November 1, 2019

Via Electronic Submission

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

RE: Certain Swap Data Repository and Data Reporting Requirements
RIN 3038-AE32

Dear Mr. Kirkpatrick:

I. INTRODUCTION

The American Public Power Association ("APPA"), Edison Electric Institute ("EEI") and National Rural Electric Cooperative Association ("NRECA") (collectively "the Joint Associations") support the Commodity Futures Trading Commission's ("CFTC" or "Commission") goal of improving the accuracy of data reported to and maintained by the swap data repositories ("SDRs") and appreciate the opportunity to comment on the notice of proposed rulemaking ("NOPR") proposing amendments to parts 23, 43, 45 and 49 of the Commission's regulations.[1]

APPA is the national service organization representing the interests of government-owned electric utilities in the United States. More than 2000 government-owned electric systems provide over 15 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.

[1] *Certain Swap Data Repository and Data Reporting Requirements*, 84 Fed. Reg. 21044, RIN 3038-AE32 (May 13, 2019) ("NOPR").

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. EEI members are regulated at both the state and federal level and have an obligation to serve customers at just and reasonable rates.

NRECA is the national service organization for America's electric cooperatives. NRECA represents the interests of the nation's more than 900 rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. America's Electric Cooperatives serve 56 percent of the nation's landmass, 88 percent of all counties, and 12 percent of the nation's electric customers, while accounting for approximately 13 percent of all electric energy sold in the United States. NRECA's member cooperatives include 62 generation and transmission (G&T) cooperatives and 831 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. The G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives, those cooperatives that provide power directly to the end-of-the-line consumer-owners. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. NRECA members account for about five percent of national generation and, on net, generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

The Joint Associations have been active participants in the Commission's numerous rulemakings implementing the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),[2] including the rulemakings on swap data reporting, and have supported the goal of affording the regulators and market participants greater transparency into the swap markets. As discussed herein, as the Commission moves forward with rule amendments to enhance swap market transparency, the Commission should not unduly burden commercial end-users.

All of the Joint Associations' members are non-financial entities, or "commercial end-users" – referred to in the NOPR as "non-SD/MSP/DCO counterparties." That is, Joint Association members are swap counterparties that are neither CFTC-registered swap dealers ("SDs") nor CFTC-registered major swap participants ("MSPs"), nor other types of entities registered with the Commission, such as derivatives clearing organizations ("DCOs") that may have regulatory obligations to report swap data to SDRs. The Joint Associations' members are not financial institutions, and their core business is not participation in financial markets transactions. Joint Association members are electric utility companies whose principal business is to deliver reliable, safe, affordable energy to American homes and businesses. The Joint Associations' members typically enter into swaps to hedge or mitigate commercial risks arising from ongoing electric business operations, and as such are subject to certain swap data reporting obligations under the Commission's rules and regulations.

[2] Pub. L. No. 111203, 124 Stat. 1376 (2010).

Part 45 of the Commission's swap data reporting rules identifies five "asset classes" of swaps, and specifies the data elements necessary to report a swap for each of those asset classes in the Appendices to Part 45. Four of the five swap asset classes are derived by reference to underlying financial commodities – rates, currencies, credit and equities. The fifth asset class of swaps, deemed "Other" in the Commission's rules, is derived by reference to categories of nonfinancial commodities, sometimes referred to as "physical" commodities, including agricultural commodities, metals and energy commodities ("NFC Swaps").

NFC Swaps are less standardized than financial commodity swaps, and there is a large percentage of NFC Swaps where neither party is a swap dealer and, consequently, one of the two commercial end-user counterparties must agree to act as the reporting counterparty as one term of the swap.[3] When the commodity underlying a swap is "nonfinancial," as that term is explained in the Commission's post-Dodd-Frank Act swap rules and interpretations,[4] there are significant distinctions in the way the markets for the different underlying nonfinancial commodities function. For example, agricultural, energy metals and environmental commodities differ in terms of quantification measures, quality distinctions, delivery locations, and transportation, transmission and/or storage constraints and limitations. A much larger percentage of NFC Swaps are customized by negotiation as commercial risk hedging contracts, rather than fungible financial trading instruments, and are not cleared. Two commercial entities (non-SD/MSP/DCO counterparties) shift/allocate commercial risks arising from their respective commodity-dependent business operations and assets between them, with customized terms that are specific to the two counterparties' credit risk, the underlying commodity market upon which the NFC Swap is derived, and the geographic location of the parties' respective assets. All of these distinctions can exponentially increase the number of the data elements relevant and necessary to accurately and completely define a transaction in any category of NFC Swaps.[5]

In some cases when entering into an NFC Swap,[6] the Joint Associations' member acts as the reporting counterparty — typically for an NFC Swap where the underlying commodity is an

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[3] See Rule 45.8(d)(2). The Commission and commentators including the Joint Associations have noted throughout the post-Dodd-Frank Act rulemakings on swaps that a higher percentage of NFC Swaps are uncleared, off-facility, and "end-user-to-end-user swaps." See the adopting release for Part 43, at 77 Fed. Reg. 1182, at 1210, 1220 and 1221 (January 9, 2012), for example, where the Commission recognizes that "the 'other commodity' asset class will tend to have significantly more non-SD/MSP counterparties than the credit or equity asset classes," and that "end-users may enter into bespoke or customized swaps more often than non-end-users."

