The Business Council for Sustainable Energy®

December 22, 2014

VIA ONLINE SUBMISSION
Christopher Kirkpatrick, Secretary
Commodities Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

RE: Proposed Interpretation, Forward Contracts With Embedded Volumetric Optionality (RIN 3235-AK65)

Dear Mr. Kirkpatrick:

The Business Council for Sustainable Energy (BCSE) wishes to express its support for the recent guidance proposed by the Commodities Futures Trading Commission (CFTC) clarifying the treatment of forward contracts with embedded volumetric optionality. The guidance should help ensure that energy markets are able to function efficiently and that market rules recognize the interplay between a range of clean energy technologies and resources.

The BCSE is a coalition of companies and trade associations from the energy efficiency, natural gas and renewable energy sectors, and also includes independent electric power producers, investor-owned utilities, publicly-owned utilities, and commercial end-users. Founded in 1992, the Council advocates for policies that expand the use of commercially available clean energy technologies, products and services. The coalition's diverse business membership is united around the revitalization of the economy and the creation of a secure and reliable energy future for America. A document with information about BCSE is attached for your reference.

Today's energy mix in the United States is radically different from that of a generation ago. The 2014 edition of the *Sustainable Energy in America Factbook* – produced for the Business Council for Sustainable Energy by Bloomberg New Energy Finance–documents this shift and demonstrates how energy efficiency, renewable energy and natural gas are contributing to the country's move towards cleaner energy production and more efficient energy usage.

As noted in the *Factbook,* natural gas and renewable energy provided over 40 percent of U.S. electricity generation in 2013, down slightly from 2012, but up 10 percent since 2007. Increased electric generation from these sources has helped the U.S. reduce greenhouse gas emissions by nearly 10 percent since 2005. The *Factbook* notes the complimentary relationship between natural gas and renewables, as natural gas-fired electricity generation can quickly ramp up or down to meet changes in demand, and can complement the integration of variable energy resources. This relationship is one way in which generators and grid operators are meeting the electricity needs of the country.

These trends highlight the importance of ensuring that energy markets are able to function efficiently and that market rules recognize the interplay between a range of clean energy technologies and resources as we move to a more diverse energy system. Important to the interplay between clean energy technologies are forward contracts that include a degree of flexibility in the final delivery terms. These contracts allow market participants to adjust delivery volumes in response to changes in supply and demand requirements at the time of delivery. For example, on a day when weather conditions are not conducive to intermittent sources, a power generator may call on a greater volume of natural gas and can do so using the flexibility built into a forward contract. Importantly, the intent to physically deliver remains despite the flexibility in the final delivery terms.

In the implementation of the Dodd-Frank Act, the CFTC's definition of the term "swap" provided an interpretation that an agreement, contract or transaction with embedded optionality falls within the forward exclusion (and is not a swap) when seven criteria are met. However, as many end-users noted during the swap definition comment period and through the Commission's April 3, 2014 Public Roundtable, the seven-criterion test is ambiguous in its application to forward contracts and could result in the regulation of forward contracts with such flexibility as swaps. This ambiguity has limited the willingness of market participants to use forward contracts with volumetric flexibility, caused unnecessary compliance uncertainty and delayed contract negotiations for physical commodities.

Given the uncertainty created by the seven-criterion test, the BCSE supports the CFTC's proposed interpretation clarifying the treatment of embedded volumetric options . Importantly, the guidance shifts the focus of the seven criterion test to the intent of the parties when the contract is entered into, as opposed to the exercise or non-exercise of the optionality. The CFTC's proposed guidance should avoid unnecessary regulation of physical forward contracts as swaps. This clarity ensures that market rules support the interplay of clean energy technologies that have helped lower US greenhouse gas emissions and achieve the Administration's climate goals.

We appreciate your consideration of the Council's views. If you have questions or comments, please feel free to contact Ruth McCormick in the Council's office at rmccormick@bcse.org.

Sincerely,

Lisa Jacobson, President