

August 10, 2011

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

Re: Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (RIN No. 3235-AK65)

Dear Mr. Stawick:

The Commodity Futures Trading Commission (the “Commission”) and the Securities and Exchange Commission (the “SEC”) issued joint proposed rules in the proceeding captioned Further Definition of “Swap,” “Security-Based Swap,” “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping¹ (“Product Definition NOPR”) pursuant to the Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). On July 22, 2011, several entities filed comments in this proceeding, including comments seeking greater clarity on the Commission’s regulation of transactions and services in Regional Transmission Organizations (“RTO”) and Independent System Operators (“ISO”). The associations of energy end-users² file these limited comments in support of comments asking the Commission to avoid regulatory overlap with the Federal Energy Regulatory Commission (“FERC”).

¹ 76 Fed. Reg. 29,818 (May 23, 2011).

² The Joint Associations include the Edison Electric Institute (“EEI”) and the Electric Power Supply Association (“EPSA”) (together, the “Joint Associations”). The Joint 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 position of the Joint Associations, but not necessarily the views of any particular member with respect to any issue. The Joint Associations or their members may submit additional comments in response to the Commission’s proposed rules.

In general, the Associations believe that, with the exception of anti manipulation matters, the Commission should take care to implement Dodd-Frank in a manner that does not overlap with FERC regulation.³ As stated in comments filed by FERC Staff:

[T]he CFTC indicates that it intends to consider the status of transactions in FERC-regulated RTOs and ISOs ... under the standards and procedures specified in section 722 rather than through this joint rulemaking. Of course, if and when any such section 4(c) public interest exemption applications are filed, FERC staff may have further comment. *We point out, however, that transactions that are executed or traded on RTOs/ISOs should be excluded from the definition of 'swap,' whether because they are deemed commercial merchandising transactions or because defining these transactions as swaps is inconsistent with the text, goals, and purpose of Dodd-Frank. As we have stated in prior comments, Dodd-Frank terms should be interpreted as not applying to any contract or instrument traded in an RTO/ISO market pursuant to a FERC-accepted rate schedule or tariff.*⁴

The Associations agree with this position. Congress did not intend that the Commission would define "swaps" to include all commercial agreements, contracts, transactions and commercial merchandising arrangements involving nonfinancial commodities. Moreover, for certain industries, such as the electric industry, Congress provided in Dodd-Frank specific directions to the Commission on certain types of transactions that should fall outside the scope of the Commission's jurisdiction. Congress also provided guidance on the types of transactions around which the Commission would need to draw careful jurisdictional lines in cooperation with existing regulators, such as FERC, in order to recognize the role of each agency, increase efficiency and avoid burdening regulated entities with dual oversight. The same is also true for the Electric Reliability Council of Texas ("ERCOT"), which is regulated by the Public Utility Commission of Texas.

Rather than implementing the approach recommended in comments, the Product Definition NOPR avoided addressing the question of whether certain electricity transactions in RTOs and ISOs are swaps.⁵ Instead, the Product Definition NOPR indicates that "persons with concerns about whether FERC-regulated products may be considered swaps (or futures) should request an exemption pursuant to section 722 of Dodd-Frank."⁶ In so doing, the Commissions do not acknowledge or provide any meaning to the elements of section 722(e) of Dodd-Frank, in which Congress

³ FERC Staff Comments at 2.

⁴ FERC Staff Comments at 4 (emphasis added).

⁵ 76 Fed. Reg. at 29,839.

⁶ *Id.*

specifically preserves the authority of FERC with respect to RTO/ISO markets.⁷ Further, Congress specifically required the Commission to work with FERC to: (1) ensure that regulatory jurisdiction is applied in manner that “ensure[s] effective and efficient regulation;” (2) resolve “conflicts concerning overlapping jurisdiction;” and (3) avoid “to the extent possible, conflicting or duplicative regulation.”⁸ While Congress expected the agencies to provide for such an outcome in a Memorandum of Understanding (“MOU”)⁹ and to do so months ago, the fact that one has not been executed does not negate the clear Congressional intent underlying this section.

The Commissions’ decision not to address RTO/ISO transactions and services in the Product Definition NOPR is unfortunate, particularly in light of the many prior comments from participants in those markets seeking clear Commission guidance on these transactions. The best result that can occur from this choice is significant ongoing regulatory ambiguity. The worst result is conflicting and duplicative regulation. Both of these outcomes run counter to Congressional intent.

In deferring to FERC’s oversight, the Commission is not somehow leaving the financial markets exposed to systemic risk. FERC already has complete authority over RTO/ISO markets under the Federal Power Act. FERC’s charge under that statute is to ensure that RTOs/ISOs produce just and reasonable electricity prices for consumers. FERC created RTOs/ISOs and their constituent transactions and services to do just that. Further, unlike CFTC-regulated exchanges which have self-regulatory authority, FERC is the direct regulator of RTO/ISOs and takes an active role in closely overseeing every aspect of their operations, including on matters related to credit and market participant qualifications. RTO/ISO transactions and services are precisely the FERC-regulated subject matter Congress expected would remain subject FERC’s sole regulation.

The RTO/ISO transactions and services themselves also are distinct in that, rather than being swaps in any traditional sense, they are integral elements of the wholesale physical electricity market regulated by FERC. These transactions and services cannot be divorced from FERC regulation of such markets. If such transactions and services were subject to the jurisdiction of other regulators while the remaining RTO/ISO transactions and services remained FERC-regulated, the bifurcated regulation could jeopardize the just and reasonable character of FERC’s transactions and services, particularly due to how integral all the transactions and services are to each other.

Accordingly, the Commissions should find that, similar to the insurance contracts, consumer agreements, and commercial agreements it has addressed in the Product Definition NOPR, RTO/ISO transactions and services are not swaps. In the alternative, the Commission should enter into an MOU with FERC making clear these transactions and services are not swaps consistent with section 720 of Dodd-Frank.

⁷ CEA Section 2(a)(1) as amended by the Dodd-Frank Act.

⁸ Dodd-Frank Act Section 720(a)(1).

⁹ *Id.*

The fact that the Commission did not use the Product Definition NOPR to provide the guidance the electricity industry and their consumers need has created the impression that the Commission has already implicitly decided, without notice and comment and without regard for Congress' intent, that certain RTO/ISO transactions and services are swaps. This implication leads to five potential outcomes that could result from the exemption process the Commission seems to favor:

- The Commission does not grant an exemption for any RTO/ISO transactions and services;
- The Commission grants a partial exemption;
- The Commission grants a conditional exemption;
- The Commission limits the exemption to existing RTO/ISO transactions and services and requires future Commission action before a FERC-approved transaction and service or RTO/ISO tariff change can be found to meet a Commission "public interest" test; or
- The exemption granted by the Commission is subject to revision/modification at a future date.

All of these outcomes create unnecessary regulatory ambiguity and conflict with Congress' intent. This, in turn, could easily lead to less infrastructure investment, less technology innovation and more risk that the transactions and services needed to ensure the availability of supply and the reliability of the grid will cease to be available, will be slow to come to market or will be more expensive for consumers.

When Congress adopted Dodd-Frank, its goal was to improve the strength of the financial system, not to impede the functioning of the electric system. Duplicative regulation would be disruptive to the efficient operation of the electric commodity markets. To avoid the adverse consequences highlighted here and discussed in more detail in the record, the Associations respectfully request that the Commission find that FERC-jurisdictional RTO/ISO transactions and services are not swaps.

Respectfully submitted,



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