Electric Power Supply Association
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August 18, 2011

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COMMENT

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

Re: Adaptation of Regulations to Incorporate Swaps (RIN No. 3038-AD53)

Dear Mr. Stawick:

The Electric Power Supply Association ("EPSA")[1] submits these comments to the Commodity Futures Trading Commission (the "Commission") on the Notice of Proposed Rulemaking ("NOPR") on Adaptation of Regulations to Incorporate Swaps (76 Fed. Reg. 33,066). EPSA files this letter in support of the comment letters of the Working Group of Commercial Energy Firms (the "Working Group") and the Electric Utility Trade Associations submitted on August 8, 2011 in this proceeding.

EPSA agrees with many aspects of the filed comments, which note that:

- It is important that the Commission make conforming amendments to its existing regulations, as well as among its many proposed rules, in order to harmonize all the changes stemming from the Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[2]

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[1] EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 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. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the view of any particular member with respect to any specific issue.

[2] Comments of Working Group of Commercial Energy Firms, at 1 (Aug. 8, 2011) ("Working Group Comments").

- Notwithstanding the need to conform the rules, the adaptation NOPR is premature insofar as it is underway before the Commission has provided a complete view of its final rules implementing the Dodd-Frank Act. The premature nature of this effort is particularly apparent in light of the fact that the Commission is still considering even the basic entity and product definitions.[3]

- Where the adaptation NOPR seeks to make substantive changes to the Commission's existing rules or rules pending in other Dodd-Frank Act rulemakings, the appropriate course of action is to initiate a separate rulemaking to address such changes so all interested parties have reasonable notice.[4]

- Participants in DCMs and SEFs, that are not otherwise so required, should not be required to engage in overly burdensome and costly recording, record retention and reporting practices that do not show a net benefit in protecting against systemic risk.

- The Commission should undertake a full cost-benefit analysis on the overall impacts of this NOPR including, but not limited to, the costs commercial end-users would incur to comply with the record retention proposal.[5]

In particular, EPSA would like to highlight concerns that commercial end-users, including generators and other power suppliers, could be subject to substantial costs to institute electronic communications recording and retention mandates if the proposed amendment to regulation 1.35 is approved. As stated in the comments filed by the Working Group, "In drafting the *Proposed Rule* as it has, the Commission is casting an extremely broad net, impacting the non-derivative portions of a vast array of physical market participants in exempt and agricultural commodities that have obtained 'memberships' in DCMs or will obtain 'memberships' in SEFs simply to get access to trading systems (or sometimes to get access at a reduced cost). These entities, which are neither futures commission merchants ("FCMs") nor swap dealers, are in fact 'end-users' and should not be subject to the same burdens as those entities that interact with customers. The Working Group submits that the requirements of regulation 1.35 have never been intended to place recordkeeping burdens on end-users."[6]

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[3] Indeed, the comment period for the product definitions just closed July 22, 2011.

[4] Working Group Comments at n.6.

[5] Working Group Comments at 4-6.

[6] Working Group Comments at 2.

For example, the proposed regulation 1.35 language which would require the retention of all electronic communications "concerning" information that leads to the execution of a transaction in a cash commodity or commodity interest[7] is extraordinary broad and all encompassing. The broad scope of the proposed rule coupled with the broad scope of its requirements appear to place burdens on end-users well beyond those that could have any relation to the purposes of the Dodd-Frank Act or those imposed by any other regulator.

Congress has repeatedly and clearly stated its intent to ensure that commercial end-users are protected from incurring unnecessary and overly-burdensome costs in reforming financial markets, including as a result of the rules the Commission proposes. EPSA has participated in numerous rulemakings at the Commission to urge that this clear direction be followed and we do so again here.[8]

As part of this adaptation effort, the Commission must look at the full costs and benefits of any proposal. We support the view of the Working Group that, "The Commission should further evaluate the actual costs, availability of technology, and the ability of market participants to deploy the technology required to comply with the requirements of regulation 1.35 before requiring compliance with such requirements. For example, it does not appear that the Commission has taken into consideration the number and types of affected parties and the costs associated with applying the record creation and recordkeeping burdens of regulation 1.35 across such a large number of end-users in the exempt and agricultural commodities."[9] Congress did not intend that end-users would have to assume new and very costly obligations to create records to support their swap transactions, including recording calls and other communications and then attempting to link those communications to specific transactions. The cost of implementing the technology and staff to comply with such a record creation

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[7] NOPR at 33,091.

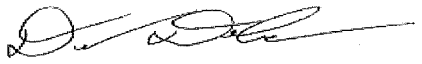
[8] *See, e.g.*, Comments on Definitions of Swap Dealer and Major Swap Participant (RIN 3038-AD06) (Feb. 22, 2011) ("Joint Associations Comments"); Comments on the Proposed Rules on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (RIN 3038-AC97) and Capital Requirements for Swap Dealers and Major Swap Participants (RIN 3038-AD54) (July 11, 2011) ("Joint Associations Comments"); Comments on Joint Proposed Rules and Proposed 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 (July 22, 2011) ("Electric Trade Associations Comments").

[9] Working Group Comments at 6. The Commission's cost-benefit analysis does not accurately consider the number or nature of entities impacted or the resource-intensive investment associated with developing, implementing and maintaining the compliance infrastructure, particularly for the information technologies that will be needed to comply but do not yet exist.

requirement could discourage end-users from using swaps to manage the risks associated with their core business or could raise energy prices – both completely unnecessary and undesirable results in order to improve the stability of the financial system.[10]

Beyond the overbroad nature of the proposed revisions to regulation 1.35 is the fact that the time is not yet ripe for consideration of the issues raised by the NOPR. Only a handful of final rules having been issued and Commission action on the most fundamental definitions of what is a swap, who are swap dealers and major swap participants and what are swap execution facilities and designated contract markets is still outstanding. As the Electric Utility Trade Associations correctly note, "Adaptation of the Commission's existing rules is an exercise for later, depending on whether and how the new comprehensive and integrated regulatory regime governing "swaps" is, ***or is not***, similar to the existing futures market regulatory structure. The Adaptation NOPR is premature and should be withdrawn."[11] EPSA agrees.

In conclusion, EPSA continues to support the transparency and oversight of the derivatives markets that the Dodd-Frank Act envisions. However, such regulation must be balanced to ensure the cost-effective access to swaps for those commercial entities that rely on the markets to support their primary commercial activities. EPSA appreciates the opportunity to provide these comments.



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[10] The Commission also should consider the large number of entities that might be impacted by this rule. For instance, in the electricity industry, PJM alone has 721 members, as indicated on its website on August 12, 2011. The Midwest Independent System Operator has 133 members, many of whom do not overlap with the PJM membership. Other Regional Transmission Organizations have their own unique memberships with only limited overlaps. A large number of these entities do not transact in swaps and yet, depending on the final regulations developed both in this rulemaking and the product definitions NOPR, could be subject to costly compliance requirements.

[11] Comments of Electric Utility Trade Associations, at 3 (Aug. 8, 2011).