereas the standard for (C) appears to be specific intent. For over thirty years, the intent standard under Section 4c of the CEA required that a defendant have knowledge (*i.e.*, specific

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[3] EEI members are subject to substantial state regulatory requirements in addition to oversight by the Federal Energy Regulatory Commission. EEI's diverse membership includes utilities operating in all regions, including in regions with Regional Transmission Organizations and Independent System Operators that have active market monitoring units.

[4] CEA § 2(h)(7). Although the term "end user" is not defined in the CEA, the "end user clearing exception" is available to non-financial entities that use swaps to hedge or mitigate commercial risk, and that notify the Commission as to how they generally meet their financial obligations associated with entering into non-cleared swaps. Id.

[5] ANOPR at 67,302

intent) of his or her misconduct.[6] EEI would suggest that one standard is used for all the prohibited activity under section 747 and that it should be a standard of specific intent.[7] Providing clarity and certainty on the scienter requirement will provide transparency and facilitate efficient markets.

Section 747 of the Dodd-Frank Act also adds section 4c(a)(7) to the CEA which makes it unlawful for a party to enter into a swap knowing or acting in reckless disregard of the fact that the counterparty will use the swap to defraud a third party. It is unclear what if any new duties of inquiry this new section places on a party to a transaction. For purposes of clarity, the Commission should indicate that the duties of inquiry by a company or trader are not enhanced beyond current market standards as a result of this rulemaking.

EEI commends the Commission for attempting to bring clarity to this issue, would urge the Commission not to rush into promulgating rules before the Commission can clarify the ambiguity in the statute and evaluate the unintended consequences that vague language will have on legitimate trading activity.

Please contact me or Lopa Parikh, Director, Federal Regulatory Affairs for Energy Supply, at (202) 508-5098 if you have any questions regarding these comments.

Respectfully submitted,

Richard F. McMahon, Jr.
Executive Director
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 508-5571
Email: rmcmahon@eei.org

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[6] CFTC v. Savage, 611 F.2d 270(9th Cir. 1979)("[a] violation of section 4c requires knowledge, as defined for purposes of section 4b"); see also Hammond v. Smith Barney, Harris Upham & Co., [1987-1990 Transfer Binder] Comm. Fut. L. Rep (CCH) 24,617 (CFTC 1990)(fraud cases require specific intent).

[7] Should the Commission find it necessary to incorporate a reckless standard within the rules for Section 747, EEI strongly urges that the Commission use an "extreme recklessness" intent standard used by the Federal Trade Commission. Prohibitions on Market Manipulation, 74 Fed. Reg. 40,686 (August 12, 2009).