Final

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Ms. Melissa Jurgens, Secretary
Commodity Futures Trading Commission
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Re: Comments of the International Energy Credit Association on CFTC "Review of Swap Data Recordkeeping and Reporting Requirements" (Part 45 Request for Comment), RIN 3038-AE12, 79 Fed. Reg. 16689 (issued March 26, 2014)

Dear Ms. Jurgens:

I. Introduction.

The International Energy Credit Association ("IECA") is an association of over 1,400 credit, risk management, legal and finance professionals that is dedicated to promoting the education and understanding of credit and other risk management-related issues in the energy industry. For over ninety years, IECA members have actively promoted the development of best and industry standard practices that reflect the unique needs and concerns of the energy industry. Our members' concerns regarding the relevant rulemakings that followed the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("DFA") have led us to submit to the Commodity

Futures Trading Commission ("CFTC" or "Commission") numerous comments on various proposed rulemakings, as well as requests for no action relief and petitions in support of relief requests sought by other energy companies and trade groups, many of which have yet to be addressed by the Commission or Commission Staff.

The IECA seeks to protect the rights and advance the interests of the commercial end-user community that makes up the majority of its membership. IECA membership includes representatives of many small and large energy companies all of whom have a fundamental mission of providing safe, reliable, and reasonably priced energy commodities that American businesses and consumers require for our economy and our livelihood. Most of the IECA's members are representatives of commercial end-users, which rely on swaps to help them mitigate and manage (i.e., hedge) the risks of energy commodity price volatility to their physical energy businesses.

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

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II. Comments on the Part 45 Request for Comment.

The IECA commends the Commissioners and the Commission Staff for holding the public roundtable on "end-user issues" on April 3, 2014, for the upcoming public roundtable on "position limits for physical commodity derivatives" to be held on June 19, 2014, and issuing the Part 45 Request for Comment, each of which represents an effort

by the Commission and the Commission Staff to provide a meaningful forum for market participants to voice their concerns with various aspects of the Commission's recently enacted swap regulations.

The Commission, the Commission Staff, and the public were given the enormous task of enacting a comprehensive regulatory scheme to implement the revisions to the Commodity Exchange Act ("CEA") brought about by the DFA. The IECA and many others have joined with you on this task by submitting numerous comments and other pleadings intended to ensure that the process of regulatory rulemaking was reasonable and thorough despite the compressed and frantic pace with which the Commission and the Commission Staff had to act in order to attempt to meet the deadlines imposed by Congress for enacting comprehensive swap regulations under the DFA. For that effort, we genuinely commend the Commission and the Commission Staff.

Equally so, we commend the Commission and the Commission Staff for now taking the time, as exhibited by the above-named public roundtables and the Part 45 Request for Comment, to consider thoughtfully and earnestly the concerns raised by market participants and other members of the public in order for the Commission to "get it right" as it now considers potential revisions to those swap regulations.

A. The IECA Requests Opportunity for Reply Comments and Public Notice and Comment on any Proposed Revisions, Amendments, or Modifications to Part 45, the Swap Data Reporting Rules or the SDR Rules.

In the Part 45 Request for Comment, the Commission has sought comments in response to 69 questions regarding Part 45 of its regulations and related provisions of the swap data reporting obligations under Part 43, Part 45 and Part 46 (collectively the "swap

data reporting rules") and Part 49 which governs swap data repository ("SDR") operations and Commission access to SDR data (the "SDR rules"). Considering that the majority of the IECA's members represent commercial end-users of swaps and that the typical swap activity of such companies is focused on managing energy-related risks, the IECA has determined that providing a response to all 69 questions would be impractical, would not necessarily reflect the specific concerns of the IECA's members, and may draw the Commission's attention away from the issues that are most important to the companies represented by the IECA's members.

Nevertheless, the IECA and its members may be affected directly and adversely by the answers submitted by others, including entities registered as Swap Dealers ("SDs") or Major Swap Participants ("MSPs"), SDRs, Designated Contract Markets ("DCMs"), or Derivatives Clearing Organizations ("DCOs"), other commercial end-users, and other members of the public to any or all of the CFTC's 69 questions on Part 45, swap data reporting rules, and/or SDR rules. Likewise, certain questions seek information on topics that IECA members may not have significant experience with at this point in time and, as a result, are not in a position to provide comments on. For example, Section E of the Part 45 Request for Comment seeks responses to questions relating to cleared swaps. Because energy commodities are not subject to a mandatory clearing obligation, most commercial end-users represented by IECA members are not in a position to provide meaningful responses to the questions presented in Section E.