[4] See the CFTC interpretations regarding "nonfinancial" commodities, found in Section II B of the "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 (the "Products Release"), at 48232-48235.

[5] In the Division of Market Oversight's "Roadmap" rulemaking in 2017, Commission staff established a goal of streamlining the swap data reporting rules to "focus on key data fields," to "reduce the number of fields currently reported," and to "focus on the minimum number of fields that allow the CFTC to perform its oversight functions, rather than capturing every data point on a swap." See page 8 of the Roadmap, available at CFTC Letter 17-33, dated July 10, 2017 (the "DMO Roadmap Review"). The Joint Associations' comment letters in the DMO Roadmap Review docket, available at links provided in footnote 16 below, strongly supported this approach.

[6] Joint Associations note that there are no NFC Swaps currently transacted on swap execution facilities ("SEFs"), and the CFTC has not published a clearing mandate for any category or type of NFC Swap. In addition, most NFC

energy or energy-related commodity, and the NFC Swap is entered into in connection with the Joint Association member's ongoing energy business operations.[7] In many other cases, the Joint Associations' member is the non-reporting counterparty, e.g., in cases where the other counterparty to an NFC Swap is a registered swap dealer, a financial entity, a large energy company entering into the NFC Swap as part of swap dealing activity beneath the swap dealer de minimis threshold, or an energy company (typically the larger of the two counterparties) that agrees as one term of the particular NFC Swap to take the role of reporting counterparty.[8]

The Joint Associations' members have spent significant time and money understanding the Commission's rules and regulations regarding swap data reporting as applicable to NFC Swaps, as well as installing financial markets reporting systems and hiring and training personnel necessary to report dozens of data elements per NFC Swap within tight timeframes to the SDRs. Any amendments to the Commission's rules, or new or changed interpretations of the rules, going forward will necessitate additional system changes and personnel training which will impose significant additional capital and ongoing operating costs on the Joint Associations' members. The Joint Associations agree that the swap transaction data reporting rules should be amended, encourage the Commission to conduct a robust analysis of the benefits and costs of any amendments, and appreciate the Commission's willingness to continue to solicit comments in an open and transparent regulatory process.

II. COMMENTS

A. The Commission Should Streamline and Harmonize the Data Elements that Are Reported to SDRs Before Imposing Additional Reporting Requirements on Commercial End-Users.

The Commission indicates that the NOPR is the first of three rulemakings it intends to propose to improve the quality and completeness of the swap data reported to the Commission, to streamline data reporting and clarify the obligations of market participants. In the NOPR, the Commission proposes amendments to parts 23, 43, 45 and 49 of its rules and regulations with the goal of providing enhanced and streamlined oversight over swap data repositories ("SDR") and enhancing the accuracy of swap data reporting generally. The Joint Associations support the broad goals articulated in the Commodity Exchange Act ("CEA"), as amended by the Dodd-Frank Act, of swap market transparency and reducing systemic risk. However, as it moves forward with amendments to its initial set of rules for swap data reporting, the Commission must carefully weigh the cost of such amendments to market participants (particularly commercial

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Swaps that the Joint Association's members enter into are highly customized and generally not standardized enough to clear.

[7] In situations where the Joint Associations' member enters into a financial commodity swap, such as an interest rate swap or currency swap, the counterparty (which is typically a financial institution, whether or not a CFTC-registered swap dealer) acts as the reporting counterparty.

[8] The Joint Associations' smaller members are the most likely to have made the decision not to enter into any swaps if they must assume the role of reporting counterparty, because the burden of establishing and maintaining the systems required for financial markets reporting would be cost-prohibitive.

end-users) against the regulatory benefits it expects the rule amendments to provide in terms of improved swap data accuracy.[9]

Commissioner Stump indicates in her Statement of Concurrence, "[t]he proposed rules are often amorphous, lacking in specificity as to the actual processes and procedures to be imposed, with RCPs (reporting counterparties) left to comment without really knowing what much of this would actually require of them in the future."[10] Joint Associations agree with these concerns and reserve the right to supplement and amend these comments, and comment on the costs and benefits of the Commission's proposed amendments to the swap reporting rules, once all of the amendments to the swap transaction reporting rules have been proposed.[11]

