



Large Public Power Council

January 7, 2013

VIA ONLINE SUBMISSION

Ms. Sauntia S. Warfield
Assistant Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st St NW
Washington, D.C. 20581

Re: Comments in Response to CME Submission # 12-391

The Edison Electric Institute ("EEI")¹, Electric Power Supply Association ("EPSA")², Large Public Power Council ("LPPC")³, National Rural Electric Cooperative Association ("NRECA")⁴, and Natural Gas Supply Association ("NGSA")⁵ ("the Coalition") submit the

¹ The Edison Electric Institute is the association of U.S. shareholder-owned electric companies. Its members serve 95 percent of the ultimate electric customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. The Edison Electric Institute also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members.

² The Electric Power Supply Association 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. The Electric Power Supply Association seeks to bring the benefits of competition to all power customers.

³ The Large Public Power Council is an organization comprised of 26 of the largest public power systems in the nation. LPPC members own and operate generation and transmission facilities that provide power to retail and wholesale customers in some of the largest cities in the country. Members are located in 12 states and Puerto Rico.

⁴ 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.

⁵ Established in 1965, the Natural Gas Supply Association represents integrated and independent companies that

following comments to the Commodity Futures Trading Commission (“CFTC” or “Commission”) in response to the Chicago Mercantile Exchange, Inc. (“CME”) Submission #12-391: Adoption of new Chapter 10 (“Regulatory Reporting of Swap Data”) and Rule 1001 (“Regulatory Reporting of Swap Data”).

On November 9, 2012, CME submitted Submission #12-391 to the Commission, which requested expedited review and approval by the CFTC of new Chapter 10 and Rule 1001 of CME’s Swap Data Repository (“SDR”) Rulebook. The rule provides that all swaps cleared by CME’s Clearing Division shall be reported to CME’s SDR. On December 6, 2012 and again on December 14, 2012, CME amended its filing and the CFTC requested comments from the public on the amended rule by January 7, 2013. In the interest of maintaining all reporting options and ensuring that transaction costs are not duplicative or onerous for using a particular SDR, the Coalition respectfully requests that the Commission reinstate previous guidance ensuring competition in the swaps reporting process as discussed below.

Absent careful application of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), the Commission risks impeding what are and have been healthy, competitive, and resilient energy markets. Essential to successful implementation is a flexible compliance environment where parties can cost-effectively and efficiently report data needed for market oversight. To accomplish this, market participants who are reporting parties must have the ability to direct data related to their transactions to any swap data repository regardless of where the transactions are executed or cleared.

With this goal in mind, NGSAs filed comments in June 2012 seeking to prevent the development of competitive barriers with respect to the reporting arrangements between swap execution facilities (“SEF”) and SDRs.⁶ The letter asked the CFTC to avoid giving SEFs the right to unilaterally choose the SDR to which all SEF-executed swaps are reported, which removes marketplace choice from reporting counterparties when they are required to report subsequent data for their swaps to the SDRs selected by the SEFs. A competitive SDR reporting process, regardless of whether the reporting is done by a SEF or Derivative Clearing Organization (“DCO”), lowers the cost of reporting for counterparties and fosters efficient interfaces for end users, especially those taking advantage of end user protections designed to maintain liquidity and participation in the market. NGSAs’s June comments are attached for further reference.

The Commission later issued a Frequently Asked Questions on the Reporting of Cleared Swaps (“FAQ”) on October 11, 2012 stating that DCMs, SEFs and DCOs that are also registered as SDRs may not require counterparties to use their “captive” SDR for reporting swap transactions. The FAQ provided guideposts ensuring a competitive reporting framework and efficient reporting options for end users. However, the Commission rescinded portions of the FAQ on November 28, 2012 in response to CME’s submission,

produce and market approximately 40 percent of the natural gas consumed in the United States. The Natural Gas Supply Association encourages the use of natural gas within a balanced national energy policy and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers.

⁶ NGSAs Comments on Proposed Rulemaking Regarding Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. 1214 (Jan. 7, 2011), June 8, 2012.

leaving market participants in flux and creating an opportunity for competitive barriers to emerge in the reporting process.

