December 22, 2014

Via Electronic Submission

Chris Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Proposed Interpretation regarding Forward Contracts with Embedded Volumetric Optionality (RIN Number 3038-AE24)

Dear Mr. Kirkpatrick:

I. INTRODUCTION

The Commodity Futures Trading Commission ("CFTC" or Commission) and Securities Exchange Commission ("SEC"), in consultation with the Board of Governors of the Federal Reserve System, have issued a proposed clarification of the CFTC's interpretation concerning forward contracts with embedded volumetric optionality.[1] The American Public Power Association ("APPA"), the Edison Electric Institute ("EEI"), the Electric Power Supply Association ("EPSA"), the Large Public Power Council ("LPPC"), and the National Rural Electric Cooperative Association ("NRECA") (hereafter "Joint Associations"), respectfully submit these comments in response to the Proposed Interpretation.

The Joint Associations' members[2] are physical commodity market participants in the energy industry and rely on commodity derivative contracts primarily to hedge or mitigate commercial risks. The Joint Associations' members enter into energy contracts with embedded volumetric optionality in the ordinary course of their daily commercial operations to facilitate physical delivery of commodities. Regulations that make effective risk management options more expensive for commercial end users of swaps will likely lead to higher energy prices if the

[1] *See Proposed Interpretation, Forward Contracts with Embedded Volumetric Optionality*, 79 Fed. Reg. 69073 (November 13, 2014) ("Proposed Interpretation"); *See also Interim Final Interpretation, Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement, Mixed Swaps*, 77 Fed. Reg. 48207, at 48238-42 (August 13, 2012) ("Products Release").

[2] A description of each of the Joint Associations and their membership is included as Attachment A.

costs associated with those regulations are passed through to retail energy consumers, commercial and industrial electricity and natural gas consumers, or will result in more volatile energy prices if commercial end users decide to hedge a smaller portion of their commercial risks. Accordingly, the Joint Associations' members have a direct and significant interest in the Commission's rules and interpretations that may adversely affect commercial end users' ability to cost-effectively hedge or mitigate commercial risks. As such, the Joint Associations' members have a significant interest in the Proposed Interpretation.

Joint Associations appreciate the Commission responding to stakeholders by issuing the Proposed Interpretation and considering comments from market participants.

II. SUMMARY OF COMMENTS

The Joint Associations commend the Commission for undertaking this effort and are supportive of the proposed revisions as they respond to many of the concerns that have been raised by the Joint Associations about the Commission's seven-factor framework for analyzing forward contracts with embedded volumetric optionality. However, beyond the scope of the proposed revisions, certain other related issues should be addressed. As such, in addition to issuing the proposed revisions in final form, the Joint Associations request that the Commission consider the following:

- The Commission should delete the language in the Proposed Interpretation relating to concerns with price risk.

- The Commission should provide clear guidance that any contracts that are entered into with the intent to physically settle are excluded from the defined term "swap," and should not consider or analyze events or circumstances which occur after the transaction is entered into.

- The Commission should further define the term "swap" in CEA 1a(47), or interpret the definition of "swap" in CEA 1a(47) -- to specifically exclude any nonfinancial commodity transaction for deferred shipment or delivery, so long as the transaction is intended to be physically settled.

- The Commission should provide other clarifications that have previously been requested by stakeholders and include them in the Final Interpretation, or propose another rulemaking to address such issues.

- The Commission should suspend obligations to file Form TO until the Final Interpretation is issued and end users have a chance to analyze and implement its clarifications and allow parties who previously filed Forms TO for calendar year 2013 based on the interpretations in the Products Release to refile in light of the clarifications.

III. COMMENTS ON PROPOSED INTERPRETATION

Joint Associations appreciate the Commission responding to stakeholder concerns by proposing changes to the fourth, fifth and seventh factors of the seven-factor framework and are

supportive of the proposed revisions.[3] As discussed below, these proposed modifications, in conjunction with the discussion in the Proposed Interpretation, provide additional certainty to some of the issues raised by Joint Associations.

A. The Joint Associations generally support the Commission's clarifications to the fourth, fifth and seventh factors of the seven-factor framework for forward contracts with embedded optionality.

