



AMERICAN PUBLIC GAS ASSOCIATION

SPECULATIVE POSITION LIMITS RULE: COMMENTS AND EXEMPTION REQUEST (2020)

May 15, 2020

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

Re: Notice of Proposed Rulemaking: Position Limits for Derivatives, 85 Fed. Reg. 11596 (February 27, 2020) (RIN 3038-AD99) (the “2020 Proposal”)

Dear Mr. Kirkpatrick:

The National Rural Electric Cooperative Association (“NRECA”), the American Public Power Association (“APPA”) and the American Public Gas Association (“APGA”) (collectively referred to herein as the not-for-profit or “NFP Energy Associations”),¹ respectfully submit these comments on the 2020 Proposal of the Commodity Futures Trading Commission (the

¹ See Attachment A for a description of the members of each of the NFP Energy Associations. The comments contained in this filing represent the collective comments and recommendations of the NFP Energy Associations, but not necessarily the views of any particular member of any NFP Energy Association on any issue. The NFP Energy Associations are authorized to note the involvement of the following organization to the Commission, and to indicate full support of these comments and recommendations: ACES. ACES provides commercial risk management and energy advisory and operations services for electric cooperatives and government-owned electric utilities.

“Commission” or the “CFTC”) for speculative position limits rules (the “Speculative Position Limits Rules”).

The NFP Energy Associations commend the Commission for its approach to “take into account differences across commodity and contract types”² in the 2020 Proposal. The NFP Energy Associations join with other energy industry commenters to support the substantial improvements in the 2020 Proposal, as compared with earlier proposals for implementing the amendments that the Wall Street Reform and Consumer Protection Act of 2010 (the “2010 Dodd-Frank Act”) made to the Commission’s authority to establish speculative position limits. The 2020 Proposal draws on the Commission’s experience applying Federal speculative position limits rules to agricultural commodity futures contracts (and options on such futures contracts), as well as overseeing the application by designated contract markets (“DCMs”) of speculative position limits to contracts executed on each DCM’s exchange platform. The 2020 Proposal also takes into account the significant differences in market structure in the bilateral (or “off-facility”) markets for nonfinancial energy commodity swaps, as well as differences in market structure in specific sectors of the energy industry where market participants trade, and commercial market participants depend on, many different types of energy commodities that were previously exempt from the Commission’s regulatory oversight, including Federal speculative position limits.³

² 2020 Proposal at 11597.

³ Prior to the 2010 Dodd-Frank Act, the Commodity Exchange Act (the “Act,” or the “CEA”) authorized the Commission to establish Federal speculative position limits rules for contracts of sale (futures contracts), and options on futures contracts, on commodities other than “excluded commodities.” under section 4a of the Commodity Exchange Act (the “CEA” or “the Act”). However, in 1993, by its own action, the Commission exempted from its regulatory jurisdiction, including its speculative position limits rules, energy commodities and agreements, contracts and transactions linked to such energy commodities (other than contracts and options traded on DCMs) in the *Exemption for Certain Contracts Involving Energy Products*, 58 Fed. Reg. 21286-02 (April 20, 1993)(the “1993 Energy Exemption”). Due to the 1993 Energy Exemption, energy commodities were defined, along with metals and other physical commodities, as “exempt commodities” in the pre-Dodd-Frank Act CEA. For historical context, see the following report by the Congressional Research Service of the Library of Congress in 2008: https://www.everycrsreport.com/files/20080512_RS21401_e7270b8a490501197549915b3ee931dd61d2fcc4.pdf. Fast forward nearly two decades. In 2010, the Commission’s authority in CEA 4a(a)(1) to impose speculative position limits was broadened by Section 737 of the 2010 Dodd-Frank Act beyond exchange-traded futures and options to include economically-equivalent swaps, including both swaps traded on or subject to the rules of a registered entity or regulated market and off-facility swaps “***that performs (sic) a significant price discovery function with respect to a registered entity.***” (*emphasis added*). In 2012, as part of its rulemaking implementing the 2010 Dodd-Frank Act, the Commission summarily withdrew the 1993 Energy Exemption. See *Joint Final Rule; Interpretations; Request for Comment on Interpretation 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, 77 Fed. Reg. 48208 (August 13, 2012) (the “2012 Products Release”) at 48227. By withdrawing the 1993 Energy Exemption, the Commission broadly asserted its jurisdiction over all agreements, contracts and transactions referencing energy commodities. As a result, over the past decade, as the Commission was defining its regulatory jurisdiction over “swaps” and developing new speculative position limits rules applicable to swaps, the Commission was concurrently focused for the first time in nearly two decades on understanding how to regulate directly the evolving market structures

As anticipated in the 2020 Proposal,⁴ the NFP Energy Associations respectfully request an entity-based exemption under CEA §4a(a)(7) for their members (the “NFP Energy Entities”). Such an exemption would implement the clear Congressional intent that the Commission take into account the impact of its speculative position limits rules on different types of market participants.⁵ The 2010 Dodd-Frank Act gave the Commission broad new exemptive authority under CEA §4a(a)(7), authorizing the Commission “by rule, regulation, or order, [to] exempt, conditionally or unconditionally, **any person or class of persons...from any requirement it may establish under this section with respect to position limits** (emphasis added).” See CEA §4a(a)(7).

In addition to the exemption request, the NFP Energy Associations respectfully request that the Commission make certain minor changes to the 2020 Proposal, including (a) clarifying the definition of “referenced contract” in certain respects, (b) defining or explaining references in the 2020 Proposal to “physically-settled swaps” and “physically-delivered swaps,” and (c) clarifying the newly-defined term “physical commodity.” Such minor changes will provide important regulatory certainty for commercial market participants, including end-users, in the energy industry by aligning the Commission’s regulatory terminology applicable to futures contracts and swaps, and confirming the meaning of such terms in relation to similar terms used in the Act itself and in the Commission’s rules, regulations, interpretations and other guidance.

Introduction. The NFP Energy Associations have been active participants throughout the Commission’s rulemakings to implement its new authority over swaps in the 2010 Dodd-Frank Act, starting with the submission of comments in 2011 when the Commission initially proposed such rules (such rules were finalized, but later vacated).⁶ The NFP Electric

in different sectors of the energy industry - from global oil markets and natural gas markets being re-shaped by the shale gas revolution to regional electricity and environmental markets). The Commission was also defining the roles and regulations applicable to new and different market participants, including “swap dealers,” “major swap participants” and “commercial end-users” of swaps, a category of entities not previously regulated by the Commission.

⁴ See 2020 Proposal at 11642.

⁵ Within different physical commodity markets, the types of commercial market participants differ. Some types of commercial businesses trade in or depend on the global crude oil markets. Other commercial market participants trade in or depend on the rapidly-evolving markets for natural gas, or the diverse regional markets for electricity, environmental and related commodities. In the United States, some aspects of the natural gas and electricity markets are regulated by, and some of the electricity markets are created by, the Federal Energy Regulatory Commission (the “FERC”). Within certain of these energy markets, the NFP Energy Entities are a unique type of commercial market participant, and the narrowly-tailored exemption requested herein recognizes that uniqueness.

⁶ The 2011 comment letter filed by the “NFP Electric Associations” on the CFTC’s initial post-Dodd-Frank Act speculative position limits rule proposal is available on the Commission’s website at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=33909&SearchText=wasson> (the “2011 NFP Electric SPL Comments”). As used herein, the “NFP Electric Associations” include NRECA and APPA and, in some comment letters, the Large Public Power Council, a trade organization whose members are 27 of the largest not-for-profit government-owned electric utilities in the United States. See <http://www.lppc.org/who-we-are/our-members>. The focus of the 2011 NFP Electric SPL Comments was broad, because the Commission’s 2010 Dodd-Frank Act rulemaking process was at a much earlier stage. When this first version of the post-Dodd-Frank Act speculative position limits rules was proposed, the

Associations commented on the Commission's 2013 re-proposal of speculative position limits rules,⁷ as did APGA,⁸ and again when the Commission reopened the comment period in July 2014 after the Public Roundtable discussion of commercial risk hedging practices in the energy industry.⁹

Representatives of the NFP Electric Associations participated in the February 26, 2015 Energy and Environmental Markets Advisory Committee ("EEMAC") meeting (the "February 2015 EEMAC Meeting"), that dealt extensively with how the Commission's 2013 re-proposal would affect the energy industry and its commercial risk hedging strategies and requirements,¹⁰ and filed supplemental comments on the 2013 re-proposed speculative position limits rules following that meeting.¹¹ Representatives of the NFP Energy Associations also participated in

Commission had just recently proposed its rules for the "end-user exception" to clearing for swaps entered into by commercial entities "to hedge or mitigate commercial risk" (as such phrase is used in CEA §2(h)(7)). As a result, the 2011 NFP Electric SPL Comments attached and cross-referenced regulatory concepts from the "end-user exception" rules, and requested exemptions from speculative position limits for entities that acted only as "end-users" or "bona fide hedgers" when entering into nonfinancial commodity swaps. At the time, the NFP Electric Associations and other energy industry commenters assumed that all commercial risk hedging (*i.e.*, economically appropriate to *the reduction of risks in the conduct and management of a commercial enterprise*, not just market price risk) would be viewed as non-speculative and therefore not subject to position limits, given Congressional support for such commercial risk hedging in the legislative proceedings that resulted in the 2010 Dodd-Frank Act. See Section III of the 2011 NFP Electric SPL Comments. The 2011 APGA comment letter on initial post-Dodd-Frank Act speculative position limits rule proposal is available on the Commission's website at: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=33675&SearchText=American%20Public%20Gas%20Association> (the "2011 APGA Comments"). The focus of the 2011 APGA Comments was also broad, and for similar reasons.

