701 Pennsylvania Avenue, N.W. | Washington, D.C. 20004-2696 | 202.508.5000 | www.eei.org

Power by Association℠

Edison Electric Institute

January 18, 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 Part 3, Designation of a Chief Compliance Officer; Required Compliance Policies and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant
75 Fed Reg. 70,881 (November 19, 2010)
RIN No. 3038-AC96

Dear Mr. Stawick:

The Edison Electric Institute ("EEI") respectfully submits these comments in response to the Commodity Futures Trading Commission's ("Commission" or "CFTC") proposed rule to implement new statutory compliance provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act[1] ("Dodd-Frank Act") as published November 19, 2010 in the Federal Register. Specifically, the proposed rules require future commission merchants, swap dealers and major swap participants to designate a chief compliance officer ("CCO") and specify the duties of the CCO which includes preparing, signing and certifying an annual report to the Commission on the registrant's compliance policies.

EEI members are largely end users,[2] as contemplated by the Dodd-Frank Act, and they engage in swaps to hedge commercial risk. As such, EEI's members do not anticipate being required to register with the Commission as "swap dealers" or "major swap participants."

[1] Pub. L. No. 111-203 (2010).
[2] Dodd-Frank Act § 723 and 721(a) (21). 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.

However, because a final rule has not been issued on the definition of "swap," "swap dealer," or "major swap participant,"[3] EEI members offer the following comments.

While EEI supports, the need for CCOs to ensure that the registrant has policies and procedures in place to ensure compliance with the Commission's rules and regulations, EEI is concerned with the overly prescriptive nature of the proposed rule which fails to take into account existing governance and compliance structures and processes developed and implemented by entities for the express purpose of meeting compliance and risk management objectives of both existing laws and business functions. The mandated and prescriptive nature of the proposal would, if adopted, present entities with a difficulty in incorporating new CFTC requirements into these existing governance and compliance programs. We believe a more flexible approach would allow this integration while achieving the requirements and meeting the principles of Dodd-Frank.

I. Description of EEI and its Interest in the Proposed Rule

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 relatively low leverage and a conservative capital structure.

EEI members are familiar with the CCO concept and maintain CCOs because they are regulated at the federal and the state level and have CCOs to ensure compliance with Federal Energy Regulatory Commission ("FERC") rules and regulations and adherence to the federal sentencing guidelines for organizations ("FSGO") due diligence factors for an effective compliance program. Based on this experience, EEI offers the following comments.

II. Comments

Section 731(k) of the Dodd-Frank Act outlines the CCO requirements for swap dealers and major swap participants and provides guidelines for the CCO position including the contents of the annual report. EEI is concerned that the proposed regulations go far beyond what is required by the Dodd-Frank Act and imposes overly prescriptive requirements on the structure and requirements of the chief compliance officer position.

[3] As of the date of this filing, the Commission has issued a Notice of Proposed Rulemaking on the definition of "swap dealer" and "major swap participant" on which comments are due February 22, 2010. The Commission has not issued a Notice of Proposed Rulemaking on the definition of "swap."

Organizations need flexibility to structure their respective compliance organizations to best meet the compliance needs and cultures of their companies. This has been recognized by other agencies. For example, FERC sets forth the principles or attributes of an effective compliance program while leaving the individual company the flexibility to implement a program that complies with the guidelines set forth by FERC but still fits within its corporate structure.[4] Another example exists in the Federal Acquisition Rules ("FARs") which much like FERC adopted FSGO based requirements. EEI urges the Commission to follow this format.

Because EEI's members have previously been subject to compliance requirements, the elements of a good compliance program are well-known to them and they are likely to have well established compliance programs in place. EEI"s members recognize the need to have strong corporate-wide compliance program in place in order to ensure compliance with rules and regulations especially in light of the harm to reputation and the large penalties that can be assessed for non-compliance. As such, the Commission should allow organizations the flexibility to incorporate the new compliance requirements into their existing programs without creating prescriptive provisions that may preclude this option and that will most likely increase compliance costs.

The proposed regulations would deny needed flexibility or require changes in current organizations, for example, by requiring that the board or the senior officer shall determine the compensation of the CCO, and by requiring that the CCO would have to be a "principal" at the registrant – "similar in status and responsibility to the CEO."[5] These proposals would, if adopted, require significant changes in how companies generally operate and require a level of specificity that far exceeds anything required by the statute. In short, the reporting structure and responsibilities of the CCO should be left to each individual firm.

In addition, the proposal asks whether additional limitations should be placed on persons who may be designated as the CCO. One suggestion is to prohibit an attorney who represents the registrant or its board of directors, such as an in-house or general counsel, from assuming the role of the CCO. In many companies, the general counsel effectively implements the role of CCO. In addition, attorneys are bound by canons of ethics and rules of conduct that prohibit conflicts of interest in their representation. The CFTC should not by rule prohibit the general counsel or other in-house attorney from assuming the duties of the CCO in accordance with the statute.

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[4] See e.g. *Statement of Administrative Policy on Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006); *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (2008), *superseding Policy Statement on Enforcement*, 113 FERC ¶ 61,068 (2005); *Submissions to the Commission upon Staff Intention To Seek an Order To Show Cause*, Order No. 711, FERC Stats. & Regs. ¶ 31,270 (2008); Ex *Parte Contacts and Separation of Functions*, Order No. 718, FERC Stats. & Regs. ¶ 31,279 (2008); Compliance *with Statutes, Regulations, and Orders*, Policy Statement on Compliance, 124 FERC ¶ 61,058 (2008).

[5] Proposed Rule at 70, 882.

