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October 15, 2012

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**Re: Comments of the International Energy Credit Association (“IECA”) to the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) Agency Information Collection Activities; Proposed Collection, Comment Request: Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping: Book-out Agreement Confirmation (“Book-out Confirmation Information Collection Notice” or “Notice”) (77 Federal Register 49428, August 16, 2012)**

Ladies and Gentlemen:

The IECA<sup>1</sup> appreciates this opportunity to respond to the CFTC’s Book-out Confirmation Information Collection Notice. As discussed in more detail below, the IECA believes the Commission’s burden estimate is grossly underestimated and is not representative of the book-out practice of IECA’s members. Accordingly, IECA’s comments herein include certain recommendations to assist the Commission in developing the appropriate level of oversight of the swaps market and to aid the Commission in meeting its Paperwork Reduction Requirement duties.

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<sup>1</sup> The IECA is not a lobbying group. Rather, we are an association of several hundred energy company credit management professionals grappling with credit-related issues in the energy industry. Our members’ concerns regarding the Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA” or “Dodd-Frank Act”) have led us to submit numerous comments to the Commission on its rule-makings under the DFA.

## **I. Introduction.**

On August 13, 2012, pursuant to requirements binding upon it pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, the Commission issued the Book-out Confirmation Information Collection Notice “announcing an opportunity for public comment on the *proposed* collection of certain information by the agency” related to the new requirement for confirming oral book-outs. *See* 77 Fed. Reg. at 49428 (emphasis added).<sup>2</sup> As stated in the Notice:

The Commission recently adopted a final rule and interpretations, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), requiring that oral book-out agreements must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form. This notice solicits comments on the recordkeeping requirement that is embedded in the final interpretation’s reporting requirement.

*Id.*

In the Notice, the Commission specifically invited comments on (i) the burden estimate and (ii) any other aspect of the information collection, including suggestions for reducing the burden. The IECA responds, in turn below, to both of these information requests.

Correspondence with respect to these comments should be directed to the following individuals:

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## **II. IECA’s Response to the Commission’s Burden Estimate.**

The Commission’s estimate that entities who engage in book-outs do so at a frequency of “On occasion, 1-2 annually” is so grossly underestimated that the IECA is reluctant to provide a replacement estimate. This is the case because what the Commission is envisioning to support this estimate cannot possibly represent the current book-out practice of IECA’s members. As a result, the IECA respectfully requests that the Commission issue a rulemaking specifically on the

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<sup>2</sup> Even though the Office of Management and Budget (“OMB”) has not approved this new documentation requirement, which would render it unauthorized under the Paperwork Reduction Act, the Commission did not act upon IECA’s petition to delay the effective date which was filed on September 21, 2012. (*See* Attachment A for IECA’s pending petition to extend the book-out effective date). The IECA respectfully reminds the Commission of IECA’s pending petition and believes the energy industry will benefit greatly if the Commission grants the extension.

book-out confirmation requirement so that the Commission can better gauge the type of oral book-outs it believes should be confirmed and what frequency they occur for the respondents.

To the extent the Commission is unwilling to engage in a new rulemaking, the IECA believes, based on discussions with its members and other industry participants, that the Commission's estimate is off by a magnitude of over 50,000 percent. In this regard, an annual estimate of 500 to 1000 book-outs is more appropriate than the 1 to 2 annual estimate provided in the Notice.<sup>3</sup> In addition, we would point the Commission to physical natural gas transactions delivering at Henry Hub. Henry Hub is the most liquid trading point for natural gas in North America. One of our members has indicated that more than 90% of natural gas transactions delivering at Henry Hub book-out. Accordingly, based on this increased burden estimate, the IECA respectfully requests that the Commission re-evaluate the anticipated benefit of requiring confirmations of oral book-outs to determine whether the additional costs are justified.

Additionally, the Commission estimates that the "respondent burden for this collection is estimated to be 10 minutes per response...[which] includes the time to prepare the written or electronic confirmation to an oral book-out agreement." Since parties' schedulers see gross delivery requirements, rather than specific transactions, and therefore may not necessarily agree on which specific transactions are "booked out," the time to confirm could be significantly greater (if a written confirmation must reference the specific transactions).