⁷ The 2014 NFP Electric SPL Comments on the Speculative Position Limits Rules is available at: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59690&SearchText=> (the "2014 NFP Electric SPL Comments").

⁸ 2014 APGA comment letter on the Speculative Position Limits Rules is available at: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59722&SearchText=American%20Public%20Gas%20Association> (the "2014 APGA Comments").

⁹ The NFP Electric comment letter on commercial risk hedging practices in the energy industry is available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59934&SearchText=> (the "2014 NFP Electric CRH Comments and, collectively with the 2014 NFP Electric SPL Comments, the "2014 NFP Electric Comments"). The 2014 NFP Electric Comments reiterated the request in the 2011 NFP Electric SPL Comments for a broad entity exemption, and also requested a series of transaction exemptions for referenced contracts that are off-facility swaps, and other transactions entered into by commercial end-users in the energy industry to hedge or mitigate commercial risk. See Section II of the 2014 NFP Electric CRH Comments.

¹⁰ We incorporate by reference the transcript of the February 2015 EEMAC Meeting here: <https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/emactranscript022615.pdf>.

¹¹ The 2015 NFP Electric comment letter on the Speculative Position Limits Rules (the "2015 NFP Electric SPL Comments") is available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60393&SearchText=wasson>. The

the EEMAC Committee meeting on July 29, 2015 to discuss how the Commission could leverage the expertise and experience of each of DCMs in administering speculative position limits rules for futures contracts referencing energy commodities traded on the DCM's exchange (the "July 2015 EEMAC Meeting").¹² At the July 2015 EEMAC Meeting, there was also a panel discussion about the evolving Commission's interpretations regarding "swaps" in the context of energy industry transactions. See Section III discussion herein. Most recently, the NFP Electric Associations provided comments on the Commission's 2016 Supplemental Proposal on Speculative Positions Limits Rules (the "2016 Supplemental SPL Proposal").¹³ The 2016 NFP Electric SPL Comments, collectively with the other NFP Energy Association comment letters cited herein, are referred to as the "Prior NFP Energy SPL Comments").

The NFP Energy Entities do not speculate in physical, or "nonfinancial,"¹⁴ commodity derivative contracts, and do not hold speculative positions in nonfinancial commodity derivative contracts.¹⁵ The NFP Energy Entities are not "financial entities" as such term is defined in CEA §2(h)(7)(C)(i). To the contrary, the NFP Energy Entities are "commercial end-users" of energy

2015 NFP Electric SPL Comments added specific requests for exemptions under CEA §4a(a)(7) for "NFP Electric Entities" and for "Electric Operations-Related Referenced Contract" transactions.

¹² We incorporate by reference the transcript of the July 2015 EEMAC meeting here: <https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/emactranscript072915.pdf>.

¹³ See Supplemental Notice of Proposed Rulemaking: Position Limits for Derivatives: Certain Exemptions and Guidance, 81 Fed. Reg. 38458 (June 13, 2016) (RIN 3038-AD99). The NFP Electric comment letter on the 2016 Supplemental SPL Proposal (the "2016 NFP Electric SPL Comments"), which is incorporated by reference herein and provides supplemental information relative to the NFP Energy Associations request for a CEA §4a(a)(7) exemption, is available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60942&SearchText=wasson>.

¹⁴ We use the term "nonfinancial commodity" advisedly, because the term appears in the definition of "swap" in Section 1a of the CEA, which was added to the CEA in the 2010 Dodd-Frank Act. In subsection (B)(ii) of the definition of "swap," the Act provides a **statutory exclusion** from the defined term "swap" for "any sale of a *nonfinancial commodity*...for deferred shipment or delivery, so long as the transaction is intended to be *physically settled (emphasis added)*." See Section III below regarding the importance of such statutory language in understanding the scope of the Commission's jurisdiction over swaps.

¹⁵ The term "speculate," as used herein, means taking a position (entering into an agreement, contract or transaction), and then offsetting it with another position for the purpose of profiting from movements in market price. Speculation is a risk-increasing activity in which commodity traders commonly engage. By contrast, an NFP Energy Entity enters into a commodity derivative contract, whether a futures contract or a swap, only as a commercial risk hedge, *i.e.*, as a risk-reducing activity. If an NFP Energy Entity enters into an energy or energy-related derivative contract that settles favorably (*i.e.*, "in the money"), that favorably-settling energy or energy-related derivative contract offsets a correlated unfavorable price movement/settlement in the underlying commercial risk being hedged. The underlying commercial risk may be a risk associated with the supply/demand of the commodity delivered to the NFP Energy Entity's unique geographic location, weather, price or other financial market risk, an environmental or other regulatory risk, or another commercial risk arising from or associated with the individual NFP Energy Entity's business operations. See the 2016 NFP Electric SPL Comments, cited in footnote 13 above, for a more complete description of the commercial risk, in addition to commodity price risk, that an NFP Electric Association member may decide to hedge.

commodity swaps and trade options referencing energy commodities.¹⁶ The NFP Energy Entities enter into energy commodity swaps and trade options ***only*** to hedge or mitigate commercial risk arising from ongoing business operations.

The NFP Energy Associations support the Commission's efforts to implement Federal speculative position limits (that is, limits on ***speculative*** positions). The NFP Energy Entities, and other commercial end-users, will benefit from the Commission monitoring speculative positions, and from considered placement and monitoring of limits on speculative positions, of financial players with no commercial need for a particular nonfinancial commodity.¹⁷ However, in implementing its speculative position limits rules, the Commission must respect the clear Congressional intent that underlies the Commission's new authority over swaps in the 2010 Dodd-Frank Act. Congress did not intend that the Commission regulate commercial (or non-financial) market participants hedging or mitigating commercial risk of ongoing operations in the same way it regulates financial market traders, dealers and speculators. Congress intended the Commission to protect end-users' continued access to cost-effective commercial risk management tools, and did not intend to burden end-users with unnecessary regulatory compliance obligations.

The NFP Energy Associations and their members have a direct and significant interest in the way in which the Commission implements its authority to establish and monitor Federal Speculative Position Limits. The Commission should structure its Speculative Position Limits Rules to clearly exempt the NFP Energy Entities in the text of the final rules. To do otherwise would be to place unnecessary regulatory burdens and costs on the NFP Energy Entities, without providing the Commission with useful or usable information about speculators, speculative transactions or speculative positions. The Commission should also take this opportunity to clarify certain terms used in the 2020 Proposal and in its final Speculative

¹⁶ We use the term "commercial end-user" to mean a person or entity that is not registered with the Commission, that is not a "financial entity" as such term is defined in CEA §2(h)(7)(C)(i), and that enters into swaps or other commodity derivative transactions "to hedge or mitigate commercial risk" of ongoing business operations, as such phrase is used in CEA §2(h)(7)(A)(ii) of the CEA and interpreted in the Commission's regulations promulgated thereunder. Such a person or entity is referred to as a "non-financial end user," or an entity that is not a "financial end-user," in the Commission's margin rules for uncleared swaps. The term "commercial end-user" also appears in the Lincoln-Dodd letter expressing Congressional intent, and is used throughout the Commission's rules, interpretations, no-action letters and guidance. See Letter from Chairman Christopher Dodd, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, and Chairman Blanche Lincoln, Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, to Chairman Barney Frank, Financial Services Committee, United States House of Representatives, and Chairman Collin Peterson, Committee on Agriculture, United States House of Representative, dated June 30, 2010, available at <https://online.wsj.com/public/resources/documents/dodd-lincoln-letter070110.pdf>.