The Joint Associations support the proposed clarification to the seventh factor of the analysis used to evaluate whether forward contracts with embedded volumetric optionality should be considered a "swap." The clarification appropriately recognizes that intent is determined at the time that the contract is entered into, not at the time the embedded optionality is exercised.[4] This clarification is consistent with the Commodity Exchange Act ("CEA"), as amended by the Dodd-Frank Act which added CEA 1a(47), and with other Commission regulations such as the swap recordkeeping and reporting rules. These regulatory requirements require parties to a transaction to determine the classification of a transaction (e.g. forward, swap, commodity trade option, or commercial transaction otherwise not included in the defined term "swap") at the time the parties enter into the transaction, so that the parties can comply with the Commission's rules and regulations. The Products Release left substantial ambiguity that one party or the other party's post-contract formation actions or considerations (during performance of the forward contract) could retroactively create missed regulatory deadlines and other legal ramifications due to the Commission's view that the transaction was a "swap." The Commission's clarification "that [the parties] may rely on counterparty representations with respect to the intended purpose for the purpose of the embedded volumetric optionality in the contract provided that they are unaware and should not reasonably have been aware, of facts indicating a contrary purpose"[5] will aid in determining the parties' intent at the time the contract is entered into and will add certainty to the market.

The Joint Associations also support the Commission's deletion of the concept of "outside the control of the parties" in the seventh factor and the clarification that the focus on "physical factors" should be interpreted broadly.[6] The Joint Associations appreciate the Commission's

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[3] Under the Proposed Interpretation, an agreement, contract or transaction would fall within the exclusion from the definition of "swap" in Section 1a(47)(B)(ii) of the Commodity Exchange Act (the "CEA"), notwithstanding that it contains embedded volumetric optionality, when: (1) The embedded optionality does not undermine the overall nature of the agreement, contract, or transaction as a forward contract; (2) The predominant feature of the agreement, contract, or transaction is actual delivery; (3) The embedded optionality cannot be severed and marketed separately from the overall agreement, contract, or transaction in which it is embedded; (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; (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; (6) Both parties are commercial parties; and (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. Proposed Interpretation at 69074.

[4] *Id* at 69075.

[5] *Id*.

[6] *Id.*

acknowledgment that a wide range of physical factors, including environmental factors, operational considerations and broader social forces, could reasonably influence intent when the parties include volumetric flexibility in the terms of a transaction that is intended to physically settle. Planning by either party for such a potential change in physical factors that may occur during the performance period of the contract does not change the parties' intent that the contract be physically settled.

These clarifications will assist Joint Associations' members in applying the seven-factor framework to the many types of contracts that contain flexibility and permit the potential for variability in the volumes or quantities ultimately delivered, emphasizing however, that the parties always intend, at the time of entering into the agreement, to settle physically -- by delivery and receipt of a commodity. For example, in the physical natural gas market, a "peaking supply" is intended to provide for reliable physical delivery of the commodity in times of peak demand. A peaking contract contains terms that allow for supply of the commodity to be obtained during times of physical need, and the transaction is always intended to settle physically. As made clear by the Proposed Interpretation, such a transaction is excluded from the defined term under CEA 1a (47) (B)(ii) as a forward contract intended to settle physically and is not a swap.

Joint Associations also support the Commission's proposal to revise the fourth and fifth factors of the seven –factor framework. Joint Associations agree that whether the embedded option or optionality is, or resembles, a put or a call does not affect the fundamental intent of the parties to such forward contracts -- to physically settle. Common forms of energy industry forward contracts may anticipate periodic needs to interrupt delivery, without changing the intention of the parties -- to physically settle. As such, the clarification provided in the Proposed Interpretation provides additional certainty to these types of transactions and clarifies that the put or call aspect in the embedded contract should not cause the physically settled forward contract to be classified as a "swap."

B. The language in the Proposed Interpretation relating to concerns with price risk should be deleted, as it adds uncertainty for market participants.

Unlike the other elements of the Proposed Interpretation, the following statement in the Proposed Interpretation increases the ambiguity of the proposal: "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.)."[7] This statement creates uncertainty in implementing the seven-factor framework articulated in the Proposed Interpretation and should not be included in the Final Interpretation.

