

June 22, 2015

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

Re: *Trade Options*, Notice of Proposed Rulemaking, RIN 3038-AE26

Dear Secretary Kirkpatrick:

By Notice of Proposed Rulemaking published May 7, 2015 in the Federal Register, the Commodity Futures Trading Commission (“CFTC” or “the Commission”) proposed to amend its regulations relating to trade options (“TO NOPR”).<sup>1</sup> Specifically, the Commission proposes to: eliminate Part 45 reporting for Non-SD/MSPs;<sup>2</sup> eliminate the Form TO notice filing requirement;<sup>3</sup> establish a \$1 billion notice provision for Non-SD/MSPs;<sup>4</sup> and modify the recordkeeping requirements for Non-SD/MSPs.<sup>5</sup>

By this letter, the Coalition of Physical Energy Companies (“COPE”) provides comments on the TO NOPR. The members of COPE are physical energy companies in the business of producing, processing, and merchandizing energy commodities at retail and wholesale.<sup>6</sup> COPE members utilize swaps to hedge the commercial risk of their physical businesses. COPE members also engage in transactions involving trade options.

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<sup>1</sup> *Trade Options*, Notice of Proposed Rulemaking, 80 Fed. Reg. 26,200 (May 7, 2015) (the “TO NOPR”).

<sup>2</sup> See TO NOPR at 26203.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 26203-26204.

<sup>5</sup> *Id.* at 26204.

<sup>6</sup> The members are: Apache Corporation; EP Energy LLC; Iberdrola Renewables, LLC; Kinder Morgan, Inc.; MarkWest Energy Partners, L.P.; Shell Energy North America (US), L.P.; SouthStar Energy Services LLC; and Targa Resources.

As a general matter, COPE supports the TO NOPR and the Commission's efforts to reduce unneeded burdens on physical end-users such as COPE members. In fact, it has been COPE's long-held view that physical supply agreements such as trade options were not intended by the drafters of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>7</sup> to be regulated as swaps and the CFTC should not have done so.<sup>8</sup> To the degree the TO NOPR reduces regulatory burdens and complexity for physical end-users, COPE is in agreement with the proposal.

As noted above, the TO NOPR proposes to eliminate Part 45 and Form TO reporting for Non-SD/MSPs. COPE supports the proposal to eliminate the referenced reporting requirements. As a general matter, most end-users have elected to file Form TO. If the NOPR is adopted, this requirement will be eliminated. However, the most significant burden that flows from the Commission regulation of trade options is the need to: (1) identify transactions that qualify as trade options; (2) segregate them from other physical transactions for recordkeeping purposes; and (3) track them. Unfortunately, while the TO NOPR reduces some burdens, it does not relieve those associated with these obligations.

In light of the specific burdens on physical end-users stemming from Commission regulation of trade options, COPE requests that the Commission go beyond the items included in the TO NOPR and act to provide more meaningful relief. As noted above, currently, the physical end-user must: (1) identify transactions that qualify as trade options; (2) segregate them from other physical transactions for recordkeeping purposes; (3) track them; and (4) annually file a Form TO. Given the requirements of Form TO, if the first three items are diligently met, the filing of Form TO, while an additional effort, is not a material burden. Under the TO NOPR, the other three elements will still, as a practical matter, be required.

Under, the TO NOPR, unless a physical end-user "reasonably expects" to enter into trade options in excess of \$1 billion in a calendar year,<sup>9</sup> it will need to keep a running balance of aggregate notional value so that it can send an email notice to the CFTC Division of Market Oversight ("DMO") advising that it has exceeded the \$1 billion notional value threshold.<sup>10</sup> As a result, it appears that physical end-users will be required to track trade options each calendar year at least until they reach the \$1 billion threshold. Thus, the relief effectively offered by the TO NOPR is to substitute for existing filing and tracking requirements an annual email after exceeding \$1 billion for Form TO.

Similarly, trade options are subject to the Commission's Part 45 recordkeeping requirements.<sup>11</sup> In the TO NOPR, the CFTC proposes to delete certain recordkeeping requirements pertaining to legal entity, swap, and product "identifiers."<sup>12</sup> The proposal does reduce the burden on end-

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<sup>7</sup> Public Law No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank").

<sup>8</sup> COPE Comments, Interim Final Rule – Commodity Options, RIN No. 3038-AD62

<sup>9</sup> TO NOPR at 26203.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 26204.

<sup>12</sup> *Id.*

users by some amount. However, it does not eliminate the burdensome requirements to identify and segregate trade options from other physical contracts maintain the material required by CFTC regulations, and be prepared to provide requested data to the CFTC within five days.<sup>13</sup>

Therefore, COPE appreciates that the TO NOPR evidences a desire on the part of the Commission to reduce the regulatory burden on physical end-users associated with trade options. As noted herein, that burden does not solely flow from Form TO but, rather, from the overall regulation of these physical contracts as swaps. Assuming the Commission continues such regulation, it should further modify it to better reduce the associated burden of physical end-users. Specifically, the Commission should:

- Remove the “\$1 billion email” and permit physical end-users to merely indicate they expect to transact in trade options during a calendar year – thus, eliminating the annual tracking burden.
- Revise the recordkeeping requirement to obligate physical end-users to keep records of trade options in a manner no less stringent than that used for their physical commercial agreements, with an obligation to provide copies to the CFTC in a commercially reasonable time upon request.

These changes would put the Commission on notice that the physical end-user was expecting to transact in trade options during the effected calendar year and obligate the end-user to maintain and produce relevant material upon CFTC request. Importantly, they would provide real relief from the burdens of trade option regulation. While they are of some value, eliminating the need to file Form TO and not requiring “identifiers” are not sufficient if the Commission wants to meaningfully reduce the burdens of trade options on end-users.

Respectfully Submitted,

/s/ David M. Perlman

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George D. Fatula

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Coalition of Physical Energy Companies**

CC: COPE Members

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<sup>13</sup> *Id.*