### **III. IECA's Recommendations to Reduce the Burden.**

As noted above, the IECA believes that the book-out confirmation requirement warrants a separate rulemaking in order to allow the Commission to better gauge the types of transactions the requirement should apply to, if any, for the energy industry. According to the Swap Definition Rule,<sup>4</sup> the Commission's requirements for book-outs are based on the Brent interpretation,<sup>5</sup> which *does not* include a confirmation requirement.<sup>6</sup> This change to an established policy, which has existed since 1990, should be implemented through a rulemaking process that allows for comments before the issuance of a final rule. Instead, the book-out confirmation requirement was not part of the proposed rulemaking, but was included by the Commission in the Swap Definition Rule.

Through the separate rulemaking process the IECA is proposing, the Commission will get the benefit of receiving comments from impacted parties *before* the Commission issues a

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<sup>3</sup> In addition, the IECA notes that some industry participants have over 12,000 book-outs each year. After the Commission executes the information sharing Memorandum of Understanding with the Federal Energy Regulatory Commission ("FERC") required by Section 720 of the DFA, the Commission will have better access to FERC's Electric Quarterly Report data, which includes the actual number of book-outs entered into by electric utilities.

<sup>4</sup> *Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement; Mixed Swaps; Security-Based Swap Agreement Recordkeeping* (the "Swap Definition Rule," 17 CFR Part 1, RIN 3038-AD46, Federal Register August 13, 2012).

<sup>5</sup> *Statutory Interpretation Concerning Forward Transactions*, 55 Fed. Reg. 39188, Sept. 25, 1990 ("Brent Interpretation").

<sup>6</sup> The IECA notes that whether or not the parties document the oral book-out with a confirmation does not change the original intent of the parties at the point of contract execution – which is what the Commission is evaluating according to the Swap Definition Rule.

final rule. Such comments may lead the Commission to conclude that it is more appropriate to defer to the regulated entities on how to document the intent of the original agreement and associated book-out – which may include recorded lines, instant messages, e-mails, and other evidential factors. This approach would be consistent with the Commission’s requirements for other transactions that result in non-delivery for reasons other than book-outs.<sup>7</sup> In summary, the IECA does not believe that a separate documentation approach for booked-out transactions is currently justified and believes the new book-out confirmation requirement should be developed only through a full rulemaking process in accordance with the Administrative Procedures Act.

In addition, the IECA recommends that the Commission clarify that, although the interpretive guidance to the Swap Definition Rule speaks in prescriptive terms (“in the event of an oral agreement, such agreement *must* be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form” (77 Fed. Reg. at 48230 (emphasis added))), the book-out documentation “requirement” is actually a safe harbor for forward contracts. The Commission does not have jurisdiction over forward contracts, and therefore cannot prescribe rules about how they should be documented, including forward contracts that are entered into orally. Thus, the Commission should clarify that its prescriptive documentation “rule” is actually a safe harbor, and that the consequence of failing to follow the “rule” is not a violation of the law, but rather an inability to take advantage of a safe harbor for transactions that are entered into orally (and that therefore the traditional facts and circumstances standard will still be available to evaluate whether a transaction entered into orally but not confirmed by some kind of written or electronic means is a forward or a swap).

If the Commission chooses not to institute a separate rulemaking process for the book-out confirmation requirement, the IECA further recommends that the Commission clarify the following points in order to reduce the burden for the energy industry:

- A. *Spot transactions are not subject to the new book-out confirmation requirement.*

As stated in the Swap Definition Rule, the book-out requirements are necessary to “qualify for the safe harbor *under the forward contract exclusion*.” See 77 Fed. Reg. at 48228. Accordingly, based on the wording in the Swap Definition Rule and because the Commission has not historically asserted jurisdiction over the physical spot markets, the Commission should clarify that the book-out confirmation requirement does not apply to physical spot transactions. This clarification will greatly reduce the burden on the energy industry.

- B. *Book-outs that have been documented by electronic means (i.e., not “oral”) such as through Instant Messages or by e-mail are not subject to a new and different book-out confirmation requirement.*

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<sup>7</sup> “[T]he CFTC will look to the relevant facts and circumstances of the transactions *as a whole* to evaluate whether the transaction qualifies for the forward exclusion from the definitions of the terms ‘swap’ and ‘future delivery.’” See 77 Fed. Reg. at 48239 (emphasis added).