¹⁷ In the 2013 Speculative Position Limits Proposal, the Commission cited numerous studies to support the benefit of limiting the speculative positions of *noncommercial entities* in various places. See, e.g., 78 Fed. Reg. 75680 (December 12, 2013) at 75683. "The Commission has found, historically, that speculative position limits are a beneficial tool to prevent, among other things, manipulation of prices. Limits do so by restricting the size of positions held by *noncommercial entities* that do not have hedging needs in the underlying physical markets" (*emphasis added*).

Position Limits Rules, to avoid creating regulatory uncertainty for the NFP Energy Entities and other commercial end-users, and to align the terminology within its rules, regulations, interpretations, orders and other guidance with respect to futures contracts, on the one hand, and with respect to swaps, on the other hand.

I. SUMMARY OF COMMENTS

The NFP Energy Associations support the 2020 Proposal and encourage the Commission to finalize and implement its Speculative Position Limits Rules in substantially the form presented,¹⁸ with a few minor changes and clarifications. In particular, the NFP Energy Associations:

- Appreciate the Commission’s willingness to consider an entity-based exemption from Speculative Position Limits Rules for NFP Energy Entities; and
- Recommend minor clarifications to the 2020 Proposal defined terms “referenced contract” and “physical commodity,” and recommend the inclusion of a new definition for “physically-settled swap.”

II. THE COMMISSION SHOULD INCLUDE IN ITS FINAL SPECULATIVE POSITION LIMITS RULE AN ENTITY-BASED EXEMPTION FOR NFP ENERGY ENTITIES.

The NFP Energy Associations strongly support the Commission’s new Speculative Position Limits Rules, and appreciate the improvements made to prior post-Dodd-Frank Act

¹⁸ Although the NFP Energy Associations comments herein are focused on the CEA §4a(a)(7) exemption request and minor changes to clarify the 2020 Proposal and make it consistent with other aspects of the Commission’s rules, interpretations and guidance, we are generally supportive of other energy industry comments that (a) support the imposition of speculative position limits based on a necessity finding by Core Referenced Futures Contract and only for the spot month, (b) propose additional enumerated bona fide hedging exemptions for commonplace energy industry commercial risk hedging transactions, (c) explain types of commercial risks, in addition to market price risk, that commercial market participants in certain segments of the energy industry routinely hedge, and (c) support a carefully phased implementation of the Speculative Position Limits Rules in order to protect market liquidity and commercial end-user access to cost-effective commercial risk hedging transactions. See, e.g., comment letters filed in this docket by the Edison Electric Institute/Electric Power Supply Association and the International Energy Credit Association, and sections IV and V of the 2016 NFP Electric SPL Comments, available at the link provided in footnote 13. The energy industry is undergoing significant market shifts and economic pressure in these extraordinary times. Commodity derivative contracts, whether transacted on regulated exchanges or bilaterally as swaps, are not just financial market trading instruments. They are critical commercial risk hedging tools for business continuity, financial stability and reliable delivery of affordable energy to American businesses and consumers. All of these points have been raised in the Prior NFP Energy SPL Comments. We appreciate support for the NFP Energy Associations’ request for an exemption from Speculative Position Limits from the International Energy Credit Association, the Edison Electric Institute and the Electric Power Supply Association, Public Gas Partners and other energy industry commenters.

speculative position limits rule proposals such that such rules “first, do no harm”¹⁹ -- to the American industries for which certain physical commodities are critical inputs or outputs of commercial business operations and the end-users in such commodity-dependent industries that rely on such referenced contracts to cost-effectively hedge or mitigate commercial risk arising from ongoing operations.²⁰ We agree with statements by Commissioner Quintenz and Chairman Tarbert at the recent EEMAC meeting on May 7, 2020 that the 2020 Proposal represents a balance of “the Commission’s policy interests of promoting liquidity, deterring manipulation, squeezes, and corners, and ensuring the price discovery function of the underlying cash market is not disrupted,” and that “in order to achieve this balance, the exceptions in this rulemaking are as important as the rule itself.”²¹

Congress intended the Commission’s rulemaking efforts to implement the 2010 Dodd-Frank Act amendments to the CEA to be a balanced response to the 2008-2009 financial markets crisis. In Section 737 of the 2010 Dodd-Frank Act, Congress broadened the Commission’s authority under Section 4a(a) of the CEA²² to establish speculative position limits on futures contracts on physical commodities traded on or subject to the rules of any contract market, to include both (a) “swaps traded on or subject to the rules of a designated contract market or a swap execution facility” and (b) “swaps *not* traded on or subject to the rules of a

¹⁹ In comments from the February 2015 EEMAC Meeting, see the remarks of Benjamin Jackson representing ICE Futures U.S., at page 211 of the EEMAC Meeting Transcript, referencing Russell Wasson’s prior statements and asking the Commission to first, “...do no harm...” Other participants repeatedly echoed that thought, noting how important it is both to protect trading market liquidity and to preserve cost-effective access to referenced contract markets for commercial risk hedgers in the energy industry. Tyler Slocum, representing Public Citizen, noted that “the issue of bona fide hedging is very important...” and “...we are extremely sympathetic to some of the specific examples that I’ve seen here where what appear to be legitimate hedging operations might be limited or prohibited under a rule, and Public Citizen is interested in making sure that legitimate hedging strategies can be utilized; that regulation doesn’t go too far.” See EEMAC Meeting Transcript at page 230. Former Commissioner Sharon Brown-Hruska noted that commercial business entities cannot be expected to get Commission staff signoff on every commercial risk hedge – or the opportunity to hedge that particular commercial risk will have passed... “[T]hat kind of a prescriptive model is not a good model, I think, for the government to adopt.” See page 239. Ms. Brown-Hruska’s recommendation was for a periodic certification model similar to what the Commission has in place for entities that avail themselves of the end-user exception to clearing under new CEA §2(h)(7) and Rule 50.50. Entities such as commercial end-users (“commercial risk hedgers”) could easily use a similar annual process to confirm that they are entering into one (or all) referenced contracts “to hedge or mitigate commercial risk.”

²⁰ We agree with Commissioner Quintenz comments at the recent EEMAC meeting on May 7, 2020, which echoed prior EEMAC Committee participants, that “[a] position limits rule, if done poorly, could directly affect the participants in America’s real economy perhaps more than any other area of the CFTC’s regulations ... commercial end-users that use the derivatives market as a risk management tool to support their businesses would all feel the effects of reduced liquidity and more constraints on legitimate hedging activity.”

²¹ See https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement050720?utm_source=govdelivery and <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement050720>.

²² 7 U.S.C. §6a.

designated contract market or a swap execution facility **that performs (sic) a significant price discovery function with respect to a registered entity** (emphasis added).²³ The language of Section 4a(a)(1) also explains that the Commission may set different limits for different commodities, markets, ...or different trading limits for buying and selling operations, etc.²⁴

Also, in the 2010 Dodd-Frank Act amendments, Congress provided the Commission broad new statutory authority to grant exemptions from such rules under new CEA §4a(a)(7). CEA §4a(a)(7) provides that “[t]he Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps, any contract of sale of a commodity for future [shipment or] delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits. Reading the new language that broadens CEA §4a(a)(1) in conjunction with new CEA §4a(a)(7) confirms Congressional intent for the Commission to focus on the impact of speculative position limits on end-users, and “to permit producers, purchasers, sellers, middlemen and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs...”²⁵

The NFP Energy Associations appreciate the Commission’s willingness to consider an entity-based exemption from the Commission’s Speculative Position Limits Rules, including Part 150,²⁶ and reiterate the request for a narrowly-targeted CEA §4a(a)(7) exemption for an NFP Energy Entity that enters into referenced contracts to hedge or mitigate commercial risk arising from ongoing operations (“Operations-Related Referenced Contracts”), where:

²³ See CEA §4a(a)(1). In the 2020 Proposal, the Commission explains its reasoning for proposing a narrower definition of “economically equivalent swaps” than in prior Commission proposals based on a reading of CEA §4a(a)(5) in light of the policy goals articulated in CEA §4a(a)(2)(C) and (3) to interpret what Congress meant by the term “economically equivalent.” See 2020 Proposal at 11614-11615. The NFP Energy Associations support the Commission’s proposed narrow definition of “economically-equivalent swap” in the 2020 Proposal, and note that it is also supported by the clear language of CEA §4a(a)(a), cited above. In footnote 126, the Commission makes reference to an earlier interpretation in the release accompanying the 2016 Reproposal, at 81 Fed. Reg. 96736, that a swap may be economically equivalent (and, therefore, subjected to aggregate Federal speculative position limits) without serving a significant price discovery function. We disagree with that prior interpretation, which is in direct conflict with the language of CEA §4a(a)(1), and respectfully request the Commission to reconsider it. Congress did not intend the Commission’s speculative position limits to cover all off-facility swaps, only those that perform “a significant price discovery function with respect to a registered entity,” that is, with respect to CFTC-“regulated markets” (the term used in CEA §4a(a)(4), which explains the significant price discovery function criteria for swaps subject to speculative position limits). In order for an off-facility swap to be deemed “economically equivalent” and covered by the Commission’s aggregate speculative position limit rules, that off-facility swap must be of a type that “performs a significant price discovery function with respect to a registered entity.”

