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Sent: Monday, August 23, 2010 1:40 PM
To: PosLimits <PosLimits@CFTC.gov>
Subject: EPSA Pre-Comments
Attach: Pre-Comments Position Limits.pdf

Attached please find pre-comments submitted by the Electric Power Supply Association.

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August 23, 2010

Via Email: PosLimits@CFTC.gov

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

Re: Advanced Comments on Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act – Position Limits

Dear Mr. Stawick:

The Electric Power Supply Association (“EPSA”) submits this letter in response to the opportunity for advanced comments issued by the Commodity Futures Trading Commission (the “CFTC”) on its implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”).¹

EPSA is the national trade association representing competitive power suppliers, including generators and power marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity to market participants throughout the country. EPSA seeks to bring the benefits of competition to all power customers.

EPSA developed extensive comments on the CFTC’s notice of proposed rulemaking (NOPR) to set speculative position limits for referenced energy contracts. EPSA’s comments addressed the questions posed in the NOPR from the perspective of its member companies who depend on the futures and options markets to manage their risk. The NOPR raised a number of questions and concerns for EPSA. In light of the recent NOPR, EPSA offers these comments for consideration as the Commission develops a new proposed rule reflecting its expanded authority.

¹ The comments contained in this filing represent the initial position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA expects to submit more substantive comments in response to the Commission’s proposed rules on position limits.

In sum, any position limits and exemptions must account for the following practical considerations:

- Counterparties historically willing to take the opposite side of a competitive power supplier's futures or options trade may be prevented from doing so based on the structure of the position limits, the risk management and swaps dealer exemptions, and the aggregation rule. This would impact liquidity and costs.
- Some market participants may elect to reduce or eliminate their participation in the U.S. futures and options markets in favor of other markets that do not impose comparable compliance challenges. This would impact liquidity and costs.
- The compliance risk associated with position limits may have the perverse effect of causing some commercial entities to reduce or avoid using futures and options to hedge risk. For example, a commercial entity may realize it lacks the ability to track multiple positions, including across affiliates, or to maintain position balance to avoid inadvertently taking a speculative position. Thus, the commercial entity might decide it is safer to avoid the futures markets and not be adequately hedged rather than face CFTC penalties for position limit violations. This would impact liquidity and costs.
- If the futures and options markets shrink, offer less reliable price signals or raise transaction costs, it could have an adverse impact on the ability of energy companies, like EPSC's members, to raise affordable capital and manage the risk associated with investing in infrastructure projects that are at the core of the U.S.'s energy policy.

The CFTC also must ensure that it is proposing position limits pursuant to its statutory authority and that the rules have a direct nexus to achieve that statutory obligation.

- The justification for any limits should be transparent in the Notice of Proposed Rulemaking, including through the release of any data or studies that serve as the basis for imposing position limits in the first place and setting any proposed limits at a given level.²

² If the CFTC fails to make the showing, a court likely would reject the CFTC's position limits as contrary to clear congressional intent and otherwise unlawful. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984); Administrative Procedure Act, Section 706, 5 U.S.C. § 706. In addition, if the CFTC were to provide the missing justification in an order adopting the proposed position limits, it would likely face arguments that it failed to give proper notice and an opportunity to comment on such justification as required by Section 553 of the Administrative Procedure Act. 5 U.S.C. § 553.

- Any position limits should only apply to a substantial and clearly speculative trading position, and should in no way limit trading used to hedge commercial risk under the exception provided in Section 2 of the Commodity Exchange Act, subsection (h)(7)(A)(ii).
- The limits should not prevent commercial market participants relying on a hedge exemption from holding a speculative position. The Commission must focus its position limits on the speculative portion of a market participant's trading activity rather than proposing rules that would limit the size of an entity's bona fide hedge position merely because the participant has some number of speculative trades. Congress has expressly protected the right of commercial end-users to hedge their positions without concern that speculative positions could jeopardize their hedges.
- Aggregation of accounts should not be required unless there is clear evidence of common control.

Conclusion

EPSA strongly encourages the Commission to follow the plain legislative language and clear Congressional intent of the Act by adopting positions limits only where strictly needed and without impeding the ability of commercial end users to manage the risks inherent in their core energy supply activities.

Respectfully Submitted,



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