



May 15, 2020

Submitted electronically

Christopher Kirkpatrick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

**Re: Position Limits for Derivatives, RIN 3038-AD99**

Dear Mr. Kirkpatrick:

Pursuant to the Position Limits for Derivatives proposed rule (“2020 Proposal”) published in the Federal Register on February 27, 2020,<sup>1</sup> by the Commodity Futures Trading Commission (“CFTC” or “Commission”), the American Gas Association (“AGA”) respectfully submits these comments. AGA supports the Commission’s continued efforts to ensure that the CFTC-regulated markets related to energy commodities function efficiently for the benefit of all market participants, including commercial end-users. Additionally, AGA appreciates the CFTC’s efforts, where necessary and appropriate, to propose position limits to prevent harm caused by excessive speculation. As discussed in detail below, AGA supports the Commission’s proposed modifications to the enumerated hedge for unfilled anticipated requirements, including the addition of utility resales. However, AGA requests that the Commission clarify the exemption recognizing a bona fide hedging position where a utility is “required or encouraged” by its public utility commission to hedge. AGA also requests clarification regarding the scope of the unfilled anticipated requirements exemption and its equal application to fixed and unfixed (or unpriced) commitments. Additionally, AGA supports the addition of the anticipatory merchandising hedge exemption to the list of enumerated bona fide hedge exemptions for qualifying hedgers of anticipatory merchandising of natural gas. Regarding the definition of “referenced contract,” AGA supports the definition and generally supports the exclusions from the definition. Moreover, AGA supports the publication, and periodic updating, of a list of referenced contracts that are subject to the proposed limits. Finally, AGA supports the proposal to use exchanges to review requests and recognize non-enumerated bona fide hedges.

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<sup>1</sup> *Position Limits for Derivatives*, 85 Fed. Reg. 11596 (February 27, 2020) (“2020 Proposal”). On April 9, 2020, the Commission voted to extend the comment period in this proceed from April 29, 2020 to May 15, 2020. *Extension of Currently Open Comment Periods for Rulemakings in Response to the COVID-19 Pandemic*, 85 Fed. Reg. 22690 (April 23, 2020).

## I. IDENTITY AND INTERESTS

The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 75 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — more than 71 million customers — receive their gas from AGA members. Today, natural gas meets more than 30 percent of the United States' energy needs. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates.<sup>2</sup>

AGA member companies provide natural gas service to retail customers under rates, terms, and conditions that are regulated at the local level by a state commission or other regulatory authority with jurisdiction. AGA's member companies engage in financial risk management transactions in markets regulated by the Commission. Many gas utilities use a variety of financial tools, such as futures contracts traded on CFTC-regulated exchanges and over-the-counter energy derivatives, to hedge the commercial risks associated with providing natural gas service, including volatility in natural gas commodity costs. As such, AGA's members are directly affected by the Commission's regulations promulgated under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").<sup>3</sup>

## II. BACKGROUND

AGA believes that the regulations implementing the Dodd-Frank Act<sup>4</sup> should ensure that the financial markets related to energy commodities function efficiently and protect the ability of commercial hedgers to engage in risk management activities for the benefit of American energy consumers at a reasonable cost. The Commodity Exchange Act ("CEA"), as amended by the Dodd-Frank Act, directs the Commission to establish limits on speculative positions that it "finds are necessary" to prevent the harms caused by excessive speculation.<sup>5</sup> Further, the CEA provides that the CFTC, in accordance with the standard set forth in Section 4a(a)(1) shall, by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions.<sup>6</sup>

As discussed in more detail below, consistent with the mandate of the CEA, any speculative position limits regime adopted by the CFTC must be established in a way that allows commercial end-users, such as natural gas utilities, to continue to enter into bona fide hedges to manage, hedge and mitigate the commercial risks of their natural gas distribution business in a non-burdensome and cost-effective manner on behalf of customers. AGA member natural gas utilities engage in commercial hedging primarily to limit volatility in the cost of natural gas purchased to provide service to their retail customers and do not pose a systemic risk to the U.S.

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<sup>2</sup> For more information, please visit [www.aga.org](http://www.aga.org).

<sup>3</sup> Public Law 111-203, 124 Stat. 1376 (2010).

<sup>4</sup> *Id.*

<sup>5</sup> See CEA Sec. 4a(a)(1) and 2020 Proposal at 11597.

