



January 18, 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 Part 44, Interim Final Rule for Reporting Certain Post-Enactment Swap Transactions
75 Fed. Reg. 78, 892 (December 17, 2010)
RIN No. 3038-AD29**

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 Certain Post-Enactment Swap Transactions (“Interim Final Rule”) published December 17, 2010 in the Federal Register. In the Interim Final Rule, the Commission invites public comment on provisions seeking to implement reporting requirements for “transition swaps” or swaps entered into after enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹ and prior to the effective date of swap data reporting rules enacted pursuant to Section 2(h)(5)(B) of the Commodities and Exchange Act (“CEA”), which was added by Section 723 of the Dodd Frank Act.

Previously, as required by the Dodd-Frank Act, the Commission issued an Interim Final Rule on Reporting Pre-Enactment Swap Transactions,² on which EEI filed comments on November 15, 2010. In the instant Interim Final Rule, the Commission states that, although the Dodd-Frank Act did not mandate an Interim Final Rule rulemaking on transition swaps entered into on or after enactment of the act, the Interim Final Rule is “intended to provide clarity and guidance with respect to such swaps by (i) establishing that transition swaps be subject to

¹ Pub. L. No. 111-203 (2010)

² Interim Final Rule for Reporting Pre-Enactment Swap Transactions, 17 CFR Part 44, 75 Fed. Reg. 63,080 (October 14, 2010), RIN 3038-AD24 (hereafter “Pre-Enactment Interim Final Rule”).

Section 2(h)(5)(B)'s reporting requirements and to Commission regulations to be promulgated thereunder; and (ii) advising potential counterparties to such swaps that implicit in this reporting requirement is the need to retain relevant data.”³ EEI appreciates the opportunity to submit comments on this rule. However, the Interim Final Rule is almost identical to the Pre-Enactment Interim Final Rule and as such continues to perpetuate the significant legal and regulatory uncertainty created by the Pre-Enactment Interim Final Rule.

Due to this ambiguity, EEI proposes, as EEI proposed for pre-enactment swap transactions,⁴ that the counterparties subject to the Interim Final Rule continue to 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 transition swap. This would provide certainty and consistency in the manner in which swaps are reported until reporting rules and definitions are adopted by the Commission. This would also clarify that the forward contract exception in the CEA⁵ that was codified in the Dodd-Frank Act for inclusion in future rules⁶ applies to the Interim Final Rule, consistent with the comments filed by EEI in response to the Commission's August 20, 2010 Advanced Notice of Proposed Rulemaking on Definitions.⁷ In addition, as further described below, EEI requests additional clarity on the information to be retained and requests that the Commission clarify that that the information required to be retained is limited to 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

³ *Interim Final Rule* at 78, 893.

⁴ Interim Final Rule for Reporting Pre-Enactment Swap Transactions, 17 CFR Part 44, 75 Fed. Reg. 63,080 (October 14, 2010), EEI Comments (filed November 15, 2010).

⁵ 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.

⁶ Dodd-Frank Act § 723 and 721(a)(21).

⁷ 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”).

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 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

Interim Final Rule section 44.03 states in part that:

- (a) A counterparty to a post-enactment pre-effective swap transaction shall:
 - (1) As required by the reporting rules required to be adopted pursuant to Section 2(h)(5)(B) of the Commodity Exchange Act, report data related to a transition swap to a registered swap data repository or the Commission by the compliance date established in such reporting rules required under Section 2(h)(5) of the Commodity Exchange Act, or within 60 days after an appropriate 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 Interim Final Rule and its associated Note⁸ create several legal and regulatory uncertainties for EEI's members. Therefore, as with the Pre-Enactment Interim Final Rule, EEI proposes the following clarifications to promote certainty and to aid in compliance.

First, the Interim Final Rule and associated Note provide a list of documents that should be retained in their existing format. Some of the listed documents are likely to be readily accessible. These include: "a copy of the transaction in electronic form, if available;" "the time,

⁸ *Id.* at 78,896.

