



January 24, 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 23, Implementation of Conflicts of Interest Policies and Procedures by Swap Dealers and Major Swap Participants  
75 Fed Reg. 71, 391 (November 23, 2010)  
RIN 3038-AC96**

Dear Mr. Stawick:

The Edison Electric Institute (“EEI”) respectfully submits these comments in response to the Commodity Futures Trading Commission’s (“Commission” or “CFTC”) Notice of Proposed Rulemaking on Implementation of Conflicts of Interest Policies and Procedures by Swap Dealers and Major Swap Participants (“NOPR”) published November 23, 2010 in the *Federal Register*. In the NOPR, the Commission invited public comment on proposed rules and regulations implementing section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)<sup>1</sup> that adds new section 4s(j)(5) to the Commodities Exchange Act (“CEA”) and directs swap dealers and major swap participants to implement conflict of interest standards and procedures between persons in a firm researching or analyzing the price or market for any commodity or swap are separated from person involved in pricing, trading or clearing activities.

EEI appreciates the opportunity to submit comments on this important issue. 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

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<sup>1</sup> Pub. L. No. 111-203 (2010).

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.<sup>2</sup> EEI members are largely end users,<sup>3</sup> as contemplated by the Dodd-Frank Act, and they engage in swaps to hedge commercial risk. As such, EEI's members do not anticipate being required to register with the Commission as "swap dealers" or "major swap participants." However, because a final rule has not been issued on the definition of "swap," "swap dealer," or "major swap participant,"<sup>4</sup> EEI offers the following comments.

EEI is supportive of Commission regulations that protect the markets. However, due to the lack of clarity on the definitions, EEI believes that the proposed rules are premature and would request that parties be able to file comments and to seek clarification or relief from rules that are adopted once they are able to determine if they qualify as a swap dealer or major swap participant.

In addition, based on a brief review of the proposed rule, we offer the following preliminary comments:

- Swap dealers and major swap participants are required to adopt written policies and procedures to ensure that non-research personnel do not have undue influence over research reports. In order to prevent undue influence, the NOPR restricts contact between research and non-research personnel. Non-research personnel is defined as "any employee of the business trading unit or clearing unit, or any other employee of the swap dealer or major swap participant, who is not directly responsible for, or otherwise involved with, research concerning a derivative, other than legal or compliance personnel."<sup>5</sup> This definition appears to be overly-broad and should be defined to include *only* persons involved with trading, pricing, and clearing, not other non-research areas.
- The preamble to the proposed rule states that pre-public disclosure of research to traders is not permitted.<sup>6</sup> However, the proposed regulatory text authorizes non-research personnel to review research reports for limited purposes, such as to verify factual

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<sup>2</sup> 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.

<sup>3</sup> 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.*

<sup>4</sup> As of the date of this filing, the Commission has issued a Notice of Proposed Rulemaking on the definition of "swap dealer" and "major swap participant" on which comments are due February 22, 2010. The Commission has not issued a Notice of Proposed Rulemaking on the definition of "swap."

<sup>5</sup> NOPR at 71,395 (Proposed Regulation 23.605(a)(5)).

<sup>6</sup> *Id.* at 71, 392.

accuracy.<sup>7</sup> These provisions appear contradictory. We recommend adopting the more precise approach taken in the regulatory text rather than the broader proscription discussed in the preamble.

- Proposed rule 17 CFR § 23.605(c)(1)(iv)(A,B) would require that any communication between a swap dealer or major swap participant’s research personnel and non-research personnel must involve authorized legal or compliance personnel. Apparently, this constraint would apply even if the communication focuses on factual information or non-substantive edits. However, a research analyst may need to gather such information as part of the analyst’s research. And as just mentioned, paragraph 23.605(c)(1)(iv) appropriately allows non-research personnel to review factual information in an analyst’s report. The need for communication of a factual nature to involve legal or compliance personnel is unclear, and such a requirement may unnecessarily slow the research and reporting process and burden legal and compliance personnel with a responsibility that produces little if any benefit. We recommend clarifying that communications of a factual or non-substantive nature need not involve legal or compliance personnel.
- The proposed rule also requires that research personnel must disclose personal financial interests and conflicts during public appearances in a prominent manner and records must be kept of such disclosures.<sup>8</sup> This proposed regulation appears to be overly prescriptive and should be modified to include a de minimus exception and to require that only relevant financial interests and conflicts need to be identified.
- Proposed rule 17 CFR §23.605(c)(5)(iv) would require swap dealer and major swap participant disclosures in the context of independent third-party research reports. By definition, such reports are prepared by entities independent of the swap dealer or major swap participant. Therefore, conflicts that would require disclosure seem unlikely to arise. We recommend reconsidering and eliminating the need for this provision.
- The proposed rule seems to assume that firms will maintain a separate research organization if they intend to disseminate their research to more than 15 people. Specifically, proposed 17 CFR § 23.605(a)(9) defines “research report” as not including communications distributed to fewer than 15 persons. This proposal could interfere with external company communications with regulators on hedging activity, which could involve communication with more than 15 persons. In addition, organizations with small trading operations should be permitted occasionally to disseminate their research publicly to justify their trading decisions or other projects to the public or the investment community. The rule should accommodate such actions.

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<sup>7</sup> *Id.* at 71, 395 (Proposed Regulation 23.605 (c )(1)(iv)).

<sup>8</sup> *Id.* at 71, 396

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,

A handwritten signature in black ink, appearing to read "Richard F. McMahon, Jr.", with a stylized flourish at the end.

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