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February 13, 2012

The Honorable David Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

RE: RIN 3038-AD64 – Interpretation; Request for Comments

Retail Commodity Transactions Under the Commodity Exchange Act

Dear Secretary Stawick:

The National Energy Marketers Association (“NEM”)¹ appreciates the opportunity to comment on the Commodity Futures Trading Commission’s (“Commission”) above-referenced request for comments on the Commission’s proposed interpretation of the term “actual delivery” under Section 742(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. This Section of the Act gave CFTC jurisdiction over certain “retail commodity transactions,” subject to certain exceptions.

NEM’s membership is primarily comprised of Retail Energy Marketers (and suppliers who serve them), who sell electricity and natural gas to consumers as a competitive alternative to the local utility. Retail Energy Marketers primarily buy physical energy and hedges necessary to provide consumers with the physical energy they want at a price (or price structure) they want. For example, Retail Energy Marketers often purchase wholesale physical natural gas and electricity on a spot (delivery) month (day) basis and purchase hedges to lock in prices for any consumers who want a long-term fixed price contract. Energy marketers as well as their suppliers are not financial entities and are not dealers as contemplated in the legislative history of the Dodd-Frank Legislation.²

¹ NEM is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM’s membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting and power line technologies.

² See NEM Comments RIN 3038-AD06, RIN 3038-AD10, RIN 3038-AC98, dated February 22, 2011, at pages 2-3.

Section 742(a) added a new Section 2(c)(2)(D) to the Commodity Exchange Act, which defines “Retail Commodity Transactions” as “any agreement, contract, or transaction in any commodity that is entered into with, or offered to (even if not entered into with), a non-eligible contract participant or non-eligible commercial entity on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.” However, certain transactions are excepted from this definition. Specifically, “a contract of sale that ‘results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved.’” Additionally, contracts of sale that, “create[] an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with the line of business of the seller and buyer,” are excepted from the definition of “retail commodity transaction” under CFTC jurisdiction. Section 742(a) was enacted in response to the type of transactions in Zelener that were denominated as spot transactions, although in practice operated as futures contracts, and by judicial precedent had been able to avoid CFTC jurisdiction.

NEM submits these comments to respectfully request that the Commission clarify that the types of transactions which its retail energy marketer members typically enter into with residential and commercial customers, in which they contract with the consumer to provide physical energy supply (electricity or natural gas) for terms that regularly in the course of business contemplate delivery of the physical energy commodity in excess of 28 days, were not intended and should not be interpreted to constitute “retail commodity transactions” under the Act. Many retail energy marketers as part of their core business offer residential and commercial consumers fixed price contracts with terms extending for a year or more to provide them with natural gas or electricity, in place of the commodity provided by their local utility.

Residential and commercial consumers value long term fixed price energy contracts because it provides them with pricing certainty that can assist them with personal or business budgeting needs. The residential and commercial consumers take delivery and consume the natural gas and/or electricity provided by the retail energy marketer. The retail energy marketer’s contract with the consumer is typically structured such that delivery will commence at a future date, generally dependent on the local distribution utilities’ meter read dates and processes for switching consumers from utility commodity service to the retail energy marketer’s commodity service. These contracts are not entered into by financial entities for speculative purposes. Indeed, the purpose is just the opposite – for the retail energy marketer to provide the physical energy to the consumer for use in the consumer’s home or business. As such, these transactions do not at all resemble the Zelener-type contracts which Section 742(a) was enacted to regulate.

Even if retail energy marketer contracts with residential and commercial consumers were considered “retail commodity transactions” within the Act, they should be interpreted to fall within the enunciated exceptions. These contracts qualify under the Section 2(c)(2)(D)(ii)(III)(aa) exception for contracts with a duration of a “longer period” duration than 28 days within “typical commercial practice.” Indeed, as discussed above,

fixed price contracts, with durations of a year or more, are one of the standard retail energy products being offered to residential and commercial energy consumers in the marketplace today, and should therefore qualify as a “typical commercial practice.” Additionally, such contracts also lie within the “line of business” exception in Section 2(c)(2)(D)(ii)(III)(bb). The “line of business” of retail energy marketers includes offering longer term fixed price contracts to both commercial and residential consumers of natural gas and electricity.

The typical commercial practice in this *line of business* is clearly to sell, hedge and deliver the physical commodities of natural gas and electricity for end use consumption. Retail energy marketers are not in the *typical commercial practice* of speculating in the financial markets nor speculating on natural gas and electricity as commodities. Indeed, such speculation would defeat their ability to deliver natural gas and electricity over the term and at the prices they contract with consumers to provide. Moreover, the extensive regulatory and financial oversight by state, regional and federal regulatory bodies as well as local utility companies who often require significant financial guarantees and/or collateral are all targeted at protecting the financial and operational integrity of insuring that retail energy marketers can and, in fact, do fulfill their long term contractual obligations to the end use consumer.

Consequently, The National Energy Marketers Association requests that longer term fixed price contracts and the commercial hedging transactions necessary to fulfill their obligations to physically deliver natural gas and electricity that are clearly intended by the consumer for end use consumption in either their home or place of business qualify for the line of business, typical commercial transaction, commercial hedging and end use exceptions as codified by Dodd-Frank and interpreted in this and related rulemakings.

NEM appreciates this and previous opportunities provided by the Commission for stakeholders to provide input as the Commission undertakes the significant and complex task of implementing the Dodd-Frank Act. We would be pleased to provide any additional information that the Commission may request.

Respectfully submitted,

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