As made clear in the Proposed Interpretation, if the parties have included volumetric optionality in a nonfinancial commodity transaction primarily to address physical factors or regulatory requirements that could reasonably influence supply or demand conditions, and they intend the transaction to physically settle, the transaction should be considered a forward contract. These criteria can be true and the optionality is intended to assure that physical needs are met. There is nothing inconsistent with this contractual intent if, at a later point in time, one

[7] *Id.* at 69076.

party or the other considers the price of the commodity in deciding how to meet its operational obligations in light of then current market conditions. At the time the market participant enters into the contract the intent is to physically settle, and to procure a means of assuring a supply source or provide delivery flexibility in the face of uncertainty regarding the quantity of the nonfinancial commodity that may be needed in light of physical factors and regulatory requirements that could reasonable influence supply and demand in the future. One party's "concerns" about price risk should not create a situation where the nonfinancial commodity forward contract, which is intended to be physically settled, is considered a "swap." Accordingly, Joint Associations respectfully request that the Commission remove this language from the Final Interpretation as it adds uncertainty and appears inconsistent with the Proposed Interpretation.

IV. COMMENTS ON RELATED ISSUES

A. The Commission should reconsider its interpretation of CEA 1a (47) in the Products Release -- that "commodity options are swaps, even if the parties intend physical settlement."

In the Introduction to the Proposed Interpretation, the Commission again paraphrases its Products Release interpretation of CEA 1a(47), stating that "…commodity options are swaps, even if physically settled..."[8] The Proposed Interpretation cites the Products Release in footnote 5 in which the Commission quotes an incomplete portion of the statutory language of CEA 1a(47). The Joint Associations respectfully point out that much of the confusion in the Commission's interpretations of what is and what is not a "swap" (or a forward contract, or a commodity trade option) can be traced to this fundamental, and ongoing, misreading of the statutory language.

Section 1a (47) of the Commodity Exchange Act ("CEA"), added to the CEA by the Dodd-Frank Act, provides in relevant part that:

> "1a (47) SWAP—
>
> (A) IN GENERAL— Except as provided in subparagraph (B), the term "swap" means any agreement, contract, or transaction—
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> (i) that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;(B) EXCLUSIONS.—The term "swap" does not include—…
>
> (ii) any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled;"*(emphasis added)*

While the Joint Associations commend the Commission for recognizing some of the concerns of the energy industry with regard to its interpretation of CEA 1a (47)(B)(ii) regarding forward contracts with embedded volumetric optionality, the Joint Associations remain concerned that the Proposed Interpretation perpetuates an erroneous interpretation that was first

[8] *Id*. at 69074.

published, without notice or opportunity for public comment, in the Products Release. The Not-For-Profit (NFP) Electric Associations[9] called this error to the Commission's attention in the post-publication docket for the Products Release and, in October of 2012, formally requested reconsideration of the CFTC's interpretation of CEA 1a(47) in the Products Release.[10] The Joint Associations respectfully request that the Commission reconsider the interpretation, or alternatively, that the Commission explains in the Final Interpretation the process by which it will respond to the request.

A nonfinancial commodity option transaction, where the transaction is intended to physically settle, is excluded from the defined term "swap" by the plain language of CEA 1a(47)(B)(ii), as amended by the Dodd-Frank Act. CEA 1a(47) provides that a commodity option is a "swap," ***except*** if the parties to a nonfinancial commodity transaction for deferred shipment or delivery intend physical settlement at the time the parties enter into the transaction. Whether the nonfinancial commodity transaction at issue is a forward contract with "embedded optionality" or a "standalone" commodity trade option, if the transaction at inception is intended for physical settlement, the transaction is excluded from the term "swap" for all regulatory purposes by CEA 1a(47)(B)(ii). As indicated in Section IV, in response to the Commission's questions, requiring that Joint Associations' members treat some of these every day operational transactions that are used to hedge commercial risks as "swaps" has significantly increased regulatory and compliance costs associated with these transactions.

Joint Associations concur that Congress intended that the Commission (working with the Securities Exchange Commission, in consultation with the prudential regulators) further define the term "swap" in CEA 1a(47). The Joint Associations also agree that, to the extent there is overlap or commonality of analysis, the Commission's interpretations of new CEA 1a(47) should be consistent with prior Commission precedent regarding the "forward contract exclusion" distinguishing nonfinancial commodity forward contracts from futures contracts. However, the Joint Associations believe that the Commission should start and finish any "further definition" or any interpretation with the clear language of the statute being interpreted – CEA 1a(47). Any Commission interpretation should focus on whether a transaction either fits within CEA 1a(47)(A) and is therefore a "swap," or falls within one or more of the exclusions in CEA 1a(47)(B) and is, therefore, not a "swap."