The swap data reporting rules were first published in January of 2012[12], and became effective for NFC Swap transactions between non-SD/MSP/DCO counterparties in August of 2013. Since January of 2014, the Commission and its Staff have acknowledged that much of the swap data reported to SDRs is virtually unintelligible by the time it reaches the Commission.[13]

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[9] The Joint Associations have consistently made this point since 2014 in several CFTC dockets regarding the swap data reporting rules. *See, e.g.,* comments of the Edison Electric Institute, Request for Comment Review of Swap Data and Recordkeeping Requirements (79 Fed. Reg. 16689, RIN 3038-AE12) (May 27, 2014) (the "2014 Staff Review"), available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59862&SearchText=, at 1-4, and the comments of the NFP Electric Associations in the same docket at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59871&SearchText=, at 5-6, (the "2014 Swap Data Reporting Comment Letters"). In the rulemakings implementing the CFTC's new Dodd-Frank Act jurisdiction over the swaps markets, APPA and NRECA have sometimes filed comments in conjunction with EEI and other energy trade associations, and have sometimes filed comments separately as the not-for-profit or "NFP Electric Associations" to distinguish their members as not-for-profit electric utilities, that are owned (directly or through governmental entities) and governed by the electric customers they serve.

[10] Statement of Concurrence of Commissioner Dawn D. Stump, April 25, 2019, at Section 2.

[11] Once all three of the anticipated rule amendments are proposed, commercial end-users will still not be informed as to the full extent of the costs they will incur as a result of the rule amendments. The NOPR proposes to allow each SDR to amend its own swap data reporting policies and procedures. A commercial end-user will have additional costs to modify and conform its systems, and train its personnel, once those SDR policy and procedures amendments are effective. Moreover, the commercial end-user may need to incur such costs for each SDR to which swap data may be (or may have been) reported for a swap for which it is or may be a counterparty.

[12] The adopting releases for the Part 43 and Part 45 rules acknowledged in January 2012 the need to harmonize and align the data elements required for reporting swaps. See 77 Fed. Reg. 1182 at 1226 and 1237 (January 9, 2012) and 77 Fed. Reg. 2136 at 2148-2150 (January 13, 2012).

[13] In January 2014, then Acting Chairman Mark Wetjen acknowledged that the Commission could not decipher the swap data being collected by the SDRs. See the CFTC Press Release available at: http://www.cftc.gov/PressRoom/PressReleases/pr6837-14.

This is particularly true for the NFC Swap asset class.[14] Since 2014[15], the Commission has solicited recommendations for improvements to its swap data reporting rules in a number of dockets and at a number of public roundtables and other Commission meetings. Most recently, the Joint Associations submitted comments in response to the DMO Roadmap Review of swap reporting rules[16], and again in September of 2017 in response to the Commission's Project KISS docket (the "Prior Comments").[17]

The SDRs that accept swap data for NFC Swaps do not have equivalent standards, taxonomy or technical specifications for data fields for reporting counterparties to populate for NFC Swaps. As the Joint Associations and others have commented before,[18] the SDRs are in the best position to help the Commission begin the process of improving data quality. However, the Commission and the SDRs must work together on this harmonization effort. If each SDR

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[14] See the 2014 Swap Data Reporting Comment Letters cited at footnote 9 above, as well as the comment letters filed supplemental to the CFTC's April 3, 2014 Public Roundtable, e.g., the NFP Electric Association comment letter available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59820&SearchText=.

In June of 2017, a report of the Commission's Office of Inspector General, (the "CFTC OIG Report," dated June 5, 2017) reported that the data available to the Commission on uncleared swaps in the "Other" asset class (NFC Swaps) is "essentially unusable." See the CFTC OIG Report at page 28, footnote 150 et seq. Although there are general statements about the regulatory benefit of "transparency" in the NOPR and other CFTC proposals to amend the swap data reporting rules, there seems to have been no analysis as to whether such transparency is of any benefit if the rules collect, and provide the Commission and the markets with, unusable data with respect to NFC Swaps.

Swap data quality issues for NFC Swaps where the underlying commodity is an energy commodity were exacerbated due to the evolving CFTC rulemakings and interpretations as to which transactions for delivery of physical energy commodities are, and are not, "swaps," and therefore reportable, as well as the evolving CFTC rules and interpretations regarding commodity trade options. These rulemakings began in mid-2012 with the publication of the initial Commodity Trade Option Rule 32.3 (that Rule was amended in mid-2016) and the Products Release interpretations, which contained interpretations regarding transactions with "embedded volumetric optionality" and physical energy commodity transactions that were modified and clarified in a series of rulemakings, interpretations and guidance documents through mid-2016. See the comments made by energy industry market participants at the CFTC's Public Roundtable on April 3, 2014, and comments supplemental thereto, including the NFP Electric Associations' comment letter available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59822&SearchText=. A non-SD/MSP/DCO reporting counterparty that reported an energy commodity transaction as an NFC Swap struggled in good faith to accurately and completely report each NFC Swap, but there was considerable disagreement as to what was required by the Commission's rules, and many requests for clarification and no-action relief during that period that remain unanswered. See for example, the requests for no-action relief from the swap data reporting rules in the NFP Electric Association's 2014 Swap Reporting Comment Letter, at the link provided in footnote 9 above, at p. 6.