A competitive and flexible reporting environment with minimal impediments is the best way to ensure cost-effective data collection, especially in light of the rapidly changing derivatives market and uncertainties in reporting requirements⁷. It is critical that reporting alternatives compete on a level playing field and that reporting swap data is not so costly or burdensome that liquidity is harmed or end users are discouraged from participating in the market. Competition among SDRs is the best way to avoid these problems while ensuring that regulators receive accurate market data. While the Coalition recognizes that CME's proposed rule may be applicable to very few energy swaps, the Coalition encourages the Commission to recognize the importance of an open and competitive reporting framework by reinstating the rescinded elements of the FAQ. Further, as part of the Commission's consideration of CME's request, the Commission should require CME to disclose and explain the fees it plans to charge for its services, both for reporting to its captive SDR and for offering the additional reporting to an SDR of the counterparties' choice. Such disclosure will help ensure that participants that choose another SDR are not subject to higher transaction costs.

The Coalition thanks the Commission for hearing these comments. Correspondence regarding this submission should be directed to:

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Sincerely,

/s/Richard McMahan, Jr.

Vice President
Edison Electric Institute

/s/ Russell Wasson

Director, Tax, Finance & Accounting Policy
National Rural Electric Cooperative Association

⁷ For example, reporting for the transitory swaps created when swaps are cleared by conversion into futures.

/s/ Melissa Mitchell

Director of Regulatory Affairs
Electric Power Supply Association

/s/ Jenny Fordham

Vice President, Markets
Natural Gas Supply Association

/s/ Noreen Roche-Carter

Chair, Tax & Finance Task Force
Large Public Power Council

Attachment

June 8, 2012

VIA ONLINE SUBMISSION

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

RE: RIN No. 3038-AD18—Comments on Proposed Rulemaking Regarding Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. 1214 (Jan. 7, 2011)

The Natural Gas Supply Association (“NGSA”) submits the following comments in response to the Notice of Proposed Rulemaking, Core Principles and Other Requirements for Swap Execution Facilities, 76 Fed. Reg. 1214 (Jan. 7, 2011) (the “Proposed SEF Core Principles Rule”) issued by the U.S. Commodity Futures Trading Commission (the “Commission”). References made herein to the Commodity Exchange Act (the “CEA”) refer to that statute as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act” or the “Act”). Correspondence regarding this submission should be directed to:

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Established in 1965, NGSA represents integrated and independent companies that produce and market approximately 40 percent of the natural gas consumed in the United States. NGSA encourages the use of natural gas within a balanced national energy policy and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers.

Because of the potential for the Dodd-Frank Act to impede what is and has been a healthy, competitive, and resilient natural gas market, NGSA played an active role in the shaping of the Act during its passage and wishes to continue this role in ensuring the Act's successful implementation.

COMMENTS

The Commission's proposed rule regarding "Core Principles" for swap execution facilities ("SEFs"), should be modified to prohibit the anticompetitive practice of tying reporting services of a particular swap data repository ("SDR") to swap execution services provided by a SEF. Elsewhere, the Commission has recognized the threat of anticompetitive tying or bundling of mandated regulatory services to other services and has prohibited such activity. In addition, the Commission recognized the importance of competition among SDRs in its final swap data reporting rule,¹ and Congress explicitly mandated the application of general antitrust principles to SEFs in the Dodd-Frank Act. As NGSA has shifted its focus regarding the CFTC's Dodd-Frank rulemakings to compliance, it has become evident to NGSA that the Commission has not adequately addressed the anticompetitive threat of tying SDR services to SEF services in its Proposed SEF Core Principles Rule, despite the antitrust considerations mentioned above. Therefore, these comments respectfully request that the Commission modify the proposed rule to prohibit such tying, which will serve to "promote market integrity," one of the primary legislative purposes behind the Dodd-Frank Act.

