PROPOSED TRADE OPTION RULE AMENDMENTS

June 19, 2015

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

Re: Notice of Proposed Rulemaking, 80 Fed. Reg. 26200, May 7, 2015
(17 CFR Part 32) RIN No. 3038-AE26

Dear Mr. Kirkpatrick:

The Electric Associations[1] respectfully submit these comments in response to the Notice of Proposed Rulemaking re Trade Options (the "Trade Option NOPR"),[2] published by the Commodity Futures Trading Commission (the "Commission" or "CFTC"), and the amendments to Commission Rule 32.4 (the "Proposed Rule Amendments") therein. The Electric Associations appreciate the Commission's efforts to address commercial end user concerns, and support the Commission's proposal to delete Form TO, and the other Proposed Rule Amendments as they will reduce regulatory burdens for all commercial end-users, including the Electric Associations' non-swap dealer/major swap participant ("non-SD/MSP") members and their commercial end-user counterparties to commodity trade options.

[1] The American Public Power Association ("APPA"), the Edison Electric Institute ("EEI"), the Electric Power Supply Association ("EPSA"), the Large Public Power Council ("LPPC"), and the National Rural Electric Cooperative Association ("NRECA") are collectively referred to as the "Electric Associations." See Attachment A for a description of the members of each Electric Association. The comments contained in this filing represent the comments and recommendations of the Electric Associations, but not necessarily the views of any particular member of any Electric Association on any issue. The Electric Associations are authorized to note the involvement of the following organizations and associated entities to the Commission, and to indicate their full support of these comments and recommendations: ACES and The Energy Authority.

[2] 80 Fed. Reg. 26,200 (May 7, 2015) (17 C.F.R. Part 32) RIN No. 3038-AE26.

The members of the Electric Associations are not financial entities; they are commercial energy companies and market participants that use commodity swaps, futures and options to hedge and mitigate commercial risks that arise from ongoing electric business operations. The Electric Associations' members use commodity trade options to hedge commercial risk, and therefore have a direct and significant interest in how the Commission regulates these nonfinancial agreements, contracts and transactions.

The Electric Associations have been active participants in the Commission's rulemaking process implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). We have commented in both dockets on the Commission's rulemakings implementing and interpreting section 721 of the Dodd-Frank Act ("DFA Section 721"), which includes the new definition of "swap" in Section 1a(47) of the Commodity Exchange Act (the "CEA") ("CEA 1a(47)"): (a) the joint rulemakings with the Securities and Exchange Commission (the "SEC") further defining and interpreting DFA Section 721 and CEA 1a(47), and (b) the commodity trade option rulemakings.

In April of 2012, the Commission published the Commodity Options Interim Final Rule (the "Trade Option IFR").[3] The Trade Option IFR was drafted on the untested presumption that the Commission would determine that all commodity options, including commodity trade options, were included in the defined term "swap." Based on that premise, the Commission published revised Rule 32.3 and exempted commodity trade options (a limited category of presumed "swaps") from some but not all provisions of the CEA that would otherwise be applicable to such transactions as "swaps." The Commission clearly acknowledged in the Trade Option IFR that it was required to make the definitional determination (whether all commodity options were, indeed, "swaps") in conjunction with the SEC in the ***joint*** rulemaking further defining the term "swap."[4] The Electric Associations commented on the Trade Option IFR in the post-publication docket in June of 2012.[5] However, at that time the energy industry was not, as yet, aware that the Commission would later determine that all commodity options, including commodity trade options, are "swaps."

When the Commission and the SEC published the Products Release in August of 2012,[6] that rulemaking contained the Commission's determination, articulated as an interpretation of DFA Section 721 and CEA 1a(47), that all commodity options are "swaps." The Commission also stated in the Products Release that it was ***not*** publishing an additional interpretation relating

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[3] 77 Fed. Reg. 25320 (Apr. 27, 2012) RIN 3038-AD62.

[4] *See* the Trade Option IFR, 77 Fed. Reg. 25320 at 25321, stating that "[t]he final rule and interpretations that result from the [product definition notice of proposed rulemaking] will address the determination of whether a commodity option…is subject to the swap definition in the first instance"). *See also* Section VI and footnote 44, *supra*.

[5] Comment letter available on the Commission's website at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58272&SearchText= (the "2012 Joint Association Trade Option IFR Comments").

[6] Joint Final Rule and Interpretations on Further Definition of "Swap," "Security-Based Swap," "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (17 CFR Part 1) RIN No. 3038-AD46, 77 Fed. Reg. 48208 (August 13, 2012) (the "Products Release").

to commodity trade options.[7] Concurrently with publishing the Products Release, the Commission invited post-publication public comments and also invited additional comments on the Trade Option IFR, recognizing the interplay between the two rulemakings interpreting and implementing DFA Section 721 and CEA 1a(47). At that point, the Electric Associations submitted comments on both rulemakings, and the NFP Electric Associations[8] requested reconsideration of the Commission's determination/interpretation that all commodity options, including commodity trade options, are "swaps" (the "Products Release TO Interpretation").[9] In December of 2014, the Electric Associations again made the same request for reconsideration of the Products Release TO Interpretation, in comments submitted on the proposed revisions to the Commission's interpretations on "embedded volumetric optionality."[10]

The Electric Associations appreciate the Commission's continuing efforts to address the inconsistencies in the interpretations and rules implementing DFA Section 721 and CEA 1a(47), including the Trade Option IFR. The Electric Associations strongly support the proposed rule amendments in the Trade Option NOPR, and request that these proposals be finalized. The Electric Associations believe the proposed rule amendments will help reduce unwarranted regulatory burdens on commercial end-users' use of physically-settled commodity trade options, especially those that Electric Associations' non-SD/MSP members and their non-SD/MSP counterparties use to hedge or mitigate commercial risks in generating, transmitting and delivering reliable and affordable electricity to consumers and businesses 24/7/365. However, the Electric Associations believe that the Commission's intended relief for commercial end-users will fall short if certain additional relief is not provided through this rulemaking. Therefore, the Electric Associations respectfully request the additional relief discussed below.

I. Summary of Comments

The Electric Associations support the Proposed Rule Amendments, and respectfully request that the Commission:

- Eliminate the regulatory burden associated with the $1 billion Notice Requirement.
- Reconcile differences between the two sets of CFTC regulatory conditions governing: (i) whether a nonfinancial commodity forward contract is ***excluded*** from the defined term "swap," and (ii) whether a nonfinancial commodity trade option is alternatively ***exempted*** from the regulatory requirements that apply to "swaps."
- Clarify and reduce the recordkeeping requirements applicable to non-SD/MSP counterparties to commodity trade options, by clarifying that such records may be

[7] The fundamental misinterpretation of the DFA Section 721 and CEA 1a(47) appears at pages 48236-48237 of the "Products Release"). See Section VI *supra* for the relevant language from the Products Release.

[8] The NFP Electric Associations include NRECA, APPA and LPPC.

[9] See http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59235&SearchText, Section X.

[10] See http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60087&SearchText, Section IV.

retained and maintained in accordance with each non-SD/MSP counterparty's ordinary course record retention practices for cash commodity transactions (intended to be physically settled).

- Affirm, in the text of the finalized amendments to Rule 32.3, that commodity trade options are excluded or exempted from the Commission's speculative position limits rules.

- Reconsider its interpretation of DFA Section 721 and CEA 1a(47) in the Products Release, when it determined that all commodity options, including nonfinancial commodity trade options, are "swaps." Nonfinancial commodity trade options are intended to be physically settled, and should therefore be excluded from the defined term "swap."

