



January 13, 2015

Via Electronic Submission

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

**Re: Records of Commodity Interest and Related Cash or Forward Transactions
RIN 3038-AE23**

Dear Mr. Kirkpatrick:

The Edison Electric Institute (“EEI”) appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (“CFTC” or “Commission”) in response to the Commission’s Notice of Proposed Rulemaking on Records of Commodity Interest and Related Cash or Forward Transactions (“Proposed Rule”).¹ EEI appreciates the Commission’s proposal to reduce some of the recordkeeping burdens of Commission Regulation 1.35(a) but requests that, consistent with historic practice only Commission registrants with fiduciary duties to customers be subject to Regulation 1.35(a).²

EEI is the association of U.S. shareholder-owned electric companies. EEI’s members serve 95 percent of the ultimate customers in the shareholder-owned segment of the U.S.

¹Records of Commodity Interest and Related Cash or Forward Transactions, 79 Fed. Reg. 68140 (Nov. 14, 2014).

² Regulation 1.35(a) is largely a product of the long-time regulation of the businesses of fiduciary intermediaries such as futures commission merchants (“FCMs”) and introducing brokers (“IBs”) operating in futures’ markets. For example, the CFTC’s Division of Market Oversight issued an “Advisory for Futures Commission Merchants, Introducing Brokers, and Members of a Contract Market over Compliance with Recordkeeping Requirements,” dated February 5, 2009, in which it stated “[t]he Commodity Exchange Act (‘Act’) and Commission regulations pertaining to recordkeeping impose requirements for recording information and maintaining records relating to the business of all FCMs, IBs and members.” Section 4g(a) of the Act, 7 U.S.C. § 6g(a) (2014), provides generally that FCMs, IBs, floor brokers, and floor traders shall make, keep, and hold open for inspection “...such reports as are required by the Commission regarding the transactions and positions of such person, and the transactions and positions of the customer thereof, in commodities for future delivery on any board of trade in the United States or elsewhere” Sections 4g(b) through (d) of the Act also provide that: registered entities, including designated contract markets, are required to “maintain daily records”; floor brokers, IBs, and FCMs are required to “maintain daily records for each customer in such manner and form as to be identifiable with the trades referred to in subsection (b)...”; and “daily trading records shall be maintained in a form suitable to the Commission for such period as may be required by the Commission.”

electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members and more than 170 industry suppliers and related organizations as Associate members. EEI members are not financial entities; they are physical commodity market participants that use futures and swaps to hedge and mitigate their commercial risk. As such, regulations that make using futures or swaps more costly will likely result in higher and more volatile energy prices for retail, commercial, and industrial customers.

EEI agrees with the concerns expressed by the panelists during the April 3, 2014 End User Roundtable regarding the obligations imposed on end users by Commission Regulation 1.35(a) if an end user is classified as a member of a SEF or DCM. As provided in the Act, a “member” is anyone that has membership or trading privileges on a SEF or DCM.³ CFTC Regulation 1.35 imposes broad recordkeeping requirements for “members” and states in relevant part that:

“(a)...Each futures commission merchant ... and member of a designated contract market or swap execution facility shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all transactions relating to its business of dealing in commodity interests and related cash or forward transactions.”

Under this regulation, “‘related cash or forward transaction’ means a purchase or sale for immediate or deferred physical shipment or delivery of an asset related to a commodity interest transaction where the commodity interest transaction and the related cash or forward transaction are used to hedge, mitigate the risk of, or offset one another.”⁴

As such, CFTC Regulation 1.35(a) imposes broad recordkeeping requirements for “members.” However, rather than limiting such requirements to the scope historically covered in the context of the existing regulation (Commission registrants with fiduciary duties to customers), the regulation applies to anyone directly using a SEF. In other words, if a commercial end-user received “trading privileges” to execute swaps directly on a SEF, it would be a “member” subject to the requirements of Commission Regulation 1.35(a). This is true even for commercial end-users, such as EEI members, who are not required to register with the Commission and who are executing trades for their own account. A plain reading of the regulation would subject the affected member, including those only executing trades for their own account, entire financial and physical trading activities to a heightened recordkeeping standard. Further, this recordkeeping requirement would apparently overlap with (and be in addition to) the existing recordkeeping requirements for swaps and futures (through large trader regulation) that already apply to the members. The result is a burdensome and confusing regime for non-registrant commercial end users that are merely executing trades for their own account to hedge their commercial risks.

