Edison Electric Institute
Power by Association

May 27, 2014

Via Electronic Submission

Melissa Jurgens, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Request for Comment – Review of Swap Data Recordkeeping and Reporting Requirements (RIN 3038-AE12)

Dear Ms. Jurgens:

I. INTRODUCTION

The Edison Electric Institute ("EEI") submits these comments in response to the March 26, 2014, *Federal Register* notice requesting comment on what clarifications, enhancements or guidance may be appropriate to the Commodity Futures Trading Commission's ("CFTC" or "Commission") reporting and recordkeeping rules.[1]

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly employ more than 500,000 workers. With more than $85 billion in annual capital expenditures, the electric power industry is responsible for millions of additional jobs. Reliable, affordable, and sustainable electricity powers the economy and enhances the lives of all Americans. EEI members are non-financial, commercial end-users that use swaps to hedge and mitigate commercial risk and as such are subject to the reporting and recordkeeping obligations under the Commission's rules and regulations.

EEI members have spent significant time and money understanding the Commission's rules and regulations and making the system upgrades and changes necessary to be in compliance. Any changes in the Commission's rules or regulations or interpretations of the rules and regulations going forward will likely necessitate additional system and process changes by EEI members which will impose additional costs on EEI members. As such, EEI members have a vested interest in this issue and appreciate the Commission's willingness to solicit comments in an open transparent process. Having broad stakeholder participation in this process will help ensure that any changes to the reporting requirements satisfies the Commission's goals of having transparent usable data while minimizing the costs imposed on market participants, especially non-financial commercial end-users, such as EEI members.

[1] *79 Fed. Reg. 16689* (March 26, 2014).

II. COMMENTS

EEI appreciates the opportunity to submit comments in this proceeding and in Section III, provides specific responses to some of the questions raised by the Commission. EEI supports the broad goals articulated in the Commodity Exchange Act ("CEA") of enhancing transparency and reducing systemic risk. As it moves forward, the Commission must balance the needs of market participants while meeting the goals articulated in the CEA. EEI offers the following ten general principles from the standpoint of an energy swap end-user that may help inform the Commission as it moves forward and balances these interests.

First, the questions asked by the Commission suggest that the Commission believes it may need more data about swap transactions to carry-out Congressional intent. EEI asserts that sometimes less is more and that the Commission can better accomplish its objectives by simplifying the reporting process. This would include requiring less data for each swap transaction, allowing end-users as well as other market participants more flexibility and re-evaluating whether the Part 45 reporting regime is achieving Congress' intent without imposing unnecessary costs on end-users.

Second, the Commission should work to address and fix the current reporting regime before it contemplates imposing any new data or system requirements on market participants. The Commission should issue additional requests for comments addressing other substantive rules or regulations adopted under Title VII of the Dodd-Frank Act that raise significant implementation and compliance issues for market participants. In this way, the Commission can improve the processes that it already has in place and access the data that it feels it needs under Part 45 without imposing extra costs on end-users and requiring them to change their business practices. If the Commission still feels that changes are needed to its rules or regulations, after fixing its current process, then the rulemaking process will give market participants the opportunity to inform the Commission's decision making process by providing substantives input on any proposed changes.

Third, in determining what data it needs, the Commission should recognize that energy markets are different from financial markets. As such, "standardization" cannot apply across all markets because the products are different. The Commission should recognize the unique attributes of energy markets and the standards/practices for reporting and confirming transactions that have been developed in energy markets over the years by accommodating these practices in its rules and regulations.

Fourth, any changes required by the Commission to standardize and harmonize data should apply to swap data repositories ("SDR") and other Commission registrants, such as swap dealers ("SD") and major swap participants ("MSP"), first as they will be the reporting parties in most instances and are in the best position to implement the changes. Prior to deciding that changes are needed, the Commission should ensure that the SDRs are consistently interpreting and applying the rules. This will help ensure that any system changes required are those actually needed and that any issues were not caused by inconsistent interpretation of the rules.

Fifth, the Commission should not require changes to internal recordkeeping practices. Energy end-users, such as EEI members, are regulated by agencies in addition to the CFTC. These agencies include state public service commissions and the Federal Energy Regulatory Commission ("FERC") among others. As such, EEI members have developed internal recordkeeping practices that accommodate the regulatory requirements imposed by these regulatory agencies as well as their own business structures. Requiring changes to these unique internal systems would not only impose significant costs but may also raise concerns about the ability to comply with regulatory requirements imposed by other agencies. As such, while the Commission can require data to be reported to the Commission in a specific format, end-users should not be required to modify their internal proprietary systems of record to meet "harmonized" standards set by the Commission. The Commission should allow end-users to determine what changes are needed to their internal systems to comply with the Commission's requirements.

Sixth, the Commission should put all obligations for reporting cleared swaps on DCOs. Separate SDR reporting for cleared swaps is duplicative of information that the Commission already has access to through its oversight of DCOs. Further because DCOs automatically net all transactions into positions, the DCO is the only entity who has access to all relevant information to trace a cleared swap for its entire existence and is the only entity that can provide the Commission with position information for individual market participants with respect to cleared swaps.