II. The Commission Should Delete the $1 Billion Notice Requirement.

The Electric Associations strongly support the Commission's proposed elimination of the Form TO requirement for Non-SD/MSPs, and appreciate the additional proposal to make more flexible (even while codifying) the $1 billion Notice Requirement introduced in the 2013 Trade Option No-Action Letter. However, the Electric Associations respectfully request that the Notice Requirement itself be deleted. The Electric Associations contend that the Commission has not provided an adequate explanation in its Trade Option NOPR or in prior Commission issuances, as to why the data collected provides any meaningful regulatory benefits to the CFTC's market surveillance and regulatory oversight mission. The Commission also does not provide an explanation as to why the Commission's general interest in receiving "insight into the size of the market for unreported trade options and the identity of the most significant market participants" merits a notice requirement that is universally applicable to all commercial end-users large and small.[11]

The Electric Associations therefore urge the Commission to eliminate the $1 billion Notice Requirement, which is not justified in light of the additional regulatory burdens for all non-SD/MSP counterparties that may need to track commodity trade options in a manner different than their ordinary tracking, measuring and recordkeeping for other cash commodity transactions (intended to be physically settled). The Commission's market surveillance and oversight goals for the various markets for commodity trade options (based on different commodities deliverable at different locations) can be achieved by requesting access to the commodity trade option records maintained by non-SD/MSP counterparties in particular industries or at specific commodity delivery locations, as necessary.

The Electric Associations strongly support the Commission's proposal "to amend regulation §32.3(b) such that a Non-SD/MSP will under no circumstances be subject to Part 45 reporting requirements with respect to its trade option activities."[12] This includes the Commission's proposal to amend Section 32.3(b) such that a non-SD/MSP would ***not*** be

[11] Proposed Rule at 26204.
[12] Proposed Rule at 26203.

required to report unreported trade options on Form TO and to delete Form TO from Appendix A. As indicated in Electric Associations comments letters and as recognized by the Commission in the Trade Option NOPR, Form TO imposes substantial costs on end-users for personnel, legal advice and infrastructure without providing measurable regulatory benefits to the Commission's market surveillance and regulatory oversight mission. Completing Form TO requires an end-user to track the commodity trade options it enters into, identify which of the commodity trade options have and have not been reported, and also to track the commodity trade options exercised, all on an ongoing basis, and to retain and maintain such records in accordance with the Commission's rules.

The Electric Associations also appreciate the Commission's proposal to provide flexibility on the $1 billion Notice Requirement initially required as a condition to reliance on the 2013 Trade Option No- Action Letter.[13] The proposed alternative Notice Requirement allows a Non-SD/MSP counterparty to notify the Division of Market Oversight if it "reasonably expects to enter into trade options, whether reported or unreported, having an aggregate notional value in excess of $1 billion during the calendar year."[14] This alternative provides flexibility and reduces some of the regulatory burden on end-users by not requiring them to track the transactions they execute once they can reasonably anticipate exceeding the threshold. We also understand that the Commission intends the Proposed Rule Amendments to mean that commercial end-users will not be penalized for inaccurate calculations of the aggregate notional value of trade options as they approach the $1 billion threshold and potentially "miss" the 30-day post-threshold reporting window.

However, the Electric Associations urge the Commission to completely eliminate the unnecessary regulatory burden, initially created without notice or comment in the 2013 Trade Option No-Action Letter, and delete the $1 billion Notice Requirement. As the Trade Option NOPR recognizes, each non-SD/MSP counterparty to commodity trade options in any commercial industry will still incur costs to track the aggregate amount of commodity trade options that it executes during a calendar year. This data collection effort imposes ongoing costs if a non-SD/MSP counterparty is not certain if it will cross the $1 billion threshold, and for associated recordkeeping.

Ironically the regulatory burdens will be greater for smaller entities than for the largest non-SD/MSP counterparties to commodity trade options. The largest non-SD/MSP counterparties can merely send the anticipatory notice in January of each year. The next tier of entities will have to track commodity trade options throughout the year. In the energy industry, significant seasonal, and longer term, energy commodity trade options are used to hedge commercial risks arising from the supply/demand for energy commodities.[15] This next tier of

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[13] No-Action Letter 13-08 available at: http://www.cftc.gov/LawRegulation/CFTCStaffLetters/No-ActionLetters/2013No-ActionLetters/index.htm.

[14] Proposed Rule at 26203.

[15] The Electric Associations have pointed out in prior rulemaking dockets that, in the markets for electricity and natural gas deliverable to specific locations in the United States, there are far more bilateral "end-user to end-user," or "non-SD/MSP to non-SD/MSP," transactions, particularly nonfinancial commodity transactions intended to be physically settled, including commodity trade options, than in dealer-dominated financial swap markets.

commercial end-users will be required to incur the ongoing technical and legal compliance costs associated with tracking commodity trade options until the entity is comfortable that it will or will not exceed the $1 billion threshold in any calendar year. Then, each January 1st, the regulatory tracking costs reset, and the recordkeeping burdens continue.

Yet, such costs and burdens are of questionable regulatory value. In several places, the Trade Option NOPR states generally that the Notice Requirement provides insight into the size of the market for unreported trade options, and identifies significant market participants. However, the lack of differentiation among "markets" by underlying commodity or industry raises questions about the value of any such insight into market size. Moreover, in terms of identifying significant market participants, the Commission notes that it received nine and sixteen $1 billion notices relative to calendar years 2013 and 2014, respectively, and that most were filed on behalf of large energy companies.[16] The Trade Option NOPR comments that "all of such entities are generally well-known in their respective industries."[17]

Consistent with the Commission's desire to reduce the regulatory burden on commercial end users, the Electric Associations respectfully request the Commission to reconsider the balance between the regulatory benefit provided by the Notice Requirement and the burden imposed by such data collection effort on the Electric Associations' members and other energy companies, utilities, manufacturers and Main Street businesses, and to eliminate the Notice Requirement. The Commission's oversight goals for the various markets for commodity trade options based on different commodities can be achieved by requesting access to the commodity trade option records maintained by non-SD/MSP counterparties in particular industries or at specific commodity delivery locations, as necessary.

III. The Commission should reconcile differences between the two sets of CFTC regulatory conditions governing: (i) whether a nonfinancial commodity forward contract is ***excluded*** from the defined term "swap," and (ii) whether a nonfinancial commodity trade option is alternatively ***exempted*** from the regulatory requirements that apply to "swaps."

For more than 30 years, the energy industry, manufacturers and other commercial enterprises relied on the Commission's pre-Dodd-Frank Act "forward contract exclusion" and "trade option exemption," as the bases upon which to enter into commercial merchandizing transactions without concern about the Commission's regulatory jurisdiction. Commodity trade options and forwards are referred to as "physical" or "cash market" contracts -- transactions that anticipate actual delivery of the "physical" commodity or the "cash commodity." It is physical delivery/receipt, also referred to as "physical settlement," that distinguishes forward contracts and commodity trade options from financially-settled derivatives contracts, including futures contracts ("contracts of sale for future delivery of a commodity"), financially-settled options, and swaps. The Electric Associations' members and other commercial enterprises handle and account for commodity trade options, like forward contracts, separately from derivatives that are intended to be financially settled.

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[16] *See* footnotes 38 and 75 of the Trade Option NOPR.

[17] *Id.* at 26207.