²⁴ CEA §4a(a)(1).

²⁵ See CEA §4a(c)(1).

²⁶ See the 2020 Proposal at 11642.

- (i) the term “NFP Energy Entity” includes the types of electric entities entitled to the 2013 NFP Electric Exemption Order,²⁷ along with certain natural gas entities described in the Commission’s 2014 amendment to the “special entity” de minimis threshold to the “swap dealer” definition in Regulation 1.3(ggg) (the “2014 USE Rule Amendment”);²⁸
- (ii) “to hedge or mitigate commercial risk” has the meaning in CEA §2(h)(7)(A)(ii) and as further explained in Commission Rule 50.50, and
- (iii) “arising from...ongoing operations” identifies the transactions intrinsically related to an NFP Energy Entity’s electric or natural gas operations, as described in the NFP Electric Exemption Order and the 2014 USE Rule Amendment.

We have provided recommended language for the proposed exemption (the “Proposed Exemption”) in Attachment B, and look forward to working with the Commission and the staff to finalize the language.

The Proposed Exemption is justified for the same policy reasons explained by the Commission first in the 2013 NFP Electric Exemption Order and supplemented the 2014 USE Rule Amendment rulemakings. The definition for “NFP Energy Entity” in Attachment B is intended to include a narrowly-defined subset of electric and natural gas entities that share a unique individual and collective public service mission: to provide reliable, affordable utility services to residential, commercial and industrial energy customers in keeping with environmental policy goals. The entities described in sections (i)-(iii) of the definition operate on a not-for-profit basis,²⁹ and have governance structures with direct involvement and oversight by elected or appointed government officials or cooperative members/consumers. The NFP Energy Entities have commercial business operations that are conservatively managed and primarily focused on delivery of utility services. Certain affiliates of such entities, that provide support for the public service mission, are also included in section (iv) of the proposed definition of “NFP Energy Entity.”³⁰

²⁷ See “Order Exempting, Pursuant to Authority of the Commodity Exchange Act, Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives,” 78 Fed. Reg. 19670 (April 2, 2013) (the “2013 NFP Electric Exemption Order”).

²⁸ See “Final Rule, Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities,” 79 Fed. Reg. 57767 (September 26, 2014).

²⁹ Some NFP Energy Entities are tax exempt, others are taxable entities but operate on a not-for-profit basis.

³⁰ NFP Energy Entity affiliates described in section (iv) of the definition may be for profit entities, but are nonetheless wholly-owned by NFP Energy Entities described in Sections (i)-(iii) or by the same consumers, cooperative members or government entities as the NFP Energy Entities, and therefore do not involve outside or third party investors; e.g., a wholly-owned subsidiary of an electric cooperative, a joint action agency or a generation and transmission (G&T) cooperative. These affiliate entity types have been analyzed by the Commission and distinguished from investor-owned utilities and “for profit” utility affiliates. See the adopting release for the 2013 NFP Electric Exemption Order at 19674. NRECA and APPA have further described these entity types in prior comment letters on the Commission’s speculative

With regard to section (i) of the definition of “NFP Energy Entity,” the Commission has described the types of **electric** entities described therein in the proposing release for the 2013 NFP Electric Exemption Order (the “2013 NFP Electric NOPR”).³¹ Citing the Petition for such exemption,³² the Commission describes government-owned electric utilities such as Bonneville Power Authority, the New York Power Authority, state or county utility boards or public utility districts formed under state, county or local law, and joint action agencies or joint power agencies formed under state law to provide wholesale power supply and transmission services to member entities. Municipal electric utilities that distribute electricity to end-use customers would also fall under section (i) of the definition, and range in size from Los Angeles Department of Water and Power and the Sacramento Municipal Utility District to the smallest municipal electric utilities with fewer than 500 electric meters, such as Hagerstown Light Department (MD), the Town of Culpeper (VA) or Thurmont Municipal Light (MD).³³

Section (i) of the definition in Attachment B also includes certain **natural gas** utility entities that are government-owned.³⁴ In the rulemaking for the 2014 USE Rule Amendment, the Commission analyzed and described such government-owned natural gas utilities – and concluded that they shared the same not-for-profit (or tax exempt) government ownership, the same public service utility mission, and the same governance structure and utility operational core competency as government-owned electric utilities.³⁵ In the 2014 USE Rule Amendment rulemaking, the Commission also distinguished such government-owned utility entities from the more typical government “special entity” types identified in the “swap dealer” regulations of CEA §4s(h)(2)(C)(ii).³⁶ Some examples of government-owned natural gas utility entities that would fall within section (i) of the definition would be the City of Fargo Municipal Gas Utility (ND) and the Tallahassee Gas Utility Department (FL). Drawing from the language in the 2014 USE Rule Amendment, section (i) of the definition in Attachment B also includes government-owned entities that supply natural gas or electric energy to other government-owned utility entities that would be NFP Energy Entities. Examples of such wholesale supply entities that would fall

position limits rule proposals, along with prior requests for CEA §4a(a)(7) exemptive relief. The most recent CEA §4a(a)(7) exemption requests can be found in the 2016 NFP Electric SPL Comments, referenced in footnote 13 above.

³¹ Proposal to Exempt Certain Transactions Involving Not-For-Profit Electric Utilities, 77 Fed. Reg. 50998 (August 23, 2012)(the “2013 NFP Electric NOPR”).

³² The Petition is available on the CFTC’s website at: <http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/nrecaetalltr060812.pdf>.

³³ See the 2013 NFP Electric NOPR at 51004, citing to the Petition.

³⁴ The 2013 NFP Electric Exemption Order covered only electric entities. That is because the specific statutory provision in the 2010 Dodd-Frank Act that authorized such an exemption order specifically referenced section 201(f) of the Federal Power Act (“FPA 201(f)”), which does not address natural gas entities or markets. See CEA §4(c)(6)(c), added to the CEA by Section 722(f) of the Dodd-Frank Act.

³⁵ See Proposed rule “Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities, 79 Fed. Reg. 31238 (June 2, 2014)(the “2014 USE Rule Amendment NOPR”) at 31240.

³⁶ See 2013 USE Rule Amendment NOPR at 31241.

within section (i) of the definition would be the Municipal Electric Authority of Georgia or the Municipal Gas Authority of Mississippi. See CFTC Regulation 1.3(ggg)(4)(i)(B)(2).³⁷

In Attachment B, section (ii) of the definition of “NFP Energy Entity” describes certain utility entities or facilities where the owner or operator is a Native American Indian tribe. The 2013 NFP Electric NOPR describes such tribal electric entities as performing government-like utility functions. The tribes are subject to U.S. Department of the Interior oversight and, like the other government or government-owned utilities, the Indian tribes are tax exempt or “not-for-profit” entities.³⁸ Such tribal entities with electric utility operations or facilities are included by case law within the scope of the FPA 201(f) exemptions from most aspects of FERC regulation of electric utilities, with the courts analogizing the characteristics of tribal ownership and governance principles to the government ownership and the public service mission of government-owned and operated electric utility operations and facilities -- a business model with a public safety mission, focused on reliable and affordable utility services and with no outside investor/stockholder interests. See the adopting release for the 2013 NFP Electric Exemption Order at 19680 for more detail on the characteristics of tribal utilities.³⁹

In Attachment B, section (iii) of the definition of NFP Energy Entity describes electric utility entities that are organized as cooperatives under state laws and exempt in most respects from income tax under certain IRS Codes sections cited in the definition.⁴⁰ Such electric utility cooperatives are owned by their members (with no outside investor/shareholders), and such

³⁷ For more discussion of these government-owned energy supply entities, see the adopting release for the 2014 USE Rule Amendment, 79 Fed. Reg. 57767 (September 26, 2014) at 57769-57770.

³⁸ See 2013 NFP Electric NOPR at 51004, citing the Petition.