The Joint Associations respectfully request that the Commission further define the term "swap" in CEA 1a(47), or interpret the definition of "swap" in CEA 1a(47), to specifically exclude from that defined term any nonfinancial commodity transaction for deferred shipment or delivery, so long as the transaction is intended to be physically settled, and whether that transaction includes optionality or is a stand-alone commodity trade option.

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[9] The National Rural Electric Cooperative Association, the American Public Power Association, the Large Public Power Council, and the Transmission Access Policy Study Group.

[10] Comments on Joint Final Rule and Interpretations on Further Definition of "Swap," "Security-Based Swap," "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (17 CFR Part 1) RIN No. 3038-AD46; Further Comments on Interim Final Rule on Commodity Options (17 CFR Parts 3.32, and 33), RIN 3038-AD62; and Request for Reconsideration of Statutory Construction of Section 721(a)(21) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") (October 12, 2012). http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59235&SearchText

B. Commission Should Provide Certainty by Addressing Other Clarifications Requested by Stakeholders

In addition to concerns about the seven-factor framework, Joint Associations have raised other concerns with the Products Release that are not addressed in the Proposed Interpretation. Joint Associations request that the Commission provide certainty by addressing these concerns in the Final Interpretation or explaining the process by which the Commission will address these concerns going forward.

In response to comments by Joint Associations and other stakeholders in the Products Release docket, the Commission's Office of General Counsel provided guidance clarifying that "the however paragraph" in the Products Release "was not intended to apply to agreements, contracts or transactions in which the buyer pays for a commodity in two parts, paying the seller's fixed/known costs upfront and the seller's variable costs associated with that commodity later once those costs are established or incurred."[11] Although the industry is currently relying on this guidance, the Office of General Counsel is not the Commission and cannot speak for the Commission. As such, Joint Associations request that the Commission formalize the guidance provided by the Office of the General Counsel as the policy and views of the Commission in the Final Interpretation.

In addition, if the Commission chooses not to reconsider its interpretation of CEA 1a(47) in the Final Interpretation, the Joint Associations respectfully request that the Commission consider previously requested clarifications to the Commodity Option Interim Final Rule ("IFR"),[12] in order to assure that it provides the same scope of relief for a "standalone" nonfinancial commodity option as is provided by the Proposed Interpretation for a nonfinancial commodity option that is "embedded" in a forward contract. The Commission should consider comments provided by the energy industry in 2012 in response to the Products Release and Commodity Option Interim Final Rule, which included clarifying the comparable scope of "nonfinancial" commodities (in CEA 1a(47)(B)(ii)) and "exempt or agricultural" commodities (in the IFR). The Joint Associations and others requested that such additional clarity be provided, in particular for emission related contracts and renewable energy credits. Further, the Joint Associations respectfully request that the Commission clarify and make consistent across all its outstanding rules and interpretations the terms "commercial market participant" and "commercial entity," which are entities that are entitled to the statutory exclusion in CEA 1a(47)(B)(ii) and the commodity trade option exemption in the IFR, in particular that both commodity merchants and commercial end-users are entitled to both the exclusion and the exemption.

The Joint Associations also request that the Commission suspend obligations to file Form TO for calendar year 2014 (due March 1, 2015) until the Final Interpretation is issued and for a reasonable period of time thereafter to allow commercial end users the opportunity to consider its implications and finalize a review of their outstanding transactions. This relief would also include allowing parties who previously filed Forms TO for calendar year 2013 (based on the interpretations in the Products Release) to refile in light of the clarifications. This will help

[11] Office of General Counsel ("OGC") Response to Frequently Asked Questions Regarding Certain Physical Commercial Agreements for the Supply and Consumption of Energy at 2.
[12] See 77 Fed Reg. 25320 (April 27, 2012)

ensure that stakeholders are evaluating contracts appropriately and that the data submitted to the Commission is accurate and complies with the framework adopted by the Commission in its interpretations.

The Joint Associations commend the Commission for responding to stakeholder concerns by providing the Proposed Interpretation, and request that the Commission provide greater certainty and clarity by providing the clarifications and additional interpretations requested above.

IV. RESPONSE TO COMMISSION QUESTIONS

1. Whether the IFR's approach to defining the universe of swaps subject to its exemption may provide a clearer and easier mechanism for providing relief from swaps requirements than the CFTC's interpretation of forwards with embedded volumetric optionality, and whether the IFR currently provides sufficient relief for such contracts.

