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CFTC

No-Action Request; Rule: 140.99



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Office of the
Secretary

October 11, 2012

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Stacy Yochum, Secretary
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Re: REQUEST FOR INTERIM NO-ACTION RELIEF FOR FERC REGULATED PRODUCTS (AS DEFINED HEREIN) UNTIL THE COMMISSION TAKES FINAL ACTION WITH REGARD TO THE PENDING QUESTIONS IN THE SWAP DEFINITION RULE

Ladies and Gentlemen:

On August 13, 2012, the Commodity Futures Trading Commission ("CFTC" or "Commission") published its release on the "Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement; Mixed Swaps; Security-Based Swap Agreement Recordkeeping" (the "Swap Definition Rule"). *See* 77 Fed. Reg. 48208. Included in the Swap Definition Rule was a "Request for Comment" that included a series of questions related specifically to "capacity contracts, transmission (or transportation) service agreements, peaking supply contracts, [and] tolling agreements." *See* 77 Fed. Reg. at 48242. For the electric and natural gas industries, each of these contracts share a common trait – they are all contracts for products regulated by the Federal Energy Regulatory Commission ("FERC Regulated Products"). According to the Swap Definition Rule, the Commission's Request for Comment was intended to evaluate whether the CFTC's "interpretation [is] sufficiently clear" with respect to these FERC Regulated Products. *Id.*

Pursuant to Commission Rule 140.99,¹ the International Energy Credit Association (“IECA”) respectfully requests that the appropriate divisions of the Commodity Futures Trading Commission (the “Commission”) grant no-action relief to all entities that offer to act or act as counterparties in swap transactions involving FERC Regulated Products, from requirements of the Commodity Exchange Act (the “CEA”) and the Commission’s regulations thereunder applicable to swaps (other than the Commission’s general anti-fraud and anti-market manipulation provisions), for the interim period described below.

While the Commission is questioning whether these regulations are “sufficiently clear,” and the electric and natural gas industries prepare and submit their comments on these pending questions, the industries will nevertheless be required to begin compliance with these same regulations. In this regard, the deadline for comments is October 12, 2012, the same day that the Swap Definition Rule goes into effect. As noted by the Honorable Commissioner Chilton, in a speech dated Friday, October 5, 2012, the pending questions “deserve [the Commission’s] careful, deliberate, thoughtful consideration and resolution.” The IECA² agrees based on the number of concerns its members are raising with regard to these pending questions on FERC Regulated Products.

FERC’s oversight of these types of contracts factors into grid reliability and other continuity of service considerations that are unique to the electric and natural gas industries and should not be underestimated. Because of the potential impacts these new regulations have on this nation’s energy markets, and the implicit desire of the Commission not to harm the electric and natural gas industries, the IECA submits that it would be in the best interest of the CFTC and the electric and natural gas industries to “pause and take a breath,” an option the Honorable Commissioner Chilton recently endorsed.

Accordingly, the IECA respectfully requests that the CFTC grant interim no-action relief for contracts, service agreements and transactions for FERC Regulated Products that are authorized pursuant to tariffs currently on file with (or which will be filed) with FERC until at least 120 days after the Commission finalizes the Swap Definition Rule (which may include making no further changes) based on the questions pending in that rule. This will provide the necessary relief to the electric and natural gas industries while the Commission considers the industries’ responses, and will provide the Commission with additional time to comply with the Dodd-Frank Act’s directives and to consider the various other industry related requests, such as the IECA’s request for an extension of the compliance date for book-out confirmations filed on September 21, 2012. Moreover, such relief will benefit the CFTC and the electric and natural gas industries by eliminating unnecessary confusion and potentially costly misinterpretations of the new regulations which are still being finalized.

For all of the aforementioned reasons, IECA respectfully requests that the appropriate divisions of the Commission grant the no-action relief. Due to the immediately pending implementation deadlines, the IECA respectfully requests expedited treatment by October 12,

¹ 17 C.F.R. § 140.99.

² 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” or “Dodd-Frank Act”) have led us to submit numerous comments to the Commission on its rule-makings under the DFA.


2012. Correspondence with respect to this request for relief should be directed to the following individuals:

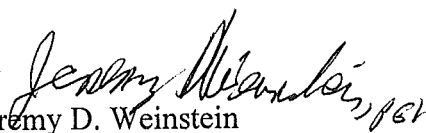
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This letter represents a submission of the IECA, and does not necessarily represent the opinion of any particular member thereof.

Yours truly,
INTERNATIONAL ENERGY CREDIT ASSOCIATION

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

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

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


/s/ Phillip G. Lookadoo
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Counsel for the IECA

cc: Honorable Gary Gensler, Chairman
Honorable Mark Wetjen, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
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September 21, 2012

Mr. David A. Stawick
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Telefacsimile: (202) 418-5521 and
Email to secretary@cftc.gov and electronically to <http://comments.cftc.gov>

COMMENT

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/
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Reed Smith, LLP

/s/
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