Seventh, the Commission should do a more thorough evaluation of the regulatory need (*i.e.*, the benefits) for each specific requirement in Part 45 and assess and explain the value of all data that it requires end-users to report. The Commission should also consider the impact of all obligations imposed on end-users including compliance and personnel costs, the cost of system modifications for both reporting and recordkeeping, fees incurred for registration and maintenance of legal entity identifiers and fees incurred for reporting swap data prior to imposing reporting requirements on end-users. End-users should not be required to report the data if the Commission determines that the incremental value of receiving the data, compared to the cost to end-users of providing the data, is low.

Eighth, EEI recognizes that "no action" letters are a useful tool for providing targeted relief from Commission rules. In some instances, however, additional conditions imposed through "no action" relief place an undue burden on those that the relief was intended to benefit. Similar to final rules, a cost/benefit analysis should be done on any additional conditions imposed through "no action" letters to help ensure that "no action" letters provides the relief intended.

Ninth, Broker arranged Bilateral swaps between end-users in products that are not subject to the clearing or trading mandate should not be required to be executed on or subject to the rules of a swap execution facility ("SEF') or be submitted to a SEF for reporting. Forcing all brokered transactions to be processed through a SEF creates needless complication for end-users who are reporting parties under Part 45 and creates a risk of double reporting. Further, to the extent clearing/trading mandate applies, consistent with the end-user exception and congressional

intent, voicebrokers should be accessible to end-users in these swaps without the swaps being transacted on or pursuant to the rules of a SEF.

Tenth, EEI members have made, and continue to make, the extensive changes necessary to comply with Commission rules and regulations. However, the Commission should recognize that mistakes and errors in reporting will occur. Accordingly, the Commission should establish a safe harbor process that allows end-users to report/log these errors with the Commission or other delegated authority (such as an SDR) at any time without risk of enforcement. This will help ensure that the data provided to the Commission is accurate and provide an additional incentive for market participants to proactively verify swap data.

III. RESPONSE TO QUESTIONS

B. Continuation Data (§45.4): How can the Commission ensure that timely, complete and accurate continuation data is reported to SDRs, and that such data tracks all relevant events in the life of a swap?

RESPONSE: As noted in the guiding principles, the Commission should evaluate whether market participants need to provide more data in order for the Commission to accomplish Congressional intent. In determining what data it needs, the Commission should evaluate the cost versus the benefit of having market participants report valuation data rather than using publically available price data which in some instances may be more current and consistent than that provided by market participants.

8. How can valuation data most effectively be reported to SDRs to facilitate Commission oversight? How can valuation data most effectively be reported to SDRs (including specific data elements), and how can it be made available to the Commission by SDRs?

RESPONSE: The Commission should require that SDRs use publically available price data for most transactions. This will help ensure that the data used is timely and accurate. In order to help ensure that the SDRs are using the same data in the same manner, the Commission could specify the public data to be used, how it is to be used and the manner in which the data should be conveyed to the Commission.

a. Should SDs and MSPs continue to be required by the swap data reporting rules to provide their own valuation data for cleared swaps to SDRs? If so, what are the benefits and challenges associated with this valuation reporting?

RESPONSE: Using publically available data would also address the possibility that valuation data for cleared swaps provided by SDRs would conflict with that provided by the derivatives clearing organization ("DCO"). In order to help ensure that there is no inconsistency, the Commission should not require any price reporting for cleared swaps and use publically reported data instead.

b. What challenges and benefits are associated with unregistered swap counterparties (both financial entities and non-financial entities) reporting valuation data for uncleared swaps to SDRs on a quarterly basis?

RESPONSE: Quarterly reports of valuation data is another area in which using publically available data would help ensure accuracy and consistency as position grouping by the SDRs may not match internal mark-to–market methodology. This is also a concern if there are swaps with multiple reporting parties in which case each party may have different valuations applied to the same position. As such, using public data, when available, would address these concerns. This public data is also more useful than the quarterly reports required by end-users. As in most cases, the data has little value by the time it is reported and there is no way to evaluate the data and how it relates to mark-to–market. The Commission should not require end-users to provide quarterly valuation reports.

C. Transaction Types, Entities, and Workflows: Can the Swap Data Reporting Rules be Clarified or Enhanced to Better Accommodate Certain Transactions and Workflows Present in Swap Markets?

RESPONSE: As noted in the guiding principles, the Commission should recognize that non-financial markets, such as energy markets, are different from those traditionally regulated by the Commission and, as such, standardization may not be appropriate. Prior to imposing new requirements whether through a final rule or a "no action" letter, the Commission should examine its purpose in requiring that market participants provide the data and ensure that the benefits in getting the data are greater than the costs of providing it. This evaluation should consider the impact of all obligations imposed on end-users including compliance and personnel costs, the cost of system modifications for both reporting and recordkeeping, fees incurred for registration and maintenance of legal entity identifiers and fees incurred for reporting swap data prior to imposing reporting requirements on end-users.

14. Please identify any Commission rules outside of part 45 that impact swap data reporting pursuant to part 45. How do such other rules impact part 45 reporting?