The IFR does not provide sufficient relief for nonfinancial commodity transactions that are intended to be physically settled but are not classified as forward contracts under the Commission's seven-factor framework. Joint Associations disagree with the Commission's perception that it appears that the IFR provides a clear and well understood mechanism through which contracts with volumetric optionality can be exempted that avoids many of the difficulties of determining whether a particular contract with volumetric optionality would satisfy the seven fctors of the CFTC's interpretation.[13]

The process for determining whether a forward contract with embedded volumetric optionality is excluded from the definition of a swap under CEA 1a (47)(B)(ii), on the one hand, and the IFR, on the other hand, serve functionally different purposes. One is a statutory exclusion from the defined term "swap," the other is a partial, conditional regulatory exemption -- of some "swaps" that meet the conditions in the IFR from some but not all of the Commission's regulations governing "swaps." The IFR issued before the Products Release, creates a distinction between two types of nonfinancial commodity contracts that are both intended to be physically settled -- by creating different frameworks and conditions to be applied to determine whether a transaction is excluded under CEA 1a(47)(B)(ii) or exempted by the IFR. The Commission should provide certainty to commercial end users that there is one bright line between nonfinancial contracts that are intended to be physically-settled and those that are "swaps," a term that would still include commodity options that are intended to be financially-settled.

The Joint Associations recognize that, if issued as proposed, the Proposed Interpretation will resolve some of the ambiguity in determining whether a transaction is a forward contract. Despite this clarification, for commodity trade options, the Form TO process still presents a reporting burden for non-financial end-users.

At this time, some in the energy industry have defaulted to trying to report nonfinancial commodity forward transactions that may or may not meet the seven-factor framework on Form TO due to the lack of regulatory clarity, and the good faith effort to report some information

[13] Proposed Interpretation at 69076.

about a transaction or transactions in an abundance of caution. Others have recognized that the information being reported is not useable by the Commission and have decided out of a comparable abundance of caution not to submit what they believe, in good faith, is data about a non-reportable forward contract. The result has been both regulatory uncertainty for the Joint Associations' members, and inconsistent and therefore un-useable data being reported to the Commission. As such, there are concerns about compliance consequences if the Commission believes either party or both parties to a transaction to have incorrectly classified a transaction as a commodity trade option, swap or a forward contract.

While the IFR, Form TO and the Commodity Option No-Action Letter[14] have provided a less-frequent reporting requirement for transactions for which there was uncertainty under the seven-factor framework in the Products Release, the timeframes and manner in which they were issued necessitate a fresh look at these rules, especially in light of the clarifications provided in the Proposed Interpretation. The IFR was issued before the Products Release and anticipated that Form TO would be used rarely. The No-Action Letter was issued by the Commission's staff just days before the reporting deadline for all nonfinancial commodity swaps, including commodity trade options. The Commodity Option No-Action Letter itself added additional conditions that presented new and different compliance challenges in terms of tracking the aggregated notional amount of commodity trade options entered into in a calendar year, identifying which commodity trade options were and were not reported under Part 45, and tracking the exercise of options during the course of a calendar year under outstanding options of different vintages, in order to take advantage of the No-Action relief and to accurately fill out Form TO.[15] The energy industry has requested clarifications of certain aspects of the No-Action Letter and Form TO, and the No-Action Letter itself is not an action binding on the Commission.

While the clarifications in the Proposed Interpretation reduce some of the uncertainty caused by the seven-factor interpretation in the Products Release, Joint Associations respectfully request that the Commission provide the clarifications requested herein to help ensure that these market participants are clearly able to determine that a transaction is a forward or otherwise excluded from the defined term "swap" under CEA 1a(47)(B)(ii) and not leave market participants to question whether it is either a commodity trade option or a "swap."

2. Whether the lack of clarity around the seventh factor of the CFTC's interpretation has led to costs to end users as contracts that fail one or more of the seven elements, or whether the costs are alleviated by the IFR.

Joint Associations agree that the ambiguity around the seven-factor framework has led to increased costs for end users and believe that the Commission has seriously underestimated the cost of complying with the IFR and the Commodity Option No-Action Letter. This includes increased costs for personnel, legal advice and infrastructure among others. For example, one Joint Association member was required to spend more than $100,000 in IT costs to implement a mechanism to track exercises of nonfinancial commodity options where the parties intend the transaction to physically settle.

