



June 3, 2011

**VIA Online Filing Process: <http://comments.cftc.gov>**

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

**Re: Comments on Notice of Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act; Footnote 128, *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Dealer," and "Eligible Contract Participant"* ("Definitions Proposed Rule"), RIN 3038-AD06; Footnote 23, *End-User Exception to Mandatory Clearing of Swaps* ("End-User Exception Proposed Rule"), RIN 3038-AD10**

Dear Mr. Stawick:

The Electric Power Supply Association ("EPSA")<sup>1</sup> submits these comments in response to the Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act issued by the Commodity Futures Trading Commission (the "Commission") reopening and extending the comment period for a number of rulemakings.<sup>2</sup> EPSA writes generally to support comments submitted by the Working Group of Commercial Energy Firms (the "Working Group") on language contained in

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<sup>1</sup> EPSA's members include power generators that use electric energy and related "swaps" to manage the commercial risks inherent in their core business activities. The comments contained in this filing represent the position of EPSA, but not necessarily the views of any particular member with respect to any issue. EPSA or its members may submit additional comments in response to the Commission's proposed rules.

<sup>2</sup> 76 Fed. Reg. 25,274 (May 4, 2011).

footnote 128 of the Definitions Proposed Rule<sup>3</sup> and footnote 23 of the End-User Exception Proposed Rule.<sup>4</sup>

## Comments

EPSA agrees with the Working Group's comments that the language in footnote 128 of the Definitions Proposed Rule and footnote 23 of the End-User Exception Proposed Rule could create a situation in which a commercial firm that hedges or mitigates legitimate price risk related to owning a commodity, or otherwise engages in physical commodity merchandising transactions that might be characterized as "trading" would be treated differently from other commercial market participants.

EPSA has concerns about the ambiguity introduced in the definition of "hedging or mitigating commercial risk" by the exclusion of swap positions that hedge "other positions" that "themselves are held for the purpose of . . . trading."<sup>5</sup> EPSA assumes that the Commission intended the reference to "other positions" in footnote 128 to mean "other *swap* positions" and did not mean to include physical commodity positions. Many of our members, as part of the conduct and management of their commercial operations, own physical assets, such as power plants and fuel supply, and are authorized by the FERC to sell wholesale power and natural gas at market-based rates. They either own, produce or merchandise, or reasonably anticipate owning, producing, or merchandizing, "assets" within the meaning of proposed rule (ttt)(1)(i)(A). EPSA's members enter into transactions related to these assets, some of which potentially may be characterized as "trading" transactions, as part of their regular business activities, and should not be prohibited from prudently hedging any corresponding commercial risks associated with those transactions.<sup>6</sup>

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<sup>3</sup> 75 Fed. Reg. 80,174 (Dec. 21, 2010).

<sup>4</sup> 75 Fed. Reg. 80,747 (Dec. 23, 2010).

<sup>5</sup> Definitions Proposed Rule at n.128; Proposed Regulation 1.3(ttt).

<sup>6</sup> EPSA agrees with the Working Group that a potential consequence of the ambiguous language in the footnotes is that "an energy or agricultural firm engaged in 'trading' activities would be unable (i) to deduct its exposure on swap positions used to hedge commercial risk associated with its trading positions in a physical commodity in applying the 'substantial position' test to determine whether it is an MSP, and (ii) to avail itself of the end-user exception to mandatory clearing for a swap used to hedge commercial risk associated with its trading positions in a physical commodity."

## **Conclusion**

EPSA shares the concerns of the Working Group regarding ambiguity in the language set forth in footnote 128 of the Definitions Proposed Rule and footnote 23 of the End-User Exception Proposed Rule and respectfully request that the Commission make clear that its members will be able to continue to prudently hedge the commercial risks associated with their physical market transactions.

Respectfully submitted,

## **ELECTRIC POWER SUPPLY ASSOCIATION**

A handwritten signature in black ink, appearing to read "Dan Dolan", with a long horizontal flourish extending to the right.

Dan Dolan  
Vice President, Policy Research & Communications