RESPONSE: Although not technically a "rule" promulgated by the Commission, Staff No-Action Letter 13-08[2] relating to Commodity Trade Options imposes specific requirements on EEI's members that impact Part 45 reporting. As noted in Staff No-Action Letter 13-08, without the relief, "Non-SDs/MSPs relying on the [Trade Option Exemption ('TOE')], as applicable under the terms of the TOE, are required to comply with Part 45 reporting requirements under certain circumstances…."[3] While EEI's members take some comfort in knowing that the CFTC's Division of Market Oversight ("DMO") "will not recommend that the Commission commence an enforcement action against a Non-SD/MSP" for failing to comply "with the Part 45 reporting requirements as set forth in § 32.3(b)(1),"[4] this relief and the associated requirements should be formally incorporated into the CFTC's regulations. EEI recommends

[2] CFTC No-Action Letter 13-08, No Action, Staff No-Action Relief from the Reporting Requirements of §32.3(b)(1) of the Commission's Regulations, and Certain Recordkeeping Requirements of § 32.3(b), for End Users Eligible for the Trade Option Exemption (April 5, 2013)("Staff No-Action Letter 13-08").
[3] Id. at 3.
[4] Id.

that the Commission specifically request comments on the notice requirement in the Staff No-Action Letter that mandates "the Non-SD/MSP notify DMO through an email to TOreportingrelief@cftc.gov no later than 30 days after entering into trade options having an aggregate notional value in excess of $1 billion during any calendar year."[5] This notice requirement was implemented without the CFTC explaining a rationale for the requirement and without formally soliciting public input regarding burdens and potential alternatives. Many of EEI's members have found the notice requirement difficult to monitor and implement. These experiences should be considered as part of a formal rulemaking.

16. Market participants have indicated that they face challenges electronically representing all required data elements for swap transactions because those elements have not yet been incorporated into standard industry representations (*e.g.*, FpML, FIXML). In particular, various market participants have indicated that these challenges impact reporting to SDRs. What is the most efficient methodology or process to standardize the data elements of a bespoke, exotic or complex swap, to ensure that all required creation data is electronically represented when reported to the SDR? Do these challenges vary depending on the asset class? If so, how?

RESPONSE: Bespoke or exotic swaps cannot be readily standardized because, as the description suggestions, their terms are bespoke or exotic, not standard. As such the current methodology for reporting these swaps is fine. This is particularly true in energy asset classes where transaction notional volumes may vary at predetermined intervals of time (sometimes hourly) or may vary based upon reference to actual physical power or gas consumption by an end-user. Trying to develop standardized data elements to report all details of such bespoke or exotic swaps would be very difficult and costly. As such, the Commission should recognize that not all data can be standardized. EEI does not believe that the Commission would materially further its regulatory objectives by attempting to force some type of standardization on these types of transactions for SDR reporting. Instead of presuming that data elements for all bespoke and exotic swaps must be forced into some sort of standardized protocols that are applicable to all types of swaps, but that were not designed to accommodate all asset classes, the Commission should evaluate the costs and benefits of trying to develop standardized reporting that could apply to all conceivable types of swaps.

20. Under Commission regulation 32.3(b)(1), swap counterparties generally are required to report trade options pursuant to the reporting requirements of part 45 if, during the previous twelve months, they have become obligated to report under part 45 as the reporting counterparty in connection with any non-trade option swaps. Under Commission regulation 32.3(b)(2), trade options that are not otherwise required to be reported to an SDR under part 45 are required to be reported to the Commission by both counterparties to the transaction through an annual Form TO filing. Please describe any challenges associated with the reporting of commodity trade options, whether reported to an SDR or to the Commission on Form TO.

RESPONSE: Notwithstanding the Staff No-Action Letter 13-08, Commission regulation 32.3(b)(1) poses potentially large, unnecessary burdens on Non-SDs/MSPs. In this

[5] Id at 5.

regard, Non-SDs/MSPs that report as little as a single trade to an SDR as the reporting party (who will likely not have developed systems to support the minimal reporting), would lose their ability to report Trade Options on the Form TO. Moreover, Trade Option transactions generally reside in different internal systems than where other swap transactions are maintained. Therefore, even for end-users who made system changes and put processes in place to facilitate SDR reporting for financial swaps, these system changes and processes are not, in many cases, applicable to the systems that maintain physical transactions such as Trade Options. Accordingly, EEI believes that, consistent with the relief granted in Staff No-Action Letter 13-08, Non-SDs/MSPs should be able to utilize Form TO regardless of their SDR reporting activity for swaps.

Although EEI believes that the relief provided in Staff No-Action Letter 13-08 is necessary, the relief creates uncertainty among market participants because of the standard disclaimer that the relief "represent[s] the views of DMO only, and do[es] not bind the Commission or any other Division or Office of the Commission's staff."[6] EEI requests that the Commission officially incorporate the relief, without the unnecessary conditions described above in response to question 14, into Part 45 through a formal rulemaking.