³⁹ The 2013 NFP Electric Exemption Order did not include tribal natural gas entities, as it only covered electric entities. 2014 USE Rule Amendment did not include the tribal utility category from the 2013 NFP Electric Exemption Order, due to the statutory definition of “special entity” in CEA §4s(h)(2)(c), which identified specific categories of United States governmental units, but did not include tribal entities. Nonetheless, given the similarity of public service/public safety, mission and governance and operational focus, we have included such tribal natural gas utility entities within the request for the Proposed Exemption from speculative position limits in order to maintain to the extent possible consistency of CFTC regulatory treatment for this narrow subset of easily identifiable types of electric and natural gas entities, despite language inconsistencies introduced into the CEA by the 2010 Dodd-Frank Act.

⁴⁰ Electric cooperatives were included in the 2013 NFP Electric Exemption Order in substantially the same manner as set forth in section (iii) of the definition in Attachment B. The 2014 USE Rule Amendment did not include the electric cooperative category due (again) to the differences in the statutory language between the electric entity types included within FPA 201(f) exemptions from FERC jurisdiction (underlying the 2013 NFP Electric Exemption Order) and the entity types in the statutory definition of “special entity” in CEA §4s(h)(2)(C)(ii). Electric cooperatives, which are included in FPA 201(f), are not owned or operated by categories of United States governmental units, and thus are not included within the definition of “special entity” (and consequently did not need to be included in the definition of Utility Special Entities). Given the similarity of public service/public safety mission, governance and operational focus, we have included electric cooperatives within the request for the Proposed Exemption from speculative position limits -- in order to maintain consistency to the extent possible of CFTC regulatory treatment for this narrow subset of easily identifiable types of electric and natural gas entities, despite language inconsistencies introduced into the CEA by the 2010 Dodd-Frank Act.

members are also the cooperative's utility customers. Most, but not all, electric cooperatives are included in the FPA 201(f) exemptions from FERC jurisdiction, together with the government-owned entities described in section (i) of the definition of NFP Energy Entity. In the 2013 NFP Electric Exemption Order, the Commission analyzed the small number of electric cooperatives that are not included in the FPA 201(f) exemptions from FERC jurisdiction, and determined that such other electric cooperatives have the same entity characteristics as other electric cooperatives and the same utility operations core competency. As such the Commission determined that it was appropriate to include all electric cooperatives within the scope of the 2013 NFP Electric Exemption Order.⁴¹ In section (iii) of the NFP Energy Entity definition, we have also included the relatively few cooperatives that provide only natural gas services to their consumer/members.⁴²

Finally, section (iv) of the definition of NFP Energy Entity describes a narrow category of entities, closely affiliated with the NFP Energy Entities described in sections (i)-(iii) and wholly-owned by such entities, that operate in conjunction with and in support of such other NFP Energy Entities. Such affiliated entities include electric generation and transmission cooperatives (owned by other electric cooperatives) and joint action agencies that are wholly-owned by other government or cooperative utility entities, as well as wholly-owned subsidiaries of electric cooperatives or utility government entities or agencies. Similar to the other NFP Electric Entities, such entities do not have outside investors or shareholders. Such entities support the individual and collective public interest/public service mission of the NFP Energy Entities described in sections (i)-(iii) and their core operational competency with respect to the use of Operations-Related Referenced Contracts.⁴³

⁴¹ See the adopting release for the 2013 NFP Electric Exemption Order at 19680.

⁴² The 2013 NFP Electric Exemption Order did not include natural gas cooperatives, as it only covered electric entities referenced in section 201(f) of the Federal Power Act. The 2014 USE Rule Amendment did not include the natural gas cooperative category of entities, due to the statutory definition of "special entity" in CEA §4s(h)(2)(c), which identified specific categories of United States governmental units, but did not include cooperative utilities. Nonetheless, given the similarity of public service/public safety, mission and governance and operational focus on delivering reliable, affordable natural gas service to owner/members, we have included such natural gas cooperative entities within the request for the Proposed Exemption from speculative position limits in order to maintain to the extent possible consistency of CFTC regulatory treatment for this narrow subset of easily identifiable types of electric and natural gas entities, despite language inconsistencies introduced into the CEA by the 2010 Dodd-Frank Act.

⁴³ See the 2013 NFP Electric NOPR at 51004. For the reasons explained in footnote 40 regarding electric cooperatives, the 2014 USE Rule Amendment did not include the category of affiliated entities from the 2013 NFP Electric Exemption Order – again due to the differences between the types of entities included in FPA 201(f) and the definition of a government "special entity" in CEA §4s(h)(2)(C). Affiliated entities to "utility special entities" that were themselves government-owned were already included in the definitions of "special entity" and therefore fell within the definition of Utility Special Entities. Entities that were wholly or partially owned or affiliated with cooperatives are not "special entities," and so did not need to be included as Utility Special Entities. Nonetheless, given the similarity of public service/public safety mission and governance and operational focus of this category of affiliated entities, we have included all such affiliated entities within the request for the Proposed Exemption from speculative position limits in order to maintain consistency to the extent possible in CFTC regulatory treatment for this narrow subset

An entity-based exemption built directly into the Commission's Speculative Position Limits Rules is crucially important to NFP Energy Associations' members.⁴⁴ If such a non-speculator NFP Energy Entity is required by the Commission's rules to analyze transactions it enters into or measure a position in referenced contracts, only to then identify and exclude each and every such transaction as non-speculative and conclude that the position is consequently non-speculative, the whole exercise is academic and will unnecessarily increase the cost of electricity, natural gas and other fuels for generation, such as fuel oil, for American consumers and businesses served by the NFP Energy Entities. There is no regulatory benefit in terms of reducing the burdens of excessive speculation on CFTC-regulated markets to balance against the costs and burdens for NFP Energy Entities (non-speculators) to study, understand and apply the Commission's Speculative Position Limits rules to their transactions and positions.⁴⁵

III. THE COMMISSION SHOULD ALIGN THE DEFINED TERMS USED IN ITS PRE- AND POST-DODD-FRANK ACT RULEMAKINGS TO REDUCE REGULATORY UNCERTAINTY.

The Commission should take this opportunity to align terminology used in the Speculative Position Limits Rules (and in the commentary to the 2020 Proposal) both with the Commission's pre-Dodd Frank Act rules and with the Commission's post-Dodd-Frank Act rules, regulations, interpretations and other guidance implementing its authority over swaps. Once finalized, the new Speculative Position Limits Rules will be applicable to "referenced contracts" that include both futures contracts and economically-equivalent swaps, including bilateral off-facility swaps. The new Speculative Position Limits Rules will be applicable to energy commodities, markets and market participants that were previously exempted from the Commission's speculative position limits rules.⁴⁶ This makes it critical that the Commission align terminology such that a market participant evaluating an energy commodity "swap" transaction understands which energy commodity agreements, contracts and transactions it

of easily identifiable types of electric and natural gas entities, despite language inconsistencies introduced into the CEA by the 2010 Dodd-Frank Act.

⁴⁴ Many NFP Energy Entities enter into bilateral swaps derived on physical (or nonfinancial) energy commodities and NFP Energy Entities may also enter into Core-Referenced Futures Contracts, such as the NYMEX Henry Hub Natural Gas, or referenced contracts traded on exchange that are directly or indirectly linked to such Core Referenced Futures Contracts. In either case and in each transaction, NFP Energy Entities enter into such referenced contract transactions exclusively to hedge or mitigate commercial risk arising from ongoing operations ("Operations-Related Referenced Contracts"). As entities, NFP Energy Entities are not speculators.

⁴⁵ The NFP Energy Entities are also proposing an appropriate pass-through exemption for counterparties to NFP Energy Entities' referenced contracts that are bilateral swaps. As explained in Section II.A.1.c.vi. of the 2020 Proposal (see p. 11613-11614), and in prior proposals regarding pass-through exemptions for bona fide hedging transactions, such pass-through exemptions are critical to attracting counterparties into what could be otherwise illiquid markets for such bilateral referenced contracts. The Proposed Exemption in Attachment B includes language comparable to that provided for a pass-through exemption for counterparties to bona fide hedging transactions.

⁴⁶ See footnote 3.

must identify as referenced contracts for compliance purposes, and which energy commodity agreements, contracts and transactions need not be considered.

The NFP Energy Associations strongly support the Commission's efforts to align and clarify the terminology of its various regulations, interpretations and guidance. Inconsistent use of defined and undefined terms in different parts of the Commission rules, interpretations, exemptions and no-action letters makes it difficult to understand the Commission's regulatory regime taken as a whole. When the Commission adds a definition for a previously-undefined, but regularly used, term in one Part or section of its rules, the Commission must consider the implications of such a definitional exercise for other Parts and sections of its rules, and other interpretations and guidance related to different commodities and different market participants -- in order to avoid creating more, not less, regulatory uncertainty. The NFP Energy Associations respectfully request that the Commission make the following minor changes in the 2020 Proposal to provide regulatory clarity for commercial end-users, particularly in the energy industry.