<sup>6</sup> See CEA Sec. 4a(a)(2)(A) and 2020 Proposal at 11658.

financial system.<sup>7</sup> Further, AGA believes that these member activities certainly do not result in the type of harm from excessive speculation that the position limits regime seeks to address.

Natural gas utilities or local distribution companies (“LDCs”) are end-users as contemplated by the legislative history of the Dodd-Frank Act and are not the focus of the Act. This is exemplified in the June 30, 2010 letter from Senators Blanche Lincoln and Christopher Dodd, Chairs of the Senate Agriculture and Banking Committees, to Congressmen Barney Frank and Colin Peterson, Chairs of the House Financial Services and Agriculture Committee (“Dodd-Lincoln Letter”) which emphasized that the purpose of the Dodd-Frank Act, *inter alia*, “Major Swap Participant and Swap Dealer definitions are not intended to include an electric or gas utility that purchases commodities that are used either as a source of fuel to produce electricity or to supply gas to retail customers and that uses swaps to hedge or manage the commercial risks associated with its business.”<sup>8</sup> The Dodd-Lincoln Letter also notes that end-users, such as LDCs, “did not get us into this crisis and should not be punished for Wall Street’s excesses.”<sup>9</sup> It is important for AGA and its members that any final position limits rule be consistent with the foregoing and not restrict access to hedging strategies undertaken by end-users, such as natural gas utilities. As discussed below, the 2020 Proposal is consistent with the foregoing history and purpose of the Dodd-Frank Act, in that the 2020 Proposal strives to prevent the harms caused by excessive speculation, while permitting end-users to continue to hedge.

### III. COMMENTS ON THE 2020 POSITION LIMITS PROPOSAL

#### A. Overview of the 2020 Proposal

The 2020 Proposal, based on the requirements of CEA Section 4a, proposes spot month federal speculative position limits with respect to twenty-five (25) core referenced futures contracts, cash-settled futures contracts that are directly or indirectly linked to one of the 25 core referenced contracts, and economically equivalent swaps.<sup>10</sup> Specifically, the 2020 Proposal identifies 25 physical commodity futures contracts, including the New York Mercantile Exchange (“NYMEX”) Henry Hub Natural Gas (“NG”) contract, that would be subject to federal limits – one limit for physically-settled referenced contracts, and a separate limit for cash-settled referenced contracts (collectively, these contracts are referred to as “core referenced futures contracts”).<sup>11</sup> For each of the 25 core referenced futures contracts, the 2020 Proposal also proposes to impose federal limits on: 1) cash-settled futures contracts that are directly or indirectly linked to one of the aforementioned 25 contracts;<sup>12</sup> and 2) swaps that are economically

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<sup>7</sup> See AGA’s September 20, 2010 Comments filed in response to the Advance Notice of Proposed Rulemaking on Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, RIN 3235-AK65/3038-AD06, at p. 4. Available at:

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26223&SearchText=american%20gas>.

<sup>8</sup> Dodd-Lincoln Letter at p. 3, available at <https://online.wsj.com/public/resources/documents/dodd-lincoln-letter070110.pdf>.

<sup>9</sup> Dodd-Lincoln Letter at p. 2.

<sup>10</sup> 2020 Proposal at 11598.

<sup>11</sup> *Id.* at 11719.

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

equivalent to a core referenced futures contract or cash-settled futures that are subject to the federal limits (collectively, these are referred to as “referenced contracts”).<sup>13</sup>

There is no current federal limit on energy contracts. For the natural gas core referenced contract, the 2020 Proposal sets a 2,000 NYMEX Henry Hub NG equivalent-size contract spot month limit, such that a market participant could only hold up to 2,000 contracts net long or net short across exchanges/over-the-counter (“OTC”) in physically-settled natural gas referenced contract(s), and another 2,000 contracts net long or net short across futures equivalent contracts combined across cash-settled futures and economically equivalent swaps. The current exchange-set spot limit is 1,000 contracts.<sup>14</sup>

Additionally, the 2020 Proposal includes a “conditional” spot month limit for natural gas referenced contracts.<sup>15</sup> According to the 2020 Proposal, if a market participant does not hold or control any positions during the spot month in the physically-settled NYMEX Henry Hub NG core referenced futures contract, the participant could hold up to 10,000 NYMEX Henry Hub NG equivalent-size contracts net long or net short per exchange, plus an additional 10,000 NYMEX Henry Hub NG futures equivalent-size contracts in economically equivalent swaps in total across all swap execution facilities and OTC.<sup>16</sup>