A. The Anticompetitive Threat of Tying SDR Services to SEF Services

Under the Dodd-Frank Act, all standardized swaps are required to be: (i) centrally cleared and (ii) traded on a designated contract market ("DCM") or SEF, subject to certain limited exceptions. With respect to each swap executed on a SEF, the Commission's Final Swap Data Reporting Rule requires the SEF to report the relevant swap creation data to an SDR.² Once the SEF reports such data to an SDR, any additional data required to be reported for the swap must also be reported to the same SDR.³ Under this framework, if SEFs are allowed to select the SDR to which SEF-executed swaps are reported, the result may be an anticompetitive tying of SDR services to SEF services, particularly where a SEF has an exclusive or dominant position with respect to the execution of certain swaps or classes of swaps and is affiliated or has an exclusive arrangement with a particular SDR. Such tying would harm competition among SDRs, perhaps even eliminating such competition with respect to certain swaps or classes of swaps. Competition among SDRs is essential to the market's development of efficient and cost-effective SDRs with systems and interfaces that facilitate

¹ Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012) ("Final Swap Data Reporting Rule").

² Final Swap Data Reporting Rule, 17 C.F.R. § 45.3(a).

³ Final Swap Data Reporting Rule, 17 C.F.R. § 45.10(a)(2).

compliance by reporting entities. Competition among SDRs will facilitate and lower the costs of compliance, which will likely enhance CFTC market oversight and regulatory transparency.

B. Congress and the Commission Have Recognized the Importance of, and Mandated, Preservation of Competition under the SEF Core Principles Rule and Other Swap Regulations.

Congress has explicitly prohibited anticompetitive practices by SEFs in the Core Principles prescribed by the Act:

- (11) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the swap execution facility shall not—
- (A) adopt any rules or taking any actions that result in any unreasonable restraint of trade; or
 - (B) impose any material anticompetitive burden on trading or clearing.⁴

The Commission must heed this mandate with respect to the unreasonable restraints and anticompetitive burdens posed by tying SDR services to SEF services—by prohibiting such tying.

In other swap regulations, and even in other parts of the Proposed SEF Core Principles rule itself, the Commission has recognized the importance of promoting competition and preserving a level playing field in the markets for both swaps and swap services. For example, in the Final Swap Data Reporting Rule, the Commission intentionally avoided giving the choice of SDR with respect to each swap to the “reporting counterparty” in order to avoid giving SDRs substantially owned by swap dealers (who will likely serve as reporting counterparties for many swaps) a dominant market position.⁵ The Commission identified that “a competitive marketplace for SDR services presents the opportunity for significant reductions to the cost of swap data reporting.”⁶ Similarly the Commission should avoid giving SEFs the right to unilaterally choose the SDR to which all SEF-executed swaps are reported, which removes marketplace choice from reporting counterparties when they are required to report subsequent data for their swaps to the SDRs selected by the SEFs.

Further, in the Proposed SEF Core Principles rule, the Commission recognized the need for SEFs to provide “impartial access” to SEF services for members and market participants, mandating the application of impartial criteria and fees for services.⁷ “The

⁴ Dodd-Frank Act § 733, CEA § 5h(f)(11).

⁵ See Final Swap Data Reporting Rule at 2149.

⁶ Final Swap Data Reporting Rule at 2186.

⁷ Proposed SEF Core Principles Rule at 1223, 17 C.F.R. § 37.202.

purpose of the proposed impartial access requirements is to prevent a SEF's owners or operators from using discriminatory access requirements as a competitive tool against certain participants."⁸ The Commission adopted similar requirements in its final rule regarding Core Principles for DCMs, explaining that "[g]ranted such impartial access to participants will likely improve competition within the market by ensuring access criteria do not inappropriately deter market participants from participating in the market."⁹ Allowing a SEF to tie swap data reporting services from a particular SDR to the SEF's swap execution services would be inconsistent with these principles of granting market participants impartial access to swap services.

