

## **Existing Commodity Exchange Act Representations**

Commodity Exchange Act Representations

Version 1.1

July 5, 2005

*Section 10.2, Representations and Warranties, is amended by replacing clauses (x), (xi) and (xii) in their entirety with the following:*

“(x) it is an “eligible commercial entity” within the meaning of Section 1a (11) of the Commodity Exchange Act, as amended by the Commodity Futures Modernization Act of 2000 (the “Commodity Exchange Act”);

(xi) it is an “eligible contract participant” within the meaning of Section 1a (12) of the Commodity Exchange Act; and

(xii) each Transaction that is not executed or traded on a “trading facility”, as defined in Section 1(a)(33) of the Commodity Exchange Act, is subject to individual negotiation by the Parties.”

**Commodity Exchange Act Representations**  
**Proposed Version 2.0**  
**Draft of February 18, 2015**

Explanatory notes:

Since the original EEI Commodity Exchange Act representations were drafted in 2005 there have been many changes to the Commodity Exchange Act and its regulations. Most significant were the changes resulting from the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) in 2010, and the voluminous regulations issued by, among others, the Commodity Futures Trading Commission.

The Dodd-Frank Act amended section 2(e) of the Commodity Exchange Act (“CEA”) to provide that it is unlawful for any person that is not an eligible contract participant (“ECP”) to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market. The list of entities that may be ECPs is fairly extensive (see Section 1a(18) of the CEA (see also the Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 75 FR 81074 (Dec. 21, 2010))). ECPs generally include entities with \$10 million in total assets, entities with a guarantor that is an entity with \$10 million in assets, entities with a net worth of at least \$1 million that are hedging, and banks and other financial institutions.

In a no-action letter issued on October 12, 2012, the Office of the General Counsel (“OGC”) of the CFTC clarified that, since a guarantor of a swap essentially takes the risk of a swap, a guarantor of a swap must also be a ECP. Notwithstanding the OGC no-action letter, the CFTC has not yet clarified the extent to which market participants are responsible to ensure that their counterparty’s guarantor is an ECP. Nonetheless, it is an advisable practice, whenever a guarantor may be guarantying a “swap” (and recall that commodity options are a form of swap), to procure a representation from the counterparty (or if possible from the guarantor) that such guarantor is an ECP. The second representation below is intended to address this concern.

Note as well that if the parties desire that these representations apply to existing transactions, additional changes may be required to make them “backward looking,” as Section 10.2 of the EEI Master only makes the representation apply as of the date the Transaction was entered into.

*Section 10.2, Representations and Warranties, is amended by*

- (i) renumbering the existing text as Section 10.2.1;*
- (ii) deleting clauses (x), (xi) and (xii) in their entirety;*
- (iii) adding the word “and” following the semicolon after clause (viii) and adding a period after clause (ix); and*
- (iv) adding the following second paragraph at the end of such Section 10.2:)*

“10.2.2.

(a) On the Effective Date and at the time of entering into each Transaction, each Party represents and warrants to the other Party that it is an “eligible contract participant” (“ECP”) as defined in the U.S. Commodity Exchange Act (“CEA”); and

(b) to the extent that (i) a Guarantor is specified for a Party on the Cover Sheet, (ii) such Guarantor provides a guaranty or assumes liability as a surety with respect to such Party’s obligations under one or more Transactions hereunder and (iii) applicable law, including without limitation the CEA, requires that such Party’s Guarantor be an ECP, then (x) at the time such Guarantor enters into such guaranty or assumption of liability as a surety and (y) at the time of entering into each Transaction for which such Party’s obligations are the subject of the guaranty or for which such Guarantor has assumed liability as a surety, such Party represents and warrants to the other Party that such Party’s Guarantor is an ECP.