August 5, 2011

Mr. David A. Stawick
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Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
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Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
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Submitted via Federal Rulemaking Portal at http://www.regulations.gov

RE: File Number S7–16–11, Joint Proposed Rules and Interpretations on Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping

The Solar Energy Industries Association (SEIA) and its 1,000 members would like to express our appreciation for the opportunity to comment on the Commodity Futures Trading Commission's (CFTC) and the Security Exchange Commission's (SEC) joint proposed rules and proposed interpretations regarding the Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (the "Proposed Rule").[1]

We acknowledge that these comments are being filed ten business days past the prescribed comment date and apologize for the delay. Due to the press of other business and the need to consult our membership, we were unable to submit a timely response. Given SEIA's interest in this proceeding, the early stage of the proceeding, and the absence of any unjust prejudice or delay, we respectfully request that the Commissions accept these comments.

SEIA respectfully requests that the CFTC and SEC establish that Renewable Energy Credits (RECs), emissions allowances and other similar environmental commodities are not swaps subject to CFTC and SEC jurisdiction. Because these commodities are physically settled, as a matter of law they are not swaps. Moreover, as a matter of policy, defining these products as swaps would be unduly burdensome and have a negative impact on efforts to support the development of clean, domestic renewable resources.

I. Introduction

Established in 1974, the Solar Energy Industries Association is the national trade association of the U.S. solar energy industry. Through advocacy and education, SEIA and its member companies are building a strong solar industry to power America. As the voice of the industry, SEIA works to make solar a mainstream and significant energy source by expanding markets, removing market barriers, strengthening the industry and educating the public on the benefits of solar energy. SEIA represents the entire solar industry, encompassing all major solar technologies (photovoltaics, concentrating solar

[1] 76 Fed. Reg. 29,818 (May 23, 2011).

power and solar heating and cooling) and all points in the value chain, including financiers, project developers, component manufacturers and solar installers.

The United States has some of the richest solar resources in the world, and last year the solar industry experienced a 67% growth rate.[2] This phenomenal growth is the result of private investment, technological innovation, a maturing industry and smart federal and state policies.

II. Comments on the Proposed Rule

SEIA respectfully offers these comments in response to Question 32 of the Proposed Rule:

> *Should the forward contract exclusion from the swap definition apply to environmental commodities such as emissions allowances, carbon offsets/credits, or renewable energy certificates? If so, please describe these commodities, and explain how transactions can be physically settled where the commodity lacks a physical existence (or lacks a physical existence other than on paper)? Would application of the forward contract exclusion to such environmental commodities permit transactions that should be subject to the swap regulatory regime to fall outside the Dodd-Frank Act?*

A. Environmental Commodities Are Physically Settled and, Therefore, Are Not Swaps

SEIA has reviewed the comments of several other participants in this proceeding[3] and we emphasize the point that both RECs and emission allowances involve the physical delivery of energy certificates from the seller's account to the buyer's account via a registry or exchange of paperwork. Therefore, these transactions are physically settled and are excluded from the current definition of "swap" in Sections 1a(47)(B)(i) and (ii) of the Commodities Exchange Act as amended by Section 721(a)(21) of the Dodd-Frank Act.

B. Renewable Energy Credits (RECs) Are Governed by State Public Utility Regulatory Commissions and Do Not Require Further Regulation

Renewable Energy Credits (RECs) are generally established as the counting mechanism for utilities to prove that they have met the requisite amount of renewable energy generation for the year, as determined by the state's Renewable Portfolio Standard (RPS) or Renewable Electricity Standard (RES). In some jurisdictions, specific targets for solar generation are established, and the resulting attribute is called an SREC.

The vast majority of SRECs are created by the authority, and under the auspices of, public utilities commissions or public service commissions in the several states. As part of their regulatory mission, these agencies are well-equipped to investigate or intervene in any potential instances of consumer protection violations, price manipulation or other abuses. Indeed, their legal charge is to protect the interests of the consumer.

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[2] U.S. Solar Market Insight™ Year in Review: 2010. Executive Summary available at http://www.seia.org/cs/research/SolarInsight.

[3] Namely, comments of the American Wind Energy Association (AWEA), the International Emissions Trading Association (IETA), the Renewable Energy Markets Association (REMA) and the Working Group of Commercial Energy Firms.

Further, it is unclear what public purpose would be served by this additional regulation, in a market dominated by bilateral transactions between those directly producing the product and those immediately consuming same, and where the conventional definition of a "swap" is an almost unheard-of transaction.

C. Environmental Commodities Are Frequently Transferred by Consumer Agreement and, Therefore, Are Not Swaps

In section 3, "Consumer and Commercial Agreements, Contracts, and Transactions," the Commissions indicate that they are generally indisposed to consider a number of typical individual contracts as swaps, including specifically contracts "to sell or assign rights owned by…consumer(s)."[4] In the solar industry, RECs are often traded by an individual consumer as an assignment of a right owned by that consumer.

Unique to the solar industry, a significant proportion of the solar equipment installed in the U.S. is in the form of individual customer rooftop systems.[5] Many individual customers assign delivery of their SRECs to the regulated utility, or transact a forward contract through an SREC aggregator, at a fixed price. It is important to keep in mind that individual customers represent a significant portion of the SREC market. For instance, as of July 26, 2011, 74% of the nearly 17,000 solar generators registered in the Generation Attributes Tracking System operated by East Coast regional transmission operator PJM's Environmental Information Service ("PJM-GATS") were less than 10 kW in size, a typical breakpoint below which a solar system is most likely to be residential.[6]

Given that the typical consumer arrangement resulting in a sale of environmental commodities is to directly assign rights held by the consumer, it would be inappropriate to include these transactions in the definition of a swap.