Accordingly, before the Commission issues any revisions, interpretive guidance, amendment, or other modification to Part 45, the swap data reporting rules or the SDR rules in response to the answers provided to the Part 45 Request for Comment, the IECA

respectfully requests that the CFTC provide an opportunity for the public (including the IECA) to comment on any such revisions, interpretive guidance, amendments or other modifications.

Such an opportunity to reply could be accomplished by the CFTC issuing public notice of any proposed revisions, interpretive guidance, amendments or other modifications to Part 45, the swap data reporting rules or the SDR rules and providing a period of 30 days or more for the public to comment on any such proposal. In addition, the Commission could issue a supplement to its Part 45 Request for Comment specifying that the public is invited to review all the comments that have been submitted to the Commission in response to the Part 45 Request for Comment and submit any reply comments by no later than June 27, 2014, or a later date.

B. In General, the IECA Suggests that Any Modifications to Part 45, the Swap Data Reporting Rules and the SDR Rules Should Reduce the Burdens on Reporting Counterparties and Not Impose Additional Reporting or Recordkeeping Burdens on Either Reporting Counterparties or Non-Reporting Counterparties.

The members of the IECA submit that the current recordkeeping and reporting obligations imposed on reporting counterparties and SDRs under the existing swap data reporting rules do not need to be expanded to enable the Commission to satisfy its transparency, monitoring and enforcement tasks under the CEA as amended by the DFA. To the contrary, many IECA members report that the swap data reporting rules may in practice undermine the Commission's ability to effectively monitor and promote transparency in the swaps markets. That is, as the scope and amount of data required for each swap increases, so does the burden imposed on reporting counterparties and the risk of inaccurate and incomplete reporting of data analyzed by the Commission.

Likewise, the variety of data currently required by the swap data reporting rules results in the Commission Staff receiving extraneous information that may hinder the Commission's efforts to efficiently perform its monitoring and enforcement functions. As a result, simplifying and reducing the burdens on reporting counterparties and SDRs would be more likely to accomplish meaningful improvements in efficiency and accuracy of the data reported, enhance market data transparency, and improve the Commission's ability to monitor markets and enforce the Commission's rules.

Many of the questions presented in the Part 45 Request for Comment suggest that the Commission may believe that the imposition of additional reporting burdens is necessary or appropriate. For example, question 29 asks commenters to identify 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." As explained in the preceding paragraph, adding obligations to submit more data fields under Part 45, the swap data reporting rules or the SDR rules will only exacerbate the problems faced by SDRs and regulators trying to make sense out of an already uninformative mound of unnecessary data.

None of the questions presented by the Commission, however, asks that commenters specifically identify data currently required under the swap data reporting rules that may be unnecessary or inefficient to provide. While the Commission may appreciate the variety of information that it receives, quantities, dates and prices are, after all, the only three data fields truly needed to achieve the bulk of what the Commission, its rules, and the public need to accomplish the objectives of the CEA as amended by the DFA.

As such, the IECA encourages the Commission to not impose additional reporting obligations on SDRs, reporting counterparties or non-reporting counterparties, but rather to assess the types of data that it currently receives and its use of such data and then, in consultation with SDRs, market participants, and other affected entities, consider which data fields are truly necessary in connection with the performance by the CFTC of its regulatory functions and simplify the reporting obligations applicable to SDRs, reporting counterparties and non-reporting counterparties.

C. Specific Comments on Section F of the Part 45 Request for Comment (Questions 43 through 49): Safe Harbors Should be Established for SDRs as a Means of Addressing the SDRs' Requirements under Regulation 49.11(b) of the SDR Rules in light of the Requirements of Non-Reporting Counterparties under Regulation 45.14.