[15] In May 2014, the Commission staff requested public comment on 69 questions, many with multiple subparts on how to align the swap data reporting rules. See the "2014 Staff Review," cited at footnote 9 above, and the 2014 Swap Data Reporting Comment Letters at the links provided therein.

[16] See Joint Association comments at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61274&SearchText=

[17] See Joint Association comments at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61311&SearchText=wasson and https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61332&SearchText=edison%20electric%20institute

[18] *See e.g*. the NFP Electric Associations' comment letter on the DMO Roadmap Review, cited in fn 16, at p 7

streamlines its policies and procedures for receiving swap data reports as anticipated by the NOPR, but amends its policies and procedures in a different way than another SDR that gathers and reports swap data to the Commission with respect to the same asset class, category or type of swaps, the Commission will likely still receive data that it cannot use.[19]

Without first reconciling the discrepancies between the SDRs, the new verification and errors and omissions reporting requirements proposed in the NOPR will almost certainly create more, not fewer, data quality issues, confusion and discrepancies in reported swap data for NFC Swaps. In Prior Comments, the Joint Associations pointed out ambiguities in the reporting fields required for reporting NFC Swaps, and asked the Commission to sequence its proposed amendments to swap transaction data reporting rules: by first working with the SDRs to harmonize reporting fields for data elements required for each asset class of swaps (the Appendices to Part 45, as well as data reporting requirements that appear elsewhere in the Commission's rules[20]). The Joint Associations suggest that one of the ways in which the Commission can meet its objective to ensure that its rule amendments are less costly and burdensome, while still providing the data required for regulatory purposes, is to focus first on

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[19] The Joint Associations appreciate that the NOPR indicates the Commission "does expect that the SDRs would be reasonable in the requirements of their policies and would utilize methods that are as low-cost and efficient as possible, and that "[t]he Commission particularly encourages SDRs to be accommodating for non-SD/MSP/DCO reporting counterparties." Nonetheless, the NOPR anticipates that each SDR's policies and procedures may develop differently. The most likely participants in any SDR's policy development process are SDs and MSPs and large commercial entities who use the particular SDR's services to report standardized swaps regularly, rather than a broad cross-section of market participants, including smaller commercial end-users that enter into highly customized bilateral swaps. It may be unrealistic for the Commission to expect each SDR to be attuned to "accommodating" smaller commercial end-user participants who are least likely to report swaps, and therefore less likely to be regular users of its services. See NOPR at 21054. Moreover, the Commission, not the SDRs, has the regulatory obligation to minimize the burdens of its swap rulemakings on commercial end-users, the market participants that Congress pointed out "were not responsible for the global financial markets crisis of 2008-2009" and, as such, are not intended to be unduly burdened by new regulations promulgated to implement the Dodd-Frank Act, or amendments to such regulations.

The Joint Associations also respectfully request that the Commission consider the burdens the NOPR would place on "small entities," as such term is defined for purposes of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (collectively, "SBREFA"). SBREFA requires Federal agencies to take steps to determine whether a rule (or rule amendment) is expected to have a significant economic impact on a substantial number of "small entities," and to identify alternative regulatory approaches to reduce regulatory burdens on such small businesses, small governmental jurisdictions and non-profit organizations. The vast majority of the 2500 NRECA and APPA members (as well as small commercial farming businesses, small natural gas producers and natural gas utilities, manufacturers and other commodity-dependent commercial businesses) have assets or net worth exceeding the CEA thresholds in (v) of the definition of "eligible contract participant" and also meet the SBREFA definition of "small entity." Such small commercial entities are also "non-SD/MSP/DCO counterparties" to bilateral swaps and may be required to act as "reporting counterparty" for one or a small number of NFC Swaps. Such commercial end-users comprise a substantial number of "small entities" under the SBREFA definition, and the Commission must consider whether its rule amendments will unduly burden their participation in the swaps markets, particularly for the swaps they enter into to hedge or mitigate commercial risks of ongoing operations. See the NFP Electric Association comment letter in the Project KISS-Miscellaneous docket, available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61312&SearchText=wasson, and the text at footnotes 38-39 thereof, as well as the NFP Electric Associations' 2014 Swap Data Reporting Comments and Prior Comments for recommended alternative regulatory approaches and requests for SBREFA review of the Commission's swap data reporting rules and the potentially disproportionate burden of proposed rule amendments on small commercial entities.