Commodity trade options are not used solely to shift price risk on a financial instrument (or contract), or on a portfolio of such instruments, or as investment instruments in the trading sense. Commodity trade options are used to secure flexible physical delivery (physical settlement) alternatives for quantities of a commodity required at a specific location during a particular time period in the future. A commercial enterprise like a utility may require a variable supply of the physical commodity delivered to a specific location as a result of its ongoing operational needs. Conversely, a commodity producer or processor may want to secure a varying or flexible ability to "put" quantities of its commodity product to a customer or a merchandizer at a particular delivery location, enabling the producer or processor to run a 24/7/365 operation without the additional cost of storage of quantities in "excess" of available orders, or due to the timing or availability of transport away from the production location. Where local transportation capacity is constrained, because a pipeline or transmission wire is required rather than transport vehicles, commodity trade options become a more important local delivery choice. In any event, the intent of the parties to the commodity trade option, and the transaction itself, is physical or "actual" delivery/receipt of the commodity (not financial settlement).

In the NFP Electric Associations' comment letter on the Products Release,[18] the NFP Electric Associations identified several ways in which the conditions set forth in the Commission's Products Release interpretations on forward contracts (including forward contracts with different types of embedded optionality) differ from the conditions in the Trade Option IFR.[19] For example, the NFP Electric Associations requested that the Commission confirm that the parties eligible to claim the CEA 1a(47)(B)(ii) exclusion and the Trade Option IFR exemption, the types of commodities, and the characteristics of the "intent" element identified in the various interpretations of the exclusion and the exemption, are identical:

Products Release: Interpretations regarding Forward Contracts	Seven-element interpretation for forward contracts with EVO – the term "optionality" is not defined, but is presumably the aspect of the forward contract that the Commission views as potentially changing the forward contract (excluded under CEA 1a(47)(B)(ii)) into a "swap"	Trade Option IFR
Both parties must be "commercial market participants," a definition	Element 6. Both must be "commercial entities."	The offeror of the option can be an ECP or a "producer, processor, ***or commercial user***

[18] *See* the NFP Electric Associations' comment letter at FN 9, *infra*.

[19] In the Commission's interpretations in the Products Release relevant to contracts that are not forward contracts (*e.g.* "customary commercial agreements" and "usage agreements), there are similar inconsistencies in terminology about entity type, intent, conditions and tests applicable to commercial transactions related to nonfinancial commodities.

drawn from the pre-Dodd-Frank Act Brent Interpretation, but that does not include commercial users of the commodity or by-products. See FN 235, questions whether one non-commercial market participant involved in a delivery chain could result in the transaction being a "swap." Both must regularly make or take delivery of the commodity in the ordinary course of regular commercial activity (as distinguished from investment activity).		***of***, or a merchant handling the commodity…or the products or byproducts thereof," whereas the offeree must be one of the commercial entities in the list. The commercial entity counterparty must "use the underlying commodity or by-product in connection with its business as such," which may limit the ability to hedge or mitigate commercial risks of ongoing operations using common fuel/output hedging techniques.
"Nonfinancial commodities" include intangible commodities where "physical settlement" may be via book entry or registry title transfer, and that are of limited quantity and can be "consumed." Examples given are renewable energy credits and emissions allowances.	"Nonfinancial commodities"	If exercised, the option must result in the sale of an "exempt" or "agricultural" commodity, under the Commission's pre-Dodd-Frank Act definitions. Some commenters have asked the Commission to confirm that renewable energy credits and emissions allowances qualify for Trade Option IFR.
The Commission will apply a "facts and circumstances" analysis to the "intent to deliver/receive" analysis. Focusing on the intent of the parties, any post-contract "bookout agreements" must be separately negotiated, new agreements, entered into subsequent to initial contract execution. Focusing on the intent of the transaction, it must be a	2. Predominant feature is "actual" delivery." 4. Seller of the commodity intends at the time it enters into the transaction, to deliver the commodity if the option/optionality is exercised. 5. Buyer of the commodity intends at the time it enters into the transaction, to take delivery if the	The commodity option must be intended to be physically settled, so that, if exercised, the option would result in the sale of an exempt or agricultural commodity for immediate or deferred shipment or delivery.

"commercial merchandizing transaction" the primary purpose of which is to transfer ownership of the commodity, and not to transfer solely its price risk. Commission's regulations should not apply to private commercial merchandizing transactions which create enforceable obligations to deliver, but in which delivery is deferred for reasons of commercial convenience or necessity.	option/optionality is exercised. 7. The EVO is primarily intended, at the time the parties enter into the transaction, to address physical factors or regulatory requirements that reasonably influence demand for or supply of the commodity. The focus of 7 is on intent of the party with the right to exercise the EVO and at the time of contract execution. Commercial parties may rely on counterparty representations provided there is no information that would cause a reasonable person to question the representation.	

As the two parallel rulemakings interpreting and implementing DFA Section 721 and CEA 1a(47) are evolving, the inconsistencies are being resolved. The Final Interpretation for Forward Contracts with Embedded Optionality (the "Final EVO Interpretation") resolved a number of concerns that the Electric Association's members had with the 7-factor test in the Products Release.[20] For example, the Final EVO Interpretation appropriately recognized that intent is determined at the time that the forward contract is entered into, not at the time the embedded option or optionality is exercised.[21] To provide additional clarity, the Electric Associations respectfully request the Commission to include this clarification when it finalizes the Proposed Rule Amendments as well, and confirm that the offeror of the commodity trade option can rely on a representation of the offeree provided there is not information that would cause a reasonable person to question the representation.

In the Final EVO Interpretation, the Commission also clarified that commercial parties could choose to either rely on an earlier characterization of an existing transaction as an excluded forward contract or an exempted commodity trade option, or recharacterize a transaction in light of the Final EVO Interpretation, for purposes of filing Forms TO.[22] This clarification was important for non-SD/MSP counterparties that had filed Forms TO for calendar years 2013 and 2014, or that were planning to file such Forms TO for 2014. In finalizing the Proposed Rule Amendments, the Commission should reiterate that guidance, or otherwise state a no-action position in respect of previously-filed Forms TO and recordkeeping. These clarifications in the

[20] Forward Contracts with Embedded Volumetric Optionality, 80 Fed. Reg. 28239 (May 18, 2015).

[21] *Id*. at 28242

[22] *Id.* at 28242.

Commission's Trade Option docket will provide additional certainty as to whether an excluded forward contract or an exempted commodity trade option must be considered a "swap," or treated as a "swap" for purposes of the Commission's regulations. This addition will also help ensure that there is consistency between the Commission's interpretations relative to CEA 1a(47) and the Trade Option exemption rules.[23]

IV. The Commission should further reduce recordkeeping requirements applicable to Non-SD/MSP counterparties that enter into commodity trade options.