In Section F of the Part 45 Request for Comment, as more fully described in Questions 43 through 49, the Commission requests comments regarding the requirements of CFTC Regulation 49.11(b) applicable to SDRs in light of the requirements of CFTC Regulation 45.14 applicable to counterparties to swap transactions. While both Regulation 49.11(b) and Regulation 45.15 are undoubtedly important to ensuring that reported data is accurate and complete, the IECA is concerned that any "clarification or enhancement to swap data reporting requirements" the Commission may consider in response to comments provided by reporting counterparties and SDRs in respect to these questions in Section F should not result in the imposition of additional, substantial and unnecessary burdens on commercial end-users, as non-reporting counterparties.

Instead of imposing additional burdens on the commercial end-user community and other non-reporting counterparties, the IECA suggests that the creation of a safe harbor to the obligations of SDRs under Regulation 49.11(b) would most effectively

enable SDRs to comply with their obligation to confirm the accuracy of submitted swap data under Regulation 49.11(b), while continuing to recognize the distinction the Commission has made between the obligations under Regulation 45.14(a) applicable to SDs, MSPs and other reporting counterparties, and the obligations under Regulation 45.14(b) applicable to non-registered entities including commercial end-users, as non-reporting counterparties.

Under Regulation 45.14(a), each registered entity and swap counterparty required to report swap data to an SDR, to any other registered entity or swap counterparty or to the Commission is required to report, as soon as technologically practicable after discovery, any errors and omissions in the data submitted. Regulation 45.14(b), which addresses the obligations applicable to the non-reporting counterparty, requires that "each counterparty to a swap that is not the reporting counterparty … and that discovers any error or omission with respect to any swap, shall promptly notify the reporting counterparty of each such error or omission." Upon its receipt of such notice from the non-reporting counterparty, the reporting counterparty is then obligated to report a correction to the SDR.[1]

Thus under Regulation 45.14(b), each commercial end-user of swaps, when it is a non-reporting counterparty, is under an obligation to report to the reporting counterparty any error or omission it discovers, but the non-reporting counterparty is under no obligation under Part 45 to audit or confirm the data submitted by the reporting

[1] Although not clearly explained in Regulation 45.14, the IECA assumes that the obligation of the reporting counterparty to correct an error or omission identified by its non-reporting counterparty only applies if the reporting counterparty determines that an error or omission actually exists. Significantly, if the reporting counterparty disagrees with the non-reporting counterparty's assessment of the existence of an error or omission, the reporting counterparty, as the entity responsibility for the accuracy and completeness of the submitted data, should not be required to defer to the non-reporting counterparty's determination in the case of a disagreement.

counterparty to an SDR or the Commission. As the Commission explained in the preamble to the Part 45 final rule, "[t]he final rule does not require swap counterparties to monitor data in an SDR, but does require them to report all data errors of which they become aware." (77 Fed. Reg. 2136 at 2170).

The differentiation between the scope of obligations applicable to the reporting counterparty and non-reporting counterparty under Regulation 45.14 is important to commercial end-users of swaps. By not imposing an obligation to review data submitted to an SDR, the Commission helps ensure that non-reporting counterparties will continue to have access to swaps markets to hedge commercial risks.

If such an obligation did exist, it would be necessary for commercial end-users to regularly monitor all SDRs in order to ensure that data submitted by the reporting counterparty to its swap transactions is accurate and complete. In addition to requiring a significant investment of time and resources, such an obligation would in effect impose potential regulatory liability on the non-reporting counterparty for errors and omissions submitted by the reporting counterparty. That is, if a reporting counterparty submitted inaccurate or incomplete data in connection with a swap, the non-reporting counterparty would be in violation of the Commission's regulations if it failed to identify and report the error. Such liability would be contrary to the Commission's position that "[i]t is the reporting party's responsibility to report data accurately" and would likely discourage many commercial end-users from using swaps to efficiently manage risk.

In contrast to the differentiation identified in Regulation 45.14, Regulation 49.11(b) imposes an obligation on SDRs to "confirm the accuracy of all swap data that is submitted pursuant to Part 45." With respect to swap data submitted directly by a swap

counterparty, Regulation 49.11(b)(1)(i) states that "a registered swap data repository has confirmed the accuracy of swap creation data that was submitted by a counterparty if the swap data repository has notified both counterparties of the data that was submitted and received from both counterparties acknowledgement of the accuracy of the swap data and corrections for any errors" (emphasis added).

