



No-Action Request; Rule 140.99

October 12, 2012

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**Re: Request for Interim No-Action Relief Regarding the Commission's
New Regulatory Requirement to Document Oral "Bookouts"**

Gentlemen and Ms. Yochum:

Pursuant to Commission Rule 140.99,¹ the Petitioners² respectfully request that the appropriate divisions of the Commodity Futures Trading Commission (the "Commission") grant no-action relief for the interim period described below to the Petitioners' members and all participants in transactions for electric energy and natural gas from the new regulatory requirement described below (the "Bookout Documentation Requirement") announced in the joint final rule and interpretations issued by the Commission and the Securities and Exchange Commission captioned **Further Definition of "Swap," "Security-Based Swap," "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping**³ (the "Product Definitions Release").

The Bookout Documentation Requirement, which appears in Section II.B.2(a)(i)(D) of the Product Definitions Release, is found in the Commission's regulatory "safe harbor" for "[f]orward contracts in nonfinancial commodities," and provides that "in the event of an oral ['bookout'] agreement, such agreement must be followed in a commercially reasonable

¹ 17 C.F.R. § 140.99.

² The National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), the Large Public Power Council ("LPPC"), and the Transmission Access Policy Study Group ("TAPS").

³ 77 Fed. Reg. 48,208 (August 13, 2012).

timeframe by a confirmation in some type of written or electronic form”(the “Bookout Documentation Requirement”).⁴

According to the Product Definitions Release, such new regulatory requirement is necessary in order for forward contracts in nonfinancial commodities, where the parties intend physical delivery (a/k/a “physical settlement”) at the time the transaction is executed, to remain within the regulatory “safe harbor” interpreting new CEA 1a(47)(B)(ii) as an exclusion from the defined term “swap.” The Product Definitions Release states that the Bookout Documentation Requirement is necessary “to prevent abuse of the safe harbor.”⁵

I. Petitioners

NRECA is the national service organization for more than nine hundred rural electric utilities and public power districts that provide electric energy to approximately forty-two million consumers in forty-seven states or thirteen percent of the nation’s population. Kilowatt hour sales by rural electric cooperatives account for approximately eleven percent of all electric energy sold in the United States. Because an electric cooperative’s electric service customers are also members of the cooperative, the cooperative operates on a not-for-profit basis and all the costs of the cooperative are directly borne by its consumer-members.

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate customers. APPA’s member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some publicly-owned electric utilities generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

LPPC is an organization representing 26 of the largest government-owned electric utilities in the nation. LPPC members own and operate over 86,000 megawatts of generation capacity and nearly 35,000 circuit miles of high voltage transmission lines, representing nearly 90% of the transmission investment owned by non-Federal government-owned electric utilities in the United States.

TAPS is an association of transmission-dependent utilities in more than 35 states, promoting open and non-discriminatory access to the transmission grid and regulatory policies to facilitate the participation of smaller utilities in the electricity markets.

⁴ See 77 Fed. Reg. at 48230.

⁵ *Id.*

II. Background

The effective date of this new regulatory requirement *appears* to be 60 days after its publication in the Federal Register, or October 12, 2012. Although the Commission has postponed a majority of the October 2012 deadlines, this deadline for the confirmation of oral bookouts *appears* to remain. In this regard, there is confusion among Petitioners' members and others in the energy markets as to the actual effective date, and the implications of a failure to comply, based on the following provision in Section X of the Product Definitions Release, entitled "Administrative Law Matters – CEA Revisions":

As noted above, the CFTC believes that its interpretation which clarifies that oral book-out agreements must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form *would result in a new 'collection of information' requirement within the meaning of the PRA*. Therefore, the CFTC is submitting the new "book-out" information collection to OMB for review in accordance with 44 U.S.C. 3506(c)(2)(A) and 5 CFR 1320.8(d). The CFTC will, by separate action, publish in the Federal Register a notice on the paperwork burden associated with the interpretation's requirement that oral book-outs be followed in a commercially reasonable timeframe by confirmation in some type of written or electronic form in accordance with 5 CFR 1320.8 and 1320.10. *If approved, this new collection of information will be mandatory.*

See 77 Fed. Reg. at 48,305 (emphasis added). Note that this language from the Product Definitions Release states that "if" the necessary approvals are obtained, the Bookout Documentation Requirement "will be mandatory."

