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David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581

**Re: Recordkeeping and Reporting of Swap Transaction Data  
(RIN No. 3038-AD19)**

Dear Mr. Stawick:

The coalition of energy end-users<sup>1</sup> submits these comments in response to the Notice of Proposed Rulemaking ("NOPR")<sup>2</sup> issued by the Commodity Futures Trading Commission (the "Commission") seeking comments on its recordkeeping and reporting proposal under Section 728 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")<sup>3</sup>. The Coalition supports the goal of bringing greater transparency to the swaps markets. However, in some respects, the Commission's proposals would impose unnecessarily burdensome obligations on end-users as non-swap dealer and non-major swap participant (non-SD/MSP) counterparties.

The Coalition's comments offer three primary observations to assist the Commission. First, the Commission is asking end-users to comply with a large number of requirements that they currently have little or no ability to meet. Second, the resources end-users will have to expend to develop, implement and sustain compliance with the proposed rules, as well as the time it will take to complete such implementation, have

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<sup>1</sup> The coalition includes the Edison Electric Institute and the Electric Power Supply Association (together, the "Coalition," separately, the "Associations"). The Associations' members include power generators and shareholder-owned electric utilities that use energy and energy-related "swaps" to manage the commercial risks inherent in their core energy business activities. The comments contained in this filing represent the initial position of the Coalition, but not necessarily the views of any particular member with respect to any issue. The Coalition or its members may submit additional comments in response to the Commission's proposed rules.

<sup>2</sup> 75 Fed. Reg. 76,473 (Dec. 8, 2010).

<sup>3</sup> 7 U.S.C. § 6r.

been underestimated.<sup>4</sup> Finally, as it applies to the end-users represented by the Coalition, the costs of compliance are significant in comparison to the contribution that the information collected from end-users will make to achieving the transparency goals underlying the Dodd-Frank Act. Thus, the Coalition urges the Commission to adapt its recordkeeping and reporting proposals in a manner that is consistent with these comments and recognizes the limited need for swaps data from end-users.

## **I. Recordkeeping Requirements**

The Commission's proposal would require non-SD/MSP counterparties to keep full, complete, and systematic records, including all pertinent data and memoranda, with respect to each swap to which they are counterparty.<sup>5</sup> The Commission needs to define what constitutes "all pertinent data and memoranda." The recordkeeping requirements should apply to the official business records memorializing the legal terms of the reportable swap and upon which the end-user relies to pay or be paid under the swap. Such records would include master or bespoke agreements, long or short-form confirmations, amendments and associated swap transaction data stored in an end-user's trade capture system. Such records should not include data extraneous to the reportable swap transaction, including records that do not memorialize the final terms of the swap such as valuation data.

The proposed regulations would require non-SD/MSP counterparties to retain all required records throughout the existence of the swap and for five years following final termination of the swap. Five years or less would be acceptable in light of current industry standards. A ten-year retention period is not warranted, as all of the Section 728 goals have surely been achieved before that point.<sup>6</sup>

The Commission proposes that non-SD/MSP counterparties must be able to retrieve a swap record upon request from the agency within three business days during the required retention period, as compared to meeting the "readily accessible" standard applicable to registered entities during the first two years after swap termination/expiration.<sup>7</sup> The recommended approach is warranted by the fact that end-users would be forced to incur unnecessary and significant costs if they had to keep records more readily accessible.

The Coalition supports adopting an approach for implementing recordkeeping requirements for non-SD/MSP counterparties whereby they will be required to report

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<sup>4</sup> The cost burdens would be exacerbated by short compliance deadlines, for example because end-users would not have time to find and assess compliance alternatives, competitive compliance technology would not have had time to develop, and prices are apt to reflect rush or early-adopter premiums.

<sup>5</sup> NOPR at 76,579.

<sup>6</sup> See NOPR at 76,580.