As explained by the Commission in the preamble to the Part 49 final rule, "[t]he SDR must affirmatively communicate with both counterparties to the swap when data is submitted directly by a swap counterparty ...." (76 Fed. Reg. 54538 at 54547). While affirmative communication is required for swap data submitted directly by a counterparty, with respect to swap data submitted by a SEF, DCM, DCO or third-party service provider, Regulations 49.11(b)(1)(ii) and 49.11(b)(2)(ii) deem that an SDR has confirmed the accuracy of the data if the SDR has a reasonable belief that the data is accurate, the data evidences that both counterparties agreed to the data, and the SDR has "provided both counterparties with a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the swap data."

Similarly, in Regulation 49.11(b)(2)(i) the Commission recognizes that an SDR will have fulfilled its "swap continuation data" confirmation obligations if the SDR has "provided both counterparties with a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the data." (Emphasis added.)

In each of these three provisions, the Commission has created a safe harbor for SDRs to satisfy their swap data confirmation obligations if, among other things, the SDR has "provided both counterparties a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the swap data."

The IECA believes that Regulation 45.14 and Regulation 49.11, and the relative obligations with respect to responsibility for accuracy of submitted swap data imposed by those regulations on SDRs, reporting counterparties and non-reporting counterparties can work well together, if the SDR obligations under Regulation 49.11(b)(1)(i) and Regulation 49.11(b)(2)(i) are revised to track the SDR's having "provided both counterparties with a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the swap data" as the Commission has used in Regulations 49.11(b)(1)(ii), 49.11(b)(2)(i) and 49.11(b)(2)(ii). Such a simple modification could be accomplished by so clarifying the language in Regulation 49.11(b)(1)(i) or by otherwise establishing a safe harbor for SDRs with respect to their compliance with Regulation 49.11(b)(1)(i).

Furthermore, the IECA understands that SDRs may be unable to comply with the Regulation 49.11 requirements when the non-reporting counterparty to a swap is not a customer of or otherwise registered with the SDR. In such situation, because the SDR does not have a relationship with the non-reporting counterparty, it lacks the information and agreements necessary to enable it to contact the non-reporting counterparty as required by Regulation 49.11. As part of the safe harbor for SDRs described herein, an SDR should be allowed, in the above-circumstances, to rely on any contact information for the non-reporting counterparty that is otherwise available to the SDR and the SDR may use that contact information, in good faith, to fulfill its obligations under both Regulations 49.11(b)(1)(i) and 49.11(b)(2)(i).

Undoubtedly, some clarification of the SDR's obligations under Regulation 49.11(b)(1)(i) and Regulation 49.11(b)(2)(i) is desirable. The IECA submits that a

reasonable method of achieving such clarification, while avoiding the imposition of additional obligations on non-reporting counterparties, is to establish a safe harbor applicable to both "swap creation data" and "swap continuation data" reported directly by a counterparty under, as applicable, Regulation 49.11(b)(1)(i) or Regulation 49.11(b)(2)(i), that is analogous to the provisions applicable to swap data submitted by a SEF, DCM, DCO or third party service provider under Regulations 49.11(b)(1)(ii) and 49.11(b)(2)(ii). Under such a safe harbor, the Commission could provide that an SDR has confirmed the accuracy of swap data submitted directly by a counterparty to the swap if the SDR has "provided both counterparties with a 48 hour (or such longer period as the Commission may deem appropriate) correction period after which a counterparty is assumed to have acknowledged the accuracy of the swap data."

D. Specific Comments on Questions 4 & 43 of the Part 45 Request for Comment: The Commission Should Establish a Safe Harbor for Reporting Counterparties for Errors and Omissions that Result From the Failure of the Non-Reporting Counterparty to Provide Necessary Information.

The IECA acknowledges the importance of ensuring that data with respect to each swap is submitted to an SDR in a timely fashion and that the information provided is complete and accurate and, as such, appreciates that CFTC Regulation 45.8 requires counterparties to a swap to agree, as a term of the swap, which party will be the reporting counterparty when they are of the same regulatory status. As between entities that are not registered with the Commission as an SD or MSP and that do not qualify as a "financial entity," the outcome of Regulation 45.8 is that one counterparty to the transaction, although otherwise unregulated under the Commission's rules, must agree to assume the compliance risk associated with obligations applicable to reporting counterparties. The ability of the reporting counterparty, however, to comply with the requirements of the

swap data reporting rules necessarily depends on the action or inaction of its non-reporting counterparty. As such, the IECA suggests that the Commission address the regulatory risk associated with the assumption of swap data reporting obligations by establishing a safe harbor that would protect reporting counterparties from errors and omissions that result from the failure of the non-reporting counterparty to provide necessary information.