AGA’s comments, as discussed in detail below, focus on the bona fide hedge exemptions and other certain exclusions that are of material importance to natural gas utilities because of the manner in which utilities uses these types of instruments and because such activities were not the focus of the Dodd-Frank Act and, therefore, should not be the focus of any position limits rule. The 2020 Proposal includes a three-part definition for a “bona fide hedging transaction or position.” First, the position represents a substitute for transactions made or to be made, or positions taken or to be taken, at a later time in a physical marketing channel.<sup>17</sup> This would satisfy the “temporary substitute test.”<sup>18</sup> Second, the position is economically appropriate to the reduction of price risks in the conduct and management of a commercial enterprise.<sup>19</sup> This element of the definition would meet the “economically appropriate test.”<sup>20</sup> Third, the position must arise from the potential change in value of actual or anticipated assets, liabilities, or services.<sup>21</sup> This would fulfill the “change in value requirement.”<sup>22</sup>

Pursuant to the 2020 Proposal, a transaction that satisfies the general definition above would also need to be an enumerated bona fide hedging transaction or be approved as a non-enumerated transaction.<sup>23</sup> The 2020 Proposal provides a list of enumerated bona fide hedging

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<sup>13</sup> 2020 Proposal at 11599.

<sup>14</sup> *Id.* at 11599.

<sup>15</sup> *Id.* at 11601.

<sup>16</sup> *Id.* at 11640.

<sup>17</sup> *Id.* at 11600.

<sup>18</sup> *Id.* Notably, under the proposed temporary substitute test, positions entered into for “risk management purposes” would no longer be recognized as bona fide hedges, unless the position offsets risk from a swap involving a counterparty with bona fide hedging needs. 2020 Proposal at 11605-06.

<sup>19</sup> 2020 Proposal at 11600.

<sup>20</sup> *Id.* at 11600, 16006.

<sup>21</sup> *Id.* at 11600.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 11601.

transactions and automatically exempts from applicable federal position limits any market participant that follows the practices detailed in the 2020 Proposal.<sup>24</sup>

Positions in referenced contracts that meet any of the listed enumerated hedges would meet the bona fide hedging definition set forth in CEA Section 4a(c)(2)(A) and the proposed definition of bona fide hedging discussed in the 2020 Proposal. The enumerated hedges in the 2020 Proposal are:

1. Hedges of unsold anticipated production;
2. Hedges of offsetting unfixed-price cash commodity sales and purchases;
3. Hedges of anticipated mineral royalties;
4. Hedges of anticipated services;
5. Cross-commodity hedges;
6. Hedges of inventory and cash commodity fixed-price purchase contracts;
7. Hedges of cash commodity fixed-price sales contracts;
8. Hedges by agents;
9. Offsets of commodity trade options;
10. Hedges of unfilled anticipated requirements; and
11. Hedges of anticipated merchandising.<sup>25</sup>

The Commission explained that it would be open, on a case-by-case basis, to recognizing bona fide hedge positions or transactions that may fall outside the bounds of the enumerated hedges, but still satisfy the proposed bona fide hedging definition and section 4a(c)(2) of the CEA.<sup>26</sup> Positions in referenced contracts subject to position limits that meet any of the proposed enumerated hedges would, for purposes of federal limits, meet the bona fide hedging definition in CEA section 4a(c)(2)(A), as well as the Commission's proposed bona fide hedging definition in §150.1.<sup>27</sup> The Commission and the exchanges would continue to exercise oversight over the positions to confirm that market participants' claimed exemptions are consistent with their cash-market activity.<sup>28</sup> For non-enumerated bona fide hedging transactions, *i.e.*, those that the CFTC has not already defined as meeting the criteria for bona fide hedging, market participants can either apply directly to the Commission for an exemption (and separately to the relevant exchange); or apply to the relevant exchange for an exemption from both federal and exchange-set limits.<sup>29</sup> If the exchange approves the application, the exemption would also be valid for purposes of federal limits unless a majority of Commissioners object within 10 business days or two business days in the case of sudden or unforeseen bona fide hedging needs.<sup>30</sup> While the 2020 Proposal would generally require market participants to obtain approval to exceed limits before taking on the excess position, it would permit those with sudden or unforeseen hedging needs to file a request for an exemption within five business days after exceeding the limit.