[20] For example, the reporting requirements in the end-user exception rules in Part 50 of the CFTC's rules.

data harmonization efforts in conjunction with the SDRs that accept swap data reporting for particular swap asset classes, or categories of swaps within the NFC Swap asset class, involving the market participants that are involved in such commodity and swaps markets.

At the February 23, 2016 Technology Advisory Committee ("TAC") meeting, the question was asked whether the Data Standards Subcommittee, which allows Commission Staff to work with the SDRs to identify and address data issues, should be re-established. The resounding answer from the SDRs was yes. All of the SDRs indicated a willingness to work with Commission Staff to both streamline and harmonize the data currently being collected from market participants and provided to the Commission. This process would help ensure that the data elements required to be reported to the SDRs are limited to those data elements the Commission needs to fulfill its regulatory mission,[21] and will allow the Commission to focus on improving the quality of the data already being collected rather than imposing new requirements. A data harmonization process focused first on the financial commodity asset classes of swaps (rates, currencies, credit and equities) would also allow the Commission to use and improve the processes that it already has in place for swap data reconciliation with swap dealers; evaluate what data is not being used by the Commission and therefore should no longer need to be reported to improve access to the data that the Commission determines it needs going forward, without imposing extra costs on commercial end-users to verify or reconcile, correct or complete unnecessary data elements.

If the Commission feels that additional process improvements and rule amendments are still needed after the Commission has worked with the SDRs to standardize and align their practices, and streamline and harmonize the data elements required to report a particular asset class or category of swaps, then the Commission should first beta test amendments to its swap data reporting rules with swap dealers and major swap participants. In the Prior Comments, the Joint Associations urged the Commission to implement any rule amendments first for reporting counterparties that are swap dealers, major swap participants and other financial entities ("SD/MSP/DCO reporting counterparties"), in order to minimize the burdens on commercial end-users.[22] Only when the Commission concludes that the amendments to its rules have

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[21] In the DMO Roadmap and the Project KISS requests for comment, the Commission and the Staff correctly focused on harmonizing the data elements necessary to define and accurately measure the characteristics common to ***standardized*** swaps, and the data elements necessary for the Commission to accomplish its regulatory mission. In the adopting releases for the 2012 "real-time" swap reporting rules, at 77 Fed. Reg.1182, at 1183, footnote 6 and again at footnote 12, and on pages 1186 and 1188, the Commission interpreted the Dodd-Frank Act to require reporting of every swap. Nonetheless nothing in the Dodd-Frank Act requires that each term of each swap be reported, or that each asset class of swaps be reported with the same level of granularity whether or not the swap was cleared by a DCO, or standardized enough to be transacted on a SEF or a DCM. See the NFP Electric Associations' comment letter in the DMO Roadmap Review, cited in footnote 16, at p. 9.

[22] Some of the Joint Associations also recommended that the Commission first amend or clarify the swap reporting rules applicable to the four financial swap asset classes, that is, rates, currency, credit equity swaps, where financial institutions define the product characteristics of each swap as a financial trading instrument. *See e.g*. the NFP Electric Associations' comment letter in the DMO Roadmap Review docket, cited in footnote 16, at p. 7, as well as the NFP Electric Associations' concurrent request for interim no-action relief from swap data reporting rules for non-SD/MSP/DCO reporting counterparties, potentially conditioned on reporting a limited number of data elements per NFC Swap. The comment letter also proposes a preliminary list of data elements for discussion. For financial commodity swaps that constitute more than 99 percent of all reported swaps, SDs and MSPs will be the reporting parties in most instances and are in the best position to implement any amendments to the rules. As noted in

produced swap data for a particular asset class or category of swaps that is materially more accurate and useful for regulatory purposes than was available prior to the rule amendments should the Commission expand any new swap data reporting requirements to non-SD/MSP/DCO reporting counterparties.[23]

By taking the preliminary steps recommended here, the Commission can achieve more accurate and complete data on the vast majority of swaps, without imposing additional costly requirements on commercial end-users by the rule amendments proposed in the NOPR. The Joint Associations concur with the National Gas Supply Association that the Commission can resolve its concerns about data quality in respect of NFC Swaps by a combination of

1. limiting the data elements that must be reported to those which serve the underlying goal of improving the CFTC's market surveillance capabilities and promoting price transparency for standardized NFC Swaps, as well as codifying the no-action letter that eliminates the need to report swap data for inter-affiliate swaps,[24]
2. harmonizing the data elements and data fields for swap reporting required by the SDRs, in accordance with the International Organization of Securities Commissions ("IOSCO"),
3. in swap data reporting rules for NFC Swaps, limiting optional data fields, clarifying data specifications, and eliminating fields that do not apply to NFC Swaps, and
4. utilizing existing swap dealer and major swap participant portfolio reconciliation processes for verification of swap data for NFC Swaps first,

comments submitted by the NFP Electric Associations in response to the DMO Roadmap Review, NFC Swaps constitute less than 1% of the global swaps market. In the NFC Swap asset class, a SD or MSP will be the counterparty to a large percentage of NFC Swaps. See the CFTC staff statistics for January 2019 cited in Commissioner Stump's Statement of Concurrence where it is noted that, for the NFC Swap asset class, there is at least one SD counterparty (which would act as the reporting counterparty) for 85.3056% of the 60,021 reported NFC Swaps.