These approvals have not yet been obtained by the Commission. In fact, the public comment period does not end until October 15, 2012. Therefore, the Petitioners respectfully submit that granting this interim no-action relief will eliminate any confusion as to when the North American electric energy and natural gas industries must comply with this new documentation requirement and whether, if such approvals are obtained, such Bookout Documentation Requirement will indeed be mandatory, or only required to secure the benefit of the regulatory "safe harbor."

This request for no-action relief is in support of, and consistent with, the request for a delay of the effective date of the Bookout Confirmation Requirement submitted by the International Energy Credit Association ("IECA Request") on September 21, 2012.⁶ This

⁶ A copy of the IECA request is attached.

request for no-action relief is also consistent with the request for comprehensive relief from the effective and compliance dates for regulations promulgated pursuant to Title VII of the Dodd-Frank Act (“Title VII DFA Regulations”) submitted by the Edison Electric Institute and the Electric Power Supply Association on September 24, 2012 (the “EEI/EPISA Request”). This request is also consistent with the Petitioners’ letter, submitted on September 27, 2012, in support of the EEI/EPISA Request respecting the nonfinancial energy commodity transactions in which the Petitioners’ members rely to fulfill their public service obligations to deliver electric energy to American businesses and consumers, and the related derivatives transactions that the members use to hedge or mitigate the commercial risks of their electric operations.

Today, October 12, 2012, the Petitioners as well as other energy industry entities and associations will submit their comments in a timely manner to the Commission on the Product Definitions Release and the related Commodity Options Release.⁷ Many commenters will raise the Bookout Documentation Requirement and ask that the Commission withdraw this new and burdensome regulatory requirement. (See Section VII of the Petitioners’ comment letter in the Product Definitions Release docket). In addition, the Petitioners and other energy industry entities and associations will submit comments in the Agency Information Collection Activities docket,⁸ and expect to be involved further in the review of the Bookout Documentation Requirement by the Office of Management and Budget in that proceeding (the “OMB Proceeding”). The Petitioners respectfully request that the Commission carefully consider the public comments on the Product Definitions Release and the interrelated Commodity Options Release in a thoughtful and deliberate manner.

The Commission has yet to complete its rulemaking process on new CEA Section 1a(47) in respect of nonfinancial commodity transactions. After such rulemaking is completed, the Commission has been requested to provide sufficient transition and implementation time to enable the energy industry and other commercial businesses to comply with the new regulatory requirements, while not disrupting the ongoing nonfinancial commodity and commodity derivatives markets. Such transition and implementation time is also necessary to preserve the ability of commercial end users, such as the Petitioners’ members, to hedge the ongoing commercial risks of their businesses. During this interim period, the Petitioners’ members and other energy companies must be able to operate their electric facilities, deliver electric service to their customers, and hedge or mitigate the commercial risks arising from electric operations, without diverting time and resources to comply with newly-proposed and burdensome regulatory requirements.

⁷ 77 Fed. Reg. 25,320 (April 27, 2012).

⁸ 77 Fed. Reg. 49,428 (August 16, 2012).

III. Request for No-Action Relief

In light of today's October 12, 2012 effective date, the fact that the Commission has not yet addressed either the IECA Request or the EEI/EPISA Request, the continuing regulatory uncertainty resulting from the Commission's ongoing regulatory proceedings in respect of the definition of "swap" and the exclusions therefrom, and in order to ensure that the Commission has sufficient time to consider fully the comments submitted in response to the Product Definitions Release and the Commodity Options Release, including completion of the OMB Proceedings and conducting a full analysis under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996 by the Small Business Regulatory Enforcement Fairness Act) of the Bookout Documentation Requirement, the Petitioners request that the appropriate divisions of the Commission grant no-action relief.