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 Interim Final 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” includes “any information necessary to identify and value the transaction” and “information relevant to the price and payment for the transaction.”⁹ Although the language in the instant Note differs slightly from the Note in the Pre-Enactment Interim Rule, which provides a little more clarity, the Note is still ambiguous as to what needs to be retained. EEI suggests that the Commission provide additional clarity by providing examples of the types of documents to be retained. This would provide clarity to the broad language in the provisions, which currently require significant interpretation by EEI members and other market participants and create 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 and would help clarify that entities do not have to start keeping documents that have not been traditionally kept in the regular course of business such as “the date and time of execution of the transaction.” This proposal is consistent with the Commission’s representation that the Interim Final Rule “does not require any counterparty to a transition swap to create new records and permits records to be retained in their existing format.”¹⁰ In addition, the Interim Rule does not address how long the records need to be retained after the transition swap is reported to a swap data repository or to the Commission. EEI would suggest that once a transition swap is reported to a swap data repository or to the Commission, parties should no longer be required to retain the documents or, in the alternative, should be able to delete the documents in keeping with their normal record retention requirements. EEI respectfully requests that the Commission adopt these clarifications.

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

⁹ *Id.*

¹⁰ *Id.* at 78, 894.

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, and that any such changes are related recordkeeping requirements take effect prospectively.

Third, EEI understands that the forward contracts and option contracts that contain an obligation for the physical delivery of a commodity are not reportable transition swaps. Due to their physical market structure, energy markets are unique. The importance of certain forwards and options transactions in energy markets has been recognized by both the CFTC and by Congress.¹¹ The Interim Final Rule does not affirmatively state that forward contract exclusion under the CEA applies when determining whether a transaction is a transition 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.

Fourth, if the Commission chooses not to provide the clarifications requested herein, 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. Response to Commission Questions

EEI offers the following comments in response to some of the Commission's questions:

Should the date on which data concerning transition swaps is required to be reported to a registered swap data repository or to the Commission be more than 90 days following the July 15, 2011 effective date of the Dodd-Frank Act? If so, what date(s) should the Commission consider and why?

Yes, the date on which data concerning transition swaps is required to be reported to a swap data repository should be more than 90 days following the effective date of the Dodd-Frank Act. The Dodd-Frank Act and the Commission's rules require transition

¹¹ 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.

swap transaction data to be reported to a swap data repository, which is a newly created entity specifically intended to receive and maintain data on swap transactions, or to the Commission. Rather than establishing a set reporting date, the obligation to report swap transaction data should not begin until a reasonable time after one or more swap data repositories have been registered and commence operations or until the Commission has in place all of the necessary systems and protocols to act as a swap data repository similar to what would be required of any entity under the proposed swap data repository registration regulations. Once a swap data repository or the Commission is available to begin to receive the information, then the counterparties should be notified and given a reasonable period of time to begin reporting the information. This will help ensure that processes are in place to receive, store, and analyze the large quantities of data that will be reported and will allow counterparties time to develop their internal reporting processes.

Should the date for such reporting be different for reporting counterparties who are swap dealers or major swap participants than it is for reporting counterparties who are not swap dealers or major swap participants?

Additional time should be provided for reporting of transactions between entities that are neither swap dealers nor major swap participants, because those entities will need to negotiate which party will be responsible for reporting the transaction. In addition, end users may need additional time to report transactions depending on the means designated for reporting. Because at least one counterparty for most transactions is likely to be a swap dealer or major swap participant, end users will need to report only a small number of transactions. A technologically simple means of reporting, such as an online form or submission of a delimited text file by email to the swap data repository, would be the most efficient means of reporting. However, if end users are required to undertake major IT upgrades or install expensive new automated systems, then additional time will be needed.

Should the Commission's permanent rules concerning data reporting for transition swaps between counterparties who are not swap dealers or swap participants specify how such counterparties should determine which counterparty will report the swap data? If so, what factors should govern this choice?

The Interim Final Rule specifies the party obligated to report transition swap information as: (1) either a swap dealer or a major swap participant; (2) the swap dealer if one party is a swap dealer and the other party is a major swap participant; or (3) the agreed-upon

counterparty if neither is a swap dealer or major swap participant.¹² Going forward, counterparties that are not swap dealers or major swap participants will be able to negotiate into their ISDA agreement or transaction confirmations the responsible reporting party. Because this clause does not appear in transition swaps, for transactions in which neither party is a swap dealer or major swap participant, the default reporting party should be the entity designated as the “calculating agent” under the applicable ISDA agreement. The calculating agent is generally responsible for administrative tasks associated with the transaction.

What additional records should be kept, if any, and what burdens or costs would the retention of such information entail?

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.

IV. 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 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 swaps.

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

¹² 17 C.F.R. § 44.03(b).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard F. McMahon, Jr.", written in a cursive style.

Richard F. McMahon, Jr.
Executive Director

Dated: January 18, 2011