Further, the Commission needs to reevaluate its assessment of costs associated with filing a Form TO. In order to review the wide range of contracts potentially subject to the Commission's oversight of Trade Options, EEI's members are expending significant amounts of time and expense. EEI believes that the Commission does not completely appreciate the level of effort market participants are going through to compile the information needed to complete the Form TO which includes reviewing each contract under the tests set forth by the Commission and installing new systems to track each exercise of a trade option. In this regard, the Commission's initial burden estimate for completing the Form TO was 2 hours. Based on the feedback EEI received from its members, EEI believes that the Commission's estimate is off by a very large magnitude. Although EEI provided these revised burden estimates to the Commission,[7] the Commission summarily dismissed the comments with no meaningful explanation in the CFTC's Supporting Statement submitted to the OMB as follows:

> The Commission disagrees, however, with the view as expressed by commenters that it would take much longer than two hours each year to prepare and submit Form TO. The Commission does not believe that an intricate knowledge of the Commodity Exchange Act or the agency's procedures, personnel, and implementing regulations is necessary in order to accurately prepare and submit a Form TO in approximately two hours to the Commission, as required under Regulation 32.3(b)(2) and explained in the instructions attached to the document.[8]

EEI is concerned with the emphasized text above that the Commission "does not believe that an intricate knowledge of the Commodity Exchange Act or the agency's procedures…and implementing regulations is necessary in order to accurately prepare and submit a Form TO…." To the contrary, in order to complete the Form TO, EEI's members must fully understand the

[6] Id.
[7] Comment of EEI, EPSA, NRECA, APPA Form TO, Annual Notice Filing for Counterparties to Unreported Trade Options (February 15, 2013).
[8] CFTC Paperwork Reduction Act Supporting Statement for Form TO, OMB Control No. 3038-0106 (April 8, 2013).

applicable procedures, regulations and CFTC interpretive guidance regarding Trade Options and the reporting of Trade Options in order to determine which contracts must be reviewed and how to review each contract to prevent over reporting or under reporting. EEI members are stunned that the Commission would state otherwise as a hastily prepared Form TO serves little purpose. EEI encourages the Commission to revisit this Supporting Statement that was made to the OMB to justify the form's approval. As such, knowledge of the CEA and the Commission's rules and regulations are necessary before a filing can be made with the Commission.

In addition, pursuant to the Paperwork Reduction Act, EEI encourages the Commission to work with the FERC, pursuant to the recently executed data-sharing MOU, to determine whether any information already collected by FERC on Trade Options will meet the Commission's data needs in this regard (*e.g.*, every power sales transaction subject to FERC jurisdiction, and the related contract details, are reported to FERC on a quarterly basis).

21. Are there instances in which requirements of CFTC regulations or reliance on exemptive or staff no-action relief result in more than one party reporting data to an SDR regarding a particular swap? If so, how should such duplicative reporting be addressed? What should be the role of the reporting entities, as well as other submitters of data, and SDRs in identifying and deleting duplicative reports? What solutions should be implemented to prevent such duplicative reporting?

RESPONSE: There are at least two instances in which there may be duplicative resorting to a SDR. The first instance occurs when a SEF reports a brokered swap and then a party to the swap uses eConfirm on ICE Trade Vault which reports the swap a second time. In the second instance, if a market participant enters into a swap with a SEF that is not cleared, the SEF will report the creation data to a SDR and the non-SD or non-MSP reporting counterparty still has the obligation to report continuation data for that swap and may report it to a different SDR than that used by the SEF. These issues could be resolved by providing flexibility to the parties as to who reports the data and to what SDR.

23. How should data reported to SDRs identify trading venues such as SEFs, DCMs, QMTFs, FBOTs, and any other venue?

RESPONSE: To the extent the Commission adopts new data requirements to identify trading venues, EEI believes that brokered swaps that are not subject to clearing/trading mandate should not have to indicate a venue.

24. In order to understand affiliate relationships and the combined positions of an affiliated group of companies, should reporting counterparties report and identify (and SDRs maintain) information regarding inter-affiliate relationships? Should that reporting be separate from, or in addition to, Level 2 reference data set forth in Commission regulation 45.6? If so, how?

RESPONSE: With regard to combined positions that are entered into on a joint and several basis, the Commission should formalize through the rulemaking process the guidance currently provided by Staff on how to report such transactions. In this regard, Staff has advised EEI's members that they should report the LEI of each joint and several entity. Based on this

guidance from Staff, both DTCC and ICE have expanded their systems to accommodate the use of multiple LEIs. In addition, EEI's members have adopted contract amendments to ensure that such transactions are reported in accordance with Staff's guidance. Due to the amount of effort being taken to implement this approach to reporting joint and several transactions, EEI believes it is necessary to formalize the guidance by adopting it into the regulations to reduce any unnecessary regulatory uncertainties.

With regard to inter-affiliate relationships, EEI believes this information should not be subject to transaction-level reporting as that information is generally not relevant to a particular transaction. Rather, affiliate relationships should be traced by the CFTC through the LEI process. This approach simplifies the tracking process without adding additional data requirements for SDR submittals.

25. <u>To the extent that a reporting entity is, in reliance on effective no action relief issued by Commission staff, reporting to an SDR in a time and/or manner that does not fully comply with the swap data reporting rules (*e.g.,* outside reporting rules' timeframe, required data elements missing), how can the reporting entity most effectively indicate its reliance upon such no action relief for each affected data element? a. Are there any other challenges associated with the reliance on staff no action relief with respect to compliance with part 45? If so, please describe them and explain how the swap data reporting rules should address those challenges.</u>

RESPONSE: The Commission should not require market participants to do any reporting to show that they are relying on a "no action" letter. When the Commission issues blanket guidance to all market participants, it should assume that market participants are relying on the guidance. Imposing such a requirement would be an example of imposing conditions on the "no-action" that outweigh the benefits. Not all EEI members have a way of capturing such information in trade management systems for each transaction and, therefore, do not have a means of reporting such information. To the extent the Commission suspects an issue or potential rule violation, it can request an explanation from the reporting party for that particular swap. EEI also notes that the Commission could alleviate any concerns it may have in this area by incorporating blanket no-action into its rules.