Specifically, the Petitioners respectfully request that the no-action relief state that the Commission's Divisions will not recommend that the Commission commence an enforcement action against any market participant in the North American electric or natural gas industries for failure to comply with the Bookout Documentation Requirement until not less than 180 days after the Commission completes the rulemaking process for the comprehensive Title VII DFA Regulations. Once all of the Title VII DFA Regulations have been published in the Federal Register, the Petitioners respectfully request that the Commission establish an implementation schedule that provides electric energy and natural gas market participants with sufficient time to commence compliance with these regulations, including the Bookout Confirmation Requirement.

In the alternative, the Petitioners respectfully request that the no-action relief state that the Commission's Divisions will not recommend that the Commission commence an enforcement action against any market participant in the North American electric or natural gas industries for failure to comply with the Bookout Documentation Requirement until 180 days after the Commission provides its response to the open questions set forth in the Product Definitions Release and the related Commodity Options Release and completes its rulemaking implementing and interpreting Section 721(a)(21) of the Dodd-Frank Act and the definition of "swap" in new CEA 1a(47) as it applies to nonfinancial commodity transactions..

The Petitioners' members are not financial entities, but instead are commercial "end users." Without such interim no-action relief, the Petitioners' members are left with uncertainty as to whether they may be in violation of the new Bookout Documentation Requirement, and must spend unnecessary time and implement unnecessary new operational procedures in order to comply. Such an unnecessary expenditure of the electric and natural gas industry's operational time and substantial costs would be directly contrary to Congresses intent in the Dodd-Frank Act.

For all of the aforementioned reasons, the Petitioners respectfully request that the appropriate divisions of the Commission grant the no-action relief requested. Please contact any of the individuals below or Patricia Dondanville, Reed Smith LLP, 10 South Wacker Drive, 40th Floor, Chicago Illinois 60606, telephone (312) 207-3911, or e-mail (pdondanville@reedsmith.com), if you have questions regarding this request.

**REQUEST FOR NO-ACTION RELIEF-
BOOKOUT DOCUMENTATION REQUIREMENT**

Respectfully submitted,

**NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION**

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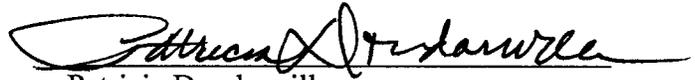
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I hereby certify that the material facts upon which the Petitioners no-action request are based are true and complete to the best of my knowledge, information and belief.⁹



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Counsel for the Petitioners

cc: Honorable Gary Gensler, Chairman
Honorable Mark Wetjen, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Daniel Berkovitz, General Counsel
Julian Hammar, Assistant General Counsel
Lee Ann Duffy, Assistant General Counsel
Mark Fajfar, Assistant General Counsel
David Aron, Counsel

⁹ In addition, I hereby agree that, if any time prior to issuance of a no-action letter, any material statement made in this letter ceases to be true and complete, I will ensure that the Commission Staff is informed promptly in writing of all materially changed facts and circumstances.

ATTACHMENT



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September 21, 2012

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
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Email to secretary@cftc.gov and electronically to <http://comments.cftc.gov>

Re: Request of the International Energy Credit Association (“IECA”) to the Commodity Futures Trading Commission (“CFTC” or “Commission”) for a Delay of the Effective Date of the Commission’s Interpretive Guidance Requiring the Confirmation of Oral Bookouts (“Bookout Confirmation Requirement”) set forth in the Commission’s Rule entitled Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (the “Swap Definition Rule,” 17 CFR Part 1, RIN 3038-AD46, Federal Register August 13, 2012)

Ladies and Gentlemen:

The Commission, as part of the above-referenced Swap Definition Rule, included an extensive section entitled Interpretive Guidance, which included a new Bookout Confirmation Requirement with respect to oral bookouts under forward contracts. This letter respectfully requests a delay of the effective date for such Bookout Confirmation Requirement.

