



Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: *RIN 3038-AC97: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23,732 (April 28, 2011).*

Dear Mr. Stawick:

EquiPower Resources Corp. ("***EquiPower***") is pleased to submit the following comments to the Commodity Futures Trading Commission (the "***CFTC***" or the "***Commission***") in response to its Notice of Proposed Rulemaking regarding "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants" (the "***CFTC Proposal***").¹ We appreciate the Commission's willingness to reopen the comment period on this important rule at a time when commercial end-users are seeking to have a clearer understanding of the potential impacts of Title VII on their businesses.² As detailed below, we support the CFTC Proposal to the extent it would: (i) allow swap dealers to exercise their business judgment in determining whether to impose margin requirements on commercial end-users such as Equipower, without establishing a regulatory minimum requirement; (ii) allow swap dealers to accept non-cash collateral from commercial end-users seeking to hedge or mitigate commercial price risk, to satisfy any margin requirements agreed to by the parties; and (iii) most importantly, allow swap dealers and their end-user counterparties to contractually agree on acceptable margining methodologies.

INTRODUCTION

¹ Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23,732 (proposed April 28, 2011).

² EquiPower and other commercial end-users in the energy sector are continuing to work through what is required or proposed to be required of them in terms of documentation, reporting, position limits, inter-affiliate transactions and other aspects of Title VII; which of their supply contracts, transportation agreements, energy management agreements and other forward contracts will have to be treated as swaps; what compliance deadlines apply to them; and what compliance deadlines apply to their counterparties that may have the practical effect of limiting end-user access to the swaps markets. We believe the Commission may have underestimated the compliance burdens placed on commercial end-users by these rules.

EquiPower is a competitive power generation company that owns and operates a portfolio of five highly efficient combined cycle natural gas power plants in Connecticut, Massachusetts, and Pennsylvania, and manages affiliate company power plants in New York, New Jersey and Texas collectively representing over 5,100 megawatts of generating capacity. We believe that we meet the definition of a “commercial end-user” for purposes of the exception from the clearing mandate.³ The purpose of our derivative transactions is solely to mitigate inherent market risk with respect to merchant natural gas fired electrical generation. Accordingly, our swaps primarily relate to natural gas and power and, to a lesser extent, locational basis differentials, emissions and interest rates. A large portion of our swaps positions are secured by a first lien on our assets, by receivables, or by letters of credit. In some limited circumstances, we do post cash margin. However, the cost to our business of posting cash margin in all circumstances would be significant—we estimate the potential posting of cash collateral for an energy based commercial end user such as EquiPower to be upwards of \$200 million and the annualized cost of the cash collateral at this level to be in the range of \$20-25 million.—Such a requirement would create substantial liquidity risk for our business and is a very inefficient and duplicative use of capital impairing the competitiveness of commercial end users.

BACKGROUND

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“*Dodd-Frank*”)⁴ requires the Commission to establish margin requirements in connection with uncleared swaps. Specifically, as noted in the CFTC Proposal, new Section 4s of the Commodity Exchange Act (the “*CEA*” or the “*Act*”) requires each swap dealer for which there is no prudential regulator to comply with Commission’s regulations governing margin.

Unlike under prudential regulators’ proposal,⁵ under the CFTC Proposal, swap dealers would not be obligated to impose margin requirements on uncleared swaps with commercial end-users. Instead, the Commission proposed that swap dealers and commercial end-users enter into credit support agreements that set levels of margin consistent with the swap dealers’ risk management processes.⁶ The Commission also proposed that swap dealers who require commercial end-users to post initial or variation margin be permitted to accept any asset as margin so long as the value of the asset may be reasonably ascertainable on a periodic basis.⁷

COMMENTS

³ We believe we meet the definition of an end-user for purposes of the exception to the clearing requirement for swaps because, as detailed in this letter, we enter into swaps for the purpose of hedging or mitigating risk, not to speculate or invest. See Final Rule on the End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42560 (July 19, 2012).

⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

⁵ See Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Farm Credit Administration, and Federal Housing Agency, Margin and Capital Requirements for Covered Swap Entities, 76 Fed. Reg. 27,564, 27,569 (May 11, 2011).

⁶ See CFTC Proposal, 76 Fed. Reg. at 23,736.

⁷ See *id.* at 23,739.

EquiPower supports the CFTC's proposal to allow swap dealers broad discretion with respect to margin requirements for commercial end-users and to accept non-cash collateral from commercial end-users to satisfy applicable margin requirements. As noted by the Commission, commercial end-users pose less risk to swap dealers and the financial markets than other types of entities.⁸ Commercial end-users also may have more limited access to liquidity than financial entities, but often have other readily available forms of collateral (such as, for natural gas and power transmission swaps, the underlying physical commodity) that provide effective protection for their counterparties. In our experience, swap dealers have historically managed the credit risk from their commercial end-user counterparties flexibly but prudently, and we support the Commission's proposal to allow them to continue to exercise such discretion. We therefore believe the CFTC Proposal with regard to the amount and acceptable forms of collateral is consistent with the Congress' intent to "permit the use of noncash collateral as . . . the Commission determines to be consistent with—(i) preserving the financial integrity of markets trading swaps; and (ii) preserving the stability of the United States financial system."⁹

The CFTC Proposal also correctly recognizes that commercial end-users may not as a practical matter maintain sufficient cash to satisfy onerous margin requirements. In the energy market, for example, common forms of collateral used by commercial end-users include letters of credit, liens on assets, and receivables. If commercial end-users in the energy market are forced to use their cash for margin purposes, then that money cannot be used to invest in infrastructure, explore alternative sources of energy, or create new jobs. All of these activities are beneficial to the economy, increase reliability of the power supply, and generally reduce energy prices. A requirement for commercial end-users to use cash for margin purposes would be a duplicative and unnecessary use of capital effectively negating the value of other forms of non-cash collateral resulting in a very inefficient capital structure and lessening the competitiveness of the companies impacted. We therefore urge the Commission to ensure that energy companies have the flexibility they need to manage risk without creating undue pressure on their liquidity and limited cash resources.

Finally, EquiPower notes that a prohibition on the use of non-cash collateral by commercial end-users would needlessly restrict the ability of such entities and their counterparties to shape their credit support arrangements to transaction and counterparty specific risks and resources. By allowing commercial end-users to elect to rely on an exception from the CEA's clearing mandate and trade execution requirements, Congress effectively approved the ability of such commercial end-users to continue to engage in bilateral swaps with customized terms that are designed to meet the specific needs of such commercial end-users. Accordingly, we believe that swap dealers should be permitted to negotiate tailored arrangements with commercial end-users with respect to the amount of margin (or other collateral) posted and the form of such margin.

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⁸ See CFTC Proposal, 76 Fed. Reg. at 23,736.

⁹ See CEA at § 4s(e)(3)(C); see also Letter from Chairman Christopher Dodd, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, and Chairman Blanche Lincoln, Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, to Chairman Barney Frank, Financial Services Committee, United States House of Representatives, and Chairman Collin Peterson, Committee on Agriculture, United States House of Representatives (June 30, 2010).

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EquiPower appreciates the opportunity to comment on the Commission's Notice of Proposed Rulemaking regarding "Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants." We would be happy to elaborate or further discuss any of the points addressed above. In the event you may have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Robert A. Hayes

Senior Vice President and Chief Commercial Officer

CC: ELLEN MARKS, PETER MALYSHEV, BRETT ACKERMAN – LATHAM & WATKINS, LLP