



February 1, 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 23 and 190, Protection
of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities
in a Portfolio Margining Account in a Commodity Broker Bankruptcy
75 Fed Reg. 75, 432 (December 3, 2010)
RIN No. 3038-AD-28**

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 Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy (“NOPR”) published December 3, 2010 in the Federal Register. In the NOPR, the Commission invited public comment on proposed rules and regulations implementing sections 724(c) and 713(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹ that adds new sections 4s(l) and 20(c) to the Commodities Exchange Act (“CEA”) which contains provisions affecting the rights of counterparties to swap dealers and major swap participants with respect to the treatment of margin for uncleared swaps.

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

¹ Pub. L. No. 111-203 (2010).

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 largely end users,² as contemplated by the Dodd-Frank Act, and they engage in swaps to hedge commercial risk. As such EEI members are likely to engage in uncleared swaps and EEI appreciates the opportunity to submit comments on this issue.

EEI generally supports the rules and regulations proposed by the Commission. The Commission correctly recognizes that the requirement in the Dodd-Frank Act that swap dealers and major swap participants³ notify counterparties to uncleared swaps that they have the right to require that their initial margin be segregated is an important right.⁴ It allows counterparties to weigh their risks and make an informed decision about their costs, which may ultimately be borne by consumers. As such, EEI offers the following comments on the notification process.

First, EEI agrees with the Commission's proposal to require that the custodian be independent of both the swap dealer or major swap participant and the counterparty and to allow the rest of the terms to be determined by the parties. These terms open for discussion between the parties would include as suggested by the Commission the designation of the custodian, including whether the custodian should be independent of any affiliate of the swap dealer or major swap participant, and whether the initial margin and variation margin, if any, should be kept in the same account⁵ and any other terms and conditions agreed upon by the parties. This construct would be similar to the agreements used by electric utilities today that allows the parties to agree upon a custodian/qualified institution as well as other terms and conditions and would allow entities to continue to use existing constructs going forward.

Allowing the parties to discuss key terms will also ensure that the full costs of segregation will be disclosed to the counterparty as disclosure of all possible costs is necessary for entities to make an informed decision. These costs include, as suggested by the Commission, any differences in cost for segregated versus comingled collateral including custodial fees and interest rates.⁶ In addition, the parties can make clear that the costs include the amount of collateral that must be posted. As regulated entities, many costs of generation procurement are passed on to customers and any information affecting the amount of initial margin required to be

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 Section 731 of the Dodd-Frank Act requires the CFTC to set capital and margin rules, including initial and variation margin rules, for non-cleared swaps. This requirement applies to uncleared swaps between swap dealers and/or major swap participants. In light of the effort that Congress went through to exempt end-users from burdensome regulations on activities that do not create systemic risk to the financial system, margin requirements should not be imposed on end-user swap transactions with any counter-party.

⁴ NOPR at 75,433.

⁵ *Id.* at 75,434.

⁶ *Id.* at 75,433.

posted or additional costs is important in making the decision of whether to request segregation. Allowing parties to determine the terms of the agreement will provide the flexibility needed to negotiate additional collateral protection or other commercial arrangements and allow parties to negotiate mutually beneficial terms that minimize costs and risks for both parties.

Second, the Commission should not require that the notification be made to specific senior decision makers, such as the Chief Risk Officer, as contemplated by Proposed Regulation 23.601.⁷ This requirement 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. Thus, the Commission should allow the entities to decide who receives the notification and signs the confirmation of receipt. If the Commission is concerned about the decision making ability of the person receiving the notification, then the regulation could say that the notification needs to be made to a senior decision maker without specifying a position. For purposes of clarity for the swap dealer or major swap participant, the person to be notified for the transaction can be listed in the swap agreement.

Third, EEI agrees with the Commission that notification may not need to be made at the beginning of each swap transaction and could be made yearly. However, if the notification is not made with each transaction then the notices should be easily accessible by the counterparty on the swap dealer or major swap participant's website and available upon request. Notification should also be provided if there are any changes in the terms of the transaction that could affect the cost of segregation.

EEI appreciates the opportunity to submit comments on this issue and appreciates the Commission's recognition of the importance of providing all the available cost information to counterparties to an uncleared swap involving swap dealers or major swap participants so the counterparties can make informed decisions on whether to exercise their right to segregate their initial margin. 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.

⁷ *Id.*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard F. McMahon, Jr.", written in a cursive style.

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