The Trade Option NOPR reduces reporting requirements, but still requires non-SD/MSP counterparties to keep records of commodity trade options under the Commission's "swap" regulations by cross-reference to Part 45. In order to qualify for the relief provided under the Proposed Rule Amendment, §32.3(b)(1) requires the non-SD/MSP counterparty to "[c]omply with the swap data recordkeeping requirements of §45.2 of this chapter, as otherwise applicable to any swap transaction."[24] The Electric Associations respectfully request the Commission to:

A. *Narrow the recordkeeping requirements for commodity trade options.*

Pursuant to §45.2, non-SD/MSP counterparties are required to:

(i) keep full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty, including, without limitation, all records demonstrating that they are entitled, with respect to any swap, to elect the clearing requirement exception in CEA section 2(h)(7) (Rule 45.2(b));

(ii) retain all records required to be kept pursuant to this section with respect to each swap throughout the life of the swap and for a period of at least five years following the final termination of the swap (Rule 45.2(c));

(iii) retain the records required to be kept pursuant to this section in either electronic or paper form, so long as they are retrievable, and information in them is reportable, as required by this section (Rule 45.2(d)(2));

(iv) keep such records required by this section so they are retrievable by within five

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[23] Commercial end-users in the energy industry rely heavily on forward contracts with embedded volumetric optionality and commodity trade options. Many of these transactions that are intended to be physically settled do not involve swap dealers. Commercial end-users may or may not be familiar with the Commission's pre-Dodd-Frank Act precedent applicable to the futures contract markets. Inconsistent language used in interpreting the statutory exclusion under CEA 1a(47)(B)(ii), and the regulatory exemption addressing the same aspects of these physically-settled contracts -- entity type, commodity type, intent -- makes it difficult for commercial end-users to understand the new regulatory regime applicable to "swaps." This is especially true for "small entities," that may not have experience using exchange-traded derivatives to hedge the commercial risks arising from ongoing business operations. *See* comments in Section VII requesting a SBREFA analysis.

[24] Note that this language references requirements "applicable to any ***swap*** transaction," which again demonstrates that the Trade Option IFR, while purporting *not* to make the definitional determination as to whether all commodity options are swaps, was nonetheless drafted based on an untested presumption that all commodity options, including commodity trade options, are "swaps."

business days throughout the period during which it is required to be kept (Rule 45.2(e)(2)); and

(v) [allow] inspection [of such records] upon request by any representative of the Commission, the United States Department of Justice, or the Securities and Exchange Commission, or by any representative of a prudential regulator as authorized by the Commission. Copies of all such records shall be provided, at the expense of the entity or person required to keep the record, to any representative of the Commission upon request… Copies of records required to be kept by any non-SD/MSP counterparty subject to the jurisdiction of the Commission that is not a Commission registrant shall be provided in the form, whether electronic or paper, in which the records are kept (relevant parts of Rule 45.2(h)).

As explained above and acknowledged in the Trade Option NOPR, commercial end-users of various types currently keep records of commodity trade options and other commodity transactions that are intended to be physically settled in different systems, in different formats and for different retention periods than transactions referencing the same commodities, but that are intended to be financially settled. Such records may not be retrievable in the same manner or format, or as quickly, as financially settled transactions. The records are likely to be in the commercial operations departments, rather than in treasury or finance departments of the commercial entity.

To further reduce the regulatory burden on commercial end-users, the Electric Associations respectfully request that the Commission revise proposed Rule §32.3(b)(1) to provide that non-SD/MSP counterparties to a commodity trade option need ***only*** "(1) Retain records for any commodity trade option that identifies the basic transaction terms (such as a transaction confirmation, or any amendment to such basic transaction terms), and maintain such records in accordance with the recordkeeping schedule and reproduce such records for Commission inspection in the record retention format that such counterparty has developed in the ordinary course of records retention practices for cash commodity contracts (*e.g.*, contracts intended to be physically settled)."[25] Without this clarification of proposed Rule, Non-SD/MSP counterparties to commodity trade options may be subject to broader and more burdensome recordkeeping requirements more appropriately applied to financially-settled transactions and to swap dealers and major swap participants.

B. ***Address other inconsistencies in recordkeeping requirements for physically-settled transactions, including commodity trade options.***

Without the clarification requested above to proposed Rule 32.3(b)(1), Non-SD/MSP counterparties to commodity trade options may be indirectly subject to recordkeeping requirements in addition to the recordkeeping requirements set forth in §45.2. In some cases, as

[25] This proposed language mirrors the language of Commission Rule 20.6(c), which relates to the recordkeeping obligations of a non-SD/MSP entity that holds a "reportable position" for purposes of the Commission's large trader reporting rules. In the adopting release for such rules, the Commission explained the reasoning for allowing such entities that may not otherwise be regulated by the Commission to maintain records of cash market transactions in the format used in the ordinary course of business. *See* 76 Fed. Reg. 43851 at 43859.

highlighted in the examples below and in comments filed with the Commission in other dockets,[26] these various recordkeeping requirements are inconsistent or do not provide the clarity required by commercial end-users. Interpreting such Commission recordkeeping requirements as applicable to commodity trade options, which are intended to be physically settled and which non-SD/MSPs maintain with their "cash market" transaction records, highlights such inconsistencies. The Electric Associations respectfully request a comprehensive review of the Commission's recordkeeping rules, with a focus on continuing to clarify and limit the regulatory recordkeeping burdens on commercial end-users.[27]

Commission Rule §1.31 is an example of broader recordkeeping requirements than Section 45.2 for non-SD/MSP counterparties to commodity trade options, as it sets forth recordkeeping requirements that purport to apply to "all books and records required to be kept by the Act or by these regulations…"[28] However, some of the requirements in §1.31 appear to impose different, more stringent, requirements than those otherwise provided for in §45.2 with respect to non-SD/MSP counterparties. For instance, under §45.2, a non-SD/MSP is permitted to retain the required records "in either electronic or paper form, so long as they are retrievable, and information in them is reportable [which of course is no longer applicable to non-SD/MSP counterparties to commodity trade options]."[29] However, §1.31 requires records to be "kept in their original form (for paper records) or native file format (for electronic records)" for the required period.[30]

Further, §45.2 provides that a non-SD/MSP may provide records requested by the Commission in the form "whether electronic or paper, in which the records are kept."[31] However, §1.31(a)(2) seems to require each person that is required to keep records to "produce such records in a form specified by a representative of the Commission." Additionally, §45.2 does not identify any specific requirements for records that are stored electronically, other than they must be retrievable within 5 business days. However, in §1.31(b) there are extensive and burdensome requirements that apply to records stored offline in an electronic medium, which require immediate accessibility, certain minimum indexing and duplicate storage and indices at separate locations.

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[26] *See* comments in response to the Notice of Proposed Rulemaking on Rule 1.35(a), 79 Fed. Reg. 68140 (Nov. 14, 2014) RIN3038-AE23 at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60232&SearchText= and http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60229&SearchText=. *See* also comments in response to the Review of Swap Data Recordkeeping and Reporting Requirements, 79 Fed. Reg. 16689 (Mar. 26, 2014),RIN 3038-AE12, at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59871&SearchText=, and http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59862&SearchText=.

[27] *See* comments in response to the Notice of Proposed Rulemaking on Rule 1.35(a), 79 Fed. Reg. 68140 (Nov. 14, 2014) RIN3038-AE23 at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60232&SearchText=, at Section III.

[28] See §1.31(a)(1). Similar concerns about the interplay between Commission Rules 45.2, 1.31 and also 1.35(a), as applicable to non-SD/MSP counterparties to swaps, or companies that enter into futures contracts but that are otherwise not registered or required to register with the Commission, were made in comments on the Commission's proposal to revise Regulation 1.35(a). See comment letters linked at FN 26, *infra*.

[29] See §45.2(d)(2).

[30] See §1.31(a)(1).

[31] See §45.2(h).

As noted in the Trade Option NOPR, the Electric Associations understand that the amendments proposed in the Trade Option NOPR are "intended to reduce recordkeeping burdens for non-SD/MSP trade option counterparties."[32] Accordingly, we are seeking clarification of the specific recordkeeping requirements applicable to non-SD/MSP counterparties to commodity trade options, rather than a general reference to §45.2, and clarification that any inconsistencies or additional requirements set forth in §1.31 or elsewhere in the Commission's rules do ***not*** apply to non-SD/MSP counterparties with respect to commodity trade options.

