



November 4, 2011

**VIA ELECTRONIC SUBMISSION**

David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
1155 21st Street, N.W.  
Washington, DC 20581

**Re: Comments of Edison Electric Institute, the National Rural Electric Cooperative Association and Electric Power Supply Association on Proposed Rule Regarding Swap Transaction Compliance and Implementation Schedule: Trading Documentation and Margining Requirements under Section 4(s) of the CEA and Clearing and Trade Execution Requirements under Section 2(h) of the CEA 76 Fed. Reg. 58176 and 58186 (September 20, 2011) RIN 3038-AC96; 3038-AC97; 3038-AD60**

Dear Mr. Stawick:

The Edison Electric Institute (“EEI”), the National Rural Electric Cooperative Association (“NRECA”) and the Electric Power Supply Association (“EPSA”) (hereafter “Joint Associations”) respectfully submit these comments in response to the proposed rules (“Proposed Rules”) implementing the trading documentation, margin and clearing requirements contained in sections 731 and 723 in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).<sup>1</sup> Joint Associations have been active participant in the Commission’s Dodd-Frank Act rulemaking process and have filed comments in the rulemakings referenced in the Proposed Rules.<sup>2</sup> As such, Joint Associations welcome the opportunity to continue to discuss these issues with the Commission and its staff.

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<sup>1</sup> Pub. L. No. 111-203 (2010).

<sup>2</sup> See Comments filed by EEI, NRECA, APPA, and LPPC on April 11, 2011 in response to the proposed “Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants,” 76 Fed. Reg. 6,715 (Feb. 8, 2011); Comments filed by EEI and EPSA on February 22, 2011 in response to the proposed “End-User Exception to Mandatory Clearing of Swaps,” 75 Fed. Reg. 80,747 (Dec. 23, 2010); Comments filed by EEI and EPSA on February 22, 2011 in response to “Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” 75 Fed. Reg. 80,174 (Dec. 21, 2010); Comments filed by EEI, NRECA, APPA, EPSA and LPPC on July 22, 2011 in response to the proposed “Further Definition of “Swap,” “Security-Based Swap,” “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,” 76 Fed. Reg. 29,818 (May 23,

(continued...)

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 95 percent of the ultimate customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members. EEI's members are not financial entities. Rather, the typical EEI member is a medium-sized electric utility with relatively low leverage and a conservative capital structure.

Formed in 1942, NRECA is the national service organization for more than 900 not-for-profit rural electric utilities and public power districts that provide electric energy to approximately 42 million consumers in 47 states or 12 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members. The vast majority of NRECA's members meet the definition of "small entities" under the Small Business Regulatory Enforcement Fairness Act ("SBREFA").<sup>3</sup> Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. The RFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that entities which provide electric services are "small entities" if their total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.<sup>4</sup> NRECA is grateful to ACES Power Marketing which has provided considerable assistance and support in developing these comments.

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

EEI, NRECA and EPSA members are largely end users,<sup>5</sup> as contemplated by the Dodd-Frank Act, and they engage in swaps to hedge commercial risk. As such, these members do not anticipate being required to register with the Commission as swap dealers ("SD") or major swap

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2011); Additional comments of EEI and EPSA filed on August 10, 2011 in response to the proposed Further Definition of "Swap," "Security-Based Swap," "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping," 76 Fed. Reg. 29,818 (May 23, 2011); Comments filed by EEI, NRECA, APPA, EPSA, LPPC and AGA on July 11, 2011 in response to Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23,732 (April 28, 2011) and Capital Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 27,802 (May 12, 2011).

<sup>3</sup> 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996).

<sup>4</sup> 13 C.F.R. §121.201, n.1

<sup>5</sup> CEA § 2(h) (7). Although the term "end user" is not defined in the CEA, the "end user clearing exception" is available to non-financial entities that use swaps to hedge or mitigate commercial risk, and that notify the commission as to how they generally meet their financial obligations associated with entering into non-cleared swaps. *Id.*

participants (“MSP”). However, these members may have SDs or MSPs as counterparties, may be subject to margin requirements for uncleared swaps and may chose to clear or not to clear a swap pursuant to the end user exception. For these reasons, Joint Associations’ members would be affected by the implementation proposal in the Commission’s Proposed Rules.