Finally, the Commission has explicitly prohibited the tying or bundling of mandated regulatory services to other services in other swap regulations that it has promulgated. In the Final Swap Data Reporting Rule, the Commission prohibited tying of the issuance of legal entity identifiers to the provision of other services offered by the issuer.¹⁰ In the final SDR Core Principles rule, the Commission, "[c]onsistent with the principles of open access," required that an SDR "shall not tie or bundle the offering of mandated regulatory services with other ancillary services."¹¹ Similarly here, the Commission should prohibit the tying of swap data reporting services from a particular SDR to the swap execution services provided by a SEF.

C. The Commission Must Prohibit Tying of SDR Services to SEF Services Under Its SEF Core Principles Rule to Preserve Competition for SDR Services and to Enforce Congress's Prohibition of Anticompetitive Activities by SEFs.

To carry out Congress's intent to prohibit anticompetitive activities by SEFs and to promote a healthy and competitive marketplace for SDR services, the Commission should explicitly prohibit the tying of SEF services to SDR services in its SEF Core Principles rule. The Commission recognized in the Proposed SEF Core Principles Rule that:

"Providing market participants with the ability to trade certain swaps openly and competitively on a SEF complying with all of the SEF core principles . . . will provide market participants with additional choices and will enhance price transparency resulting in protection of market participants and the public."¹²

⁸ Proposed SEF Core Principles Rule at 1223.

⁹ Final Rule (Draft), Core Principles and Other Requirements for Designated Contract Markets 239-40, *available at* <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister051012b.pdf>.

¹⁰ Final Swap Data Reporting Rule, 17 C.F.R. § 45.6(c)(4).

¹¹ Final Rule, Swap Data Repositories: Registration Standards, Duties and Core Principles, 17 C.F.R. § 49.27(a)(2).

¹² Proposed SEF Core Principles Rule at 1237 (emphasis added).

These open market principles and benefits apply equally to preserving competition and market participant choice with respect to SDRs. Some market participants may desire and derive significant benefits (including operational efficiencies and data security) from having all or as much as possible of their swap data reported to a particular SDR or group of SDRs. Other market participants may desire to promote or maintain competition among SDRs or to manage SDR costs that would otherwise likely be passed-through by SEFs without any input from the counterparties. As the Commission identified in its Final Swap Data Reporting Rule, “a competitive marketplace for SDR services presents the opportunity for significant reductions to the cost of swap data reporting.”¹³ By adopting the rule changes proposed herein, the Commission can thwart the potential for anticompetitive tying of SDR to SEF services and preserve competition and market participant choice with respect to swap data reporting.

D. Proposed Changes to the SEF Core Principles Rule to Prohibit Tying

For the reasons discussed above, NGSAs request that the Commission add the following provisions to either section 37.202, 37.1100, or a new section of its SEF Core Principles rule:

A swap execution facility shall not tie the swap data reporting services of a particular swap data repository to the swap execution services provided by such swap execution facility. A swap execution facility shall report all swaps that it is required to report to a non-affiliated swap data repository unless the counterparties to a swap agree otherwise or no other swap data repository is available to which to report the swap. A swap execution facility shall not enter into an exclusive agreement with any swap data repository to report all swaps to such swap data repository. Swap execution facilities shall accommodate the requests of swap counterparties, with first priority given to the requests of non-swap dealer/major swap participant counterparties, regarding the swap data repository to which to report any swap executed on the swap execution facility.

For the same reasons, and because Congress has similarly prohibited anticompetitive activities by DCMs, we request that the Commission amend its final rule for DCM Core Principles in a similar manner. Alternatively, or in addition to these changes, the Commission should amend the Final Swap Data Reporting Rule with respect to exchange-traded swaps to: (i) give the right to select the SDR for each swap to the non-swap dealer/major swap participant counterparty or counterparties to such swap or (ii) if there are no non-swap dealer/major swap participant counterparties to the swap,

¹³ Final Swap Data Reporting Rule at 2186.

require the SEF or DCM to report the swap to a non-affiliated SDR, unless the counterparties agree otherwise or there is no non-affiliated SDR to which to report the swap.

CONCLUSION

NGSA welcomes the opportunity to discuss the recommended changes discussed above and the supporting analysis. If we can provide any additional information, please do not hesitate to contact us.

Respectfully submitted,

Natural Gas Supply Association