The IECA requests that the Commission clarify that book-outs that have been documented through Instant Messages or by e-mail, or via third party administered automated book-out matching systems are not “oral” and therefore not subject to a new and different book-out confirmation requirement. This clarification is warranted because the book-out confirmation requirement states that an “oral” book-out must be followed in a commercially reasonable timeframe by a confirmation in some type of written or *electronic form*. Accordingly, book-outs already executed in an “electronic form,” or that already are not “oral,” should not be subject to the requirement. This additional clarification will reduce the burden on the energy industry by allowing entities which utilize these documentation methods to continue their existing practices without change.

**IV. Conclusion.**

The IECA respectfully submits the foregoing comments in response to the Commission’s Book-out Confirmation Information Collection Notice. This letter represents a submission of the IECA, and does not necessarily represent the opinion of any particular member thereof.

Yours truly,  
INTERNATIONAL ENERGY CREDIT ASSOCIATION

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September 21, 2012

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Re: Request of the International Energy Credit Association (“IECA”) to the Commodity Futures Trading Commission (“CFTC” or “Commission”) for a Delay of the Effective Date of the Commission’s Interpretive Guidance Requiring the Confirmation of Oral Bookouts (“Bookout Confirmation Requirement”) set forth in the Commission’s Rule entitled Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (the “Swap Definition Rule,” 17 CFR Part 1, RIN 3038-AD46, Federal Register August 13, 2012)

Ladies and Gentlemen:

The Commission, as part of the above-referenced Swap Definition Rule, included an extensive section entitled Interpretive Guidance, which included a new Bookout Confirmation Requirement with respect to oral bookouts under forward contracts. This letter respectfully requests a delay of the effective date for such Bookout Confirmation Requirement.

**I. Introduction.**

The IECA is not a lobbying group. Rather, we are an association of several hundred energy company credit management professionals grappling with credit-related issues in the energy industry. Our members’ concerns regarding the Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”) have led us to submit numerous comments to the Commission on its rule-makings under the DFA.

Correspondence with respect to these comments should be directed to the following individuals:

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## **II. Request for a Delay of Effective Date of the Bookout Confirmation Requirement.**

The Commission's Interpretive Guidance, included as part of the Swap Definition Rule, established a new Bookout Confirmation Requirement for oral bookouts under forward contracts (77 Fed. Reg. at 48,230), which is stated as follows:

Under the Brent Interpretation, what is relevant is that the book out occur through a subsequent, separately negotiated agreement. While the CFTC is sensitive to existing recordkeeping practices for book-outs, in order to prevent abuse of the safe harbor, the CFTC clarifies that in the event of an oral agreement, such agreement must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form.

The effective date of this requirement would *appear* to be 60 days after its publication in the Federal Register, or October 12, 2012. Although the Commission has postponed a majority of the October 2012 deadlines, this deadline for the confirmation of oral bookouts *appears* to remain. In this regard, there is some confusion among IECA's members as to the actual effective date based on the following provision in the Swap Definition Rule:

As noted above, the CFTC believes that its interpretation which clarifies that oral book-out agreements must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form *would result in a new 'collection of information' requirement within the meaning of the PRA.* Therefore, the CFTC is submitting the new "book-out" information collection to OMB for review in accordance with 44 U.S.C. 3506(c)(2)(A) and 5 CFR 1320.8(d). The CFTC will, by separate action, publish in the Federal Register a notice on the paperwork burden associated with the interpretation's requirement that oral book-outs be followed in a commercially reasonable timeframe by confirmation in some type of written or electronic form in accordance with 5 CFR 1320.8 and 1320.10. *If approved, this new collection of information will be mandatory.*

*See* 77 Fed. Reg. at 48,305 (emphasis added). Accordingly, the language from the Swap Definition Rule states that "if" the necessary approvals are obtained, the Bookout Documentation Requirement "will be mandatory." These approvals have not yet been obtained by the CFTC.

Therefore, IECA respectfully submits that granting this request will eliminate any confusion as to when the industry must comply with this new documentation requirement as discussed in more detail below.

**A. A Reasonable Extension of the Deadline for the Oral Bookout Confirmation Requirement Is Needed to Ensure Compliance by the Energy Industry.** With this deadline looming, the electric industry, the natural gas industry and others have been aggressively working to develop standard language that can be adopted to confirm oral bookouts. Contracts may also need to be amended and employees will need to be trained on the new confirmation requirement.