Joint Associations support the Commission’s proposal to stagger implementation based on the category of market participant, including the proposal to give additional time to those market participants that may not be registered with the Commission and who would be less familiar with the regulatory requirements.<sup>6</sup> In the Proposed Rules, the Commission recognizes that implementation of the trading documentation rules, margin requirements and clearing requirements are dependent on the finalization of other proposed rules and as such the implementation schedules in the Proposed Rules would not be effective until such other rules are finalized. Specifically, the Commission states:

“The Commission observes that before swap dealers and major swap participants could be required to comply with § 23.504, the Commission must adopt final rules related to confirmation of swap transactions and the protection of collateral for uncleared swaps. This is because the substance of the required documentation under proposed § 23.504 is found in those two rulemakings. For this reason, the Commission anticipates that it will finalize the confirmation and protection of collateral proposals at approximately the same time that it finalizes the Trading Documentation rule. Consequently, the compliance schedules proposed under this release would not become effective until the Commission finalizes those two proposals in addition to the Trading Documentation rule.”<sup>7</sup>

“As explained above with regard to the Trading Documentation rules, the Commission observes that no CSE could be required to comply with final Margin Requirements rules until (1) the Commission adopts further definitions of swap,” “swap dealer,” and “major swap participant”; and (2) the Commission adopts registration rules for SDs and MSPs. As noted above, the proposed Margin Requirements cross reference certain provisions in the Trading Documentation rule. As a result, the final Trading Documentation rule would have to be published in the **Federal Register** prior to requiring compliance with the final Margin Requirements.”<sup>8</sup>

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<sup>6</sup> 76 Fed. Reg. at 58180.

<sup>7</sup> *Id.* at 58178.

<sup>8</sup> *Id.* at 58180.

“The Commission observes that before market participants could be required to comply with a mandatory clearing determination, the Commission must adopt its final rules related to the end user exception to mandatory clearing established by section 2(h)(7) of the CEA.”<sup>9</sup>

“In addition, the Commission recognizes that the swap transaction compliance schedules that are the subject of this proposal reference terms such as “swap,” “swap dealer,” and “major swap participant” that are the subject of rulemaking under sections 712(d)(1) and 721(c) of the Dodd-Frank Act. The Commission and the SEC have proposed rules that would further define each of these terms. As such, and in a manner consistent with the temporary relief provided in the Commission’s Effective Date Order, the Commission must adopt its final rules regarding the further definitions in question prior to requiring compliance with a mandatory clearing determination.”<sup>10</sup>

Joint Associations support and agree with the Commission that these rules need to be finalized before the proposed implementation process can occur. However, due to the complex and inter-related nature of the rulemakings referenced above, Joint Associations will not be able to comment on whether the implementation periods proposed by the Commission are sufficient until the final versions of the rulemakings referenced above have been issued.

As previously indicated, Joint Associations filed comments with suggested changes to the proposed rule on documentation; the definitions of swap, SD and MSP; the end-user clearing exception; and margin requirements for uncleared swaps. The members that Joint Associations represent will not know the extent of their obligations in these areas until the final rules are issued by the Commission. For example, Joint Associations’ members use swaps to hedge commercial risk and believe that they should not be required to register as swap dealers. However, as Joint Associations indicated in their comments, changes to the proposed entity definitions rule would provide greater certainty for market participants and more effectively advance the Dodd-Frank Act’s goal of promoting financial stability.<sup>11</sup> Joint Associations also recommended changes in response to the proposed rules on Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants and the End-User Clearing Exception.<sup>12</sup> The Commission’s determinations in response to these and other proposed changes or clarifications requested by Joint Associations will affect the amount of time that will

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<sup>9</sup> *Id.* at 58188.