<sup>7</sup> NOPR at 76,579.

only swap data they currently maintain in their trade capture systems such as price, counterparty, term, product and quantity. Records not created or maintained today should not be required to be created or retained under this rule.

Finally, the Coalition believes it is appropriate for the Commission to defer compliance with these reporting obligations until final rules have defined what energy transactions will be treated as swaps subject to Commission regulation and who will be a swap dealer, major swap participant ("MSP") or other type of registered business. Market participants will face substantial and possibly unnecessary costs if they must take steps to comply with recordkeeping requirements before they know their regulatory status in the market (for example, an end-user has different recordkeeping obligations than a swap dealer) and which transactions actually are regulated and reportable swaps. Imposing recordkeeping obligations before regulations are final would cause end-users to divert limited resources to developing recordkeeping systems that are apt to be incomplete or incorrect because the regulatory parameters have not been set or are subject to change as a result of the rulemaking proceedings underway at the Commission.

## **II. Swap Data Reporting – Who Reports**

To determine who has swap reporting responsibilities, the Commission has proposed to look at whether the swap was executed on a platform or cleared and who are the reporting counterparties to the swap (swap dealer, MSP and non-SD/MSP counterparties).<sup>8</sup> The Coalition supports the proposal that reporting obligations on end-users should exist only in those instances where a swap transaction is with another end-user and there is not a swap execution facility ("SEF"), designated contract market ("DCM") or derivatives clearing organization ("DCO") involved in the swap transaction. Imposing swap data reporting requirements on both counterparties would be unduly burdensome on end-users.<sup>9</sup>

### **A. Primary Economic Terms Data**

As stated above, the Coalition agrees with the general framework of requiring a swap dealer or MSP to be the reporting counterparty in their swaps with non-SD/MSP counterparties. Where both counterparties are SDs, MSPs, or non-SD/MSP counterparties (*i.e.*, of the same counterparty status), the Coalition further agrees with the NOPR that the counterparties should determine which counterparty will fulfill the reporting obligations for that swap.<sup>10</sup>

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<sup>8</sup> NOPR at 76,586; Rule 45.5. This proposal is consistent with the Commission's interim swap reporting rules. *Reporting Certain Post-Enactment Swap Transactions*, 75 Fed. Reg. 78,892 (Dec. 17, 2010) (Interim Regulation 44.03(b)).

<sup>9</sup> NOPR at 76,592.

<sup>10</sup> NOPR at 76,593; Rule 45.5.

In requiring reporting of primary economic terms by end-users, the Commission should limit the required data to the commercial data already captured in end-user trade capture systems today. That data is generally limited to price, counterparty, term, product and quantity.<sup>11</sup> Many end-users keep track of the commercial terms of swaps using spreadsheets, and even the most sophisticated of end-users capture them in relatively inflexible, often off-the-shelf trade capture products that have limited customization options. As the amount of end-user reporting is expected to be *de minimis* and the cost of customizing reporting to capture terms not needed for commercial purposes would be unduly burdensome, the Commission should limit the end-user data set to the economic terms end-users capture today.

The Coalition also believes that certain of the primary economic terms listed by the Commission are inappropriate or will provide no useful information to the Commission. For example, the NOPR includes "Settlement Method" (cash or physical) and "Delivery Type" (for physical delivery). Swaps are financially settled agreements. As each of these items relates to physically delivered products, the Commission should eliminate them from the data that any party with a reporting obligation must report. Further, the NOPR includes "Total Quantity" (the amount of the commodity for the entire term of the swap). As swaps transactions are made for a term, but also typically settle in discrete periods within the term commonly called "settlement periods" (e.g., 12-month term;

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<sup>11</sup> As applicable to the specific swap, the key terms are:

- Product (fixed-for-floating, float-for-floating, swaptions on both);
- Fixed price;
- Underlying product and index/pricing point (two products if it is float-for-float);
- Tenor (including hours, e.g., on-peak/off peak);
- Notional quantity; and
- Counterparty (with the appropriate confidentiality restrictions against publishing counterparty identity).