A. The Commission should exclude from the defined term “referenced contract” not just trade options and swap guaranties, but all agreements, contracts and transactions that the Commission has previously determined are excluded or exempted from its regulatory jurisdiction over swaps.

Over the past 10 years, as the Commission has implemented its new 2010 Dodd-Frank Act authority to regulate swaps, there has been considerable debate and dialogue within the energy industry, and between the energy industry and the Commission, as to which ordinary course agreements, contracts or transactions involving the sale of a nonfinancial energy commodity for deferred shipment or delivery are or are not (or may or may not be) “swaps.”⁴⁷

The NFP Energy Entities regularly enter into agreements, contracts and transactions for the sale of nonfinancial energy and energy-related commodities for deferred shipment or delivery, where the transactions are intended to be physically settled. Such transactions are expressly excluded from being considered “swaps” by subsection (B)(ii) of the definition of

⁴⁷ For an overview of this debate and the ongoing challenges it presents for commercial end-users in the energy industry, see the NFP Electric Association's comment letter filed in the 2017 “Project KISS” docket available at:

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61312&SearchText=wasson>. The debate began almost immediately after the 2010 Dodd-Frank Act was enacted, with initial Definitions ANOPR: “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant,” 75 Fed. Reg. 51429 (August 20, 2010). See the NFP Energy Associations initial comment letter in the Dodd-Frank Act rulemakings in response to the Definitions ANOPR, available on the Commission's website at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26217&SearchText>, as well as EEI's comment letter in the same docket, available on the Commission's website at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26193&SearchText>. The 2017 “Project KISS” comment letter also includes a description of the NFP Electric Associations' members common commercial risk hedging transactions, as well as a recommendation that the Commission establish a division or an ombudsman with a policy development function for commercial end-users of off-facility, nonfinancial commodity swaps (including energy commodity swaps).

“swap” that was added to the CEA by the 2010 Dodd-Frank Act (the “Statutory Exclusion”).⁴⁸ In addition, the NFP Energy Entities regularly enter into nonfinancial commodity option transactions that are now generally exempt from the Commission’s regulations under Rule 32.⁴⁹ The NFP Energy Entities also enter into various customary commercial transactions and arrangements regarding nonfinancial energy commodities (and related services) as part of operations that the Commission interprets as “**not** intended by Congress to be regulated as ‘swaps.’”⁵⁰ (see Section IIB3 of the 2012 Products Release). Finally, the NFP Energy Entities regularly enter into energy industry transactions that the Commission has in general exempted from its regulatory regime for swaps under other Commission interpretations, exemption orders and guidance.⁵¹

The NFP Energy Associations respectfully request that the Commission expressly exclude from the defined term “referenced contract” all such nonfinancial energy commodity transactions -- to clarify that the transactions are not intended inadvertently to fall within the scope of the Commission’s Speculative Position Limits Rules. For regulatory clarity, the Commission should confirm that the same analysis set forth in the Commission’s various rules, interpretations, exemption orders and other guidance regarding the defined term “swap” apply

⁴⁸ A “swap,” as defined in section 1a of the Act, added by Section 721 of the 2010 Dodd-Frank Act, expressly excludes “any sale of a nonfinancial commodity...for deferred shipment or delivery, so long as the transaction is intended to be physically-settled...”

⁴⁹ See 17 CFR §32.3, and the interpretations thereunder, including in the adopting release for the final Rule 32.3 at 81 Fed. Reg. 14966 (March 21, 2016).

⁵⁰ As part of its rulemakings implementing the 2010 Dodd-Frank Act, the Commission has published a series of interpretations regarding the defined term “swap,” to assist commercial market participants in the energy industry with drawing a line between “swaps” and transactions that are not “swaps.” Many of these interpretations with regard to energy commodities were initially published as “interim final interpretations” in the 2012 Products Release referenced in footnote 3 above as the same publication in which the Commission summarily withdrew the 1993 Energy Exemption. Sections IIB2 and IIB3 of the Products Release include both interpretations and proposed interpretations on which public comment was sought for the first time only after the 2012 Products Release was published. Since the 2012 Products Release was published, such interpretations and proposed interpretations with respect to energy industry transactions have been the focus of ongoing Commission rulemaking proceedings, clarifications, requests for no-action letters and other Commission guidance documents. See the Project KISS comment letter cited in footnote 47 above for more detail.

⁵¹ See, for example, the 2013 NFP Electric Exemption Order, and the “Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act,” 78 Fed. Reg. 19880 (Apr. 2, 2013) and the “Final Order Regarding Southwest Power Pool, Inc. Application To Exempt Specified Transactions; Amendment to the Final Order Exempting Specified Transactions of Certain Independent System Operators and Regional Transmission Organizations,” 81 Fed. Reg. 73062 ((the “RTO/ISO Exemption Orders”).

as a starting point for the analysis of an off-facility “economically-equivalent swap” as a referenced contract.⁵²

(i) *The NFP Energy Associations strongly support the Commission expressly excluding from “referenced contract” nonfinancial commodity trade options (“Trade Options”).*

The NFP Energy Associations strongly support the Proposal to expressly exclude from the defined term “referenced contract” agreements, contracts or transactions that meet the conditions in Rule 32.3 as nonfinancial commodity “trade options.” In the 2012 Products Release, the Commission interpreted the statutory definition of “swap” to mean that all commodity options are “swaps,” including those nonfinancial commodity options intended to be physically settled.⁵³ In a parallel 2012 interim final rulemaking, the Commission exempted nonfinancial commodity “trade options” from nearly all its regulations regarding swaps, so long as the parties to the option and the transaction itself met certain conditions.⁵⁴ However, the 2012 Interim Final Rule 32.3(c) listed the Commission’s speculative position limits rules as one of the rules for which such nonfinancial commodity trade options were required to be considered, counted and measured as “swaps.”⁵⁵

Four years later, in the 2016 adopting release for Final Rule 32.3, the Commission confirmed its *intention* to exclude commodity trade options from Federal speculative position limits rules.⁵⁶ Therefore, the NFP Energy Associations strongly support and appreciate the Commission’s 2020 Proposal explicitly providing such exemption in the final Speculative Position Limits Rule.

(ii) *The Commission should clarify the definition of “referenced contract” to exclude (1) any agreement, contract or transaction excluded or exempted by the Commission from the Commission’s regulations under interpretations, exemption orders or other guidance, and (2) any consumer, commercial or other agreement, contract or*

⁵² Some commentators have noted that the intersection of the two sets of regulatory analyses – swap/not-a-swap and economically-equivalent swap/not an economically-equivalent swap – has become easier as the Commission’s interpretations defining “swap” in the context of energy transactions have evolved and been clarified in recent years. Nonetheless, the swap/not-a-swap distinction for nonfinancial energy commodity transactions (including options) is only understandable with a comprehensive review and understanding of the past 10 years of Commission regulatory statements on the topic.

⁵³ The NFP Electric Associations have on file with the Commission a motion for reconsideration of the Commission’s statutory construction of CEA §1a(47)(A) and §1a(47)(B)(ii) that all nonfinancial commodity trade options are “swaps,” notwithstanding the parties’ intent to physically-settle the transaction. The Commission’s misconstruction of the statute is found in the Products Release, 77 Fed. Reg. 48208 at 48236-48237, and the motion for reconsideration can be found at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59235&SearchText=>

⁵⁴ The 2012 Interim Final Rule on Trade Options is found at 77 Fed. Reg. 25320 (April 28, 2012).

⁵⁵ See 77 Fed. Reg. at 25328.

⁵⁶ Final Rule on Trade Options, 81 Fed. Reg. 14966 (March 21, 2016) at 14971. In finalizing Rule 32.3, the Commission removed the reference to the speculative position rules from Interim Final Rule 32.3(c).

transaction that the Commission has further defined or interpreted as “not intended by Congress to be regulated as a swap.”