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<sup>24</sup> 2020 Proposal at 11601.

<sup>25</sup> *Id.* at 11608-11612.

<sup>26</sup> *Id.* at 11607-08.

<sup>27</sup> 2020 Proposal at 11608.

<sup>28</sup> *Id.* at 11611.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 11602.

## **B. Bona Fide Hedge Exemption Related to Unfilled Anticipated Requirements and Resale by Utilities**

The unfilled anticipated requirement enumerated hedge currently appears in § 1.3 of the Commission’s regulations setting forth the bona fide hedge exemption. In the 2020 Proposal, the Commission proposes to include it as an enumerated hedge with modifications.<sup>31</sup> To satisfy the requirements of this particular enumerated hedge, the bona fide hedge would be to establish a long position in a commodity derivative contract to offset the expected price risks associated with the anticipated future purchase of the cash-market commodity underlying the commodity derivative contract.<sup>32</sup> The Commission explains that unfilled anticipated requirements could include requirements for processing, manufacturing, use by that person, or resale by a utility to its customers.<sup>33</sup> Regarding resale by a utility to its customers, the Commission notes that the proposed inclusion of unfilled anticipated requirements for resale by a utility to its customers does not appear in the existing bona fide hedging definition.<sup>34</sup> The Commission explains that this provision would recognize a bona fide hedging position where a utility is “required or encouraged” by its public utility commission to hedge.<sup>35</sup>

Further, consistent with the existing provision, the Commission states that exchanges may adopt rules providing that during the lesser of the last five days of trading, such positions must not exceed the person’s unfilled anticipated requirements of the underlying cash commodity for that month and for the next succeeding month. However, regarding the existing twelve-month limit on this enumerated hedge outside of the spot period, the Commission proposes to remove this twelve-month limitation because of commercial needs to hedge unfilled anticipated requirements for longer than twelve months.<sup>36</sup>

AGA supports the Commission’s proposed modifications to the enumerated hedge for unfilled anticipated requirements. Furthermore, AGA appreciates and supports the inclusion of utility resales in the proposed enumerated hedge. As the Commission explains, the proposed inclusion of unfilled anticipated requirements for resale by a utility to its customers does not appear in the existing § 1.3 bona fide hedging definition.<sup>37</sup> This provision is analogous to the unfilled anticipated requirements provision of existing paragraph (2)(ii)(C) of the existing bona fide hedging definition, except the commodity is not for use by the same person (that is, the utility), but rather for anticipated use by the utility’s customers.<sup>38</sup>

AGA requests that the Commission, however, clarify the statement in the 2020 Proposal that provides that the exemption recognizes a bona fide hedging position where a utility is “required or encouraged” by its public utility commission to hedge. AGA is concerned that this proposed utility hedge exemption as qualified by the term “required or encouraged” is unduly limiting and too restrictive to satisfy its intended purpose. State regulatory authorities vary

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<sup>31</sup> 2020 Proposal at 11610.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 2020 Proposal at 11610, Footnote 99.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at Footnote 99.

<sup>38</sup> *Id.*

significantly in how each reviews a utility's risk management program. For example, more commonly the state regulator may "permit" or "allow" hedging activities, as compared to expressly requiring such actions. While the "required or encouraged" element is not in the proposed regulatory text, clarification of the scope for the exemption in the final rule would result in more certainty for those utilities in states that may not directly address hedging activities but allow or permit it for the potential benefits to customers. AGA encourages the Commission to clarify its explanation and scope of the enumerated hedge as it will provide clarity<sup>39</sup> and allow for more effective use by utilities of the bona fide hedge exemption for its risk management transactions on behalf of its customers.

