Dear Ms. Jurgens:

The American Gas Association (“AGA”) submits the following statement in response to a request for comments regarding the Commodity Futures Trading Commission (“CFTC” or “Commission”) Staff Public Roundtable to Discuss Dodd-Frank End-User Issues (“Staff Roundtable”). AGA thanks the Commission for holding a roundtable to address the many concerns of non-financial end-users that seek regulatory certainty from the Commission for their business planning and regulatory compliance. We appreciate the opportunity to provide further comments that help the Commission fully appreciate these concerns and take further action to provide clarity. While we commend the CFTC for providing necessary interim relief for end-users that are reporting commodity trade options or swaps, we urge the Commission to issue final rules and revised interpretations that address comments filed in response to the CFTC interim final interpretation for contracts with embedded volumetric optionality and the commodity trade option exemption interim final rule. AGA also requests that in providing final rules and interpretations, the Commission should ensure that any conditions placed on the determination of a contract’s regulatory status as a forward or a swap, should look to whether the contract satisfies the conditions at the time the contract is executed, not at the time a commercial end-user exercises physical delivery rights under the contract. We further request that the Commission clarify that certain stand-alone physical delivery contracts, such as natural gas peaking supply agreements that exclusively provide for physical delivery but do not require delivery of any amounts unless exercised, should be considered forward contracts under the CFTC’s interpretations.

1 Request for Comments, CFTC Staff Public Roundtable to Discuss Dodd-Frank End-User Issues (March 27, 2014), at http://www.cftc.gov/PressRoom/PressReleases/pr6872-14.


I. Communications

All pleadings, correspondence and other communications filed in this proceeding should be served on the following:

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II. Identity and Interests

AGA represents more than 200 local energy companies that deliver clean natural gas throughout the United States. More than 65 million residential, commercial and industrial natural gas customers, or more than 175 million Americans, receive their gas from AGA members. 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. They use financial tools to hedge the commercial risks associated with providing natural gas service to customers, such as commodity cost volatility. These tools include futures contracts traded on CFTC-regulated exchanges and over-the-counter energy derivatives. AGA members also participate in the physical natural gas market and contract for pipeline transportation, storage and asset management services in order to procure and deliver affordable, reliable natural gas to their customers. AGA members have an interest in transparent and efficient financial markets for energy commodities, so that they can engage in risk management activities at reasonable cost for the benefit of America’s natural gas consumers. Under CFTC rules, AGA member companies are classified as non-financial entities, or “end-users” of futures and swaps.

III. Comments

AGA members are regulated energy companies that have an obligation to serve their customers, and must stand ready to supply natural gas in accordance with their customers’ needs at all times under just and reasonable rates as per terms and conditions set by state regulatory authorities. In order to fulfill this obligation, AGA members must enter into natural gas supply agreements with flexibility delivery provisions, including agreements with varying degrees of volumetric optionality. These non-financial, natural gas supply contracts with flexible delivery terms are physical transactions for firm delivery, which are always intended to be physically settled and do not provide for alternative financial settlement. AGA members use these contracts to secure short-term and long-term reliable gas supplies at the lowest reasonable cost to customers, while managing commercial and operational conditions that may cause expected or unexpected constraints on their delivery systems. AGA has provided the Commission with specific details about the contractual terms and conditions under these contracts, in a request for interpretative guidance, filed in February, 2013.4

AGA greatly appreciates the Commission’s efforts to consider its concerns with respect to applying the CFTC forward contract interpretation as a framework for analyzing whether these natural gas contracts would be exempt from the Commission’s regulation.5 AGA has filed


comments and a request for interpretative guidance, asking the CFTC to clarify whether certain natural gas peaking supply contracts entered into for managing both expected and unexpected variations in commercial demand would be exempt from regulation as forward contracts with volumetric optionality. The CFTC has not responded to comments, and the request for interpretative guidance remains pending; meanwhile, the CFTC has issued additional, non-binding guidance and no-action letters that provide interim relief.

At the CFTC Staff Roundtable, AGA and other energy stakeholders explained that the resulting regulatory uncertainty is creating tremendous confusion and disagreement in the natural gas industry, including: extended transactional negotiations; exit of the natural gas supply business by some market participants; new costs to negotiate physical delivery transactions; inconsistent counterparty representations interpreting the CFTC “seven-factor test” regarding embedded volumetric optionality; and increased costs for many end-users that must classify, document, perform additional compliance reviews, and manually confirm certain physical transactions as excluded forward contracts or reportable commodity trade options. AGA and others at the CFTC Staff Roundtable also noted that many energy delivery companies are still negotiating their summer 2014 contracts for anticipated customer demand, and that regulatory uncertainty regarding application of the CFTC forward contract interpretation may significantly protract the pace and complexity of these negotiations. Participants provided information that these changes are ultimately skewing physical contracting away from innovative, customized, long-term, and open ended physical contracts with volumetric flexibility, toward multiple, smaller contracts for fixed and daily supply.

Specifically, AGA emphasized the ongoing confusion about applying the seven-factor test to natural gas physical delivery agreements, particularly “peaking supply” and “swing” agreements. AGA explained that these agreements provide for open-ended firm delivery to respond to customer needs, and that regulatory uncertainty is creating business-changing impacts for gas utilities, such as increasing costs and resources required for gas utilities’ negotiations and procurement of firm supplies. AGA also cautioned that the movement of natural gas contracting practices away from innovative, flexible delivery agreements to alternative procurement strategies for firm supplies, could increase the costs of delivering reliable gas supplies – costs that will ultimately be passed through to gas utility customers.