The term “swap” is embedded in the definition of “referenced contract” in proposed Rule 150.1. As discussed above, beginning in 2012, the Commission issued a series of interpretations regarding nonfinancial commodity swaps set forth in Section IIB2 and IIB3 of the 2012 Products Release and concurrently withdrew the 1993 Energy Exemption. Thereafter, on several occasions and in several different types of guidance documents, the Commission modified such interpretations.⁵⁷ The Commission has also granted a number of exemption orders to energy industry market participants, the terms of which allow those energy commodity markets to continue operating and end-users to effectively use these energy commodity transactions (not considered to be “swaps”) to hedge or mitigate commercial risk arising from ongoing operations.⁵⁸

Because the Commission has determined not to codify its interpretations and other guidance, or to establish a single reference source for assistance in confirming “swap/not-a-swap” distinction, the two counterparties to a bilateral off-facility energy transaction must make the “swap/not-a-swap” determination without the benefit of standardized rules or product definitions. Although the terms of many off-facility, bilateral energy commodity transactions are highly-customized, other such transactions may be many iterations closer to futures contract “look-alikes,” that is, to referenced contracts. If such a transaction is (or may be) a “swap,” such a swap would then also need to be evaluated to determine whether it was “economically-equivalent” under the Speculative Position Limits Rules.⁵⁹

Now, as the Commission finalizes its Speculative Position Limits Rules, it is important to have regulatory certainty that the Commission expects energy industry market participants to utilize the same “swap/not-a-swap” line (articulated in Commission interpretations and other forms of guidance, but not in Part 150) in their efforts to distinguish transactions that are, and are not, subject to the new Speculative Position Limits Rules.⁶⁰ We have attached a revised definition of “referenced contract” as Attachment C.

⁵⁷ For an overview of the ongoing rulemaking regarding which energy industry transactions are and are not “swaps,” see the Project KISS comment letter referenced in footnote 47 above.

⁵⁸ See the 2013 NFP Electric Exemption Order and the 2013 RTO/ISO Exemption Order.

⁵⁹ The material terms of a Core Referenced Futures Contract can be found in the product definition in the relevant DCM’s rules. The 2020 Proposal tasks the exchanges with identifying referenced contracts transacted on exchange by reference to each Core Referenced Futures Contract. Yet the determination of which off-facility swaps are referenced contracts is left to the counterparties to each “swap.”

⁶⁰ The Commission has acknowledged in the 2020 Proposal the need to address its interpretations regarding the defined term “swap” in the Products Release, and the implications of such interpretations for compliance with Speculative Position Limits Rules, by expressly excluding “any guarantee of a swap” from its definition of “referenced contract” in §150.1. The NFP Energy Associations are requesting that the Commission provide similar regulatory clarity in §150.1 with respect to the applicability of its interpretations and other guidance regarding the defined term “swap” in the context of off-facility energy industry transactions.

B. The Commission should define the term “physically-settled swap,” as used in the 2020 Proposal, in order to clarify that the use of such term is not intended to contradict or conflict with (i) the Statutory Exclusion for nonfinancial commodity transactions in subsection (B)(ii) of the defined term “swap,” which includes the phrase “intended to be physically settled,” or (ii) the Commission’s other rules, regulations, interpretations, exemption orders and other guidance with respect to transactions in the energy industry that are characterized in the Products Release and elsewhere as “physically settled” or “physically delivered,” and yet not considered “swaps.”

The term “physically-settled swap” appears a handful of times in the 2020 Proposal, but without definition.⁶¹ This term is confusing and creates regulatory uncertainty for energy industry commercial end-users trying to understand both the Speculative Position Limits Rules and the Commission’s rules taken as a whole, as applied to energy industry transactions. The Commission should explain what the adjective “physically-settled” means in the 2020 Proposal in relation to the defined term “swap.”⁶² Alternatively, the Commission should confirm that, by using such term, it is not intending to contradict or conflict with the Statutory Exclusion for nonfinancial commodity transactions, with Rule 32.3, or with other Commission statements regarding agreements, contracts and transactions that are excluded or exempted from the defined term “swap” under the Commission’s interpretations, exemption orders and other guidance.⁶³ We have attached a definition of “physically-settled swap” as Attachment D.

C. The Commission should clarify the newly-defined term “physical commodity” to confirm that its meaning is co-extensive with the meaning of the term “nonfinancial commodity” in subsection (B)(ii) of the definition of “swap” in section 1a of the Act, as such term is further defined and interpreted in the Commission’s rules, regulations, interpretations and other guidance.

⁶¹ The term appears on pages 11615, 11616, in footnote 13 on page 11617, in questions 12 and 13 on page 11623, and in footnote 247 on page 11636. Then the term appears one last time, 40 pages later, in footnote 577 on page 11676, where the Commission notes that it “preliminarily believes that physically settled economically equivalent swaps would be few in number.” In addition, the term “physically-delivered swap” also appears once, on page 11617.

⁶² The NFP Energy Associations appreciate that, in the Commission’s pre-2010 Dodd-Frank Act rules regarding futures contracts, the Commission has historically distinguished between futures contracts that are either “physically-settled” or “cash-settled.” But, as the energy industry comments in Commission rulemakings over the past decade have shown, a similar distinction is not well-understood, and by contrast creates significant regulatory uncertainty, with respect to bilateral, off-facility swaps and other energy industry transactions where the parties and the transaction intend physical settlement or delivery.

⁶³ After discussions with staff, some energy industry representatives have posited that the term may have been intended to reference transactions that were structured to evade the Commission’s regulatory jurisdiction over swaps, or transactions that failed to meet the conditions for trade options in Rule 32.3 or the conditions for other transactions that are not “swaps” as set forth in the Commission’s interpretations and other guidance. But the Commission has made it clear that it will consider those transactions to be “swaps,” not “physically-settled swaps.” See Products Release at IIB2 and IIB3, and in particular at 48231 and 48301-48302.

The NFP Energy Associations support the 2020 Proposal to define the term “physical commodity” to confirm the meaning of a term that appears throughout the Commission’s rules, regulations, interpretations and other guidance, including in CEA §4a(a). Physical commodities must mean those commodities that the Act defines as either “agricultural commodities” or “exempt commodities” (a term that, under prior iterations of the Act and the Commission’s rules, meant “exempt” from Commission jurisdiction), including energy commodities, as distinguished from a third category of commodities, that is, “excluded commodities.” Nonetheless, the NFP Energy Associations respectfully request that the Commission take another step to provide regulatory certainty to commercial end-users of nonfinancial energy commodity swaps.

We request the Commission to confirm that the meaning of “physical commodity” is co-extensive with the meaning of the term “nonfinancial commodity” that appears in subsection (B)(ii) of the definition of “swap” in section 1a of the Act, and that is the subject of an important Commission interpretation regarding swaps in the Products Release.⁶⁴ As the Commission moves forward on finalizing its important Speculative Position Limits Rules, the NFP Energy Associations support its efforts to add regulatory clarity for new market participants, as well as for market participants with years of experience in the futures industry. We have attached for consideration changes to the Proposal’s definition of “physical commodity” as Attachment E.

IV. CONCLUSION

The NFP Energy Associations are available to assist the Commission and Commission staff as they finalize the 2020 Proposal and implement the Speculative Position Limits Rules. Most importantly, the NFP Energy Associations are available to discuss and finalize the CEA §4a(a)(7) entity-based exemption from Speculative Position Limits Rules for NFP Energy Entities.

⁶⁴ See the Products Release at 48233. The NFP Electric Associations have requested before that the Commission confirm the alignment of the three categories of commodities referenced in its pre-2010 Dodd-Frank Act rules applicable to futures contracts (agricultural, “exempt” and “excluded”) to the two categories of swaps over which the Commission has jurisdiction (as distinguished from “security-based swaps” over which the Securities and Exchange Commission has jurisdiction). Swap asset classes derived on “financial commodities” include rates, credit, equity and currencies, whereas the “other” asset class of swaps references or is derived on “nonfinancial” commodities, which include energy, agricultural and metal commodities.

**SPECULATIVE POSITION LIMITS RULE:
COMMENTS AND EXEMPTION REQUEST (2020)**

Respectfully submitted,

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Harold Hild, Policy Advisor, Division of Market Oversight
Lillian Cardona, Special Counsel, Division of Market Oversight

ATTACHMENT A - DESCRIPTION OF THE NFP ENERGY ASSOCIATIONS

NRECA is the national trade association representing nearly 900 local electric cooperatives and other rural electric utilities. From growing regions to remote farming communities, electric cooperatives power 1 in 8 Americans and serve as engines of economic development for 42 million Americans across 56 percent of the nation's landscape. Electric cooperatives operate at cost and without a profit incentive. Because an electric cooperative's electric service customers are also members and owners of the cooperative, all the costs of the cooperative are directly borne by its members/owners. NRECA's member cooperatives include 62 generation and transmission (G&T) cooperatives and 831 distribution cooperatives. The G&Ts generate and transmit electricity to distribution cooperatives that, in turn, provide it to the end of line co-op consumer-members. Both distribution and G&T cooperatives share an obligation to serve their member/owners by providing safe, reliable, and affordable electric service.