Furthermore, AGA requests clarification regarding the scope of the unfilled anticipated requirements exemption and its equal application to fixed and unfixed (or unpriced) commitments. Previously, the Commission stated that unfilled anticipated requirements are those anticipated inputs that are estimated in good faith and that have not been filled, and that an anticipated requirement may be filled by fixed-price purchase commitments, holdings of commodity inventory, or unsold anticipated production of the market participant.<sup>40</sup> Furthermore the Commission has stated in the past that unfixed-price purchase commitments do not fill an anticipated requirement because the participant's price risk to the input has not been fixed.<sup>41</sup> While such explicit language is not in the 2020 Proposal, AGA urges the Commission to clarify that hedge exemptions for unfilled anticipated requirements<sup>42</sup> should apply equally to unpriced anticipated requirements. Utilities, such as AGA's members, in performing their obligations to serve customer needs, typically enter into contracts to purchase natural gas with respect to anticipated customer requirements months, or even years, in advance of a particular anticipated delivery period in order to ensure that sufficient natural gas supply is available to provide safe and reliable service to customers. Companies use forward contracts with floating prices based on monthly or daily price indices compiled independently and published in a number of industry publications. Moreover, while the portion of these utilities' anticipated customer requirements acquired through these index-priced contracts are no longer unfilled, and from their suppliers' standpoint, the portion of anticipated production represented by these contracts no longer remains unsold, these contracts effectively remain unpriced and exposed to price risk. The Commission should consider clarifying that the bona fide hedge exemption related to unfilled anticipated requirements also applies to this circumstance.

### **C. Bona Fide Hedge Exemption for Anticipatory Merchandising**

The Commission proposes to maintain the current four categories of enumerated hedges that may be exempt from federal position limits.<sup>43</sup> Furthermore, the Commission also proposes

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<sup>39</sup> AGA notes that in the *Position Limits for Derivatives: Certain Exemptions and Guidance*, 81 Fed. Reg. 38458, 38505 (June 13, 2016), the Commission proposed to include in the bona fide hedge for unfilled anticipated requirements that transactions would need to be "required or encouraged" by a public utility commission. However, that language was removed later in *Position Limits for Derivatives: Reproposal*, 81 Fed. Reg. 96704, 96752 (December 30, 2016) ("Reproposal").

<sup>40</sup> Reproposal at 96752.

<sup>41</sup> *Id.*

<sup>42</sup> This clarification should apply to the other "anticipated" related hedged exemptions, as applicable, such as production.

<sup>43</sup> 2020 Proposal at 11602. The four existing categories of enumerated hedges are: (1) hedges of ownership or fixed-price cash commodity purchases and hedges of unsold anticipated production; (2) hedges of fixed-price cash

to expand that list to include, among other hedging practices, anticipatory merchandising as an enumerated hedge.<sup>44</sup>

For hedges of anticipated merchandising,<sup>45</sup> the Commission is proposing to recognize certain offsets of anticipated purchases or sales as bona fide hedging.<sup>46</sup> Under this proposed enumerated hedge, a merchant may establish a long or short position in a commodity derivative contract to offset the anticipated change in value of the underlying commodity that the merchant anticipates purchasing or selling in the future.<sup>47</sup> However, such hedges must meet certain conditions: (1) the commodity derivative position must not exceed in quantity twelve months of purchase or sale requirements of the same commodity that is anticipated to be merchandised; and (2) merchants must be in the business of purchasing and selling the underlying commodity that is anticipated to be merchandised, and who can demonstrate that it is their historical practice to do so. The Commission notes that if a merchandiser lacks the requisite history of anticipatory merchandising activity, if the merchandiser can show activities in the physical marketing channel, then such merchandiser could potentially receive the bona fide hedge recognition under the proposed non-enumerated process.<sup>48</sup>

AGA supports the addition of the anticipatory merchandising hedge exemption to the list of enumerated bona fide hedge exemptions for qualifying hedgers of anticipatory merchandising of natural gas.<sup>49</sup> The inclusion of the exemption for such activity promotes liquidity. Absent such an enumerated hedge, there would be a piecemeal approach to permitting such hedges which could reduce liquidity, raise costs, and create undue risks for gas utilities, without any regulatory benefits toward the Commission's goal to reduce excessive speculative activities. Further, such an exemption does not unreasonably restrict or eliminate hedging strategies commonly used by gas utilities to reduce gas price commodity risk.

#### **D. Excluding Trade Options from Referenced Contracts**

The Commission is proposing to define the term, "referenced contract," to include any core reference futures contract listed in proposed § 150.2(d) and their linked cash-settled futures, options on futures, and "economically equivalent" swaps.<sup>50</sup> Further, the proposed referenced contract definition would exclude certain types of contracts, including: a location basis contract, a commodity index contract, a swap guarantee, or a trade option that meets the requirements of § 32.3.<sup>51</sup>

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commodity sales and hedges of unfilled anticipated requirements; (3) hedges of offsetting unfixed-price cash commodity sales and purchases; and (4) cross-commodity hedges.