³ 7 U.S.C. § 1a(34)(B) (2014).

⁴ CFTC Regulation 1.35(a)(5).

EEI does appreciate the Commission's proposal to reduce some of the recordkeeping burden imposed by Commission Regulation 1.35(a) on commercial end users. However, while the Commission's intentions are well-placed, the approach in the Proposed Rule still leaves uncertainty and costs that are not necessary to impose on persons that are not registered with the Commission and who are only executing trades for their own account. For example, because the Proposed Rule provides different recordkeeping requirements for emails and text messages, there is uncertainty around what communications fall in the category of a "text message", and there will be unnecessary operational costs in trying to distinguish the two for recordkeeping purposes.⁵

By not limiting the application of 1.35(a) only to Commission registrants who trade on behalf of customers, the Proposed Rule encourages end users to look for alternatives to transacting on a SEF. End users can execute futures transactions on DCMs through intermediaries without becoming "members". They can also transact swaps over-the-counter and avoid using/becoming a member of a SEF. The impact of grouping them with regulated futures and swaps businesses with respect to recordkeeping requirements will not likely change their indirect use of DCMs, but certainly serves as a barrier to their participation on SEFs. Simply stated, if the Commission's policy is to encourage the use of SEFs, it should avoid making participation on them burdensome and expensive. Commercial end users are already subject to derivative recordkeeping requirements. There is no regulatory benefit to subjecting them to the overlapping requirements of Regulation 1.35(a). Rather, the effect of such a requirement would be to discourage the use of SEFs, which is inconsistent with the Commission's policy of supporting exchange traded swaps.

If the Commission chooses not to grant EEI's request to exclude persons who do not trade on behalf of customers from the requirements of Regulation 1.35(a) then EEI requests, that the Commission make a distinction between "trading privileges" on a registered entity, which would make a market participant a member of a SEF per Commission Regulation 1.3q(1)(ii), and those that are simply executing trades for their own account (i.e. "execution privileges"). This distinction is consistent with the Commission's historic approach as trading privileges is associated with executing futures transactions on behalf of customers. Execution privileges, in contrast, should be read in the context of electronic platforms, such as SEFs, that are used by end users to facilitate transactions between eligible contract participants. An entity that only executes swaps directly on a SEF for its own account should be deemed to have "execution privileges" and not "trading privileges," and should not be considered a "member" of that SEF.

In conclusion, EEI appreciates the Commission's proposal to reduce the recordkeeping burdens of Commission Regulation 1.35 on unregistered entities such as commercial end users.

⁵ The recordkeeping obligations under 1.31, which apply to entities subject to 1.35, also create uncertainty and potentially burdensome costs. In addition, as end-users, EEI members have not utilized many of the items included on the "original source documents" list (*e.g.*, trading cards, signature cards, street books, canceled checks). Furthermore, the recordkeeping rules in Parts 43, 45, and 46 of the Commodity Exchange Act do not require non-SDs/MSPs to keep records of all transactions that were unfilled or canceled.

However, EEI respectfully submits that the Proposed Rule does not go far enough and requests that the Commission clearly exclude persons who are not registered with the Commission and who do not trade on behalf of customers from the requirements of Regulation 1.35(a).. This approach will still require all market participants to maintain proper records without imposing unnecessary burdens or providing disincentives to the use of swap exchanges. If the Commission chooses not to provide commercial end users with a direct and clear exclusion from the Regulation 1.35 then EEI requests that the Commission clarify that an entity that only executes swaps directly on a SEF for its own account should be deemed to have “execution privileges” and not “trading privileges,” and should not be considered a “member” of that SEF.

Thank you for the opportunity to provide comments and please contact the undersigned if you have any questions.

Respectfully Submitted,



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