[23] *Id.* If the Commission chooses to move forward with these proposed amendments that impose additional regulatory burdens on non-SD/MSP/DCO counterparties, then to reduce those regulatory burdens, the Commission should exclude non-SD/MSP/DCO counterparties that report an average over the last 12 months of 50 or fewer swaps.

[24] In No Action Letter No. 13-09, the Division of Market Oversight and the Division of Clearing and Risk recognized that intra-group swaps are used for managing risk within a corporate group, and do not increase overall systemic risk or warrant the same reporting requirements as outward-facing swaps with unaffiliated counterparties, and granted no-action relief to end users from certain reporting obligations under part 45 and part 46 of the Commission's regulations, as well as the reporting requirements related to the end-user exception from required clearing under regulation 50.50(b), with respect to certain intra-group swaps. The no-action relief recognized that transactions between affiliates transfer risk internally and do not present risk to the market. The Commission should provide regulatory certainty to end users and codify this relief.

before adding new verification requirements for non-SD/MSP/DCO reporting counterparties.[25]

For these reasons, the Joint Associations urge the Commission to present for comment a complete set of rule amendments for its swap data reporting rules, work sequentially with the SDRs, and then with the SD/MSP/DCO reporting counterparties, on standardization of data elements and data fields, and implement amendments first for the financial swap asset classes before the NFC Swap asset class categories, to reduce regulatory burdens of the rule amendments proposed in the NOPR on commercial end-users. In that way the Commission can most efficiently improve data quality for 99% of all reported swaps, prior to imposing new and more proscriptive regulatory obligations on non-SD/MSP/DCO reporting counterparties.

B. The Commission Should Not Impose On-Going Verification Requirements on Non-SD/MSP/DCO Reporting Counterparties.

The NOPR proposes new verification requirements for reporting counterparties, including commercial end-users that act as non-SD/MSPDCO reporting counterparties for swaps in proposed §45.14. The proposed new rules require the reporting counterparty to:

- Periodically reconcile its internal books and records for each open swap for which it is the reporting counterparty with each open swaps report provided to it by any SDR to which it has reported a swap (Proposed § 45.14(a)(1)). The timing requirement in § 45.14(a) is based on when the SDR makes the open swaps report available to the reporting counterparty and not when the reporting counterparty receives or accesses the open swaps report.
- Conform to the swap data verification policies and procedures created by any SDR to which it reports, or has reported, an open swap under proposed § 49.11 (Proposed § 45.14(a)(1)).
- Submit either a verification of data accuracy or a notice of discrepancy in response to every open swaps report within 96 hours of the SDR providing the open swaps report (Proposed § 45.14(a)(2))
    - If a reporting counterparty reviews its books and records and finds no discrepancies, it must submit a verification of data accuracy indicating that the swap data is complete and accurate to the SDR in the form and manner required by the SDR's verification policies and procedures (Proposed § 45.14(a)(3)).
    - If a reporting counterparty finds a discrepancy in any aspect or data element of any open swap, it must submit a notice of discrepancy to the SDR in the form and manner required by the SDR's verification policies and procedures (Proposed § 45.14(a)(4)).

Commissioner Stump, in her Statement of Concurrence on the NOPR called this new process a "solution in search of a problem," and the Joint Associations agree. These proposed new rules would require the reporting counterparty to periodically verify the accuracy and

[25] NGSA comments at 4.

completeness of swap transaction data for each open swap for which it acts as the reporting counterparty throughout the life of the swap. This new regulatory obligation would be in addition to the current obligations to report primary economic term ("PET") transaction data when entering into a swap, as well as confirmation data, continuation data and valuation data, with respect to each swap. The NOPR does not explain how these new ongoing regulatory obligations would enhance the accuracy of the swap data that is reported.

