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Commodity Futures Trading Commission
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- **17 CFR Part 3, 32 and 33**
- **RIN Number 3038-AD62**
- **Commodity Options**

Dear Mr. Stawick.

Thank you for giving us the opportunity to comment on your Final rule and interim final rule: Commodity Options. As requested, I will restrict my comments in this letter to the interim final rule that incorporates a trade option exemption into the final rules for commodity options (added § 32.3). For a transaction to be within the trade option exemption, the option, the offeror (seller), and the offeree (buyer), as applicable, must satisfy the following eligibility requirements: that the option, if exercised, be physically settled; that the option seller meet certain eligibility requirements; that the option buyer be a commercial user of the commodity underlying the option; and certain other regulatory conditions.

Physical commodity option

For a transaction to be within the trade option exemption, § 32.3(a)(3) requires that: "The commodity option must be intended to be physically settled, so that, if exercised, the option would result in the sale of an exempt or agricultural commodity for immediate or deferred shipment or delivery." The commentary states that: "To assist parties in determining whether the sale of the exempt or agricultural commodity is intended to be physically settled, the Commission refers parties to the forward contract exclusion guidance as provided in the Product Definition NPRM".¹ The Product Definition NPRM discusses this in some detail, specifically referencing the Brent Interpretation,² and states that:

¹ See Product Definition NPRM, at 76 FR 29827-29830.

² See Statutory Interpretation Concerning Forward Transactions, 55 FR 39188, September 25 1990 (Brent Interpretation).

“As noted above, the Brent Interpretation applies to ‘commercial participants in connection with their business.’ Market participants that regularly make or take delivery of the referenced commodity (in the case of the Brent Interpretation, a tanker full of Brent oil) in the ordinary course of their business meet that standard. Such entities qualify for the forward exclusion from both the future delivery and swap definitions for their forward transactions under the Brent Interpretation even if they enter a subsequent transaction to ‘book out’ the forward contract rather than make or take delivery. Intent to make or take delivery can be inferred from the binding delivery obligation for the referenced commodity in the contract and the fact that the parties to the contract do, in fact, regularly make or take delivery of the referenced commodity in the contract in the ordinary course of their business.”³

This recognises the importance of a “binding delivery obligation” and that parties “regularly make or take delivery of the referenced commodity”. This is quite clear; however it is not sufficient or complete guidance for determining whether the sale of the exempt or agricultural commodity is intended to be physically settled. Firstly, the “binding delivery obligation” should relate to a clearly documented commercial need; secondly, you should provide guidance for determining when parties “regularly” make or take delivery of the referenced commodity. These changes would provide further robust criteria for determining whether the sale of the exempt or agricultural commodity is really intended to be physically settled (and thus whether the commodity option is intended to be physically settled).

Yours sincerely

C.R.B.

Chris Barnard

³ See Product Definition NPRM, at 76 FR 29829.