




# National Rural Electric Cooperative Association

A Touchstone Energy® Cooperative 

February 13, 2012

**VIA ELECTRONIC SUBMISSION**

Office of the Comptroller  
of the Currency  
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Washington, DC 20219  
Telefacsimile: (202) 874-5274  
Email: [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov)  
Docket ID OCC-2011-14

Board of Governors  
of the Federal Reserve System  
Attn.: Jennifer J. Johnson, Secretary  
20th Street and Constitution Avenue, N.W.  
Washington, DC 20551  
Telefacsimile: (202) 452-3819  
Email: [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)  
Docket No. R-1432 and RIN 7100 AD 82

Federal Deposit Insurance Corporation  
Robert E. Feldman, Executive Secretary  
Attn.: Comments  
550 17th Street, N.W.  
Washington, DC 20429  
Email: [Comments@fdic.gov](mailto:Comments@fdic.gov)  
Message subject line: RIN 3064-AD85

Securities Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549  
Email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)  
Message subject line: File Number S7-41-11

Mr. David A. Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581  
Email to [secretary@cftc.gov](mailto:secretary@cftc.gov)

**Re: Restrictions on Proprietary Trading and Certain Interests in and Relationships with Hedge Funds and Private Equity Fund -- Proposed Rules to Implement Section 619 (“Volcker Rule”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”) (Office of the Comptroller of the Currency (“OCC”) 12 CFR Part 44, Docket No. OCC-2011-0014 and RIN 1557-AD44; Federal Reserve System, 12 CFR Part 248, Docket No. R-1432 and RIN 7100 AD 82; Federal Deposit Insurance Corporation (“FDIC”) 12 CFR Part 351, RIN 3064-AD85; Securities and Exchange Commission (“SEC”) 17 CFR Part 255, Release No. 34-65545, File No. S7-41-11 and RIN 3235-AL07; Commodity Futures Trading Commission (“CFTC”; collectively with the OCC, Federal Reserve, FDIC and SEC, the “Agencies”) 17 CFR Part 75, RIN 3038-AC[-])**

Ladies and Gentlemen:

This letter responds to the above-referenced notices by which the Agencies request public comment on the proposed rules implementing the Volcker Rule.

## **I. Introduction.**

The National Rural Electric Cooperative Association (“NRECA”) is the national service organization for more than 900 not-for-profit rural electric utilities and public power districts that provide electric energy to approximately 42 million consumers in 47 states or 12 percent of the nation’s population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. NRECA members generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. The vast majority of NRECA members are not-for-profit, consumer-owned cooperatives which distribute electricity to consumers. NRECA’s members also include approximately 66 generation and transmission (“G&T”) cooperatives, which generate and transmit power to 668 of the 846 distribution cooperatives. The G&T cooperatives are owned by the distribution cooperatives they serve. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost. Electric cooperatives own approximately 43% of the electric distribution lines in the U.S., reaching some of the country’s most sparsely populated areas, from Alaskan fishing villages to remote dairy farms in Vermont. In an electric cooperative, unlike most electric utilities, its owners -- called “members” of the cooperative -- are also customers, who are able to vote on policy decisions, directors and stand for election to the board of directors. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members.

The vast majority of NRECA’s members meet the definition of “small entities” under the Small Business Regulatory Enforcement Fairness Act (“SBREFA”). 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. SBREFA incorporates by reference the definition of “small entity” adopted by the Small Business Administration (the “SBA”). The SBA’s small business size regulations state that entities which provide electric services are “small entities” if their total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. 13 C.F.R. §121.201, n.1.

NRECA respectfully submits these comments on the proposed rules issued by the Agencies to implement the Volcker Rule, which generally prohibits any “banking entity” from engaging in proprietary trading. After a two-year Volcker Rule transition period beginning in July 2012, banking entities cannot engage as a principal in, but can only engage as a “market maker” of, “covered financial positions.” “Covered financial positions” include “swaps,” as well as nonfinancial (or physical) commodity forward transactions that are excluded from the definition of “swap” by Commodity Exchange Act Section 1a(47)(B)(ii), as amended by DFA. The proposed rules imply that no banking entity will be allowed to transact in energy commodity forward contracts or energy “swaps,” except in a narrow market maker capacity.

Some of NRECA’s members have existing transactions in covered financial positions to which banking entities are counterparties. Such transactions have contract performance periods extending into and well past the two-year transition period. In addition, NRECA’s members need uninterrupted access to such long-term transactions and willing participants in the markets for such long-term transactions to finance energy infrastructure development and to hedge or mitigate commercial risks arising from their electric operations. NRECA is concerned that the

Volcker Rule should not call into question the rights and obligations of banking entities under such existing transactions or disrupt these important markets during the transition period. This concern and the potential consequences of the proposed rules are discussed below in section II.

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

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**II. The Agencies Should Provide in the Final Rules Explicit Grandfathering for Existing Nonfinancial Commodity Forward Transactions and Nonfinancial Commodity Swap Transactions, and all such Transactions Entered into Prior to the End of the Volcker Rule Transition Period.**

The Volcker Rule establishes a two-year transition period that begins in July 2012, after the end of which a banking entity must be in compliance and cannot engage as a principal in, but only as a market maker of, “covered financial positions.”<sup>1</sup> “Covered financial positions” include as-yet undefined “swaps” and nonfinancial commodity forwards that are not Title VII swaps.<sup>2</sup> In other words, prohibited activities include not only swaps, but also regular nonfinancial commodity forward transactions. Although banking entities may not engage as “principals,” they can, within the limits of the remainder of DFA, engage in “bona fide” market making<sup>3</sup> and hedging. The Volcker Rule in Title VI of DFA restricts federally insured institutions from engaging in proprietary trading of nonfinancial commodities or commodity “swaps.”