26. <u>Under the swap data reporting rules, are there any challenges presented by swaps for which the price, size, and/or other characteristics of the swap are determined by a hedging or agreed upon market observation period that may occur after the swap counterparties have agreed to the PET terms for a swap (including the pricing methodology)? If so, please describe those challenges.</u>

RESPONSE: EEI agrees that there are times when certain transaction characteristics are unknown at the time the parties agree on the PET terms. However, in such circumstances, reporting the assumptions that were made at the time the transaction was entered into or reporting general or approximate information at the time the transaction was entered into should suffice. The information relied upon at the time of the transaction formed the basis of the transaction. As such any information determined after the transaction is completed does not affect the transaction. Requiring parties to retroactively report the additional PET terms as the

actual information is learned would be burdensome a never-ending cycle with minimal, if any, benefit.

D. PET Data and Appendix 1 (§45.3 and Appendix 1): Monitoring the Primary Economic Terms of a Swap

RESPONSE: As noted in the guiding principles above, EEI believes that the Commission should first step back and determine the specific data that it needs under Part 45 to accomplish Congressional intent. The Commission should consider the impact of any obligations imposed on end-users through a cost/benefit analysis assessing and explaining the value of any data that it requires end-users to report and realistically assessing the associated costs and burdens placed on end-users. EEI suggests that Commission objectives can be met by simplifying the reporting process, requiring less data for each swap transaction, allowing market participants more flexibility and re-evaluating whether the Part 45 reporting regime is achieving Congress' intent without imposing unnecessary costs on end-users.

28. Please describe any challenges (including technological, logistical or operational) associated with the reporting of required data fields, including, but not limited to: a. Cleared status; b. Collateralization; c. Execution timestamp; d. Notional value; e. U.S. person status; and f. Registration status or categorization under the CEA (e.g., SD, MSP, financial entity)

RESPONSE: Among the data fields identified above, EEI members have experienced challenges with Collateralization and Execution Time.

Collateralization is an area of challenge that is in part tied to the well-established counterparty credit practices that have been in place in the swap markets generally, and the energy markets in particular, for many years. Under industry standard master agreements swaps are typically collateralized on a portfolio rather than transactional basis. Further, in energy markets, counterparties have for many years engaged in both physical and financial transactions with the same counterparties. ISDA developed physical power and gas annexes to the standard ISDA Master Agreement to help energy market participants efficiently reduce counterparty exposure through set-off, netting and portfolio margining between and among both physical and financial transactions executed with a single counterparty under a single master agreement. In energy markets, the risk between counterparties, and in turn, the collateral exchanged between the counterparties, is typically based on the overall exposure of the entire portfolio of transactions between the two counterparties, which may include both physical and financial transactions. Further, where counterparties have a collateral agreement, it is common to provide credit-based exposure thresholds (the "Threshold" in ISDA terminology), such that a counterparty is not required to post any collateral until its portfolio exposure exceeds the threshold. Accordingly, collateralization is typically not determined, or even determinable, on an individual swap basis and collateralization of a portfolio may change on a daily basis. Further, in addition to being largely unworkable in the context of portfolio margining, the field values for collateralization provided in Part 45 ("uncollateralized," "partially collateralized," "one-way collateralized," and "fully collateralized") are vague, confusing and do not provide meaningful information to the Commission. Because collateral is exchanged on a portfolio basis and is

typically subject to exposure thresholds it is not clear how EEI members should attempt to report Collateralization for each swap transaction.

Reporting execution time down to the second has also proven challenging and costly to end-users in the energy space. While front office personnel transacting in bilateral non-cleared swaps in the market are attempting to identify execution time down to the second, such precision is not always possible when the terms of a transaction are agreed to over the course of several hours or days and involve numerous email, phone and/or instant message communications. In addition, counterparties frequently disagree on the execution time of over-the-counter transactions when trying to identify the time down to the second. Further, back offices of end-users and those responsible for performing the confirmation and reporting function typically cannot independently determine or verify an execution time down the second and can only rely on the time provided to them by front office personnel. For bilateral over-the-counter swap transactions between end-users, the Commission should solicit input from various market participants as to the timeframe that would be consistent with industry practice and provide relief from what has surfaced as common discrepancy in back-office confirmation processes. Moreover there is an incremental cost and burden to resolving these discrepancies that is not outweighed by any identifiable benefit. As stated in the principles above, the Commission should consider the impact of any obligations imposed on end users through a cost/benefit analysis.

29. What additional data elements beyond the enumerated fields in Appendix 1 of part 45, if any, are needed to ensure full, complete, and accurate representation of swaps (both cleared and uncleared)? For example, other fields could include additional timestamps (for each lifecycle event, including clearing-related timestamps); clearing-related information (identity of futures commission merchant, clearing member, house vs. customer origin indication, mandatory clearing indicator, or indication of exception or exemption from clearing); and/or execution-specific terms (order type or executing broker). Responses should consider the full range of oversight functions performed by the Commission, including, but not limited to, financial surveillance; market surveillance; risk monitoring; and trade practice surveillance.
    a. Should the Commission require reporting of the identities, registration status, and roles of all parties involved in a swap transaction (e.g., special entity (as defined in Commission regulation 23.401(c)); executing broker; or voice/electronic systems)?
    b. What, if any, additional fields would assist the Commission in obtaining a more complete picture of swaps executed on SEFs or DCMs (e.g., order entry time; request for quote (''RFQ''), or central limit order book (''CLOB''), or order book; request for cross, blocks, and other execution method indicators or broker identification)?
    c. Are there additional data elements that could help the Commission fulfill its oversight obligations, as described above?