APPA is the national service organization representing the interests of government-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 electric 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 government-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. Government-owned utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a government-owned electric utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

APGA is the national association of government-owned natural gas distribution systems. Government-owned gas systems are not-for-profit retail distribution entities that are owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other government agencies that have natural gas distribution facilities. APGA was formed in 1961 as a non-profit, non-partisan organization, and currently has over 730 members in 38 states. In total, there are nearly 1,000 municipally-owned systems in the U.S. serving more than five million customers.

ATTACHMENT B – PROPOSED NEW EXEMPTION AND ADDITIONAL DEFINITIONS

§150.7 Exemptions for Certain Entities.

(a) *Entities for Which Certain Transactions or Positions May be Excluded from Part 150 Limits.*

(1) *NFP Energy Entity Exemption.* The speculative position limits set forth in §150.2 will not apply to Operations-Related Referenced Contracts entered into or executed by, or to a position in Operations-Related Referenced Contracts maintained by, an NFP Energy Entity.

(2) *Pass-through swap and pass-through swap offset pair.* In addition, an entity that enters into a swap that is an Operations-Related Referenced Contract with a counterparty that is an NFP Energy Entity may exclude from such entity's speculative position limits calculations any pass-through swap or pass-through swap offset entered into by such entity where:

(i) The pass-through swap is an Operations-Related Referenced Contract that is a swap, and'

(ii) The pass-through swap offset is a futures, option on a futures, or swap position entered into by the pass-through swap counterparty in the same physical commodity as the pass-through swap, and which reduces the pass-through swap counterparty's price risks attendant to that pass-through swap; and provided that the pass-through swap counterparty is able to demonstrate upon request that the pass-through swap qualifies as a swap exempted from the speculative position limits set forth in §150.2 pursuant to this paragraph (a).

(3) *Offsets of a position in Operations-Related Referenced Contracts exempted pursuant to this paragraph (a).* A futures, option on a futures, or swap position entered into by a NFP Energy Entity that reduces the price risks attendant to a previously-entered into swap position that qualified as a transaction or position exempted from speculative position limits set forth in §150.2 at the time it was entered into for that counterparty pursuant to paragraph

(b) *Recordkeeping.* (1) NFP Energy Entities who avail themselves of exemptions or relief under this §150.7 shall keep and maintain books and records concerning their cash, forward contracts, futures contracts, options on futures contracts, and swap transactions and positions, including anticipated requirements in Operations-Related Referenced Contracts, in accordance with the recordkeeping schedule and reproduced for Commission inspection in the records retention format that such person has developed in the normal course of its business operations, and shall make such books and records available to the Commission upon request at such person's business location, and (2) A person seeking to rely on a pass-through exemption pursuant to paragraph (a)(2) may rely on the written representation of the NFP Energy Entity that it meets the definition of "NFP Energy Entity and that it is entering into the swap "to hedge or mitigate commercial risk" of ongoing operations, as such phrase is defined in §50.50(c) of this chapter, and consequently that the swap is an Operations-Related Referenced Contract, as such term is defined herein, respectively, unless it has information that would cause a reasonable person to question the accuracy of the representation.

Any person that relies on a representation received from another person that a swap qualifies as a pass-through swap under this §150.7 shall keep and make available to the Commission upon request all relevant books and records supporting such representation, including any

record the person intends to use to demonstrate that the pass-through is an exempt transaction or position hereunder, for a period of at least two years following expiration of the swap. All books and records of a pass-through swap counterparty kept pursuant to this section shall be kept in accordance with the requirements of §1.31 of this chapter.

(c) *Delegation of authority to the Division of Market Oversight.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight, or such other employee or employees as the Director may designate from time to time:

(1) The authority to request additional information with respect to a particular NFP Energy Entity confirming that it meets the requirements of the definition; or

(2) The authority to request that a person relying on this exemption provide updated materials to the Commission.

Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

NFP Energy Entity means any entity that (i) is, or is wholly-owned by, a government entity and that (a) owns or operates electric or natural gas facilities, electric or natural gas operations or anticipated electric or natural gas facilities or operations, or (b) supplies natural gas or electric energy to other such entities, (c) has public service obligations or anticipated public service obligations under Federal, State or local law or regulation to deliver electric energy or natural gas service to utility customers; or (d) is a Federal power marketing agency as defined in Section 3 of the Federal Power Act, 16 U.S.C. 796(19); (ii) is, or is wholly-owned by, a native American Indian tribe and that (a) owns or operates electric or natural gas facilities, electric or natural gas operations or anticipated electric or natural gas facilities or operations, (b) supplies natural gas or electric energy to other such entities, (c) has public service obligations or anticipated public service obligations under law or regulation to deliver electric energy or natural gas service to utility customers; (iii) is any cooperative, regardless of such cooperative's status pursuant to FPA section 201(f), so long as the cooperative is treated as such under Internal Revenue Code section 501(c)(12) or 1381(a)(2)(C), 26 U.S.C. 501(c)(12), 1381(a)(2)(C), and that (a) owns or operates electric or natural gas facilities, electric or natural gas operations or anticipated electric or natural gas facilities or operations, and (b) exists for the primary purpose of providing electric energy or natural gas service to its member/owner customers at cost; or (iv) is any other entity, including a joint action agency, that is wholly owned, directly or indirectly, by any one or more of the foregoing. The term "NFP Energy Entity" does not include any "financial entity," as defined in CEA §2(h)(7)(C).

Operations-Related Referenced Contract means a referenced contract that meets the following conditions:

(i) If the Operations-Related Referenced Contract is a swap, one counterparty to the swap is an NFP Energy Entity;

(ii) The NFP Energy Entity counterparty is entering into the Operations-Related Referenced Contract “to hedge or mitigate commercial risk” of ongoing utility operations, as such phrase is defined in §50.50(c) of this chapter;

(iii) The Operations-Related Referenced Contract is related to a physical commodity that is used as fuel for generation of electricity, or is otherwise used in the normal operations of an NFP Energy Entity; and

(iv) The commodity underlying the Operations-Related Referenced Contract is an electric energy or natural gas commodity, or the Operations-Related Referenced Contract is associated with: The generation, production, purchase or sale of natural gas or electric energy, the supply of natural gas or electric energy to an NFP Energy Entity, or the delivery of natural gas or electric energy service to customers of an NFP Energy Entity; fuel supply for the facilities or operations of an NFP Energy Entity; compliance with an electric system reliability obligation; or compliance with an energy, energy efficiency, conservation, or renewable energy or environmental statute, regulation, or government order applicable to an NFP Energy Entity.

ATTACHMENT C - INSERT FOR DEFINITION OF "REFERENCED CONTRACT"

Referenced contract means:

(1)...

(2)...

(3) The definition of *referenced contract* does not include (i) a location basis contract, (ii) a commodity index contract, (iii) any guarantee of a swap, ~~or~~ (iv) a trade option that meets the requirements of §32.3 of this chapter, (v) a nonfinancial commodity contract that meets the requirements of the Commission's forward contract exclusion or that is otherwise excluded from the Commission's jurisdiction over "swaps" as a result of Commission regulation, interpretation, exemption order or other guidance, or (vi) a customary commercial agreement, contract or transaction entered into as part of operations (so long as entered into off-facility and not involving a financial intermediary).

ATTACHMENT D - INSERT FOR DEFINITION OF "PHYSICAL COMMODITY"

Physical commodity means any agricultural commodity as that term is defined in §1.3 of this chapter or any exempt commodity as that term is defined in section 1a of the Act, and also has a meaning co-extensive with the meaning of the term "nonfinancial commodity" as that term appears in subsection (B)(ii) of the definition of swap in section 1a of the Act.

ATTACHMENT E - INSERT FOR DEFINITION OF “PHYSICALLY-SETTLED SWAP”

Physically-settled swap means:

(1) a swap that allows for physical settlement or delivery; and

(2) The term *physically-settled swap* does not mean (i) a transaction described in subsection (B)(ii) of the definition of *swap* in section 1a of the Act, (ii) a commodity trade option that meets the requirements of §32.3 of this chapter, (iii) a nonfinancial commodity agreement, contract or transaction that meets the requirements of the Commission’s forward contract exclusion or that is otherwise excluded from the Commission’s jurisdiction over “swaps” as a result of a Commission regulation, interpretation, exemption order or other guidance statement, or (iv) a customary commercial agreement, contract or transaction entered into as part of operations (so long as entered into off-facility and not involving a financial intermediary). For the avoidance of doubt, the term *physically-delivered swap* has a meaning coextensive with the meaning of the term *physically-settled swap*.