While the Commission recognizes that commenters have indicated that commercial end-users and other non-SD/MSP/DCO reporting counterparties would incur greater costs for reporting and verifying data because swaps are not their primary business, the Commission dismisses these concerns by saying that commercial end-users would be provided more time to complete the verification process.[26] This additional time would not reduce the immense new regulatory burdens on commercial end-users. These burdens include additional investment in technological systems to review and reconcile data on open swaps on an ongoing basis, additional investment in maintenance of records of all data elements, and additional staff and training required to meet the 96-hour deadline for verification of the SDR provided data.[27] Simply providing commercial end-user reporting counterparties with 96 rather than 48 hours to conduct the new verification process does not either explain the benefit or justify or reduce the costs of such amendments.[28]

C. The Commission Should Delete the Requirement that Reporting Counterparties Agree with Non-Reporting Counterparties on Corrections to Previously-Reported Swap Data, Eliminate or Extend the New Timeframes for Non-SD/MSP/DCO Reporting Counterparties to Correct Errors and Omissions, and Delete the Language in the NOPR that Would Require Non-SD/MSP/DCO Reporting Counterparties To Correct or Complete Swap Data Reports for "Dead Swaps"

The Commission proposes to amend § 45.14(b)'s requirements for correcting errors and omissions in swap transaction data previously reported, to impose a new requirement to correct the data within 3 business days after discovery of an error or omission or, if the reporting counterparty is unable to do so, to immediately inform the Director of the Division of Market Oversight ("DMO") in writing of the errors or omissions with an initial assessment of the scope and an initial remediation plan for corrections.[29] The Commission explains this as a "backstop"

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[26] NOPR at text accompanying footnote 180 and at 21092.

[27] Reporting counterparties may also need to establish additional verification processes with their nonreporting counterparties which will impose additional costs and obligations on both parties.

[28] If the Commission moves forward with this new verification requirement, and does not exempt non-SD/MSP/DCO counterparties that report an average over the last 12 months of 50 or fewer swaps as requested in footnote 23 above, then the Commission should significantly extend the 96 hour timeframe to 240 hours – 10 days – or longer, to recognize such entities' commercial business priorities, such as the Joint Associations' members obligation to provide reliable and affordable electricity. The proposed substantial new regulatory burden provides no benefit to such commercial businesses.

[29] The Joint Associations note that parallel amendments to the proposed amendments to Section 45.14(b) are proposed in the NOPR to the "real-time" swap data reporting rules in CFTC rule 43.3(e), to impose new obligations on reporting counterparties and non-reporting counterparties, including commercial end-users, to report errors and

to the current obligation to report errors and omissions as soon as technologically possible. Proposed §45.14(b)(1)(iii) would also require a reporting counterparty to conform to any new errors and omissions reporting policies and procedures to be developed by each SDR (to which it has reported any swap).[30]

Section 45.14(b)(2) also requires the reporting counterparty, if it discovers what it believes to be an error or an omission, to ***agree with the non-reporting counterparty*** on the correct or complete data to report for the swap. This new regulatory obligation for reporting counterparties requires an agreement with the non-reporting counterparty that is not currently required at the time a swap is first executed and reported to an SDR.[31] The NOPR explains this new requirement as reducing the likelihood of the reporting of corrections when there is a legitimate "dispute" over whether swap data contains an error or omission.[32] But there is no regulatory premise or predicate for such a dispute, in that the reporting counterparty for a swap is solely responsible for reporting data for that swap to an SDR. These new regulatory deadlines and requirements for non-SD/MSP/DCO reporting counterparties, and particularly for commercial end-users like the Joint Association members, are not supported by explaining the regulatory benefit of the proposed amendments, or a justification of the substantial new regulatory costs.

The most significant new regulatory burden reflected in the NOPR, and the new regulatory burden of most concern to the Joint Associations, is not proposed as an amendment to the Commission's swap data reporting rules. Instead, the Commission includes several statements in the NOPR that the Commission is "proposing to clarify" that errors and omissions in previously-reported swap data must be reported and corrected within the new timeframes proposed in the NOPR "regardless of the state of the swap that is the subject of the swap data", such that "all incorrect or omitted swap data must be corrected, ***even if the swap that the swap data described has been terminated, matured, or otherwise ceased to be an open swap*** *(emphasis added)*.[33] This clarification imposes a substantial new regulatory burden, especially

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omissions in the "real-time" swap data reported to SDRs under that rule. All of the Joint Associations' comments on the proposed rule amendments to Part 45 should be read as comments on the parallel proposals for amendments to Part 43.

[30] The NOPR cross-references to its proposed rule amendment allowing each SDR to develop its own policies and procedures for such correction process. As with the new verification requirement, unless the Commission works first with the SDRs to harmonize these new errors and omissions policies and procedures, a reporting counterparty that chooses to report different asset classes of swap data to multiple SDRs, or finds itself required to report to multiple SDRs as a result of the CFTC rules that shift the reporting obligations for a swap under certain circumstances, will have to adapt to new policies and procedures for each SDR.

[31] NOPR at page 21070. In the NOPR at 21068, the Commission declined to propose that the SDRs confirm swap data with the non-reporting counterparty to a swap as inconsistent with the Dodd-Frank Act amendments to the CEA, which placed the responsibility of reporting swaps to SDRs on just one of the two counterparties to a bilateral, off-facility, uncleared swap – the reporting counterparty. Many non-reporting counterparties are unfamiliar with the Commission's swap reporting rules and enter into swaps (even swaps that hedge or mitigate commercial risks of ongoing operations) only if the other counterparty agrees to perform substantially all reporting obligations.