RESPONSE: Many of the swap reporting and recordkeeping issues experienced by EEI members relate to data overload, and EEI believes that requiring more information is not the

solution. Given the concerns leading to the Request for Comment such as assimilating data across multiple SDRs and the ability to effectively analyze data received, EEI would suggest that the Commission should first step back and determine the specific data that it needs under Part 45 to accomplish Congressional intent. EEI believes that the Commission currently requires more data under Part 45 than it needs to accomplish its regulatory objectives. EEI would assert that the Commission can better accomplish its objectives by simplifying the reporting process, requiring less data for each swap transaction, allowing market participants more flexibility and re-evaluating whether the Part 45 reporting regime is achieving Congress' intent without imposing unnecessary costs on end-users. As an example, of the large amounts of data that end-users are required to report, a review of the primary economic terms required by eConfirm for a basic financial product for power and for gas illustrates that the information required by the SDR's is in excess of those required by the Commission in appendix and tables associated with Part 45.

With regard to Question 29 and its subparts regarding reporting the identities, registration status, and roles of all parties involved in a swap transaction, this information can be more efficiently and consistently obtained via tweaks to LEIs rather than additional reporting requirements.

d. Should the fact that a swap is guaranteed be a required data element for SDR reporting? If so, what information regarding the guarantee should be reported to the SDR? What will be the challenges presented to the reporting party in capturing this information?

RESPONSE: Information as to whether a swap is guaranteed is properly excluded under Part 45 as it would be difficult to report whether a particular swap is guaranteed for many of the same reasons it is difficult to report whether a swap is collateralized. Guaranties typically apply at a master agreement level and often only become active once counterparty exceeds an exposure threshold or suffers a negative credit event. Further, guaranties are virtually always subject to a limit, which applies on a portfolio basis. Thus, it is generally not possible to report guaranty information on a transaction basis and the status may change on a daily basis. Therefore, it is not clear how guaranty information on a transactional basis would be useful to the Commission. Further guaranty information is typically not tracked in EEI members' trade management systems that handle swap reporting so further technology modifications would be required even to track whether a guaranty exists as a master agreement level.

30. Have reporting entities been unable to report to an SDR terms or products that they believe are required under part 45 or related provisions? If so, please generally describe the data elements and/or products involved.
    a. Where a single swap has more than two counterparties, please comment on how such information should be provided within a single part 45 submission (i.e., one USI)?

RESPONSE: One issue that EEI has identified with regard to this question involves the novation of a swap that would result in a new reporting party for the swap. There is some uncertainty as to whether the novation should be considered a lifecycle event to the existing swap (i.e. the same USI is retained), or whether the novation should be treated as a new swap

transaction with a new USI. If the latter, the SDR should link the old transaction with the new one, especially if an end-user is the reporting party. If the former, issues could arise if the new reporting party reports to a different SDR than the initial reporting party. For example the new reporting party may not have the capability to report ongoing continuation data to the SDR it is not enabled with. EEI would recommend that either alternative be considered acceptable, but that the Commission encourage greater SDR harmonization and standardization, and permit swaps to be transferred from one SDR to another in order to mitigate the issues described above.

Another issue relates to the exercise of a swaption as there is inconsistency among the SDRs as to how this exercise is characterized. For example, DTCC considers the exercise of a swaption as a new option that will receive a new USI and ICE Trade Vault considers it a life cycle event. This is illustrative of an example for which the Commission should ensure that the SDRs are consistently interpreting and applying the rules before requiring any changes.

31. Could the part 45 reporting requirements be modified to render a fuller and more complete schedule of the underlying exchange of payment flows reflected in a swap as agreed upon at the time of execution? If so, how could the requirements be modified to capture such a schedule?

RESPONSE: As previously indicated. EEI believes that additional reporting requirements are not necessary, and the Commission should instead engage in a cost benefit analysis to explore ways to decrease the required reporting fields.

32. Taking into account the European Union's reporting rules and Commission regulation 39.19, should the Commission require additional reporting of collateral information? If so, how should collateral be represented and reported? Should there be any differences between how collateral is reported for cleared and uncleared swaps?

RESPONSE: As described above, EEI believes that additional reporting requirements are not necessary, and the Commission should instead engage in a cost benefit analysis to explore ways to decrease the required reporting fields. Because collateral is typically exchanged between counterparties on a portfolio basis, as opposed to individual swap basis, and because collateral may be determined for a portfolio that includes both financial and physical transactions, reporting requirements regarding collateral is unnecessarily burdensome and challenging at best. Further, many EEI members do not track collateral information in the same trade management system that handles swap data reporting and could not track collateral information in their trade management systems because collateral requirements are typically not determined on a transactional basis.

E. Reporting of Cleared Swaps (§§45.3. 45.4, 45.5 and 45.8): How Should the Swap Data Reporting Rules Address Cleared Swaps?

