

**UNITED STATES OF AMERICA  
BEFORE THE  
COMMODITY FUTURES TRADING COMMISSION**

**PETITION FOR MEMBERS OF THE ELECTRIC POWER SUPPLY ASSOCIATION TO  
REMAIN SUBJECT TO THE EXISTING PROVISIONS OF SECTION 2(h)  
OF THE COMMODITY EXCHANGE ACT**

The Electric Power Supply Association (“EPSA”) respectfully submits this petition to the Commodity Futures Trading Commission (the “Commission”) pursuant to Section 723(c)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”) to obtain legal certainty that its members’ exempt commodity transactions that fall within the terms of Section 2(h) of the Commodity Exchange Act (“CEA”) (as in existence on the day before the Enactment Date),<sup>1</sup> may remain subject to CEA Section 2(h) for a one year period commencing on the general effective date of the Act, *i.e.*, July 15, 2011 (“Effective Date”), or for a period deemed appropriate by the Commission (the last day of which is the “Extension Date”). In the alternative, the Commission can accomplish the same transition goals that it describes in its September 10, 2010 notice by granting relief now and announcing the Transition Period once it has more fully developed information about the time and resources that persons will need to change their business practices to comply with the Dodd-Frank Act and the Commission’s implementing regulations. If the Commission chooses this later option, it should find that any market participant may qualify for relief regardless of whether they submitted a 723(c) petition before September 20, 2010.<sup>2</sup>

---

<sup>1</sup> The Act was signed into law by President Obama on July 21, 2010 (the “Enactment Date”).

<sup>2</sup> Extending the relief to any qualified market participant is fair in light of the Commission’s September 10, 2010 notice announcing it would not grant any relief.

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.<sup>3</sup>

Upon the Effective Date, Title VII of the Act will repeal substantially all of the provisions of Section 2(h) of the CEA in effect immediately prior to the Enactment Date.<sup>4</sup> As set forth in Section II, EPSA members have executed, and will likely continue to execute exempt commodity transactions in reliance on the terms of CEA Section 2(h). A substantial portion of these transactions are integral to competitive power suppliers' core business, which includes the delivery of physical energy and energy-linked commodities to consumers in U.S. energy markets. The repeal of CEA Section 2(h) will directly impact Petitioner with respect to its core business.

The Act recognizes the uncertainty that could be created in exempt commodity markets by the repeal of CEA Section 2(h) and provides a statutory mechanism that allows for the extension of the provisions of CEA Section 2(h) in effect on the day before the Enactment Date for a period of up to one year. Specifically, Section 723(c)(1)

---

<sup>3</sup> EPSA members include BP Energy Co., Calpine Corp., Capital Power Corporation, ConocoPhillips Gas & Power, Constellation Energy, Edison International, Exelon Power Team, GDF SuezEnergy NA, International Power America Inc., LS Power Associates L.P., Mirant Corp., Northern Star Generation LLC, NRG Energy Inc., PPL Corp., PSEG Power LLC, RRI Energy Inc., Sempra Generation, Shell Energy North America (US) L.P., Tenaska Inc., and US Power Generating Co.

<sup>4</sup> Section 2(h) of the CEA, 7 U.S.C. § 2(h), establishes a general statutory exclusion from the CEA with respect to certain transactions in "exempt commodities." Such exempt commodities include, among other things, energy and energy-linked commodities. Under Section 2(h)(1) of the CEA, 7 U.S.C. § 2(h)(1), market participants that are "eligible contract participants" can enter into bilateral, negotiated over-the-counter transactions, so long as such transactions are not executed on a trading facility. Under Section 2(h)(3) of the CEA, 7 U.S.C. § 2(h)(3), market participants that are "eligible commercial entities" can enter into principal-to-principal transactions executed on an electronic trading facility, *i.e.*, on an exempt commercial market.

permits “any person” to submit a petition to the Commission within 60 days of the Enactment Date (September 20, 2010) to continue to remain subject to Section 2(h) of the CEA for no longer than one year after the Effective Date.<sup>5</sup>

## **I. BASIS FOR REQUEST**

EPSA’s members and their affiliates intend to comply with their obligations under the Dodd-Frank Act and the Commission’s regulations. Nevertheless, EPSA files this petition because the Dodd-Frank Act sets a statutory deadline – September 20, 2010 – by which petitions for grandfather relief must be filed.

