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June 26, 2012

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

RE: RIN 3038-AD62; Final Rule and Interim Final Rule

Commodity Options and Trade Option Exemption

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 interim final rule that incorporates a trade option exemption into the final rules for commodity options.

NEM’s membership is primarily comprised of Retail Energy Marketers (and suppliers who serve them), that sell electricity and natural gas to consumers as a competitive alternative to the local utility. Retail Energy Marketers primarily buy physical energy and physical and financial 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 financial hedges to lock in prices for any consumers who want a long-term fixed price contract. Energy marketers are not the entities intended to be regulated by the Dodd-Frank Act.²

¹NEM 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.

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

The Commission is undertaking a definitions rulemaking in conjunction with the Securities and Exchange Commission (“SEC”) to further define the term swap. We believe that physically settled options, physically settled contracts, and transactions with optionality should be excluded from the swap definition.³ Our members use physically settled options to manage price and volumetric risks that naturally occur in our members’ business of delivering reliable and affordable electricity and natural gas to residential and commercial customers continuously. Our members routinely engage in risk management activities and strategies that utilize physically settled options to manage, across the clock, uncertain volumetric deliveries that are influenced by weather, time-of-day, day of week, holidays, transportation and transmission availability and congestion, storage issues, changes in supply stack and its marginal costs, etc. For example, when natural gas marketers need to purchase peak gas for winter demands, instead of buying storage, they have the option to buy gas and they pay an option fee to do this. These risk management strategies based on physical options are fundamental to both meet the customers’ needs and stay in business. We remain concerned that additional record keeping and reporting requirements will:

- (1) Increase compliance costs,
- (2) Reduce the availability and liquidity of physically settled options, and
- (3) Increase premiums of physically settled options as fewer players would offer or demand these options.

The ultimate result of these three items would be to increase costs to electricity and natural gas to residential and commercial customers caused by the increase in risks and costs to the Retail Energy Marketers that serve them. NEM submits that the proposed reporting and recordkeeping requirements should not be imposed on REMs as end users because the transactions these entities engage in, including the use of options to manage risk, ultimately result in actual physical energy delivery to consumers. In other words, trade options should be treated as any other contract intended for physical delivery with respect to recordkeeping and reporting requirements.

CFTC Form TO pertains to trade options that are not required to be reported to a swap data repository by either counterparty pursuant to CFTC regulation 32.3(b)(1) and part 45 of the Commission’s regulations. Form TO is an annual filing requirement due to the commission no later than March 1 for the prior calendar year. The first submission is due on March 1, 2014 for trade option transactions executed between January 1, 2013 and December 31, 2013. In most instances, by the time this report is filed, the trade options will be long expired. From a surveillance perspective Form TO will be neither actionable nor timely. We understand the CFTC’s need to have comprehensive and complete market transactions but we feel this requirement will increase business costs without significantly enhancing the CFTC’s timely and actionable surveillance capabilities.

³This view is consistent with NEM’s comments offered regarding RIN 3038-AD46 (Notice of Proposed Rulemaking) filed on July 21, 2011.

NEM also recommends that the capital and margin requirements should be removed for trade options because it is intended for physical delivery. The capital and margin requirements raise the costs of doing business to energy wholesalers. In turn, these increased costs would be passed on to Retail Energy Marketers and the consumers they serve. Notably, the capital and margin requirements are not imposed on standard spot or forward contracts.

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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