RESPONSE: As noted in the guiding principles, the Commission should only require end-users to provide data when the Commission finds that the cost of providing the data to end-users to is low and the benefit to the Commission of receiving the incremental data is high.

Under this principle, EEI believes that the Commission's approach to reporting cleared swaps creates confusion and imposes costs on market participants without specifying the additional value received. The Commission should put all obligations for reporting cleared swaps on DCOs. Separate SDR reporting for cleared swaps is duplicative of information that the Commission already has access to through its oversight of DCOs. Further because DCOs automatically net all transactions into positions, the DCO is the only entity who has access to all relevant information to trace a cleared swap for its entire existence and is the only entity that can provide the Commission with position information for individual market participants with respect to cleared swaps.

If a swap is not intended to be cleared when executed, and the parties later decide to clear the swap, the parties should report a termination of the swap to the relevant SDR and the DCO should take over all reporting obligations for the two new swaps. The reporting party can simply provide the DCO the USI for the original swap so that origin of the original swap can be traced to the original bilateral swap.

34. <u>In addressing the questions posed in items 33 (a)–(d), commenters are also requested to address how any modifications to the reporting of cleared swaps would be consistent with the swap reporting requirement in CEA section 2(a)(13)(G) and the restrictions on CFTC exemptive authority in CEA section 4(c)(1)(A)(i)(I).</u>

RESPONSE: EEI believes that Dodd-Frank specifically contemplates that separate reporting of cleared swaps is not necessary because CEA section 21(a)(1)(B) specifically provides that a DCO can register as an SDR. Notably, two of the largest DCOs have registered entities as SDRs and provide automated reporting for all cleared transactions.

36. <u>What steps should reporting entities and/or SDRs undertake to verify the absence of duplicate records across multiple SDRs for a single cleared swap transaction?</u>

RESPONSE: Similar to EEI's general response under Part E, above, if the DCO is the only party responsible for reporting information about cleared swaps, there should not be any concerns about duplicate reporting. If the parties intend to clear a swap when they execute the swap, there is no reason to require any reporting of the swap prior to clearing. The Commission can easily create bright-line rules to require reporting where a swap fails to clear or where a swap is not submitted for clearing shortly after execution. However, the Commission has not explained any reason to require redundant reporting – an initial report of the swap between the two parties and a second report for the cleared swap – for cleared swaps that are intended to be cleared at the time of execution. If the parties to a swap did not originally intend to clear the swap, but submit the swap for clearing later, the reporting party should report the original swap as terminated and the DCO should handle all further reporting.

37. <u>How should cleared swap data be represented in the SDR to facilitate the Commission's oversight of compliance with clearing-related rules, including the clearing requirement (Commission regulations 50.2 and 50.4) and straight through processing requirements (Commission regulations 1.74, 23.506, 37.702(b), 38.601, and 39.12(b)(7))?</u>

RESPONSE: EEI believes the Commission should monitor compliance with clearing-related rules through its oversight of DCOs rather than trying to layer additional, and potentially confusing, rules into Part 45.

41. As described above, DCOs provide position data to the Commission pursuant to part 39 and report transactions to SDRs pursuant to part 45. The Commission is aware of potential overlap in these data sets. With respect to such overlap, how can reporting of swaps data be made more efficient, while ensuring that the Commission continues to receive all data necessary to fulfill its regulatory responsibilities?

RESPONSE: The Commission should streamline the process and simply choose one data source to eliminate any redundant reporting in the way that minimizes the costs and burdens on market participants.

I. Ownership of Swap Data and Transfer of Data Across SDRs

RESPONSE: As noted in the guiding principles, the Commission should recognize that energy markets are different from other markets and that business practices involving the ownership of data have evolved over time. As such, the Commission should recognize these practices in the implementation of its rules and regulations.

64. Is the swap transaction data from a particular swap transaction owned by the counterparties to the transaction?

RESPONSE: Although information that is now made available to the public pursuant to the provisions of the Dodd-Frank Act is in the public domain, it is still owned by the counterparties to the transactions although in some cases it may no longer be "owned" by the counterparties exclusively.

a. If cleared, should a DCO have preferential ownership or intellectual property rights to the data?

RESPONSE: Through its fulfilling its clearing function, a DCO becomes a party to the swap transaction at issue and thereby would acquire rights to the data equal to those of the original counterparties. Such rights, however, should not be considered "preferential" to those of the original counterparties but, rather, commensurate with the counterparties' rights.

b. Should ownership or intellectual property rights change based on whether the particular swap transaction is executed on a SEF or DCM?

RESPONSE: With respect to any non-public data, the counterparties would clearly maintain their ownership interest regardless of whether the swap is executed on a SEF or DCM. In addition, neither the SEF nor the DCM should acquire any rights to the data simply by providing the platform for its execution.

c. What would be the basis for property rights in the data for each of these scenarios?

RESPONSE: As indicated above, with respect to any non-public data, the counterparties would clearly maintain their ownership interest regardless of whether the swap is executed on a SEF or DCM, and neither the SEF nor the DCM should acquire any rights to the data simply by providing the platform for its execution.

d. What ownership interests, if any, are held by third-party service providers?