Another example of an issue that would require additional clarity if the requested change to proposed Rule 32.3(b)(1) is not made, is the records retention period applicable to long-term commodity trade options with a series of daily, monthly or other periodic exercise opportunities, each resulting in physical delivery for a delivery period following that particular exercise. In the energy industry, it is common for a commercial entity to enter into a long-term commodity trade option (intended to be physically settled), with an overall transaction duration of 20 years or longer. Individual daily, monthly or other period are not transferrable separately. Rule 45.2(c), quoted above, would seem to require that records for such a transaction be kept throughout the term of the transaction and for a period of at least five years following the final termination of the transaction. However, due to ambiguities in the language, it is unclear how "life of the transaction plus five years" records retention period would apply to such a 20-year commodity trade option.

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If such a long-term commodity trade option with multiple exercise opportunities were treated as one ongoing transaction, the recordkeeping requirement could be interpreted to mandate keeping all accreting transaction records for up to 25 years after the commodity trade option was first executed.[33] Consistent with recordkeeping practices for cash commodity transactions (nonfinancial commodity transactions that are intended to be physically settled) and with the Commission's goal of reducing the regulatory burden on non-SD/MSP counterparties to commodity trade options, for recordkeeping purposes, a non-SP/MSP counterparty should be able to keep only the original commodity trade option transaction confirmation and not retain documentation in respect of each exercise, other than records that it keeps in the ordinary course of its physical commodity business. We believe this approach strikes an appropriate balance in preserving records that may be useful for market surveillance without imposing unnecessary and costly recordkeeping burdens on commercial end-users (non-SD/MSP counterparties) that enter into commodity trade options.

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[32] 88 FR 26200, at 26204.

[33] This standard does not, however, apply to a person subject to recordkeeping obligations with respect to certain nonfinancial commodity swaps or swaptions under CFTC Regulation 20.6(c). Instead, it is permitted to keep the records in accordance with its recordkeeping schedule and in its normal record retention format, in lieu of following the requirements of Regulation 1.31. Such a person, though, would also likely be subject to recordkeeping obligations relating to its nonfinancial commodity swaps and swaptions under Regulation 45.2, which in contrast imposes the "term plus five years" record retention period for data and memoranda pertinent to a swap transaction. This is an example of the potentially overlapping or inconsistent requirements that commercial end-users face under the Recordkeeping Rules.

These examples highlight the need for the Commission to continue to review its recordkeeping rules, and to engage in a comprehensive review of such recordkeeping rules, with a focus on continuing to limit the regulatory recordkeeping burdens on commercial end-users such as the Electric Associations' members, and particularly as such recordkeeping rules may apply to transactions that are intended to be physically settled, including commodity trade options.

V. Confirm that commodity trade options are excluded or exempted from the Commission's speculative position limits, concurrently with finalizing the proposed amendment to the trade option rules.

The Electric Associations support the Commission's proposal to delete regulation §32.3(c)(2) to reflect that Trade Options are not currently subject to position limits. The Electric Associations also respectfully request that the Commission go further, and clarify that commodity trade options are not subject to position limits. The Electric Associations strongly endorse Commissioner Giancarlo's proposal that the Commission address the request for a CEA 4a(a)(7) exemption from the Commission's speculative position limits rules for commodity trade options concurrently with finalizing the Proposed Rule Amendments. Such a concurrent exemption would represent another significant step to remove the uncertainty for commercial end-users in the energy industry as to whether and how commercial trade options can be measured, aggregated and categorized as if they were financially settled trading positions.

As the Electric Associations have indicated in comment letters filed with the Commission, and as was discussed at the Energy and Environmental Markets Committee meeting in February of 2015,[34] commodity trade options are entered into by commercial entities and, if exercised, result in the sale/purchase of a nonfinancial commodity for immediate or deferred shipment or delivery (physical settlement).[35] Commodity trade options are entered into in connection with the commercial entity's business as such, and should not be subject to position limits. Commodity trade options are not transactions that are generally used to manage financial risk relating to changes in prices, but instead are physically settled transactions that are used to manage supply and demand risks arising from the need for a particular nonfinancial commodity in a specific location at a specific time, sometimes in variable quantities. In other words, the primary purpose of commodity trade options is to ensure that the physical commodity itself will be available when and where it is needed. Including commodity trade options in a position in the same manner that you would include a financially-settled commodity option will distort position size by mixing transactions that primarily manage various commercial risks with those that manage commodity price risks. Moreover, including commodity trade options in position reports only to later exclude them as bona fide commercial risk hedges creates more unnecessary recordkeeping and reporting obligations for non-SD/MSP counterparties that enter into such transactions to hedge or mitigate commercial risks. Subjecting these physically-settled transactions to position limits could materially harm the efficient operation of physical

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[34] As discussed earlier, the Electric Associations and other commercial end-users would have made these comments when the initial Trade Option IFR was published, but at that time were not on notice that the Commission would, in the Products Release, determine that commodity trade options were "swaps."

[35] Proposed Rule at 75,711 ("the position limit requirements proposed herein still would be applicable to trade options qualifying under the exemption").

commodity markets and will increase costs for commercial end-users like our members, which will ultimately result in higher customer electric bills**.**

In particular, the Electric Associations' members would appreciate such relief in advance of the 2015-2016 winter season, when many Electric Association members enter into sizable energy commodity trade options in anticipation of winter supply and transportation constraints in locations across the country.

VI. The Commission should further define the term "swap," or reconsider its interpretation of the defined term "swap" in DFA Section 721 (CEA 1a(47)). Nonfinancial commodity trade options are intended to be physically settled, and should therefore be excluded from the defined term "swap."[36]

As was noted in Commissioner Bowen's concurring statement to the Trade Option NOPR, both forward contracts (with or without embedded options or optionalities) and commodity trade options play an important role in managing physical commodity risks attendant to commercial operations. However, Commissioner Bowen's statement continues by noting that the Trade Option NOPR is intended to provide relief to commercial entities entering into commodity trade options "to the extent they would otherwise be subject to regulation *by virtue of being a commodity option (emphasis added).*"[37] This statement does not accurately reflect the Electric Associations' concerns about the Final EVO Interpretation and the Trade Option NOPR, both interpreting DFA Section 721 and CEA 1a(47). Commercial entities seek relief from the Commission for commodity trade options (and forward contracts) -- to the extent they would otherwise be subject to regulation *by virtue of being a "swap.*"

In the Introduction to the Trade Option NOPR, the Commission makes the statement that the Electric Associations have questioned in the past: that "…section 721 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or "Dodd-Frank') [footnote omitted] amended the CEA to define the term "swap" to include commodity options."[38] In support of this statement, the Commission relies on an edited portion of new CEA 1a(47)(A)(i).[39] However, the edited portion does not include the introductory words of CEA 1a(47)(A), or the language of the exclusion in CEA 1a(47)(B)(ii). As a result, although the phrase is accurately excerpted from the statute, the words are taken out of context and do not

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[36] Elsewhere in its rulemakings, the Commission states the point somewhat differently, but to the same effect. In the recently-published Final EVO Interpretation, the Commission states that "…commodity options are swaps, even if physically settled…" See 80 Fed. Reg. 28240 (May 18, 2015). The Electric Associations again requested reconsideration of this Commission interpretation. See the comment letter at FN 10. The Commission has not yet addressed the request for reconsideration, and republished that portion of the Final EVO Interpretation. See the unchanged language at footnote 5. Instead of addressing the request, the Commission added language to footnote 5, pointing to this rulemaking as a further Commission effort to provide relief for commercial end-users. Such relief is, and continues to be, welcome, but still does not respond to the pending request for reconsideration of the Products Release TO Interpretation.