[14] Staff No-Action Relief from the Reporting Requirements of § 32.3(b)(1) of the Commission's Regulations, and Certain Recordkeeping Requirements of § 32.3(b), for End Users Eligible for the Trade Option Exemption, CFTC Letter 13-08 (April 5, 2013)("Commodity Option No Action Letter").
[15] *Id*. at 4-5,

There are a number of regulatory requirements imposed on commodity trade options as "swaps," even with the benefit of the exemption provided in the IFR, that are not imposed on parties to nonfinancial commodity forward contracts excluded under CEA 1a(47)(B)(ii). Commodity Option No Action Letter 13-08, while providing some relief requested by market participants, also imposes additional conditions and reporting requirement on parties, and requires some operational compliance measures that are not required for "swaps" and that are not typically in place at the Joint Associations' members. It is important to note that the users of physical forwards with embedded volumetric optionality are physical market participants, predominantly end-users of commodities, not banks and financial entities that were the focus of Dodd Frank. This policy consideration should be factored into the Commission's cost benefit analysis regarding the treatment of these transactions products as "swaps" under CEA 1a(47).

The recordkeeping requirements for commodity trade options are significantly greater than those required for excluded forward contracts. The CFTC stated in the Commodity Options FAQ that counterparties entering into commodity trade options "are required to comply with the recordkeeping requirements of Part 45 of the Commission's regulations."[16] For non-swap dealers or non-major swap participants, "the primary recordkeeping requirements are set out in § 45.2(b),which [require keeping] 'full, complete and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty.'"[17] This includes the continuation data on swap continuation events, such as option exercises, pursuant to § 45.4. "Non-SD/MSPs also are subject to the other general recordkeeping requirements of § 45.2, such as the requirement that records must be maintained for 5 years [following the final expiration or termination of the swap] and must be retrievable within 5 days."[18] Forward contracts with embedded volumetric optionality can often have contract terms of 10 years or even more, and the life of swap plus 5-year retention is very non-standard for such physical transactions. There are no such regulatory recordkeeping requirements for forward contracts under the Commodity Exchange Act.

In addition, the Commission underestimates the costs associated with reviewing contracts and filing a Form TO. Substantial effort is needed by market participants to compile and analyze the information needed to complete the Form TO. Form TO obligates market participants to certify that the information is true and accurate, which means market participants cannot simply classify all transactions that are intended by the parties to physically settle, but that have embedded volumetric optionality, as trade options without substantial effort and analysis. This includes reviewing each contract under the framework set forth by the Commission and installing new systems to track both commodity trade options entered into during a calendar year, which commodity trade options were and were not reported under Part 45 (if the counterparty is a swap dealer or a non-SD reporting party chooses not to rely on the Commodity Option No-Action Letter relief), as well as each exercise of each outstanding trade option. In this regard, the Commission's burden estimate for completing the Form TO was 2 hours. Based on the feedback received from its members, Joint Associations believe that the Commission's estimate is off to a large degree. Although the Joint Associations provided comments to the

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[16] CFTC Division of Market Oversight Responds to Frequently Asked Questions Regarding Commodity Options - Commodity Options FAQs issued September 30, 2013 ("Commodity Options FAQ") citing 17 CFR Part 45; 77 FR 2136 (Jan. 13, 2012) ("Swap Data Recordkeeping and Reporting Requirements").

[17] Commodity Options FAQ citing 17 CFR § 45.2(b).

[18] Commodity Options FAQ citing 17 CFR § 45.2(c), 17 CFR §45.2(e)(2).

Commission challenging its burden estimates,[19] the Commission Supporting Statement submitted to the OMB stated:

> The Commission disagrees, however, with the view as expressed by commenters that it would take much longer than two hours each year to prepare and submit Form TO. The Commission does not believe that an intricate knowledge of the Commodity Exchange Act or the agency's procedures, personnel, and implementing regulations is necessary in order to accurately prepare and submit a Form TO in approximately two hours to the Commission, as required under Regulation 32.3(b)(2) and explained in the instructions attached to the document.[20]

Joint Associations are concerned with the text above that the Commission "does not believe that an intricate knowledge of the Commodity Exchange Act or the agency's procedures…and implementing regulations is necessary in order to accurately prepare and submit a Form TO…." To the contrary, in order to complete the Form TO, Joint Associations' members must fully understand the applicable procedures, regulations and CFTC interpretive guidance regarding Trade Options and the reporting of Trade Options. Having completed and filed the first set of annual Forms TO by March 1, 2014, the Joint Associations' members know from actual experience that the costs and burdens of filing such forms exceeds the Commission's 2 hour estimate.