[32] NOPR at 21070.

[33] NOPR at 21069.

considering that the Commission has been aware since early 2014 of the ambiguities in its swap data reporting requirements. The NOPR does not acknowledge or explain this new clarification.

The NOPR also does not attempt to quantify the burden of requiring reporting counterparties to retroactively correct and complete reported swap data for "dead swaps." These include additional investment in technological systems, additional staff and training required to review every swap reported to any SDR since 2013 for errors and omissions (including those that may have been terminated over the past 6 years), within the same proposed 3 business day deadline for reporting and correcting any discovered errors and omissions.[34]

This new regulatory requirement would be particularly burdensome for commercial end-users that have agreed to act as reporting counterparties for NFC Swaps, including the Joint Associations' members, for the reasons explained in Section IIA above. Providing non-SD/MSP counterparties with more time to report and remedy errors and omissions does not even begin to remove the overwhelming (and ever increasing) burden of reviewing and validating or correcting more than 6 years of swap data submitted in good faith in response to data elements that the DMO Roadmap Project admitted were overbroad and ambiguous and, for swaps in the NFC Swap asset class, that contained "optional" or "catch-all" data elements, seemingly designed to capture every single granular detail about each swap, rather than data elements that were necessary to carry out the Commission's regulatory mission. [35]

The Commission should retract this new regulatory interpretation in any final rulemaking (or sooner). Any new or amended obligation to correct errors and omissions in swap data reports should only be effective prospectively, and after rule amendments are final and effective, and adequate time is provided for market participants to budget for and implement new systems, policies and personnel training to allow compliance. For swaps entered into thereafter, the Commission should extend or eliminate the 3-business day deadline. These timeframes, while longer than those provided for SDs and MSPs, are inadequate for commercial end users who are not primarily in the business of entering into swaps. This requirement will also require a commitment in personnel and technology and imposes a substantial burden on a small number of counterparties that comprise a small component of the global swap markets.

D. The Commission Should Not Add Any Regulatory Reporting Obligations for Non-Reporting Counterparties.

Finally, the Commission should not directly or indirectly impose new regulatory requirements for swap data reporting on the non-reporting counterparty. While § 45.14(b) currently requires a non-reporting party to promptly notify the reporting counterparty of an error or omission it discovers, proposed §45.14(b)(2) appears to add two new regulatory requirements. First, it imposes a requirement that the non-reporting counterparty notify the reporting

[34] Reporting counterparties may also need to establish additional processes with their nonreporting counterparties to "agree" as to whether there is an error or omission in the swap data reported for a "dead swap," which will compound the burdens and additional costs and obligations on both parties.

[35] See also the explanation in footnote 13 of the regulatory uncertainty about which physical energy transactions are "swaps," and must be reported, or commodity trade options, and how to report such transactions and their highly customized terms, in compliance with the data elements listed in Parts 45 and 43, and the data fields provided by the various SDRs.

counterparty no later than 3 business days after the discovery. Second, if the non-reporting counterparty does not know the reporting counterparty's identity, then proposed §45.14(b)(2) requires that the non-reporting counterparty must notify the SEF or DCM where the swap was executed no later than 3 business days after discovery.[36] As discussed above, proposed §45.14(b)(2)'s obligation on the reporting counterparty to consult and agree with the non-reporting counterparty before correcting an error or omission that it discovers creates a new indirect obligation on the non-reporting counterparty.

These proposals would impose substantial new burdens on non-reporting counterparties to swaps (particularly for NFC Swaps), including commercial end-users like the Joint Association's smaller members that do not have the processes, technology, knowledge of the Commission swap data reporting rules or personnel to fulfill such obligations. These new regulatory obligations have no benefits for the non-reporting counterparty's ongoing business operations. The NOPR does not reference any regulatory benefit associated with these new regulatory obligations, which would be imposed on commercial end-user that enter into NFC Swaps to hedge or mitigate commercial risks arising from ongoing business operations – swap market participants that are least able to bear these new regulatory costs.

III. CONCLUSION

EEI appreciates the Commission undertaking this effort, and requests that the Commission consider the input and provide the relief described herein.

[36] This new "backstop" reporting obligation for a non-reporting counterparty that discovers an error or omission in reported swap data seems unlikely to provide any benefit in terms of more accurate swap data. See footnote 6 and Prior Comments that note that there are no NFC Swaps currently transacted on SEFs. Moreover, if a swap is executed by the counterparties on a SEF or a DCM, the SEF or the DCM has the reporting obligation, and there is no reporting counterparty/non-reporting counterparty designation for that swap. In such a case, neither of the swap counterparties would have an obligation to report errors and omissions.

Respectfully Submitted,

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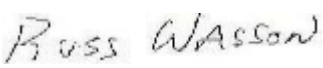

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