RESPONSE: Absent an express agreement by both counterparties to the swap at issue, third-party service providers should not be deemed to acquire any ownership interests in swap transaction data. Such third parties are adequately compensated for their services.

e. What are the ownership interests of non-users/non-participants of an SDR whose information is reported to the SDR by a reporting counterparty or other reporting entity?

RESPONSE: As a counterparty to a swap transaction reported to the SDR, a non-user/non-participant of an SDR nevertheless retains ownership rights in the data reported to the SDR, regardless of who reports the data. As an owner, each counterparty, whether a user/participant or a non-user/non-participant, should retain the right to view the data at no additional cost.

65. Is commercialization of swap transaction data consistent with the regulatory objective of transparency?

RESPONSE: As defined by regulation, commercial use entails the use of swap data for a profit or business purpose, as contrasted with regulatory purposes or fulfillment of an SDR's statutory and regulatory responsibilities. Commercialization could conceivably range from use of swap data to compete with other registered SDRs for SDR business from swap counterparties to the use of such data in support of additional service offerings by SDRs. It does not appear that commercial use of swap data for a profit or business purpose is relevant to, consistent with, or in furtherance of the objective of transparency that is at the heart of the Dodd-Frank Act.

a. In what circumstances should an SDR be permitted to commercialize the data required to be reported to it?

RESPONSE: An SDR should be permitted to commercialize the data required to be reported to it only with the agreement of the counterparties to the subject swap transaction and only pursuant to relevant regulatory limitations that will ensure that the commercialization of such data is not accomplished in a manner that will cause confusion in the public square that might undermine the goals of the Dodd-Frank Act.

b. Does commercialization of swap data increase potential data fragmentation?

RESPONSE: In the absence of regulatory safeguards, the risk would be present.

c. Is commercialization of swap data reported to an SDR, DCM or SEF necessary for any such entity to be economically viable? If so, what restraints or controls should be imposed on such commercialization?

RESPONSE: Respondents are not in a position to opine on whether commercialization is economically necessary from the SDR's, DCM's, or SEF's perspective. Respondents presume that entities that sought to be registered as SDRs, DCMs, and/or SEFs did so with the expectation that the fee structure adopted in support of such functions would more than cover the cost to perform such functions.

66. Does the regulatory reporting of a swap transaction to an SDR implicitly or explicitly provide "consent" to further distribution or use of swap transaction data for commercial purpose by the SDR?

RESPONSE: The Commission should not determine that the act of reporting data to a SDR as required by Commission rules and regulations provides consent to further distribution of the swap transaction data for commercial purposes. Since the data is owned by counterparties, affirmative action authorizing the use of the data should be required before the data can be used for commercial purposes by the SDR.

67. Even though swap data reported to an SDR must be available for public real-time reporting, should any use of such real-time data or commercialization of such data occur only with the specific consent of the counterparties to the swap?

RESPONSE: Assuming that this question is limited entirely to data relating to real-time public reporting, respondents believe that because such data is publicly available pursuant to the Act and Commission regulations, it is available to SDRs and others for commercial or any other use allowed by law.

68. Should portability of data be permitted? If so, should there be agreement by the counterparties to a swap prior to the data being ported?

RESPONSE: Portability of data should clearly be permitted at the discretion of the reporting party with notification given to the swap counterparty. The Dodd-Frank Act imposed significant responsibilities on SDRs relating to swap transaction data collection and reporting, as well as the duty to protect the confidentiality of data that is intended for use solely by the Commission and other regulators. An SDR that falls short of these duties and responsibilities could well warrant a transfer of data to a more reliable and responsible SDR, yet current regulations only appear to allow for portability in the event that an SDR ceases to operate as an SDR registered with the Commission. There are likely a multitude of other situations where the counterparties might prefer a different SDR than the one originally receiving the swap transaction data, such as where the swap is novated to a new reporting counterparty or where an SDR changes its fee structure, and the transfer of such data after the point in time when the original data was reported does not frustrate any goals of the Dodd-Frank Act.

J. Additional Comments

69. To the extent not addressed by any of the questions above, please identify any challenges regarding: (i) The accurate reporting of swap transaction data; (ii) efficient access to swap transaction data; and (iii) effective analysis of swap transaction data. Please address each issue and challenge as it pertains to reporting entities, SDRs, and others. Please also discuss how such challenges can be resolved.
    c. What challenges do non-financial entities, including natural persons, face as reporting counterparties and nonreporting counterparties under the swap data reporting rules? What enhancements or clarifications to the Commission's rules, if any, would help address these challenges?

RESPONSE: As reporting counterparties and non-reporting counterparties, non-financial entities face a number of difficulties with respect to SDRs. EEI members have undergone substantial and costly system modifications to facilitate reporting to even a single SDR. Compliance with swap data reporting rules would be less complicated and more economic for end-users such as EEI members if the Commission simplified the rules and reduced the amount of required data.

Non-reporting counterparties do not have access to their data in some SDRs unless they also report to the SDR. Having access to this data is important to EEI members for many reasons including the basic recordkeeping requirement that a party have the USI for all of its swaps. SDRs should be required to provide counterparties access to swap data at no charge.

IV. CONCLUSION

EEI appreciates the Commission's willingness to take stakeholder input on the important issues raised in the Request for Comment and prior to requiring system changes that could have significant cost implications for market participants. To that end, EEI has provided the Commission with ten principles to facilitate consideration and discussion of these issues going forward.

Respectfully submitted,

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