EPSA takes comfort from the Commission’s promise to be “attentive to the transition needs of parties that rely on [CEA Sections 2(d), 2(g) and 2(h)] as it considers Dodd-Frank Act-required regulations” and commitment to “strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime” and to “use its available exemptive authorities to address” situations in which required regulations may pose “particular difficulties [for persons who rely on Section 2(h)] that cannot be addressed in final regulations.” EPSA also acknowledges the Commission’s stated concern for not wanting to grant a blanket waiver for all industry participants when it is still developing its regulations under the Act. However, Congress nonetheless created the opportunity for grandfathered relief in Section 723(c) and set the deadline for making such requests early in the implementation schedule. Thus, it is not clear that a uniform denial of all petitions is what Congress intended or what the Commission actually meant by its September 10 Order.

---

<sup>5</sup> A number of EPSA members are planning to file individual petitions on their own behalf. The Commission should consider the petitions of those companies independent of the EPSA petition.

In order to meet the statutory deadline and avoid any harm that might arise for inadvertently assuming that the Commission will not grant any 723(c) petitions, EPSA submits this request for relief.

## **II. QUALIFICATIONS OF PETITIONER**

Members of EPSA are Eligible Commercial Entities as defined by CEA Section 1a(11) (as in existence on the day before the Enactment Date) or Eligible Contract Participants as defined by CEA Section 1(a)(12) (as in existence on the day before the Enactment Date), and are party to exempt commodity transactions, or are a business that operates or is otherwise, subject to the provisions of CEA Section 2(h) (as in existence on the day before the Enactment Date).

## **III. REQUEST FOR EXEMPT COMMODITY TRANSACTIONS TO REMAIN SUBJECT TO CEA SECTION 2(H)**

Pursuant to Section 723(c)(1) of the Act, EPSA respectfully requests that the Commission allow its members' transactions subject to CEA Section 2(h) (as in existence on the day before the Enactment Date), entered into before or after the grandfather period granted pursuant to this petition has commenced, to remain subject to this statutory provision through the Extension Date.

EPSA members routinely engage in exempt commodity transactions involving energy and energy-linked commodities in reliance on the terms of CEA Section 2(h) (as in existence on the day before the Enactment Date). A substantial portion of these transactions are integral to our members' core business of delivering physical energy and energy-linked commodities to consumers in U.S. energy markets. The repeal of CEA Section 2(h) and implementation of measures designed to comply with the new requirements of Title VII of the Act will significantly impact Petitioner, as well as all other

persons that transact, operate, or otherwise rely on the existing provisions of CEA Section 2(h).

#### **IV. POLICY SUPPORT FOR THE APPROVAL OF THE PETITION**

##### **A. Approval of the Petition Will Ensure Stability in Markets for Exempt Commodities**

By granting this petition, the Commission will provide legal certainty and ensure an orderly regulatory transition in exempt commodity markets by (i) providing Petitioner with an appropriate amount of time to review, interpret and develop a plan to comply with rules and regulations implementing Title VII, and (ii) making clear that CEA Section 2(h) (as in existence on the day before the Enactment Date) will remain in effect during this transition period. For example, EPSA notes that such rules and regulations will be developed over the course of the next several months and, consistent with the applicable statutory deadlines, may be finalized only days or weeks before the underlying statutory provisions of Title VII become effective. Such a short period to comply with substantial new rules and regulations could result in considerable disruption in markets for exempt commodities, which would subject EPSA members and other market participants to significant costs and increased commercial risk.<sup>6</sup>

---

<sup>6</sup> For example, pursuant to Section 721(c) of the Act, the Commission is required to adopt further rules defining critical new statutory terms, such as “Swap,” “Swap Dealer,” “Major Swap Participant,” and “Eligible Contract Participant.” In addition, pursuant to Sections 721(a)(16) and 721(a)(21) of the Act, respectively, the Commission is required to issue rules defining key aspects of the definition of “Major Swap Participant” and “Swap Dealer.” Final rules for each of the rulemakings listed above must be issued by the Commission by no later than 360 days after the Enactment Date, *i.e.* July 15, 2011. Assuming these rules were to become effective in the minimum period of time permitted under Section 754 of the Act, parties that transact, operate or otherwise rely on the existing provisions of CEA Section 2(h), such as Petitioner, would only have a maximum of 60 days after the Enactment Date to identify how they are impacted by such rules and come into compliance.