As used in the above list, floating means the variable price that one party pays (e.g., the PJM West Hub price that PJM publishes). It is an index because it is a weighted average of many PJM LMP nodes. Each node is a pricing point. A swap will either use an index or a single pricing point. For example, someone might pay a fixed price in exchange for the other's promise to pay the price at the other party's generator node. That generator node is a pricing point. Continuing with the PJM example, the underlying product is physical power. Tenor means term, and sometimes sub-elements within the term. For example, if the swap is for July/Aug, and it is physical power, it likely would be ATC (around-the-clock), on-peak (the 16 peak hours on each weekday), or the "wrap" which means all hours other than the on-peak hours (i.e., all off-peak hours). The swap math in the latter two cases is only done for the specified hours. Notional quantity is the amount swapped in each hour (e.g., 25 or 50 MW are standard amounts for many power swaps). Note also that the notional quantity can itself be a variable quantity. For example, a "load-following" swap could be for the amount of actual load of a wholesale customer in each hour. A load-serving entity might be able to get a dealer to accept a fixed price in exchange for the dealer's promise to pay the price (which will typically be an index, usually a zonal price) that the load has to pay for all of its load as it changes in every hour. The Coalition would welcome the opportunity to further discuss its recommendations regarding prospective end-user recordkeeping and reporting practices with respect to primary economic terms, valuation or other swap data.

monthly settlement), the quantity is typically aligned with the settlement period. As opposed to requiring end-users to track total quantity, which has no practical commercial use and therefore does not appreciably advance the Dodd-Frank Act's regulatory purpose of promoting transparency, this field can be derived by the Commission in those rare instances where it is desirable to know.

## **B. Confirmation Data**

For cleared swaps, the Commission observes that confirmation data will be generated by DCOs in the course of the normal clearing process. Consequently, DCOs should report confirmation data for all cleared swaps to the appropriate SDR. For non-cleared swaps, confirmation data will be reported by the applicable counterparty. This approach is acceptable subject to the comments on timing provided below.

The Commission also asks whether back-office confirmation should be an acceptable means of confirming a swap.<sup>12</sup> The Coalition believes that confirmation data currently captured in the trade capture systems of end-users, including data that underwent back-office confirmation, should be the only required data when non-SD/MSP counterparties have the duty to report confirmation data.

## **C. Non-U.S. Persons**

The proposed regulations provide that, where only one counterparty to a swap is a U.S. person, the U.S. person should be the reporting counterparty.<sup>13</sup> This approach might be acceptable where the U.S. person is a swap dealer or MSP. However, in cases where the U.S. counterparty is a non-SD/MSP counterparty, the Commission should require the non-U.S. swap dealer or non-U.S. MSP to report or permit the parties to the specific swap transaction to decide which will have the reporting obligation, as the Commission has proposed in the case of two non-U.S. persons that execute a swap on a U.S. SEF or DCM.

## **D. SDR Selection**

The Commission proposes that when a SEF, DCM, swap dealer or MSP has a duty to report the required primary economic terms data, they must select the SDR that receives the initial report by following procedures to be determined by the Commission.<sup>14</sup> The Coalition urges the Commission to adopt rules that ensure that this selection process is equitable and does not result in costs or other unreasonable burdens being imposed on end-users. The Coalition agrees that where an end-user

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<sup>12</sup> NOPR at 76,586.

<sup>13</sup> NOPR at 76,593.