<sup>44</sup> 2020 Proposal at 11607 (other enumerated hedges in the 2020 proposal include: (1) hedges by agents; (2) short hedges of anticipated mineral royalties (3) hedges of anticipated services; and (4) offsets of commodity trade options).

<sup>45</sup> 2020 Proposal at 11608-12.

<sup>46</sup> *Id.* at 11610.

<sup>47</sup> *Id.* at 11610-11.

<sup>48</sup> *Id.* at 11611.

<sup>49</sup> AGA also supports the Commission's proposed new enumerated hedges for anticipated services and production, for the same reasons stated herein with regard to the anticipatory merchandising exemption. *See* 2020 Proposal at 11608 and 11609.

<sup>50</sup> 2020 Proposal at 11619.

<sup>51</sup> *Id.* at 11620.



As the Commission mentioned<sup>52</sup> in the 2020 Proposal, it has traditionally exempted trade options from Commission requirements because such options are typically used by end-users to hedge physical risk and, therefore, do not contribute to excessive speculation.<sup>53</sup> Furthermore, trade options are not subject to position limits under current regulations, and the proposed exclusion of trade options from the referenced contract definition would simply codify existing practices.<sup>54</sup>

AGA supports the proposed definition of referenced contract as well as the explicit exclusion of trade options from that definition, as it would be consistent with the Commission's current regulations for position limits and enable commercial end-users to continue to use these physically settled contracts to manage supply risk. Trade options are not the type of transactions for which position limits are necessary to diminish or prevent excessive speculation or market manipulation; therefore, the exclusion of trade options from the position limits is warranted. Trade options, by definition, are entered into by commercial entities for purposes related to their businesses with physical delivery of the commodity as the intent.<sup>55</sup> Further the Commission has noted, "the trade option exemption is intended to permit parties to hedge or otherwise enter into transactions for commercial purposes."<sup>56</sup> Since both the offeror and the offeree are commercial entities in the commodity value chain, and thus likely to be sophisticated entities able to negotiate at arm's length, the Commission should have little concern about market manipulation or even market power abuse. The Commission has already determined that it is reasonable and appropriate that trade options be subjected to significantly less regulatory burden than other types of transactions; therefore, it is appropriate to exclude such contracts for the referenced contract definition in the 2020 Proposal. For the foregoing reasons and those in the 2020 Proposal, AGA supports the exclusion of a trade option from the reference contract definition.

Furthermore, AGA generally supports the other exclusions from the referenced contract definition.<sup>57</sup> For example, as the Commission explains, the proposal to exclude location based contracts would create certain netting benefits and the exclusion may allow commercial end-users to more efficiently hedge the cost of commodities at a preferred location.<sup>58</sup> AGA believes that market participants benefit from clear rules and definitions, especially with regard to what is and is not a referenced contract. Uncertainty only serves to invite potential disagreement leading to increased transaction costs, potential loss of liquidity, and compliance strategies that generally make the markets less efficiently.

AGA further supports the Commission's proposal that market participants may request clarification from the Commission on the scope and application of the referenced contract definition.<sup>59</sup> AGA supports the establishment of a specific and expeditious process that market

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<sup>52</sup> 2020 Proposal at 11621.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See 17 CFR § 32.3.

<sup>56</sup> *Commodity Options*, 77 Fed. Reg. 25320, 25326 (2012).

<sup>57</sup> See 2020 Proposal at 11620.

<sup>58</sup> *Id.* at 11620.

<sup>59</sup> *Id.* at 11621.

participants could use when questions arise in order to obtain a timely clarification on whether a particular transaction would be considered a “referenced contract.”