[37] *Id.* at 26209.

[38] *Id*. at 26201.

[39] *See* footnote 4 to the Trade Option NOPR.

accurately reflect what DFA Section 721 says or the meaning of the definition of "swap" in CEA 1a(47) read as a whole.

CEA 1a (47), added to the CEA by DFA Section 721, provides in relevant part:

"1a (47) SWAP—

(A) IN GENERAL— ***Except as provided in subparagraph (B), the term "swap" means*** any agreement, contract, or transaction—

(i) ***that is a put, call, cap, floor, collar, or similar option*** of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;

(B) EXCLUSIONS.—***The term "swap" does not include—…***

(ii) ***any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled****;"(emphasis added)*

The Commission's focus only on the edited portion of CEA 1a(47)(A)(i), and then the separate focus only on the first 13 words in CEA 1a(47)(B)(ii), has resulted in two incorrect and inter-related legal conclusions: first, that all commodity options (including commodity trade options) are "swaps" and, second, that Congress required the Commission to not only interpret CEA 1a(47)(B)(ii) in a manner consistent with the pre-Dodd-Frank Act "forward contract exclusion" from Commission jurisdiction, but that the Commission is required to interpret CEA 1a(47)(B)(ii) as coextensive with (and subject to all the conditions in) the pre-Dodd-Frank Act interpretations of the "forward contract exclusion."

In order to reach this second legal conclusion, the Commission seems to have interpreted the first 13 words of CEA 1a(47)(B)(ii) as so similar to the words of the pre-Dodd-Frank Act "forward contract exclusion," that the rest of the words in CEA 1a(47)(B)(ii) -- "so long as the transaction is intended to be physically settled" – are either redundant or unnecessary. The Electric Associations disagree, and instead view those words, taken in the context of CEA 1a(47) as a whole, as the basis for the exclusion of transactions from the defined term "swap."[40]

[40] Both the Product Team and the CTO Team, and many commentators as well, refer to CEA 1a(47)(B)(ii) as the "forward exclusion" from the defined term "swap." However, there is nothing in either the plain words of the statute or the legislative history that suggests that Congress meant CEA 1a(47) to require repeal of the Commission's exemption for commodity trade options or, for that matter, the repeal of the exemption for certain contracts involving energy products, 58 Fed. Reg. 21286 (April 20, 1993). Each of those interpretation decisions was made by the Commission in the Products Release, as part of the Products Release TO Interpretation. The pre-Dodd-Frank Act forward contract exclusion provided that "any sale of any cash commodity for deferred shipment or delivery" was excluded from the definition of "a contract of sale of a commodity for future delivery." In order to fulfill the Congressional intent that CEA 1a(47) be interpreted "consistent with" such pre-Dodd-Frank Act precedent, the Commission could have issued a simple statement that the Commission did not intend to regulate as "swaps" any sale or other agreement, contract or transaction (as distinguished from a "contract of sale") involving

In the Products Release, the Commission provides a limited explanation of why it focused only on the single phrase in each of CEA 1a(47)(A)(i) and CEA 1a(47)(B)(ii), or how it reached these two conclusions. The following passage in the Products Release also highlights the Commission's initial misunderstanding of the comments it received in both the Products Release and Trade Option IFR dockets. The relevant language from the Products Release reads as follows:

> "The CFTC ***reaffirms*** that commodity options are swaps under the statutory swap definition (*emphasis added*), and is not providing an additional interpretation regarding commodity options in this release. …Several commenters in response to the Proposing Release argued that commodity options should not be regulated as swaps. [Citing energy industry commenters.] In general, ***these commenters believed that commodity options should qualify for the forward exclusion from the swap definition***, emphasizing the similarities between commodity options and forward contracts on nonfinancial commodities (*emphasis added*). ***The CFTC is not providing an interpretation that commodity options qualify as forward contracts in nonfinancial commodities.*** Such an approach would be contrary to the plain language of the statutory swap definition, which explicitly provides that commodity options are swaps. [FN again citing the language excerpted from CEA 1a(47)(A)(i)]. This approach also would be a departure from the CFTC's and its staff's longstanding interpretation of the forward exclusion with respect to "future delivery," [FN 321, see below] which the CFTC has determined above to apply to the forward exclusion from the swap definition as well. [FN omitted]
>
> FN 321 reads: "*See* 1985 CFTC OGC Interpretation, supra, note 245. In this regards, an option cannot be a forward under the CFTC precedent, because under the terms of the contract, the optionee has the right, but not the obligation, to make or take delivery, while under a forward contract, both parties must have binding delivery obligations; one to make delivery and the other to take delivery."

This section of the Products Release embodies the gap between footnote 6 of the Trade Option IFR and the Product Release interpretation -- confusing what the Commission itself had

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a nonfinancial (or "cash") commodity, so long as the transaction was intended to be physically settled. The Electric Associations acknowledge that Congress may have patterned the wording in CEA 1a(47)(B)(ii) after the forward contract exclusion from the CFTC's futures jurisdiction. However, legislative history instructing the Commission to interpret section 721 "consistent with" the forward contract exclusion from its pre-Dodd-Frank futures jurisdiction does not require the Commission to concurrently assume that Congress intended the Commission to repeal the commodity trade option exemption and the energy exemption, and to expand the Commission's jurisdiction over physically settled contracts (commodity trade options) by interpreting them as "swaps" under CEA 1a(47).

and had not previously decided in its Dodd-Frank Act rulemakings.[41] It also embodies the Commission's the initial misunderstanding of what the commenters were (and are) asking it to determine in the Products Release. The commenters were not asking the Commission to provide an interpretation that commodity options are forwards, or vice versa. The commenters were, and are, asking the Commission to interpret the ***new*** statutory language in DFA Section 721 and CEA 1a(47), taken as a whole, to say that both forward contracts and commodity trade options are ***transactions that are intended to be physically settled***, and are therefore not "swaps." The commenters were, and are, asking the Commission to maintain the pre-Dodd-Frank Act market delineation between transactions that are physically-settled and those that are, or are intended to be by their terms, financially-settled.

The 1985 CFTC OGC Interpretation is also accurately cited in the Products Release, but for a principle that is not directly relevant to the statutory language being interpreted. The 1985 CFTC OGC Interpretation distinguished commodity options from forward contracts, at a time when forward contracts were excluded from the Commission's jurisdiction, and commodity options were subject to the Commission's plenary jurisdiction, under CEA Section 2(a)(1)(A) and 4c(b). Nothing in the Dodd-Frank Act changed that analysis or called the Commission's plenary jurisdiction over commodity options into question. The Commission still has plenary jurisdiction over commodity options under CEA Section 2(a)(1)(A) and 4c(b).

The question before the Commission is whether Congress intended in DFA Section 721 to ***also*** give the Commission jurisdiction over all commodity options, including commodity trade options, as "swaps." As part of this analysis, the Commission must decide, not presume, whether Congress intended it to repeal the long-standing exemption for commodity trade options, as transactions that are intended to be physically settled. Put yet another way, the Commission is asked to consider expressly whether Congress intended in DFA Section 721 for commodity trade options, where the transaction is intended to be physically settled, to be "swaps," or to be excluded from the defined term "swap."

