Christina Crooks

Director
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January 28, 2015

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

Re: Comments on Proposed Interpretation of Forward Contracts with Embedded Volumetric Optionality

Dear Secretary Kirkpatrick:

The National Association of Manufacturers (NAM)—the nation's largest manufacturing association in the United States—thanks you for the opportunity to submit comments on the Commodity Futures Trading Commission's (CFTC) proposed interpretation titled *Forward Contracts with Embedded Volumetric Optionality* (the "Proposal").[1] The NAM is concerned that the Proposal may subject manufacturers' supply contracts to costly and unnecessary swap regulation.

Supply contracts, which typically include the purchase of raw materials, component parts and resources necessary for the manufacturing process, are a vital component of U.S. manufacturing operations. Such manufacturing supply contracts historically have been excluded from financial regulation and have been covered by the commercial transaction exception from the definition of swaps. The CFTC, in describing the commercial transaction exemption (77 FR 48208, 48246), stated that swaps do not include the purchase, sale or transfer of inventory or equipment, among other customary commercial arrangements. Indeed, manufacturers' supply contracts fit this description of customary commercial arrangements.

The NAM is concerned that language in the Proposal could be interpreted to mean that the operation of certain terms in supply contracts—used for appropriate business purposes by a manufacturer or its supplier—would convert a commercial supply contract into a "financial instrument" (i.e. a "swap") subject to swap regulation.

Manufacturing supply contracts can provide for the purchase "up to" a certain amount or within varying levels of the relevant subject of the supply contract or to provide for price adjustments under certain conditions. These terms enable manufacturers to have the flexibility to adjust to changing business conditions. There are many business reasons why a manufacturer or supplier might want to enter into a contract allowing the delivery amount to

[1] 79 Fed. Reg. 69,073 (Nov. 20, 2014).

fluctuate: the goods delivered may not meet quality standards or be delivered in a timely manner; the supplier may be subject to regulatory action or suffer from departures of key personnel; the supplier may become less creditworthy or change its business; the manufacturer may have located a closer or more economical supplier; demand for the manufacturer's products may vary; or the manufacturer's needs, financial condition, or product line-up may change.

Any of these factors, among many others, may influence whether the manufacturer wants to purchase the maximum amount permitted to be delivered under the contract. Similarly, there are many reasons why manufacturers may want to include a flexible price in a supply contract: the price might fluctuate if the market changes; or if a greater volume of goods are purchased; or if the manufacturer's or supplier's circumstances change.

The Proposal would characterize contract terms that provide for adjustment of the price or the volume of the subject of a contract (or the utilization of such terms by a party) as "Options" subject to swap regulation. NAM members believe that manufacturer supply contracts, e.g., to purchase raw materials, component parts and resources necessary for manufacturing operations, should continue to be exempt from treatment as "financial instruments" under the commercial transaction exemption and that the commercial transaction exemption does not hinge on whether or not the contract contained terms adjusting the price or volume of the subject of the contract or whether such terms were utilized by the parties.

Administering supply contracts for a large manufacturing company is complex. A large manufacturing company can have thousands of supply contracts. If a manufacturer's supply contracts are deemed to be "swaps," it will provide significant challenges to manufacturers and impose a huge level of unexpected and unnecessary compliance complexities and costs.

Accordingly, we request that the CFTC confirm that the use of supply contracts by manufacturers (e.g. contracts to purchase raw materials, component parts and resources necessary for manufacturing operations) will continue to be exempt from treatment as "financial instruments" (i.e. "swaps") under the commercial transaction exemption and that the commercial transaction exemption does not hinge on whether or not the contract contains terms providing for the adjustment of price or volume of the subject of the contract or whether such terms are utilized by the parties.

The NAM thanks you for the opportunity to comment on this Proposal and encourages the Commission to ensure that manufacturers' business operations are not disrupted due to the potential for their supply contracts to be unnecessarily interpreted as a swap.

Sincerely,

Christina Crooks

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Director, Tax Policy