<sup>14</sup> NOPR at 76,593.

submits the initial report of required primary economic terms data, that end-user may choose the SDR to which the swap report is made.<sup>15</sup>

### III. Swap Data Reporting – Time Of Reporting

With respect to swaps not executed on a SEF or DCM, where reporting of required primary economic terms data will be done by the reporting counterparty, the Commission recognizes that the amount of time needed to report could vary depending on swap standardization and whether execution of the swap and verification of the swap terms occur electronically or manually.<sup>16</sup> Taking such factors into account, the Commission proposes to impose the following reporting deadlines for primary economic terms data:

- 15 minutes after execution of a swap for which execution and verification of primary economic terms occur electronically.
- 30 minutes after execution of a swap which is not executed electronically but for which verification of primary economic terms occurs electronically.
- 24 hours for a swap for which neither execution nor verification of primary economic terms occurs electronically.<sup>17</sup>

Similarly, the Commission requires the DCO for cleared swaps and the reporting counterparty for uncleared swaps to report confirmation data. For uncleared swaps, the confirmation data is due:

- 15 minutes after confirmation of a swap for which confirmation occurs electronically.
- For manually confirmed swaps, within a time to be determined by the Commission.<sup>18</sup>

The Coalition appreciates the Commission's recognition that swaps between two end-users will require manual intervention and require at least 24 hours to be reported. For those reasons, the Coalition believes the proposed reporting deadlines are far too short for swaps between two end-users. It would be virtually impossible for most, if not all, end-users to meet the deadlines proposed in the NOPR. For example, end-users generally do not capture the data requested, do not have technology in place to collect or report the requested data or to meet the deadlines, do not electronically verify swaps, and do not have the personnel necessary to meet the proposed requirements. This

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<sup>15</sup> NOPR at 76,593.

<sup>16</sup> NOPR at 76,583.

<sup>17</sup> NOPR at 76,582-83.

<sup>18</sup> NOPR at 76,583 and n.51.

high-level, non-comprehensive list of implementation challenges also shows that end-users will incur substantial implementation and ongoing compliance costs if they are forced to comply with such deadlines and will do so without furthering the goals of the Dodd-Frank Act. Instead, energy end-users should be allowed to report their swap data no sooner than by the close of business one business day after execution or confirmation regardless of whether such tasks were completed manually or electronically.<sup>19</sup> There would be no adverse impact on the Commission's ability to manage system risk or oversee the market if it gets this small segment of data at a later time, as such trades are typically hedge positions and not of a sufficient size to threaten the market.

#### **IV. Swap Data Reporting – Updates And Valuation Data**

For energy swaps, the proposed regulations would require reporting of all "state data," (*i.e.*, all of the data elements necessary to provide a daily snapshot of all the primary economic terms of a swap, including any changes since the last snapshot).<sup>20</sup> The updates must be submitted daily until the swap is terminated or expires. The Coalition opposes this proposal as it is unduly burdensome and does not provide any relevant information to the Commission. Non-SD/MSP counterparties should not have to submit these daily updates. Instead, the non-SD/MSP counterparties would provide a snapshot of all reportable swap data, but only when there has been a change to a material data element of a reportable swap. For example, if a utility entered into a single swap to manage its gas position and the terms of that swap never change, the utility would have no duty to provide state data on a daily basis during the term of the swap.

In addition, the Commission proposes to require market participants to report valuation data (data needed to determine the current market value of a swap, such as daily margin, daily mark-to-market, and other measures of valuation to be determined by the Commission).<sup>21</sup> For cleared swaps, the DCO and the reporting counterparty would report valuation data.<sup>22</sup> For uncleared swaps, the reporting counterparty would report valuation data.<sup>23</sup>

The Coalition understands that the Dodd-Frank Act requires the reporting of swap data. That data consists of the terms of the swap. While the Commission has an interest in

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<sup>19</sup> The Commission should seek additional input from end-users before imposing short reporting deadlines.

<sup>20</sup> NOPR at 76,585.

<sup>21</sup> NOPR at 76,584.

<sup>22</sup> The Coalition believes that for off-facility swaps that are subsequently cleared, the DCO should report the valuation data. The majority of such swaps are cleared nearly simultaneously with execution, so concerns about reporting delays are misplaced.