Several other provisions of the proposed rule, as well as the questions posed by the CFTC, suggest that the CFTC is trying to micro-manage the role the role of the CCO. For example, the CFTC seeks comment on whether the CCO should report to the board of directors or the senior officer, and whether the senior officer or board "generally is a stronger advocate of compliance matters within the organization." This question asks for a subjective response and raises questions as to the reason for posing it given that both the board of directors and the senior officer have fiduciary duties to the corporation that include compliance with applicable laws and regulations. Quite simply, the compliance obligation is with the company and cannot be carved out to become the obligation of the CCO.

Another such question is whether the authority to remove the CCO should be reserved to the board of directors, barring removal of the CCO by the CEO or other senior officer. And, as noted above, the CFTC asks whether the corporation's general counsel or other in-house counsel should be barred from serving as the CCO. Instead of the proposed requirements for CCOs, which appear to dictate corporate governance, the CFTC should leave the designation of the CCO up to the regulated companies or in the alternative require that a person responsible for compliance be designated with the requisite experience and with free access to the governing body much like the language found in the FSGOs.

In addition to overly mandating the appointment and nature of the CCO, we believe that the proposal places more responsibility on the CCO than is required by the Dodd-Frank Act and fails to take into account the compliance roles and responsibilities that should be shared and borne by other individuals in a company. The proposed approach does not recognize a basic tenet of modern compliance discipline that the role of Compliance Departments is to advise how to comply with applicable laws and regulations, to monitor activity, to assist in remediation of violations and to escalate to the governing body, if necessary. The act of complying must be born and executed by the individuals in the business (including senior management), the true compliance owners. To impose execution of compliance on the CCO could abrogate the responsibility of senior management and other employees to act compliantly.

Laws such as Sarbanes-Oxley and prudent business practice have lead to required organizational structures and separation of duties, such as auditing, accounting, intellectual technology and risk management functions. These already existing disciplines and departments have their own compliance functions which should be coordinated with the CCO. Much of what is assigned to the CCO under the proposal, such as risk management policies, safeguards on electronic signatures, and customer records protection are "owned" by these other departments. It may be appropriate for a CCO to work in concert with business and control functions to assure appropriate policies and procedures are in place to meet compliance requirements, but it is inappropriate to impose upon a CCO "full responsibility" to "develop and enforce" all policies, rules, and procedures to meet compliance requirements. This goes beyond the requirements of Dodd-Frank Act.

The proposed rules also add requirements to the annual report beyond those required by the Dodd-Frank Act. The relevant part of section 731(k) of the Dodd Frank Act states:

> ''(3) ANNUAL REPORTS.—
> (A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—
> (i) the compliance of the swap dealer or major swap participant with respect to this Act (including regulations); and
> (ii) each policy and procedure of the swap dealer or major swap participant of the chief compliance officer (including the code of ethics and conflict of interest policies).
> (B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—
> (i) accompany each appropriate financial report of the swap dealer or major swap participant that is required to be furnished to the Commission pursuant to this section; and
> (ii) include a certification that, under penalty of law, the compliance report is accurate and complete.''

The Commission's proposed rule 3.1(d) outlines the annual report provision and adds a number of requirements.[6] These requirements include among others: (1) providing an assessment of the effectiveness of policies and procedures; (2) discussing recommendations for improvement; (3) listing material changes to the policy during the coverage period; (4) describing staffing resources; (5) describing identified non-compliance issues. These requirements exceed those required in the Dodd-Frank Act, which simply requires the report to contain a description of compliance with the Act. Moreover, these requirements are both broad and subjective and may lead to widely-differing interpretations among companies with respect to what information is required to be reported. Indeed, the Commission should expect to receive reports so lengthy and detailed that their usefulness will be greatly diminished.

In addition, the requirement that the annual report include a "certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the information contained in the annual report is accurate and complete"[7] places requirements on the CCO not contemplated by the Dodd-Frank Act and which may require disclosure of confidential information on internal compliance plans without cause. While the Dodd-Frank Act requires the CCO to certify that the report is accurate and complete, it does not contain the extensive provisions on what needs to be included in the annual report that are in the Commission's proposed rule.

The proposed rule also imposes a duty to report violations. While self-reporting is an important aspect of an effective compliance program, whether and how to self-report a potential violation is determined on a case-by-case basis by the corporation and should not be determined

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[6] Proposed Rule at 70, 887
[7] Id.

by the CCO, though the CCO would have the right to escalate to the governing body, if necessary. In addition, the proposed rule does not address whether or not the annual reports are public documents. If available to the public, the concerns about being required to report confidential or proprietary information are amplified.

These proposals and questions, taken together, suggest that the Commission views the CCO position as more of an "inspector general" than a corporate official entrusted with the significant responsibility to ensure compliance with the applicable CFTC regulations. The proposed rule would give such importance to the CCO that it appears that the Commission felt obliged to clarify that "the duties of the chief compliance officer do not elevate the position above the board of directors."[8] In sum, the proposed rule exceeds the statutory requirements and would deprive corporations of needed flexibility to structure their CFTC compliance program as part of their overall corporate compliance programs, including other important areas such as health, safety, environmental and other statutory and regulatory requirements imposed under other statutes and by other regulatory agencies.

III. CONCLUSION

EEI appreciates the opportunity to submit comments on this important issue and urges the Commission to not be overly-prescriptive and to allow registrants to develop compliance processes that meet the guidelines established in the Dodd-Frank Act as well the needs of their individual organizations.

Please contact me or Lopa Parikh, Director, Federal Regulatory Affairs for Energy Supply, at (202) 508-5098 if you have any questions regarding these comments.

Respectfully submitted,

Richard F. McMahon, Jr.
Executive Director
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 508-5571
Email: rmcmahon@eei.org

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[8] Id. at 70, 883.