



Via Electronic Submission

Stacy Yochum, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments on Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (RIN 3235–AK65)

Dear Ms. Yochum:

The Electric Power Supply Association (“EPSA”) respectfully submits these comments on the Final Rule on the Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (“Swap Definition Final Rule”)¹ issued on August 13, 2012, by the Commodity Futures Trading Commission (“CFTC” or “Commission”) and the Securities and Exchange Commission and seeks clarification that guarantees of non-financial commodity transactions will not be considered swaps under the Swap Definition Final Rule.

The Swap Definition Final Rule defines the contracts, transactions, and agreements that will be considered “Swaps,” “Security-Based Swaps,” and “Security-Based Swap Agreements” under the Commodity Exchange Act (“CEA”) as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) and those transactions, contracts, and agreements that will be subject to the Commission’s rules that are applicable to all “swaps.”²

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.³

¹ Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48028 (Aug. 13, 2012).

² Pub. L. No. 111-203 (2010).

³ The comments contained in this correspondence represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

EPSA members are physical commodity market participants that rely on commodity swaps, futures, and options primarily to hedge and mitigate commercial risk. They are not financial entities, but commercial end-users that have a direct and significant interest in how the Commission regulates transactions in non-financial commodities, and in particular, swaps on non-financial commodities.⁴

EPSA seeks clarification that guarantees of non-financial commodity transactions will not be considered swaps under the Swap Definition Final Rule. The Commission determined that guarantees of swap agreements will be treated and evaluated the same as swaps, under the Swap Definition Final Rule.⁵ EPSA is concerned that such determination will lead to regulatory uncertainty and cause a whole category of transactions to fall under the swap umbrella that Congress never intended to be considered as swaps. Therefore, EPSA seeks clarification that guarantees of non-financial commodity transactions will not be considered swaps under the Swap Definition Final Rule.

In the Swap Definition Final Rule, the Commission explained that "...the CFTC is interpreting the term "swap" (that is not a security-based swap or mixed swap) to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position."⁶

It is common practice of EPSA members, as well as other commercial participants in the energy industry, for parent companies of electric utilities to guarantee non-financial commodity transactions entered into by electric and energy market participants. These non-financial commodity transactions are commonly documented under the North American Power Annex or the North American Gas Annex to the ISDA Master Agreement in order to create a contractual agreement between the counterparties and provide the benefits of netting both non-financial (in this case, physical) commodity transactions and "financial" or derivative commodity transactions. Parent company guarantees are then often posted by one or both of the counterparties in order to provide credit support for the entire ISDA Master Agreement relationship, both for swap transactions and non-swap transactions. These guarantee transactions constitute commercial arrangements and have long-existed in the electric industry to provide additional financial and credit protection for electric and energy market participants.

⁴ EPSA has also joined with the Edison Electric Institute ("EEI") on comments regarding the seven part test under the Swap Definition Final Rule. The comments in this document address this discreet issue and are supplemental to EPSA's joint comments with EEI.

⁵ 77 Fed. Reg. 48225-48226 (Aug. 13, 2012).

⁶ In the discussion in the Swap Definition Final Rule, the Commission notes that it plans to address further issues related to guarantees of swaps in a separate release. EPSA commends the Commission for addressing this issue and offers these comments to inform any future release and, in the event that a separate release is delayed, in order to seek regulatory certainty in the interim period.

In many cases, the parent company of the particular electric energy market participant will guarantee either performance, that is, physical settlement, or payment of damages should physical delivery or receipt not take place due to the occurrence of one or more *bona fide* termination events in a non-financial energy commodity transaction. The same guarantees that cover non-financial commodity forward transactions often also cover non-financial commodity options transactions.

If such guarantees are considered “swaps” themselves, then it could trigger many non-financial transactions to be considered swaps and would lead to uncertainty regarding how to evaluate these guarantees under the rules governing swaps, including how to maintain appropriate records of such guarantees, how to report them, and how to value such guarantees. Additionally, since the guarantees as explained above in the energy industry serve as an additional financial and credit protection to ensure that the non-financial commodity transaction will be fully met, considering such guarantees as swaps may lead to market participants no longer providing these guarantees, thus weakening the non-financial energy commodities markets.

The Commission explains in the preamble discussion of treating guarantees as swaps that considering such guarantees as swaps will allow the Commission’s regulation of the swaps market to be more effective and cites the role that guarantees played in the failure of AIG Financial Products.⁷ EPSA reiterates that these guarantees have existed in the energy market for a long time and are used to provide additional financial and credit protection against the possibility that the non-financial commodity may not be delivered/received. Additionally, Congress did not intend for the Dodd-Frank regulations to limit or restrict the impact of non-financial commodity transactions, and EPSA is concerned that, without clarification that such guarantees are not considered swaps, the Commission could inadvertently cause the very impact on non-financial market participants and end-users that Congress sought to avoid.

For the reasons stated herein, we respectfully request that the Commission clarify that guarantees of non-financial commodity transactions will not be considered swaps under the Swap Definition Final Rule. In the event the Commission issues a separate release to address or seek comment on this issue, EPSA requests the Commission consider these comments in any such release.

EPSA appreciates the Commission’s consideration of our comments seeking clarification of the Commission’s treatment of guarantees as swaps. We are happy to discuss any comments further. Please feel free to contact EPSA at the number listed below if you have any questions regarding these comments.

⁷ 77 Fed. Reg. 48226 (Aug. 13, 2012).

Stacy Yochum, Secretary
October 12, 2012
Page 4

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Melissa M. Mitchell". The signature is written in a cursive style with a large initial "M".

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