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Power by Association℠

September 30, 2011

Electronically Filed

David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

RE: Comments of Edison Electric Institute, 17 CFR Parts 1, 23 and 39, Customer Clearing Documentation and Timing of Acceptance for Clearing 76 Fed Reg. 45730 (August 1, 2011) RIN No. 3038-AD51

Dear Mr. Stawick:

The Edison Electric Institute ("EEI") respectfully submits these comments in response to the Commodity Futures Trading Commission's ("Commission" or "CFTC") Notice of Proposed Rulemaking on Customer Clearing Documentation and Timing of Acceptance for Clearing ("NOPR") published August 1, 2011 in the Federal Register.[1] In the NOPR, the Commission proposes rules addressing (i) the documentation between a customer and a futures commission merchant ("FCM") that clears on behalf of the customer; and (ii) the timing of acceptance or rejection of trades for clearing by Derivative Clearing Organizations ("DCO") and clearing members.

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. 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's members are not financial entities. Rather, the typical EEI member is a medium-sized electric utility with

[1] A corrected version was published August 5, 2011 in the Federal Register, 76 Fed. Reg. 47529.

relatively low leverage and a conservative capital structure. EEI members are largely end users,[2] as contemplated by the Dodd-Frank Act, and they engage in swaps to hedge commercial risk.

Within the context of their corporate risk management strategies, EEI members use both uncleared and cleared swaps. Many EEI members choose to clear some swaps through a DCO, and for a portion of these cleared swaps, the executing counterparty is a swap dealer ("SD") From the time when a swap is executed to the time when it is accepted for clearing, the end user and SD assume the risk that the swap will be rejected for clearing by the end user's FCM. End users and SDs may be able to use a kind of trilateral (i.e., three-party) agreement to mitigate this risk.

EEI understands that the Futures Industry Association ("FIA") and the International Swaps and Derivatives Association ("ISDA") have recently completed work on a voluntary agreement called the FIA-ISDA Cleared Derivatives Execution Agreement that includes an optional trilateral execution annex. We further understand that this optional annex is intended to mitigate the risk to two counterparties (e.g., an SD and an end-user counterparty) that their bilateral swap transactions will be rejected for clearing by a third party (i.e., an FCM). The optional annex allows the three parties to agree in advance on a credit limit within which the FCM would accept for clearing transactions between the SD and end user. However, the proposed rule would prohibit the use of this kind of voluntary arrangement because of concerns that it may lead to anti-competitive effects.

EEI is concerned that, until real-time clearing can be implemented across the clearable swaps markets, prohibiting trilateral credit agreements such as the trilateral execution annex discussed above may in fact reduce end-users' open access to cleared swaps. Specifically, we are concerned that if an SD cannot mitigate the risk that its bilateral transactions with an end user will be accepted for clearing, then the SD may choose to execute fewer (i.e., a reduced notional level of) cleared swap transactions with the end user because of the risk that a transaction will be rejected by the end user's FCM.

EEI agrees with Commissioner O'Malia that the proposed rule may be unnecessary and would benefit from a more robust public discussion.[3] As such, **EEI recommends that the Commission extend its consideration of the rule and convene a public roundtable in order to gain a better understanding of the potential costs and benefits of a rulemaking of this nature.** Given the many proposed rules currently before the Commission, we believe that

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[2] CEA § 2(h)(7). Although the term "end user" is not defined in the CEA, the "end user clearing exception" is available to non-financial entities that use swaps to hedge or mitigate commercial risk, and that notify the Commission as to how they generally meet their financial obligations associated with entering into non-cleared swaps. Id.

[3] "The Importance of Being Accountable," Opening Statement by Commissioner Scott D. O'Malia, CFTC Open Meeting, July 19, 2011. *See:* http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071911.

further consideration of this rule should be postponed until after the rules required by the Dodd-Frank Wall Street Reform and Consumer Protection Act[4] ("Dodd-Frank Act") have been finalized.

Respectfully submitted,

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[4] Pub. L. No. 111-203 (2010).