A primary factor in determining the burden of complying with the IFR relates to the sheer number of contracts that may be subject to the requirement if the Commission assumes that the IFR is an easy alternative for a forward contract that fails the seven-factor framework. In this regard, after a contract is bucketed as a commodity trade option, certain document retention requirements must be instituted and the contract has to be reviewed and monitored for Form TO and No-Action reporting. For example, the optionality must be identified and valued for determining compliance with the notice requirement in the Commodity Option No-Action Letter, and then exercises must be tracked in order to complete the Form TO. Providing the clarifications requested herein will help narrow this universe and reduce the burden associated with complying with the IFR and the Commodity Option No-Action Letter.

As indicated, classifying a transaction as a commodity trade option does not provide a clear or easy mechanism for reporting transactions. It is important that the Commission allow parties who classified transactions as commodity trade options under the Products Release that would be classified as forward contracts with embedded volumetric optionality under the Proposed Interpretation to reclassify the transactions to eliminate recordkeeping burdens upon a final interpretation of the seventh element. The Joint Associations request that the Commission explain that the additional, burdensome Part 45 recordkeeping requirements no longer apply to these reclassified transactions that will no longer be considered commodity trade options.

[19] Comment of EEI, EPSA, NRECA, APPA Form TO, Annual Notice Filing for Counterparties to Unreported Trade Options (February 15, 2013).

[20] CFTC Paperwork Reduction Act Supporting Statement for Form TO, OMB Control No. 3038-0106 (April 8, 2013).

3. **Do the proposed changes provide sufficient clarity on how contracts with embedded volumetric optionality may satisfy all seven elements of the interpretation particularly the first and second elements? Are there reasons why trying to provide further relief through the swap definition forward contract exclusion would not be in the public interest?**

As previously indicated, the clarifications in the Proposed Interpretation address some of the concerns about the seven-factor framework for analyzing forward contracts with embedded volumetric optionality that have been raised by the Joint Associations. Additional clarification is needed and it is in the public interest to provide the clarification that has been requested by end users in response to the Products Release, the IFR and as indicated herein.

IV. CONCLUSION

Joint Associations appreciate the Commission responding to end user concerns by issuing the Proposed Interpretation. As indicated above, the Proposed Interpretation is a good resolution of the ambiguity arising from the seven element test. However, the Commission should not stop there but, rather, address the several related issues that have not yet been addressed by the Commission. Joint Associations therefore request that the Commission provide the clarifications requested herein in the Final Interpretation.

Please contact the undersigned with any questions.

Respectfully submitted

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Attachment A - Description of the Joint Associations' Membership

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate customers. APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some publicly-owned electric utilities generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 99 percent of the ultimate consumers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members.

EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

LPPC is an organization representing twenty-six of the largest locally owned and operated public power systems in the nation. LPPC members own and operate over 75,000 megawatts of generation capacity and nearly 34,000 circuit miles of high voltage transmission lines. Collectively, LPPC members own nearly ninety percent of the transmission investment owned by non-federal public power entities in the U.S. LPPC member utilities supply power to some of the fastest growing urban and rural residential markets in the country. Members are located in eleven states and Puerto Rico and provide power to some of the largest cities in the country, including Los Angeles, Seattle, Omaha, Phoenix, Sacramento, Jacksonville, San Antonio, Orlando, and Austin.

Formed in 1942, NRECA is the national service organization for more than nine hundred not-for-profit rural electric utilities and public power districts that provide electric energy to approximately forty-two million consumers in forty-seven states or twelve percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately eleven percent of all electric energy sold in the United States. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members.[21]

[21] 13 C.F.R. §121.201, n.1. The vast majority of NRECA's members meet the definition of "small entities" under the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). Only four distribution cooperatives and approximately twenty-eight G&Ts do not meet the definition. The RFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). In addition, many of APPA's members also meet the definition of "small entities" under SBREFA. The SBA's small business size regulations state that entities which provide electric services are "small entities" if their total electric output for the preceding fiscal year did not exceed four million megawatt hours.