The words of CEA 1a(47)(B)(ii) are not limited to nonfinancial commodity ***forward contracts*** (without embedded options or optionalities). The word "sale" does not, presumably, exclude the word "purchase" as the opposite perspective on a bilateral transaction. CEA 1a(47), when read as a whole, excludes from the defined term "swap" all nonfinancial commodity sales (and arguably purchases and options as well), so long as in each case the transaction is intended to be physically settled.[42] The legislative history for CEA 1(a)(47)(B)(ii) indicates that Congress intended that the Commission interpret the section in a manner "consistent with" the forward

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[41] As footnote 6 to the Trade Option IFR notes, the Commission had never finalized, or affirmed in the first instance, its interpretation of DFA Section 721, so in the Products Release it could not have been "reaffirming" such a determination or interpretation, that all commodity options (including commodity trade options) are "swaps." Nor was the Commission being asked to provide an "additional" interpretation that commodity trade options are forward contracts. The single interpretation being requested is that commodity trade options are not "swaps."

[42] The Commission seems to focus its analysis of CEA 1a(47)(B)(ii) only on the similarity that the first 13 words bear the words of the pre-Dodd-Frank Act forward contract exclusion – "sale" vs. "contract of sale," with sale viewed as an obligation, not an option, to deliver the physical commodity. But the remaining words of CEA 1a(47)(B)(ii) use the noun "transaction," not "sale," when the focus is on physical settlement, actual delivery and receipt, and not financial- or cash-settlement.

contract exclusion. Congress did not require the Commission to interpret the statutory exclusion from "swap" in CEA 1(a)(47)(B)(ii) as necessarily coextensive with, or limited in scope by, the pre-Dodd-Frank Act forward contract exclusion, as that exclusion is applied to futures contracts.

The speed and sequencing of the Commission's initial Dodd-Frank Act rulemaking process may have contributed to the Commission's effort to provide relief under the Trade Option IFR, rather than to analyze commodity trade options under DFA Section 721 and CEA 1a(47) taken as a whole. The CFTC's Dodd-Frank Act rulemakings began in the fall of 2010.[43] One Commission rulemaking team (the "Products Team") worked with the SEC to "further define" the new statutory term "swap" in DFA Section 721 and new CEA 1a(47). A second Commission rulemaking team (the "CTO Team"), working concurrently but more expeditiously than the joint agency Products Team, set about revising the Commission's ***pre-Dodd-Frank Act rules*** on commodity options, including commodity trade options.

At the time, the CTO Team's efforts were based on the incorrect assumption, based on the words of only CEA 1a(47)(A)(i) (see above) that DFA Section 721 and new CEA 1a(47) ***required*** the Commission to treat all commodity options, including commodity trade options that are intended to be physically settled, as "swaps." The CTO Team assumed the repeal of Rule 32.4. Then, starting from that as yet untested premise, the CTO Team attempted to remedy the negative effects of that untested premise by providing a new exemption for commodity trade options – an exemption from the regulations governing "swaps."[44]

Due to the parallel way in which the two dockets developed, the two Dodd-Frank Act rulemakings use different words, and articulate somewhat different tests and conditions. One analysis is drawn from the exclusion contained in the new statute itself, and focuses on

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[43] The NOPR Introduction mistakenly characterizes the Trade Option IFR as a step by the Commission to clarify its jurisdiction over commodity trade options. *Id.* at 26201. In fact, the Commission first proposed in early 2011 to substantially amend its existing rules applicable to commodity trade options on the ***assumption*** that all commodity options, including commodity trade options, would be regulated as "swaps" under the Dodd-Frank Act revisions to the CEA. Notice of Proposed Rulemaking "Trade Options and Agricultural Swaps," 76 Fed. Reg. 6095 (February 3, 2011). After public comments pointed out the serious, negative impacts to commercial end-users of regulating commodity ***trade*** options (intended to be physically settled) as "swaps," the Commission published the Trade Option IFR.

[44] In the April 2012 Trade Option IFR, the Commission (guided by the CTO Team) was careful ***not*** to pre-judge the fundamental definitional question to be addressed in the Products Release – whether all commodity options, including commodity trade options that are intended to be physically settled, are "swaps." See Footnote 6 to the Trade Option IFR, which reads, in relevant part: "***For purposes of this [Trade Option IFR], the commission uses the term "commodity options" to apply solely to commodity options not excluded from the swap definition set forth in CEA section 1a(47)(A). 7 U.S.C. 1a(47)(A)(emphasis added)***. As will be discussed in greater detail below, the Commission is undertaking a definitions rulemaking in conjunction with the Securities and Exchange Commission ("SEC") to further define, among other things, the term "swap." [Citation to the proposal underlying the Products Release deleted] ("Product Definitions NPRM"). ***The final rule and interpretations that result from the Product Definitions NPRM will address the determination of whether a commodity option or a transaction with optionality is subject to the swap definition in the first instance (emphasis added).*** If a commodity option or a transaction with optionality is excluded from the scope of the swap definition, as further defined by the Commission and the SEC, the final rule and/or interim final rule adopted herein are not applicable." In context, the regulatory language – in particular footnote 6 of the Trade Option IFR -- shows that the Trade Option IFR was never intended to provide a definitive interpretation that all commodity options are "swaps." It was, in fact, only intended to relate to commodity options that were ***not excluded*** from the definition of "swap" by the Products Release.

"nonfinancial commodities" and concepts surrounding whether the "transaction is intended to be physical settled." The other analysis begins with the Commission's pre-Dodd-Frank Act precedent and, presuming that all commodity options are "swaps," attempts to exempt commodity trade options using language from pre-Dodd-Frank Act precedent interpreting Part 32.

The resulting regulatory structure is like a bridge between two states ("not swap" and "swap"), with the traffic lanes going east to west that are built by teams speaking different languages and one using metric and the other using U.S. standard measurements. Each team is certain of the beginning and ending part of the span. But each team articulates the characteristics of the middle three columns differently, and delineates where the true middle of the span is located (the line between "non-swaps" and "swaps") differently.

The bridge span looks like this:

Forward Contracts (intended to be physically settled)	Forward Contracts with Embedded Options or "Optionalities" (but intended to be physically settled)	Standalone Commodity trade options (intended to be physically settled)	Commodity options that are intended to be financially settled	Swaps (financially-settled)

The Electric Associations respectfully request that the Commission further define, or interpret, DFA Section 721 and CEA 1a(47) taken as a whole to mean that the three columns to the left are excluded from the definition of "swap," and the two columns on the right are included in the defined term "swap."

As Commissioner Bowen points out in her concurring statement on the current Trade Option NOPR, this conclusion would be consistent with understandings in the pre-Dodd-Frank Act nonfinancial (or "physical") commodity marketplace. Commercial end-users in the manufacturing, agricultural and energy industries keep stating a consistent view: commodity trade options and nonfinancial commodity forward contracts are physical contracts, intended to be physically settled, part of the physical or cash commodity markets, and therefore not "swaps."[45] The Electric Associations respectfully point out that there is no reason to believe that

[45] Commissioner Bowen's concurring statements on both the recently-issued Final EVO Interpretation and to the Trade Option NOPR also reflect the confusion about what the statute says and what Congress intended when it directed that the Commission interpret DFA Section 721 and CEA 1a(47) "consistent with" the pre-Dodd-Frank Act forward contract exclusion. In the Final EVO Interpretation concurrence, Commissioner Bowen expresses concerns that the Commission "cannot make an option into a forward contract." In her concurring statement on the Trade Option NOPR, Commissioner Bowen proposes more and different tests in an attempt to clarify whether a transaction is a forward or an option. Both these statements are focused on the line between the second and third columns above, even though the new tests she proposes use different language and more undefined terms. The Electric Associations urge the Commission to focus on the line between the third and fourth columns above - differentiating transactions that are intended to be physically settled from those that are intended to be financially settled. Transactions that are intended to be physically settled may have "optionality" or "variability" (contract terms that

Congress intended to turn these marketplace understandings upside down, or that Congress intended the Commission to repeal the jurisdictional distinction in Rule 32.4 between commodity options that are intended to be financially settled and those that are intended to be physically settled (commodity trade options).[46]

Although, in the Trade Option NOPR, the Commission states that it has considered and responded to all relevant comments in prior rulemakings on this topic,[47] the Commission has not responded to the Electric Associations' request for reconsideration. Thus, the Electric Associations must again respectfully request that the Commission further define "swap" to exclude commodity trade options, reconsider the Product Release TO Interpretation, or alternatively, that the Commission explain the administrative procedure by which it will respond to the request.

