

**BEFORE THE
COMMODITY FUTURES TRADING COMMISSION**

**End-User Exception to Mandatory Clearing of Swaps
Modifications to Commodity Exchange Act by Title VII
Of the Dodd-Frank Wall Street Reform and Consumer
Protection Act (RIN 3038-AD10)**

**COMMENTS OF THE
RETAIL ENERGY SUPPLY ASSOCIATION**

The Retail Energy Supply Association (“RESA”)¹ appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (“CFTC” or the “Commission”) on the Commission’s proposed rule governing the End-User Exception to Mandatory Clearing of Swaps, published in the Federal Register on December 22, 2010.² The proposed rule has been issued by the Commission in order to implement changes to the Commodity Exchange Act by enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).³

A. RESA and its Interests

RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity and natural gas. RESA and its members are actively involved in retail electricity and natural gas markets throughout the United States in states that

¹ RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus; Reliant Energy Northeast LLC and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² *End-User Exception to Mandatory Clearing of Swaps*, RIN3038-AD10, 75 Fed. Reg. 80747 (December 23, 2010).

³ Pub. L.111-203, 124 Stat. 1376(2010).

have implemented markets that allow entities other than the incumbent electric or natural gas utility to provide commodity electric and gas service.

Under the retail supply model, a retail supplier of gas or electricity will provide the commodity gas or electricity to an end-use customer – generally a commercial, industrial or residential consumer. The utility will remain as the distributor of the commodity, generally through distribution-level natural gas pipelines or distribution electric lines. The retail supplier will purchase the gas or electricity in competitive wholesale markets and deliver it (or have it delivered) pursuant to Federal Energy Regulatory Commission (“FERC”) approved tariffs to the local utility’s citygate.

RESA’s members are a diverse group of companies. Some are independent companies and others are subsidiaries of larger energy-related companies. RESA’s members serve customers in approximately 22 states and the District of Columbia. All of RESA’s members, however, share the common belief that competitive retail markets deliver a more efficient, customer-oriented outcome than the regulated utility structure.

In connection with its retail supply activities, most of RESA’s members also utilize a number of commercial products to hedge their risks, including commodity price risks. These products include commodity swaps and other related products that are the subject of the Commission’s proposed rule. RESA members use these commodity swaps to hedge their business risks. Retail suppliers such as RESA members also use a variety of mechanisms to finance their business, including using receivables as collateral instead of posting cash. Increased prices and/or regulatory requirements applicable to these products may increase transactions costs, increase commodity price volatility and increase prices to the ultimate consumer. Mandatory clearing or cash margining would be detrimental to retail suppliers’

financing arrangements. Congress enacted the exemption for end-users specifically recognizing that these sorts of activities should remain exempt from regulation under the Commodities Exchange Act. While Congressional intent illustrates that RESA members' activities should be covered by the End-User Exception, the Commission's regulations must reflect that intent so that end-users may engage in hedging and risk management transactions for their commercial purposes. RESA's members, as end-users of commodity swaps to hedge commercial risk, have a direct and significant interest in the Commission's implementation of the end-use clearing exemption.

B. RESA Supports the Comments of Edison Electric Institute and Electric Power Supply Association

RESA supports the comments filed by the Edison Electric Institute ("EEI") and Electric Power Supply Association ("EPSA") (the "Joint Associations") filed on February 22, 2011. Specifically, RESA agrees with the Joint Associations that the Commission should: (1) only require a one-time general financial obligation notice; (2) prevent abuse of the end-user clearing exception through representations made by non-financial entities, rather than require additional reporting obligations; (3) permit reasonable reporting timelines and means for reporting any required swap-related information to the Commission; and (4) not limit the ability of end-users to hedge commercial risk through an affiliated entity.

A one time notice submitted to the Commission that requires end-users seeking the exemption to provide general information with respect to the end-user's credit support agreements, the use of the pledge of assets to secure the end-user's exposure and discussion of the end-user's financial resources that may be available to meet the end user's financial obligations. An obligation to update this information when there are material changes in the end-

user's policies or activities should be more than sufficient to ensure that the end-user exemption is properly claimed and monitored by the Commission.

As noted by the Joint Associations (at 6), transaction-by-transaction notification is inconsistent with the way that entities in the energy industry transact. Generally, parties to a transaction use a master agreement to define the general terms and conditions (such as an ISDA Master Agreement) and then execute confirmations for individual commercial arrangements entered into between the parties. Credit is generally addressed in the master agreement (or a credit annex executed between the parties) and the credit provisions apply to all transactions under the master agreement.. In many cases, credit and related issues are more portfolio-based and not necessarily on a transaction by transaction basis. A general notice such as that proposed by the Joint Associations and supported by RESA, would be consistent with the marketplace realities and should be adopted.

In the same vein, it is not necessary for an end-user claiming the exemption to prove that it is eligible for the exemption. A contractual-based affirmation is sufficient, especially when the Commission could seek any transaction documents at any time to confirm that the exemption is properly claimed. If the end-user is an entity that is registered with or files reports under the Exchange Act, the Commission should allow a one-time declaration by the entity's board of directors authorizing use of the end-use exemption rather than require such entity's board of directors to approve each transaction. As the Joint Associations properly note (at 9), the statute does not require such a case by case analysis, but, instead, requires the notification to include "whether an appropriate committee of the board of directors. . . has reviewed and approved the decision to enter into *swaps* that are subject to the . . . exemptions."⁴

⁴ See CEA Section 2(j).

In addition, the Commission must take a practical and reasonable approach to defining “hedging or mitigating commercial risk” in the proposed rule so that entities, such as RESA members, are entitled to claim the end-use exemption for their commercial hedging activities. Importantly, activities such as “asset optimization or dynamic hedging” must be considered “hedging or mitigating commercial risk.” Not only are these activities a critical component of retail gas and electric business risk mitigation, but these activities clearly fit within Congress’ direction to permit exemption for “swaps used to hedge or mitigate *any* of a person’s business risks.”⁵

C. Conclusion

In sum, RESA supports the Joint Associations comments that present a practical and statutorily-consistent approach to implementation of Dodd-Frank as it relates to the end-user exemption. RESA members rely on hedging products to mitigate their risks and so that they can provide value and services to end use customers in markets where retail competition is permitted. Increased costs associated with registration and the other regulatory requirements proposed in the Commission’s rules will not only be burdensome to RESA members, some of whom are quite small, but may ultimately result in increased costs to customers. Congress created this

⁵ See 75 Fed. Reg. at 80,752 (emphasis added).

exemption for entities such as RESA members and the Commission should exercise its jurisdictional discretion to promulgate regulations that ensure that the end-user exemption is properly claimed. The Joint Associations' proposals achieve that result.

Respectfully submitted,

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