In addition, Title VII of DFA includes in Section 716 the Swaps Push-Out Rule, which prohibits “federal assistance” to “swap entities” and effectively requires banking entities to “push out” swaps activity to subsidiaries that are not directly federally insured. The Swaps Push-Out Rule has a compliance timetable similar to that of the Volcker Rule. The Swaps Push-Out Rule references the Volcker Rule, but is not reciprocally referenced in the Volcker Rule. Subsidiaries and affiliates of banks (all of which are “banking entities”) must comply with the Volcker Rule, and therefore it appears that a federally-insured institution may not be permitted to enter into a guaranty of obligations of entities to which proprietary trading has been “pushed out” in compliance with the Swaps Push-Out Rule, to the extent such proprietary trading by subsidiaries may be engaged in under the Volcker Rule at all.

Under the Swaps Push-Out Rule, all existing swaps and swaps entered into before the “end of the transition period” (July 2014) are grandfathered.<sup>4</sup> Section 739 of DFA (Commodity

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<sup>1</sup> Text of Proposed Common Rules §§ \_\_.3(a); \_\_.3(b)(i).

<sup>2</sup> Text of Proposed Common Rules § \_\_.2(I)(i)(B).

<sup>3</sup> Text of Proposed Common Rules § \_\_.4(b)(2)(ii).

<sup>4</sup> DFA §716(e); see also DFA §739.

Exchange Act §22(a)(5)(A)) also provides that ***Title VII*** is not a Termination Event or Force Majeure for existing contracts.<sup>5</sup> Thus, the Swaps Push-Out Rule does not imply that banking entities need to be concerned about or take any action during the transition period in respect of existing long-term commodity forward transactions or commodity “swap” transactions. However, this grandfathering protection is specific only to Title VII, and therefore is not necessarily extended to the Volcker Rule (in Title VI). Also, in contrast to the Swaps Push-Out Rule, the Volcker Rule has no provision explicitly grandfathering existing transactions.

The Agencies should provide clarity in the final rules implementing the Volcker Rule that all existing transactions and all those transactions entered into before the “end of the transition period” (July 2014) will not be affected and are not subject to any Volcker Rule prohibitions or requirements. The Volcker Rule should not create uncertainty as to whether banking entities have rights with respect to existing transactions that are not present in the underlying transaction documents (*e.g.* assignment rights), or give rise to claims of unilateral termination rights. Nonfinancial entities that are currently counterparties to long-term transactions with banking entity counterparties are entitled to legal and regulatory certainty. Moreover, the Agencies should promulgate regulations that mitigate, rather than potentially foster, disputes between contract counterparties. In addition, there should be regulatory certainty during the transition period to assure that the long-term infrastructure financing markets, and nonfinancial commodity and commodity derivatives markets, are not disrupted by regulatory uncertainty.

**NRECA accordingly requests a clear grandfathering provision providing that nonfinancial commodity forward transactions and commodity swap transactions to which a banking entity is a party, and guaranties which banking entities provide in connection with such transactions, entered into prior to the end of the Volcker Rules transition period have the same legal certainty protections that are provided in Section 716(e) of the Swaps Push-Out Rule and DFA Section 739 (Commodity Exchange Act Section 22(a)(5)(A)).**

Our members are parties to long-term energy infrastructure transactions to which banking entities are counterparties, lenders and guarantors. The maturity dates of such transactions, which include nonfinancial commodity forward transactions and energy commodity derivatives, extend well beyond the year 2020. Additionally, during the Volcker Rule transition period, our electric cooperative members and other electric utilities need to continue to build and finance such energy projects, and hedge or mitigate the commercial risks of such projects and their ongoing operations.

### **III. Conclusion.**

The Agencies should provide in the final rules implementing the Volcker Rule explicit grandfathering provisions with respect to all existing transactions and transactions entered into by banking entities prior to the end of the Volcker Rule transition period. Otherwise nonfinancial entities like our electric cooperative members will face serious legal and regulatory

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<sup>5</sup> DFA §739: “5(A) Unless specifically reserved in the applicable swap, neither the enactment of the Wall Street Transparency and Accountability Act of 2010, nor any requirement under *that Act* or an amendment made by *that Act*, shall constitute a termination event, force majeure, illegality, increased costs, regulatory change, or similar event under a swap (including any related credit support arrangement) that would permit a party to terminate, renegotiate, modify, amend, or supplement 1 or more transactions under the swap.” (emphasis supplied).

uncertainty with respect to these outstanding long-term transactions. Regulatory uncertainty may also impede the ability of our members and others in the energy industry from hedging or mitigating the commercial risks arising from our electric operations.

NRECA appreciates the opportunity to provide the foregoing comments and information to the Agencies. NRECA is pleased to make available to the Agencies credit and derivatives professionals with experience in advising nonfinancial entities with respect to energy infrastructure transactions, energy commodity transactions and energy commodity derivatives for further discussion and information upon request.

Respectfully yours,

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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