CEA 1a(47) provides that a commodity option is a "swap," ***except*** if the nonfinancial commodity transaction for deferred shipment or delivery is intended to be physically settled. Whether the nonfinancial commodity transaction at issue is a forward contract without or with "embedded optionality" or a "standalone" commodity trade option, if the transaction is intended at inception to be physically settled, the transaction is excluded from the term "swap" for all regulatory purposes by CEA 1a(47)(B)(ii).

The Electric Associations believe that the Commission should start and finish any "further definition" or any interpretation of section 721 of the Dodd-Frank Act with the clear language of the statute being interpreted – CEA 1a(47). The statute does not require the Commission's conclusion that "all commodity options are swaps, even if intended to be physically settled." If the transaction is intended to be physically settled, if indeed by its terms it can ***only*** be physically settled and not financially settled, it is not a "swap."

This interpretation would resolve many of the concerns that commercial end-users, including the Electric Associations, have raised about the Commission's current rules and proposed rules for "swaps." These include questions as to whether a commodity trade option should be reported, or records retained under Part 45 or the remainder of the Commission's rules governing "swaps." This interpretation would resolve the question of whether such a physically settled transaction is subject to speculative position limits or whether a commodity trade options is subject to margin and regulatory capital rules for non-cleared swaps. The appropriate answer in each case is "no," because a commodity trade option is not a "swap."

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have the appearance, or some characteristics, of options). Or indeed such transactions may be standalone options (commodity trade options), that are intended to be physically settled. But they are not "swaps." Transactions that are intended to be financially settled, or that have the potential to be financially settled, including commodity options, are "swaps."

[46] In the Trade Option NOPR, the Commission cites approvingly the Commission's own long history of providing special treatment to "trade options," as physically delivered commodity options transacted by commercial users of the commodities underlying the option. *See* Trade Option at FN6.

[47] *See*, *e.g.*, Trade Option NOPR at 26205 which states that "[i]n issuing this proposal the Commission has reviewed all relevant comment letters and taken into account significant issues raised therein."

VII. The Commission must consider the impact of its interpretations of DFA Section 721 and CEA 1a(47) and its trade option exemption, as well as its decision to grant or deny the request for a CEA 4a(a)(7) exemption from speculative position limits rules, on "small entities,"[48] including the majority of NFP Electric Association members[49] which enter into commodity trade options in the ordinary course of their physical energy commodity business, and do not enter into speculative transactions or hold speculative positions

For the reasons explained in the prior NFP Electric Associations" comments, the Commission must consider the impact of its Dodd-Frank rulemakings, individually and in the aggregate, on "small entities," including more than 2500 NFP Electric Association members, as well as the impact on "small entities" of its decision(s) whether or not to grant or deny requests for reconsideration of the Commission's interpretation of DFA Section 721 (CEA 1a(47)) and request for CEA 4a(a)(7) exemption(s).

VIII. Conclusion

The Electric Associations appreciate the Commission's proposal to reduce the regulatory burdens of its swap regulations on commercial entities that enter into commodity trade options. However, unless and until the Commission reconsiders its interpretation that commodity trade options are "swaps," the Electric Associations encourage the Commission to continue to limit and/or eliminate the "swap" regulatory requirements applicable to commodity trade options, and in particular to focus on reducing regulatory burdens on commercial end-users (i.e. non-SD/MSPs) that are counterparties to commodity trade options.

Please contact the undersigned for more information or assistance.

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[48] The Regulatory Flexibility Act, as amended by SBREFA (collectively, "SBREFA"), incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA").

[49] Using the SBREFA criteria for small business size regulations, the vast majority of NRECA's 900 members meet the definition of "small entity" (13 C.F.R. §121.201, as modified effective January 22, 2014. See 78 Fed. Reg. 77343 (December 23, 2013)). Only three generation and transmission cooperatives would be expected not to meet the definition. Most of APPA's more than 2,000 members also meet the definition of "small entity." In the aggregate, the NFP Electric Entities constitute more than 2500 "small entities" that will be affected by the Commission's rulemakings, and that number does not consider "small entity" commercial end-users in other industries that will be swept into the Commission's rules governing "swaps," even if they use nonfinancial transactions that are intended to be physically settled, such as commodity trade options used "to hedge or mitigate commercial risks." At the same time, the NFP Electric Associations' small entity members are also "eligible contract participants" under CEA 1a(18). The Commission cannot continue to ignore its responsibilities under the RFA by repeatedly citing its own dated and unsupported assertion that "eligible contract participants" are not "small entities," without responding to the NFP Electric Associations' members. The case repeatedly cited by the Commission contains no analysis as to why the Commission made such an assertion, and provides no analysis applying the SBREFA criteria to various categories of entities in the definition of "eligible contract participant." In some rulemakings, the Commission acknowledges that some number of eligible contract participants may be "small entities," but dismisses the NFP Electric Associations' request to conduct the required SBREFA analysis by saying there are only a few such "small entities,." *See*, for example, the Trade Option IFR at 77 Fed. Reg. 25320 and 25335-25336 (April 27, 2012). See, as well, the Trade Option NOPR at 26206, where the Commission cites its inapplicable precedent and then disclaims an ability to estimate non-ECP small entities that may be affected. The NFP Electric Associations respectfully submit that their more than 2500 "small entity" members (most of which are ECPs) deserve the full regulatory review afforded them by SBREFA.

PROPOSED TRADE OPTION RULE AMENDMENTS

Respectfully submitted,

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Honorable Mark Wetjen, Commissioner
Honorable Sharon Bowen, Commissioner
Honorable Christopher Giancarlo, Commissioner
Jonathan Marcus, Esq., General Counsel
David N. Pepper, Special Counsel, Division of Market Oversight
Elise Pallais, Counsel, Office of the General Counsel

ATTACHMENT A - DESCRIPTION OF THE ELECTRIC ASSOCIATIONS

APPA is the national service organization representing the interests of government-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate electric customers. APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some government-owned electric utilities generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. Government-owned utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a government-owned electric utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 99 percent of the ultimate consumers in the shareholder-owned segment of the U.S. 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.

EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

LPPC is an organization representing 26 of the largest government-owned electric utilities in the nation. LPPC members own and operate over 86,000 megawatts of generation capacity and nearly 35,000 circuit miles of high voltage transmission lines, representing nearly 90% of the transmission investment owned by non-Federal government-owned electric utilities in the United States.

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to more than forty-two million people in forty-seven states or twelve percent of electric customers. Kilowatt-hour sales by rural electric cooperatives account for approximately eleven percent of all electric energy sold in the United States. Because an electric cooperative's electric service customers are also members of the cooperative, the cooperative operates on a not-for-profit basis and all the costs of the cooperative are directly borne by its consumer-members.