**B. Approval of the Petition Will Not Impede Efforts to Bring Transparency and Structure to Exempt Commodity Markets**

Approval of this petition will not interfere with the Commission's mandate under Title VII of the Act to bring transparency and structure to over-the-counter derivatives markets. For instance, Title VII's reporting requirements for existing uncleared swaps adopted pursuant to Section 729 of the Act will bring enhanced transparency to the markets for exempt commodities. Further, it will not impede the Commission's obligation to issue rules and regulations designed to police excessive speculation in exempt commodity markets through position limits adopted pursuant to Section 737(a)(4) of the Act. Finally, approval of this petition will leave the Commission free to focus its resources on implementing the substantive provisions of Title VII of the Act by providing legal certainty and preserving stability in markets for exempt commodities during the transition to new regulation.

**C. Approval of The Petition Will Provide Legal Certainty as EPSA Members Implement Changes to Comply with the Requirements of Title VII in the Least Cost Manner**

Approval of this petition will provide legal certainty as EPSA members implement measures intended to mitigate costs imposed by the regulatory framework set forth in Title VII of the Act. In the energy industry, for example, cost mitigation is critical to protecting consumers from increased prices for physical energy commodities.

In order to mitigate costs associated with complying with Title VII, EPSA members may choose to implement internal structural or organizational changes or make changes to their trading operations, business practices, and internal risk management systems. EPSA members also may elect to restructure some portion of

their exempt commodity transactions to minimize margin costs and regulatory capital requirements or to more easily comply with new reporting requirements.

Additionally, EPSA members will likely be required to make changes to their existing information technology systems or acquire new systems to comply with, among other things, new recordkeeping and reporting requirements. Systems changes of this magnitude often require a significant amount of time and the dedication of significant internal and external resources.

As entities that rely on CEA Section 2(h) (as in existence on the day before the Enactment Date), if EPSA members are not provided an appropriate transition period and, as a consequence, are forced to implement such changes immediately following the Effective Date, there is a substantial risk that (i) the limited, external supply of resources and expertise needed to facilitate these changes will be quickly exhausted by the demand for those resources and backlogged for a significant period of time, or (ii) EPSA members will be forced to expend considerable resources to expedite implementation. The failure to provide legal certainty and an adequate transition period will needlessly expose EPSA members to potential regulatory non-compliance and commercial risk until the required changes are fully implemented and tested.

Finally, EPSA members' existing hedging and price discovery trading programs utilize exempt commodities transactions. These trading programs were developed, priced, and executed in reliance upon the fact that exempt commodity transactions would be subject to CEA Section 2(h) (as in existence on the day before the Effective Date). Requiring comprehensive, mid-course revisions to its existing exempt transactions would likely force EPSA members to incur unforeseen costs and risks. As

noted above, this uncertainty could adversely affect the efficient operation of energy markets and could potentially result in consumers paying higher prices for physical commodities, such as coal, oil, natural gas, or electricity.

## **V. CONCLUSION**

For the reasons state herein, EPSA respectfully requests that the Commission grant this petition as set forth herein, and allow all of its members' transactions that either (i) were subject to CEA Section 2(h) (as in existence on the day before the Enactment Date), or (ii) would have been subject to CEA Section 2(h) (as in existence on the day before the Enactment) but for the amendments in the Act, to be subject to such "pre-Act" provisions of CEA Section 2(h) until the Extension Date. If the Commission will not grant this petition based on the inclusion of one or more requested terms, but would otherwise grant this petition if such terms were removed or modified, EPSA hereby requests the Commission grant this petition on such terms as if the unacceptable terms were removed or modified.

Respectfully submitted,



---

Daniel S.M. Dolan  
VP, Policy Research & Communications  
Electric Power Supply Association  
1401 New York Avenue, NW, 11th Floor  
Washington, DC 20005  
(202) 628-8200

September 20, 2010