D. Environmental Commodities Are Non-Financial Commodities and should be Excluded from the Definition of "Swaps"

The Proposed Rule states "Forward contracts with respect to nonfinancial commodities are commercial merchandising transactions. The primary purpose of the contract is to transfer ownership of the commodity and not to transfer solely its price risk."[7] As described below, a REC's primary value is to be retired and thereby relieve a contractual legal obligation for delivery. Buyers of RECs desire the RECs themselves; they are not seeking a transfer of risk. Therefore, environmental commodities should be excluded from the definition of "swaps."

The vast majority of the SREC market – if not the entire market – consists of transactions between systems or system owners physically producing the electricity from which the SREC derives, and entities requiring a transferred SREC for immediate "usage," with at most one intermediate aggregation step.

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[4] Proposed Rule at 29,832.

[5] At the end of March 2011, there were about 166,000 rooftop solar systems deployed in the U.S., and most of the country's solar generation comes from those systems.

[6] https://gats.pjm-eis.com/myModule/rpt/myrpt.asp?r=228

[7] Proposed Rule at 29,828.

Looking to the customer rooftop solar system, the RECs/SRECs are effectively sold (or assigned) in a single contract transaction, in exchange for a single fixed price. In New York's RPS program, for instance, New York State Energy Research and Development Authority (NYSERDA) serves as the single procurer for all New York utilities, and retains the option to use customer RECs for this purpose.[8] In Colorado, the Solar*Rewards program operated by Xcel Energy requires a REC assignment contract up front for a fixed price known in advance.[9]

With limited lifetimes and capped prices designed to decline over time, RECs represent an unattractive prospect for hedging or financial/derivative purposes. Firstly, in their role as "compliance counters" for state renewable portfolio standards, individual RECs have severely limited lifetimes. A three-year life from date of creation is somewhat unusual, and two years is more common. Within that timeframe, a REC must be used for its ultimate purpose, (viz., retired and reported to a public service or public utility commission) or it loses all compliance value.

In addition, many RPS programs contain "alternative compliance payment" (ACP) schemes, wherein a fixed per-megawatt-hour fine may be paid by the entity with a compliance obligation as an alternative to purchasing the requisite RECs. Because these ACPs decline over time (often severely), the future value of a given REC as a risk mitigation instrument is quite limited.

There is no evidence to indicate that the REC markets and emissions allowance markets are anything other than conventional commercial mercantile exchanges of a commodity.

E. Environmental Commodities Spur the Growth of the Solar Industry

One of the important state policies driving solar deployment is the Renewable Portfolio Standard (RPS) or Renewable Energy Standard (RES). Under an RPS, Renewable Energy Credits (RECs) are sold as a separate product based on the physical electricity or energy created by the renewable generating source. Twenty-nine states plus the District of Columbia have established an RPS. Another eight states have set non-binding renewable energy goals.[10] In addition, sixteen states plus the District of Columbia require that a percentage of the energy to satisfy the RPS come from solar energy or other distributed generation technologies. Of these, many of the largest markets for solar energy in the United States rely on solar-specific RECs, called SRECs, as their primary means of incentivizing the development of solar energy.[11]

In jurisdictions with a separate distributed or solar energy requirement, SRECs generally have a higher value than RECs. The value of those SRECs is used, in part, to finance solar projects both at residential and commercial installations. Inclusion of RECs or SRECs in the definition of a "swap" could hinder the

[8] http://www.nyserda.org/Funding/916attf.pdf and http://www.nyserda.org/rps/PastSolicitations.asp#currentsolicitations

[9] http://www.xcelenergy.com/Save_Money_&_Energy/Find_a_Rebate/Solar*Rewards_-_CO

[10] Database of State Incentives for Renewables & Efficiency, RPS Summary Map available at http://dsireusa.org/documents/summarymaps/RPS_map.pptx.

[11] For example, Arizona (4.5% distributed generation), Colorado (3% distributed generation), Maryland (2%), Massachusetts (400MW), New Jersey (5,316 GWh), New Mexico (4%), New York (0.48%), North Carolina (0.2%), Ohio (0.5%), Pennsylvania (0.5%) and Washington, DC (0.4%) all require solar or other distributed generation to comprise a portion of the state's renewable portfolio standard.

buying and selling of these SRECs and RECs, potentially damaging the REC market through increases in REC transaction costs. Small solar developers might also be eliminated from the REC market, eliminating a key source of funding for solar projects, and overall slowing the investment and growth of the solar industry.

Another of the policies driving growth in the solar industry is the Regional Greenhouse Gas Initiative, in which ten Northeastern states currently participate. Through the buying and selling of emission allowances, the revenue from the sale of those emission allowances are often directed to renewable energy deployment projects, including solar, in the participating states. Inclusion of emission allowances in the proposed definition of a "swap" would hinder the buying and selling of these emission allowances, likely providing less funding to state-run renewable energy deployment programs, and negatively affecting the solar industry.

III. Conclusion

The solar industry is one of the fastest growing industries in the United States. However, that growth would be put in jeopardy by the adoption of these proposed rules. For all of the above reasons, we respectfully request that you find that environmental commodities are not "swaps" and allow the REC and emissions allowance markets to function as they currently do.

If you have any questions, please do not hesitate to contact the undersigned.

Respectfully,

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