I. Introduction.

The IECA is not a lobbying group. Rather, we are an association of several hundred energy company credit management professionals grappling with credit-related issues in the energy industry. Our members’ concerns regarding the Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”) have led us to submit numerous comments to the Commission on its rule-makings under the DFA.

Correspondence with respect to these comments should be directed to the following individuals:

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II. Request for a Delay of Effective Date of the Bookout Confirmation Requirement.

The Commission's Interpretive Guidance, included as part of the Swap Definition Rule, established a new Bookout Confirmation Requirement for oral bookouts under forward contracts (77 Fed. Reg. at 48,230), which is stated as follows:

Under the Brent Interpretation, what is relevant is that the book out occur through a subsequent, separately negotiated agreement. While the CFTC is sensitive to existing recordkeeping practices for book-outs, in order to prevent abuse of the safe harbor, the CFTC clarifies that in the event of an oral agreement, such agreement must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form.

The effective date of this requirement would *appear* to be 60 days after its publication in the Federal Register, or October 12, 2012. Although the Commission has postponed a majority of the October 2012 deadlines, this deadline for the confirmation of oral bookouts *appears* to remain. In this regard, there is some confusion among IECA's members as to the actual effective date based on the following provision in the Swap Definition Rule:

As noted above, the CFTC believes that its interpretation which clarifies that oral book-out agreements must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form *would result in a new 'collection of information' requirement within the meaning of the PRA.* Therefore, the CFTC is submitting the new "book-out" information collection to OMB for review in accordance with 44 U.S.C. 3506(c)(2)(A) and 5 CFR 1320.8(d). The CFTC will, by separate action, publish in the Federal Register a notice on the paperwork burden associated with the interpretation's requirement that oral book-outs be followed in a commercially reasonable timeframe by confirmation in some type of written or electronic form in accordance with 5 CFR 1320.8 and 1320.10. *If approved, this new collection of information will be mandatory.*

See 77 Fed. Reg. at 48,305 (emphasis added). Accordingly, the language from the Swap Definition Rule states that "if" the necessary approvals are obtained, the Bookout Documentation Requirement "will be mandatory." These approvals have not yet been obtained by the CFTC.

Therefore, IECA respectfully submits that granting this request will eliminate any confusion as to when the industry must comply with this new documentation requirement as discussed in more detail below.

A. A Reasonable Extension of the Deadline for the Oral Bookout Confirmation Requirement Is Needed to Ensure Compliance by the Energy Industry. With this deadline looming, the electric industry, the natural gas industry and others have been aggressively working to develop standard language that can be adopted to confirm oral bookouts. Contracts may also need to be amended and employees will need to be trained on the new confirmation requirement.

In addition, the energy industry needs to work with the Commission to better clarify what transactions qualify as an oral bookout and are, therefore, subject to this new confirmation requirement. As the Commission is aware, there has been recent confusion over the scope of this undefined term.¹ The IECA intends to include a discussion of this topic when it submits comments on October 12, 2012, regarding the Interpretive Guidance set forth in the Commission's Swap Definition Rule. In order to allow time for analysis and resolution of these issues, additional time will be needed to effectively complete these necessary tasks and others.

The lack of sufficient implementation time threatens to disrupt, possibly substantially, the North American wholesale energy markets. This disruption will immediately increase the costs of electricity and natural gas to consumers nationwide, because parties will be prohibited from entering into bookouts until they can develop and implement the necessary documentation and training.

For this reason alone, the Commission should grant a reasonable extension of the effective date of the new Bookout Confirmation Requirement applicable to oral bookouts under forward contracts.

