NATIONAL ENERGY MARKETERS ASSOCIATION

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December 19, 2014

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

RE: RIN 3038-AE24 - Forward Contracts with Embedded Volumetric Optionality

Dear Secretary Kirkpatrick:

The National Energy Marketers Association ("NEM")[1] hereby submits comments on the CFTC's proposed clarification of its interpretation concerning forward contracts with embedded volumetric optionality pursuant to the November 20, 2014, Federal Register Notice. NEM has made multiple submissions to this Commission in the course of its implementation of the Dodd-Frank Act. As with NEM's prior comments, we submit these comments to offer our unique perspective on the impact of the proposed clarification on Retail Energy Marketers[2] that sell electricity and natural gas to consumers as a competitive alternative to the regulated utility monopoly. Specifically, NEM wishes to caution against conferring an unfair competitive advantage to regulated utility monopolies, as is suggested in an expressly delineated carve out with regard to the seventh element of the Commission's test to examine whether a contract with embedded volumetric optionality falls within the forward exclusion. NEM recommends, as a matter of competitive neutrality for entities that are direct competitors (Retail Energy Marketers and regulated utility monopolies), that the exclusion under the seventh prong be expressly recognized for any Load Serving Entity serving retail load (Retail Energy Marketers and regulated utility monopolies) and subject to state Public Service Commission jurisdiction.

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[1]NEM is a non-profit trade association representing both leading suppliers and major consumers of naturalgas 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] 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 as well as their suppliers are not financial entities and are not dealers as contemplated in the legislative history of the Dodd-Frank Legislation.

The Commission previously provided an interpretation regarding the circumstances under which an agreement including embedded volumetric optionality would fall within the forward contract exclusion from the definitions of "swap" and "future delivery" under the Commodity Exchange Act in the "Products Release."[3] The previous interpretation included seven elements for consideration. In the instant proposed clarification the Commission is leaving the first six element largely unchanged but offering modifications to the seventh element.

The seven elements comprising the Commission's proposed clarified interpretation of the forward contract exclusion for contracts with embedded volumetric optionality is as follows:

> 1. The embedded optionality does not undermine the overall nature of the agreement, contract, or transaction as a forward contract;
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> 2. The predominant feature of the agreement, contract, or transaction is actual delivery;
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> 3. The embedded optionality cannot be severed and marketed separately from the overall agreement, contract, or transaction in which it is embedded;
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> 4. The seller of a nonfinancial commodity underlying the agreement, contract, or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction to deliver the underlying nonfinancial commodity if the embedded volumetric optionality is exercised;
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> 5. The buyer of a nonfinancial commodity underlying the agreement, contract or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction, to take delivery of the underlying nonfinancial commodity if the embedded volumetric optionality is exercised;
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> 6. Both parties are commercial parties; and
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> 7. The embedded volumetric optionality is primarily intended, at the time that the parties enter into the agreement, contract, or transaction, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of, the nonfinancial commodity.[4]

NEM notes its support for the Commission's efforts, in general, to craft rules that are responsive to the needs of commercial users. Additionally, we support the Commission's efforts, in the instant proposed clarification, to craft the seventh element in a manner that is less proscriptive and that provides increase certainty to the marketplace.

The Commission explains that the seventh element is meant to ensure that the primary reason for including the embedded optionality in a contract is the need to provide flexibility to the parties to

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[3] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207.
[4] 79 FR 69074.

vary the amount of the nonfinancial commodity in response to uncertainty in demand for, or supply of, the nonfinancial commodity. NEM's Retail Energy Marketer members that utilize a contract with embedded volumetric optionality should, under most circumstances, be able to satisfy all seven elements.

NEM is, however, concerned that the Commission has included in its discussion an express preference for regulated utility monopolies to treat such contracts as forwards, without a similar expressly stated exclusion for competitive Retail Energy Marketers, that likewise serve retail customer load. The Commission stated in the proposed clarification that:

> The CFTC is also proposing to clarify that the phrase ''physical factors'' should be construed broadly to include any fact or circumstance that could reasonably influence supply of or demand for the nonfinancial commodity under the contract. Such facts and circumstances could include not only environmental factors, such as weather or location, but relevant ''operational considerations'' (*e.g.,* the availability of reliable transportation or technology) and broader social forces, such as changes in demographics or geopolitics. **Concerns that are primarily about price risk (*e.g.,* expectations that the cash market price will increase or decrease), however, would not satisfy the seventh element absent an applicable regulatory requirement to obtain or provide the lowest price (*e.g.,* the buyer is an energy company regulated on a cost-of-service basis). (emphasis added).**[5]

This express preference for regulated utility monopolies confers an unfair competitive advantage to these entities versus Retail Energy Marketers that are competing to serve the same retail customer base. In the interest of promoting a competitively neutral, level playing field for entities that are direct competitors (Retail Energy Marketers and regulated utility monopolies), NEM recommends that the expressly recognized exclusion under the seventh prong be reframed so as to applicable to any Load Serving Entity serving retail load (Retail Energy Marketers and regulated utility monopolies) and subject to state Public Service Commission jurisdiction.

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.

Respectfully submitted,

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[5] 79 FR 69075-76.