In addition, the energy industry needs to work with the Commission to better clarify what transactions qualify as an oral bookout and are, therefore, subject to this new confirmation requirement. As the Commission is aware, there has been recent confusion over the scope of this undefined term.<sup>1</sup> The IECA intends to include a discussion of this topic when it submits comments on October 12, 2012, regarding the Interpretive Guidance set forth in the Commission's Swap Definition Rule. In order to allow time for analysis and resolution of these issues, additional time will be needed to effectively complete these necessary tasks and others.

The lack of sufficient implementation time threatens to disrupt, possibly substantially, the North American wholesale energy markets. This disruption will immediately increase the costs of electricity and natural gas to consumers nationwide, because parties will be prohibited from entering into bookouts until they can develop and implement the necessary documentation and training.

For this reason alone, the Commission should grant a reasonable extension of the effective date of the new Bookout Confirmation Requirement applicable to oral bookouts under forward contracts.

**B. Paperwork Reduction Act Compliance Requires an Extension.** In addition, the CFTC is still working to obtain the necessary Office of Management and Budget approval under the Paperwork Reduction Act, which must occur before the new Bookout Confirmation Requirement becomes effective. In this regard, the Commission has recently published a Notice on Agency Information Collection Activities related to the new bookout documentation requirement ("Information Collection Notice") providing "an opportunity for public comment on the *proposed* collection of certain information by the agency." (emphasis added). As noted in the CFTC's Information Collection Notice:

Under the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501 *et seq.*, Federal agencies are required to publish notice in the Federal Register concerning each

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<sup>1</sup> In this regard, the CFTC's Notice on Agency Information Collection Activities related to the new bookout documentation requirement estimates *one to two* oral bookouts requiring confirmation per year per respondent. However, based on a discussion among IECA's members, it appears this estimate is grossly underestimated. As a result, the IECA believes further discussion is warranted to better understand what the CFTC considers to be an oral bookout requiring a confirmation. In addition, it appears this new requirement could apply to IECA members that would not otherwise be subject to the Commission's jurisdiction – because they only participate in physical forward transactions that include no optionality.



proposed collection of information and to allow 60 days for public comment. The Commission recently adopted a final rule and interpretations, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), requiring that oral book-out agreements must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form. This notice solicits comments on the recordkeeping requirement that is embedded in the final interpretation’s reporting requirement.

(emphasis added).

The CFTC’s Information Collection Notice further states:

Under the PRA, Federal agencies must obtain approval from the Office of Management and Budget (“OMB”) for each collection of information they conduct or sponsor. “Collection of Information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the Federal Register concerning each proposed collection of information before submitting the collection to OMB for approval. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. To comply with this requirement, the CFTC is publishing the notice of the proposed collection of information listed below.

(emphasis added).

Comments on the CFTC’s Information Collection Notice are due October 15, 2012 – three days after the bookout documentation requirement goes into effect. Only after October 15, 2012, following the procedure described in the Commission’s Information Collection Notice, will the Commission be able to seek OMB approval for the “collection” to be established by this new Bookout Confirmation Requirement.

**C. Extension of Effective Date Requested.** For all the foregoing reasons, the IECA respectfully requests a delay in the effectiveness of this provision of the CFTC’s Interpretive Guidance until not less than 180 days after the Commission completes the rulemaking process for the comprehensive regulations promulgated pursuant to Title VII of the DFA (“Title VII DFA Regulations”). Once all of the Title VII DFA Regulations have been published in the Federal Register, the IECA requests that the Commission establish an implementation schedule that provides market participants with sufficient time to commence compliance with the Title VII DFA Regulations, including the Bookout Confirmation Requirement. In the alternative, the IECA requests that the Commission delay the effectiveness of the CFTC’s Interpretive Guidance on bookout documentation until 180 days after the Commission provides its response to the open questions set forth in the Swap Definition Rule.

Depending on how one defines the transactions for which bookout confirmation will now be required, this new CFTC requirement regarding confirmation of oral bookouts potentially affects millions of transactions per year. The additional time requested by this petition will greatly benefit the electric industry, the natural gas industry, and others, including the Commission, by providing the necessary time for more meaningful implementation.

With the fast approaching effective date, the IECA respectfully requests expedited treatment of this petition by September 28, 2012.

### **III. Conclusion.**

The IECA respectfully submits the foregoing request for a delay in the effective date of the Commission's new Bookout Confirmation Requirement as more fully described herein. This letter represents a submission of the IECA, and does not necessarily represent the opinion of any particular member thereof.

Yours truly,  
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