In response to the needs of the commercial end-user community, the IECA developed the "IECA Dodd-Frank Act Representations and Reporting Amending Agreement" to facilitate the process of allowing swap counterparties to bilaterally agree as to the identity of the reporting counterparty. The IECA reporting party agreement, in addition to other bilateral agreements that emerged in advance of the effective date of the swap data reporting rules, enabled counterparties to satisfy the Regulation 45.8 requirements by establishing the necessary agreement regarding the identity of the reporting counterparty. In connection with the identification of the reporting counterparty, these agreements typically imposed obligations on the non-reporting counterparty intended to ensure that the reporting counterparty would be able to satisfy its applicable obligations under swap data reporting rules. The addition in such agreements of obligations applicable to the non-reporting counterparty, however, is of limited utility. Any liability that may result from a breach of such contractual obligations might only arise only after the Commission determines that a violation of the reporting obligations of the reporting counterparty has occurred and has assessed penalties against the reporting counterparty.

Despite the success of the IECA and other bilateral agreements, counterparties that accept the reporting counterparty designation are only able to comply with the obligations of the swap data reporting rules insofar as the non-reporting counterparty provides timely, accurate, and complete data with respect to the swap. To illustrate, Regulation 45.3(d)(3) requires the reporting counterparty to report "all confirmation data for the swap, as defined in § 45.1, as soon as technologically practicable" and provides for a progressively shorter "no later than" time based on the date that the swap is entered into. Notably, however, counterparties do not always return executed transaction confirmations necessary for the "confirmation" (as such term is defined in Regulation 45.1) of the swap. This is particularly common when the tenor of the swap transaction is very short or when the execution and return of every confirmation would be unduly burdensome in light of the frequency and number of swap transactions entered into. In such situations, the reporting counterparty may be unable to satisfy its obligation under Regulation 45.3(d)(3) to report confirmation data as, technically, the swap is never actually confirmed.

To address the potential regulatory liability that may attach to a reporting counterparty for failing to provide timely, complete and accurate swap creation data and swap continuation data, the IECA suggests that the Commission establish a safe harbor that would hold the reporting counterparty harmless for errors and omissions in submitted swap data to the extent such errors result from the failure of its non-reporting counterparty to provide accurately or completely the data necessary to enable compliance with the swap data reporting rules, despite being asked for such data by the reporting

counterparty or otherwise being subject to a contractual obligation to provide such data to the reporting counterparty.

The IECA believes that such a safe harbor would, for example, protect a reporting counterparty that submits confirmation data to an SDR notwithstanding the failure of the non-reporting counterparty to return a fully executed confirmation. Likewise, such a safe harbor would result in a reporting counterparty not being found in violation of the swap data reporting rules to the extent that its non-reporting counterparty fails to provide information that is uniquely within its control or provides inaccurate data to the reporting counterparty.

Significantly, the IECA is aware that the Commission previously considered and rejected the creation of a safe harbor to the reporting rules. As explained in the preamble to the Part 45 final rule (77 Fed. Reg. 2136 at 2170), "The Commission has determined that the final rule should not provide a safe harbor for good-faith mistakes made in reporting data. It is the reporting party's responsibility to report data accurately and develop processes to achieve this goal." While the IECA agrees in principle with the Commission's position, it also believes that the Commission may have failed to take into consideration the fact that the ability to report data accurately is often dependent on the data provided (or not provided) by the non-reporting party. The IECA believes that the suggested safe harbor strikes an appropriate balance between the competing considerations by not excusing the reporting counterparty for its own failures, while simultaneously recognizing that processes implemented by the reporting counterparty cannot guaranty that the data submitted is accurate.

III. Conclusion.

The IECA appreciates the opportunity to provide the foregoing comments and information to the Commission. This letter represents a submission of the IECA, and does not necessarily represent the opinion of any particular member. If you would like for us to expand our discussion of any of the above-listed discussion points, please let us know.

Yours truly,

INTERNATIONAL ENERGY CREDIT ASSOCIATION

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