



March 28, 2011

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

**Re: Comments of Encana Marketing (USA) Inc. on the Proposed Rule on
Position Limits for Derivatives, RIN Numbers 3038-AD15 and 3038-AD16**

Dear Secretary Stawick:

Encana Marketing (USA) Inc. (EMUS) hereby files comments on the Notice of Proposed Rulemaking (NOPR) issued by the Commodity Futures Trading Commission (Commission) in this proceeding.¹ EMUS is an indirect, wholly-owned subsidiary of Encana Corporation (Encana). Its principal U.S. office is located in Denver, Colorado. EMUS' marketing activities include selling and purchasing natural gas, natural gas liquids, other related energy commodities and services in the U.S. wholesale energy markets. As part of EMUS' marketing activities, Encana, for itself and its subsidiaries, enters into hedging transactions or swaps to manage and mitigate commercial risks associated with EMUS' sales, purchases and movement of these energy commodities. It considers itself to be an end-user of swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act).

Comments

EMUS takes no position on whether it is appropriate for the Commission to adopt position limits pursuant to Section 737 of the Act. However, if the Commission elects to proceed with this rulemaking, EMUS provides the following comments on certain aspects of the proposed regulations.

1. **Definitions in Proposed § 151.1**

The Commission has not yet adopted definitions of certain terms used in the NOPR, including the term "swap." However, EMUS believes that swap transactions between affiliates and swap transactions between a parent and its subsidiaries should not be considered for purposes of position limits. Inter-affiliate swap transactions of this nature pose no material risk to the U.S. financial system, especially when they are among affiliates that are not financial entities.

¹ *Position Limits for Derivatives*, 76 Fed. Reg. 4752 (Jan. 26, 2011).

2. Position Limits for Referenced Contracts in Proposed § 151.4

The Commission proposes to establish position limits for certain physical commodity derivatives in two phases. In the first phase, the Commission proposes to establish spot-month position limits at the levels currently imposed by designated contract markets (DCMs) because it does not currently have the information necessary to set position limits outside the spot-month. In the second phase, the Commission proposes to establish single-month and all-months-combined position limits and set its own spot-month position limits pursuant to the formulas in proposed § 151.4. This second phase would commence once the Commission has implemented a comprehensive system for gathering swap positional data which provides it with the data necessary to establish such position limits.

The Commission states in the NOPR that, “CFTC set-position limits after the transitional period would be recalculated every year based on the formulas set forth in proposed § 151.4, subject to any changes to the formulas that may be proposed and adopted based on the Commission’s surveillance of the markets for the referenced contracts.”² The Commission goes on to state that information collected in the position viability reporting requirements proposed in the NOPR “may facilitate evaluating the efficacy and appropriateness of the proposed position limit framework[.]”³

EMUS does not oppose the Commission’s proposal to establish position limits in two phases. EMUS takes no position on the specific formulas that the Commission proposes to use to establish position limits in the second phase. However, EMUS supports the Commission’s proposal to wait to determine numerical non-spot-month position limits until it has collected the necessary open interest and market structure data.

EMUS is concerned that, unlike proposed § 151.4(h) which would require the Commission to recalculate the position limits on an annual basis, the Commission would not be required to reevaluate the formulas on a periodic basis. The Commission states in the NOPR that it has the discretion to make changes to the formulas set forth in § 151.4, but it does not appear to be under any obligation to do so. EMUS recommends that the Commission consider adopting procedures for a periodic reevaluation of the formulas to ensure that they do not reduce liquidity and/or impair the price discovery function of the markets.

3. Bona Fide Hedging Exemption in Proposed § 151.5

The Commission proposes to exempt *bona fide* hedging transactions from position limits in § 151.5. EMUS encourages the Commission to adopt a definition of *bona fide* hedging that is consistent with the definition of “hedging or mitigating commercial risk” previously proposed by the Commission in other

² *Id.* at 4753. The Commission would be required to fix position limits by January 31st of each calendar year pursuant to proposed § 151.4(h)(1). Proposed § 151.4(h)(4) would require the position limits to become effective on the 1st day of March immediately following the fixing date and remain effective up until and including the last day of the immediately following February.