<sup>10</sup> *Id.* at 58188 – 58189.

<sup>11</sup> Comments filed by EEI and EPSA on February 22, 2011 in response to “Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” 75 Fed. Reg. 80,174 (Dec. 21, 2010)

<sup>12</sup> Comments filed by EEI, NRECA, APPA, and LPPC on April 11, 2011 in response to the proposed “Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants,” 76 Fed. Reg. 6,715 (Feb. 8, 2011); Comments filed by EEI and EPSA on February 22, 2011 in response to the proposed “End-User Exception to Mandatory Clearing of Swaps,” 75 Fed. Reg. 80,747 (Dec. 23, 2010).

be needed by EEI, NRECA and EPSA members for implementation. As more documentation, procedural and reporting changes are required, more time would be needed to comply.

Joint Association members are electric utility companies that possess resources and systems needed to support their physical electric generation, transmission and distribution businesses. They are not financial companies and generally do not have significant information technology ("IT") development capabilities. Their position and swap tracking systems are typically generic platforms purchased from software vendors and are used by the companies to track their positions and to manage their risk in the context of their commercial business needs. As a general matter, EEI members intend to comply with Dodd-Frank by the purchase of updates of modules designed for meeting the regulatory requirements of Category 3 and 4 entities<sup>13</sup>.

It is our members' experience that IT development typically takes longer than anticipated and often needs some debugging period to implement new software. As a result, Joint Associations urge the Commission to afford adequate time after the finalization of relevant regulations for commercial software vendors to assimilate relevant final rules and offer viable off-the-shelf products designed to permit Joint Associations' members to confidently comply with the CFTC's rules without having to perform company specific one-off programming. It is our understanding that many software vendors use a process when new functionality is released to not only develop the software but to also put the new software through a development cycle protocol to insure proper functionality and adequate testing. At this time, it is simply unknown whether entities such as Joint Associations' members will have access to adequate software updates needed to comply with final rules issued by the Commission.

Joint Associations request that the Commission affirmatively seek input from software vendors that provide position and trade capture software to insure that there is adequate time to obtain and implement any necessary software modifications to permit compliance by Joint Association members with final rules issued by the Commission. While such software modifications will certainly have a cost, generally available off-the shelf products will be the most cost-effective and, likely, most compliant tools that entities such as physical electricity business members will be able to obtain for Dodd-Frank compliance.

Therefore, Joint Associations request that the Commission re-issue the Proposed Rules after the underlying final rules have been issued and after the Commission has been able to determine whether tools are available and capable of integration into existing software that will allow Joint Associations' members to comply with the final rule within the prescribed timeframe. This will enable stakeholders to provide comments that are based on a better awareness of their responsibilities and upon the compliance tools available.

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<sup>13</sup> Joint Associations note that the Commission does not specifically list end users as a category or in the description of the categories. Joint Associations are assuming that end users would fall into Category 4 for purposes of the Trading Documentation and Margining Proposed Rule and under Category 3 for purposes of the Clearing and Trade Execution Proposed Rule. Joint Associations would request that the Commission clarify that this interpretation is correct.

Additionally, Joint Associations agree with Commissioner O'Malia that a comprehensive implementation schedule that would detail compliance dates for each registered entity-specific obligation and market-wide obligation would benefit market participants, including EEI, NRECA and EPSA members.<sup>14</sup> Joint Associations also believes that market participants could provide increasingly better input to such a schedule as more of the rules proposed under the Dodd-Frank Act are finalized. Consequently, Joint Associations would encourage the Commission propose such a schedule but also to provide an extended period for public comment.

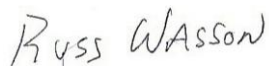
Please contact the undersigned if you have any questions regarding these comments.

Respectfully submitted,



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<sup>14</sup> 76 Fed. Reg. at 58185 – 58186.

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