B. Paperwork Reduction Act Compliance Requires an Extension. In addition, the CFTC is still working to obtain the necessary Office of Management and Budget approval under the Paperwork Reduction Act, which must occur before the new Bookout Confirmation Requirement becomes effective. In this regard, the Commission has recently published a Notice on Agency Information Collection Activities related to the new bookout documentation requirement ("Information Collection Notice") providing "an opportunity for public comment on the *proposed* collection of certain information by the agency." (emphasis added). As noted in the CFTC's Information Collection Notice:

Under the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501 *et seq.*, Federal agencies are required to publish notice in the Federal Register concerning each

¹ In this regard, the CFTC's Notice on Agency Information Collection Activities related to the new bookout documentation requirement estimates *one to two* oral bookouts requiring confirmation per year per respondent. However, based on a discussion among IECA's members, it appears this estimate is grossly underestimated. As a result, the IECA believes further discussion is warranted to better understand what the CFTC considers to be an oral bookout requiring a confirmation. In addition, it appears this new requirement could apply to IECA members that would not otherwise be subject to the Commission's jurisdiction – because they only participate in physical forward transactions that include no optionality.

proposed collection of information and to allow 60 days for public comment. The Commission recently adopted a final rule and interpretations, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), requiring that oral book-out agreements must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form. This notice solicits comments on the recordkeeping requirement that is embedded in the final interpretation’s reporting requirement.

(emphasis added).

The CFTC’s Information Collection Notice further states:

Under the PRA, Federal agencies must obtain approval from the Office of Management and Budget (“OMB”) for each collection of information they conduct or sponsor. “Collection of Information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the Federal Register concerning each proposed collection of information before submitting the collection to OMB for approval. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. To comply with this requirement, the CFTC is publishing the notice of the proposed collection of information listed below.

(emphasis added).

Comments on the CFTC’s Information Collection Notice are due October 15, 2012 – three days after the bookout documentation requirement goes into effect. Only after October 15, 2012, following the procedure described in the Commission’s Information Collection Notice, will the Commission be able to seek OMB approval for the “collection” to be established by this new Bookout Confirmation Requirement.

C. Extension of Effective Date Requested. For all the foregoing reasons, the IECA respectfully requests a delay in the effectiveness of this provision of the CFTC’s Interpretive Guidance until not less than 180 days after the Commission completes the rulemaking process for the comprehensive regulations promulgated pursuant to Title VII of the DFA (“Title VII DFA Regulations”). Once all of the Title VII DFA Regulations have been published in the Federal Register, the IECA requests that the Commission establish an implementation schedule that provides market participants with sufficient time to commence compliance with the Title VII DFA Regulations, including the Bookout Confirmation Requirement. In the alternative, the IECA requests that the Commission delay the effectiveness of the CFTC’s Interpretive Guidance on bookout documentation until 180 days after the Commission provides its response to the open questions set forth in the Swap Definition Rule.

Depending on how one defines the transactions for which bookout confirmation will now be required, this new CFTC requirement regarding confirmation of oral bookouts potentially affects millions of transactions per year. The additional time requested by this petition will greatly benefit the electric industry, the natural gas industry, and others, including the Commission, by providing the necessary time for more meaningful implementation.

With the fast approaching effective date, the IECA respectfully requests expedited treatment of this petition by September 28, 2012.

III. Conclusion.

The IECA respectfully submits the foregoing request for a delay in the effective date of the Commission's new Bookout Confirmation Requirement as more fully described herein. This letter represents a submission of the IECA, and does not necessarily represent the opinion of any particular member thereof.

Yours truly,
INTERNATIONAL ENERGY CREDIT ASSOCIATION

/s/
Phillip G. Lookadoo, Esq.
Reed Smith, LLP

/s/
Jeremy D. Weinstein
Law Offices of Jeremy D. Weinstein