³ *Id.*

rulemaking proceedings.⁴ EMUS believes that inconsistent definitions would cause confusion, raise the potential for conflicts among various parts of the Commission's regulations, and increase the risk of non-compliance with one or more of the rules adopted by the Commission to implement the requirements of the Act.

Proposed § 151.5(b) would require a trader with a position that exceeds a position limit pursuant to the *bona fide* hedging exemption to make a 404 filing. Proposed § 151.5(d) would require a trader that exceeds a position limit to reduce the risks of certain swap transactions to submit a 404S filing. The proposed regulations would require a 404 or 404S filing made pursuant to § 151.5 to be submitted to the Commission the day after a position limit is exceeded and all days the trader exceeds such levels and the first day after the trader's position is below the position limit. However, the Commission solicits comments on how frequently traders should be required to make such reports. The Commission asks whether it should only require such reports to be filed when a trader's position either first exceeds a limit, or when a trader's hedging need increases, with a monthly summary while the trader's position remains in excess of the limit.⁵ EMUS encourages the Commission to adopt this alternative proposal because it would provide the Commission with periodic information regarding *bona fide* hedges without imposing an undue reporting burden on traders that qualify for the exemption.

Under proposed § 151.5(g), the counterparties to a swap that qualifies for the *bona fide* hedging exemption would be required to satisfy certain written representation and confirmation requirements. EMUS recommends that the Commission reconsider its proposal to require the counterparties to engage in a series of steps to verify the eligibility of a swap transaction for the *bona fide* hedging exemption. The Commission should revise § 151.5(g) to permit the counterparties simply to represent in their transaction documents that that a swap transaction qualifies for the *bona fide* hedging exemption.

As proposed, § 151.5(h) would require the counterparties to a *bona fide* hedging transaction to "retain" the written representations and confirmations described in proposed § 151.5(g). Assuming that the Commission adopts EMUS' suggested revision to proposed § 151.5(g), the Commission should revise § 151.5(h) to require the counterparties to retain transaction documents (rather than written representations and confirmations) for a swap that qualifies for the *bona fide* hedging exemption. Consistent with the record retention requirements recently proposed by the Commission in other rulemaking proceedings,⁶ EMUS encourages the Commission to clarify that § 151.5(h) would require

⁴ The definition of "hedging or mitigating commercial risk" in proposed § 1.3(ttt) would include a swap position that qualifies as *bona fide* hedging for purposes of an exemption from position limits. See *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant"*, 75 Fed. Reg. 80,174 (Dec. 21, 2010). Under proposed § 39.6(c), a swap would be deemed to be used to "hedge or mitigate commercial risk" when it qualifies as *bona fide* hedging for purposes of the exemption from position limits. See *End-User Exception to Mandatory Clearing of Swaps*, 75 Fed. Reg. 80,747 (Dec. 23, 2010).

⁵ NOPR at 4761.

⁶ See *Swap Data Recordkeeping and Reporting Requirements*, 75 Fed. Reg. 76,574, 76,579 (Dec. 8, 2010) (proposing regulations that would require certain counterparties to keep records for five years following final termination of the swap transaction).

the relevant records to be retained by the counterparties for five years from the date of the final termination of a swap transaction.

4. Preexisting Positions in Proposed § 151.9

EMUS supports the Commission's proposal to exempt positions that are established in good faith prior to the effective date of the specific position limits that may be adopted by the Commission pursuant to the regulations proposed in this proceeding.

5. Reporting Requirements in Proposed § 151.10

The Commission proposes to address the form and manner of reporting and submitting information or filings regarding position limits in § 151.10. EMUS strongly supports the adoption of an electronic reporting system for any reports or filings that would be required under the proposed regulations. EMUS encourages the Commission to provide the public with the opportunity to file comments on the format of the 404, 404A and 404S filings in the future.

Conclusion

EMUS appreciates the opportunity to file comments on the NOPR, and encourages the Commission to take the comments and recommendations set forth above into consideration in this rulemaking.

Sincerely,

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