<sup>23</sup> NOPR at 76,585.

overseeing the risk positions of its regulated entities, such as swap dealers and MSPs, the Coalition does not believe that the Dodd-Frank Act extends such authority to end-users. Accordingly, there is no basis for requiring the reporting of end-user business information such as an end-user's view of forward pricing. Further, the forward value of commodities for liquid markets is relatively transparent today and will be more transparent after the implementation of the Dodd-Frank Act. The valuation data developed by end-users is for internal purposes. An end-user's opinion of forward market value will add nothing to the understanding of the forward market values in liquid transparent markets. For illiquid markets or structured trades, the Commission's reporting requirement will provide only the end-user's business judgment of value. There is no reason to believe that judgment is right or wrong and, because only one party to the trade will be reporting, it could actually be misleading. Thus, no valuation data should be required to be reported by non-registrants, such as end-users.

## V. SDR Selection

The proposed regulations would require reporting parties to use the facilities, methods, or data standards of their chosen SDR. The Commission goes on to say that its regulations would give an SDR flexibility to allow reporting via various facilities, methods, or data standards.<sup>24</sup> This flexibility is important and should be encouraged for non-SD/MSP counterparties by contemplating tools that will help satisfy the requirements for smaller volume or less sophisticated reporting counterparties. For example, a utility that has a reporting obligation for a handful of swaps each year should not have to deploy the same reporting mechanisms as a swap dealer or MSP that executes larger swap volumes.

However, whether there is one SDR or many SDRs, there should be a uniform set of standards for all SDR reporting. The Coalition recommends that the Commission establish a standard-setting process that can effectively result in cost-effective, efficient reporting. The Coalition is familiar with the American National Standards Institute ("ANSI") based processes used by the Federal Energy Regulatory Commission ("FERC") and other agencies in which affected stakeholders and technical experts come together under the umbrella of satisfying a regulatory mandate.<sup>25</sup> Through these processes, numerous regulatory requirements requiring technical standards have been implemented. Although the Coalition does not believe that the CFTC must follow FERC's approach *per se*, a comparable coordinated process should be adopted by the Commission to avoid the chaos and potential expense of implementation without a basic set of agreed standards.

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<sup>24</sup> NOPR at 76,594.

<sup>25</sup> See, for example, *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676, FERC Stats. & Regs. ¶ 31,216, n.5 (2006), *reh'g denied*, Order No. 676-A, 116 FERC ¶ 61,255 (2006).



## VI. Third-Party Facilitation

The Commission's proposal would allow reporting counterparties to use third-parties to facilitate swap data reporting.<sup>26</sup> This is an important option for end-users that might not have, or want to create, the infrastructure needed to fulfill their reporting obligations. The Commission should not be overly prescriptive as to the appropriate types of third-party facilitators and functions. Market participants should have the ability to contract for the third-party services that they think they need. The only real issue for the Commission is ensuring that SDRs and other registered businesses do not impose measures related to technology or other procedures that would interfere with a reporting counterparty's ability to contract out reporting services (e.g., by adopting procedures that would make it hard for third-parties to acquire or send data on behalf of an end-user). The adoption of an ANSI-like process proposed above upon which the third-party facilitators could build systems would help create an effective third-party process.

## VII. Conclusion

The Coalition supports providing the Commission with the information necessary to provide transparency to the system. However, the Commission should implement rules that work with current practices and that are not unduly burdensome for end-users. The Coalition members respectfully urge the Commission to adopt swap recordkeeping and reporting rules that are consistent with these comments. Please contact us if you have any questions or concerns regarding these comments.

Respectfully submitted,



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Daniel S.M. Dolan  
VP, Policy Research & Communications  
Electric Power Supply Association



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Richard F. McMahon, Jr.  
Vice President  
Edison Electric Institute

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<sup>26</sup> NOPR at 76,593.