Furthermore, AGA supports the publication of a list of referenced contracts to provide clarity to market participants . The Commission published the *CFTC Staff Workbook of Commodity Derivative Contracts under the Regulations Regarding Position Limits for Derivatives* as a non-exhaustive list of referenced contracts,<sup>60</sup> to provide market participants with some clarity on which exchange-traded contracts are subject to the proposed federal limits. The workbook is helpful, but it should be updated and expanded as applicable and appropriate so that market participants can quickly identify contracts subject to the limits and avoid the time-consuming process of conducting a review to determine if a contract would fit within the referenced contract definition. Moreover, as definitive and comprehensive a list as possible would greatly reduce the potential for inconsistent treatment across market participants, as well as the amount of time a company needs to spend working through contract specifications, particularly in natural gas, where there are a large number of futures contracts. AGA understands that a comprehensive workbook would need to be updated over time in order to account for new exchange-listed products and the 2020 Proposal provides a process that could be used for this purpose. Specifically, when an exchange self-certifies a new contract to the Commission or submits a new contract for Commission approval, the proposal requires that the exchange identify whether the contract meets the definition of a referenced contract.<sup>61</sup> AGA believes that these exchange filings could be used by the CFTC to update the workbook as needed.

#### **E. Exchanges and Non-enumerated Bona Fide Hedges**

The Commission is proposing to establish a framework, applicable to proposed referenced contracts in all commodities, whereby a market participant who is seeking a bona fide hedge recognition that is not enumerated in the 2020 Proposal can file one application with an exchange to receive a bona fide hedging recognition for purposes of both exchange-set limits and for federal limits.<sup>62</sup> This framework would be separate from the Commission’s process for reviewing exemption requests.<sup>63</sup>

Specifically, for a given reference contract, the proposed framework would allow a person to exceed federal position limits if the exchange listing the contract has recognized the position as a bona fide hedge with respect to exchange-set limits.<sup>64</sup> The exchange would make the determination with respect to its own speculative position limits, and, unless the Commission denied or stayed the application within ten business days (or two business days in the case of sudden or unforeseen bona fide hedge needs), the exemption would be approved for purposes of federal position limits.<sup>65</sup>

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<sup>60</sup> Available at: <https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/PositionLimitsforDerivatives/index.htm>

<sup>61</sup> 2020 Proposal at 11621.

<sup>62</sup> *Id.* at 11650.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 11651.

<sup>65</sup> *Id.*

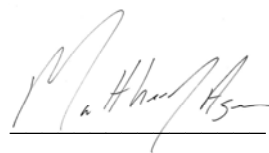
The exchange's exemptions would be valid only if the exchange meets the following conditions: (1) the exchange maintains rules, approved by the Commission, that establish application processes for recognizing bona fide hedges; (2) the exchange meets the prerequisites for granting such recognitions; (3) the exchange satisfies specified recordkeeping requirements; and (4) the exchange notifies the Commission and the applicant upon determining to recognize a bona fide hedging transaction or position.<sup>66</sup>

AGA urges the Commission to adopt an application and review process that is reasonable and workable for all market participants. AGA supports the proposal to use exchanges to review requests and recognize non-enumerated bona fide hedges. The proposal would conserve limited Commission resources while helping to ensure that the review and recognition of a request is performed in a timely, streamlined and efficient manner. Further, the framework permits the Commission to deny or stay the application in the event such action is warranted, thereby preserving agency oversight and its ability to act when needed. Moreover, if a market participant chooses, it may seek to apply directly to the Commission for a non-enumerated bona fide hedging exemption, thereby allowing the option of an exchange process or an agency process. AGA urges that in the final rule, the Commission adopt the proposed framework for seeking bona fide hedge recognition for non-enumerated hedges.

#### IV. CONCLUSION

Wherefore, for the reasons stated above, the American Gas Association respectfully requests that the Commission consider these comments in adopting its final rule and, *inter alia*, clarify the statement in the 2020 Proposal that provides that the exemption recognizes a bona fide hedging position where a utility is "required or encouraged" by its public utility commission to hedge, clarify that hedge exemptions for unfilled anticipated requirements should apply equally to unpriced anticipated requirements, adopt the definition of referenced contract and issue and update the list of referenced contracts, and adopt an exchange review process that is reasonable and workable for all market participants.

Respectfully submitted,



Michaela Burroughs  
Staff Attorney  
American Gas Association  
400 N. Capitol Street, NW  
Washington, DC 20001  
(202) 824-7311  
[mburroughs@aga.org](mailto:mburroughs@aga.org)

Matthew J. Agen  
Assistant General Counsel  
American Gas Association  
400 North Capitol Street, NW  
Washington, DC 20001  
(202) 824-7090  
[magen@aga.org](mailto:magen@aga.org)

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<sup>66</sup> *Id.*