AGA is pleased to provide the following additional information responding to questions posed by staff at the CFTC Staff Roundtable. We hope that this information will assist the Commission in issuing final rules and revised interpretations that respond to the concerns of natural gas market participants.

Responses to CFTC Staff Roundtable Questions

**Q1: TO Compliance:** Given the relief granted in the Trade Option Exemption and staff letter 13-08, what remaining compliance concerns, if any, do you have regarding trade options? E.g. Position limits? How, specifically, would the proposed position limits rules raise concerns about Trade Options? Is there a way to address your concerns about the application of position limits to Trade Options without disapplying position limits to Trade Options?

**A:** CFTC Form TO permits end-users to report otherwise unreported commodity trade option activity, under a less burdensome process. However, regulatory uncertainty about applying the CFTC’s forward contract exclusion interpretation to certain physical natural gas supply agreements is causing some market participants to report more physical supply transactions than would
otherwise be reported on Form TO. Form TO has become a catch-all for the reporting of physical natural gas contracts with flexible delivery terms because counterparties cannot agree on whether this flexibility satisfies the CFTC’s forward contract interpretation and other guidance.

In the absence of regulatory clarifications that can precisely distinguish excluded physical transactions from reportable financial transactions, market participants have faced a number of compliance concerns regarding trade option reporting. First, counterparty disagreement on the reporting of non-financial transactions has led to inconsistent reporting decisions; parties have “agreed to disagree” on whether a transaction is a trade option, and they remain very concerned about compliance consequences if the CFTC believes either or both have incorrectly classified a transaction as a commodity trade option, swap or forward. Second, some market participants have exited the physical natural gas business or segments of the physical natural gas business because of their concerns that counterparties taking supply under physical contracts with volumetric optionality could use those contracts in a manner that may require reporting by both parties under CFTC rules for trade options, or for financial swaps. Third, market participants are very concerned that the vagueness of the embedded volumetric optionality guidance test may lead to the incorrect interpretation that while some contracts with volumetric flexibility may be excluded if they contain a minimum delivery requirement, the same contracts that permit but do not require a gas utility to call on the permissible additional quantity (“zero” delivery), would be treated as swaps. Additionally, the CFTC’s guidance could be misinterpreted such that the regulatory status of a contract might not depend on that contract’s terms, but on whether or not a party holds several contracts and chooses to take delivery under one of those contracts while taking “zero” delivery under another contract. Fourth, AGA’s numerous meetings with CFTC leadership and staff have evidenced that different parties do not share consistent views on whether the trade option reporting, the CFTC’s guidance for excluded forwards, or CFTC swap regulation, is the appropriate framework to analyze peaking supply natural gas delivery agreements.

AGA believes the Commission should not subject trade options to position limits and should issue a position limits rule that exempts trade options from the definition of a “referenced contract”. By definition, trade options being reported by natural gas companies are entered into for purposes related to their businesses with the intent to make or take physical delivery of the commodity. Due to physical constraints on the amount of natural gas that many customers could possibly purchase and use, many natural gas transactions being reported as trade options are structured with no contractual upper limit on the volume of natural gas that could be sold pursuant to that transaction. More specifically, for AGA members that are gas-only companies, the ability to enter into gas supply agreements which constitute trade options is limited by the number of customers and the expected normalized sales volumes to be delivered to these customers. For AGA member companies who also have electric system operations, there is a physical limit to the number of trade options they may enter into due to a hard limitation on their physical installed gas-fired generation capacity. In both cases, the lack of a contractual upper limit on these contracts would make it impossible to aggregate and report position limits in financial swaps and commercial trade options.

Additionally, many physical, non-financial agreements that would otherwise be excluded from reporting as forward contracts, are being reported as trade options because Form TO is being viewed in the natural gas marketplace as a catch-all in the absence of regulatory clarity about the applicability of the CFTC’s forward contract exclusion interpretation. AGA believes that many trade options, with respect to natural gas commodities, are likely to be natural gas peaking supply transactions that should not be subject to the Commission’s swap regulations in any event. AGA

6 Comments of the American Gas Association, Position Limits for Derivatives (RIN 3038-AD99) (February 10, 2014) (available online).
contends that natural gas peaking supply transactions and other similar commodity options embedded in forward contracts that may arguably not pass the seven-factor test, do not present a systemic risk issue and are not the types of transactions for which position limits are needed.

AGA also notes that the Commission has not yet received significant data from trade options reporting through Form TO, especially data that can be harmonized with individual trade option transaction reports received through registered Swap Data Repositories under the CFTC Part 45 rules. Because currently available Form TO data is unlikely to be meaningful for the purposes of setting limits or limits formulae, AGA believes the Commission must resolve these concerns before making a reasoned decision as to whether position limits on trade options would be necessary, or effective, in diminishing or preventing excessive speculation or market manipulation.

Further, from a public policy standpoint, exempting trade options from position limits would be entirely consistent with the Commission’s justification for exempting bona fide hedging from position limits. As noted by the Commission, the trade option exemption “generally is intended to permit parties to hedge or otherwise enter into transactions for commercial purposes.” The offeror of a trade option may only offer or enter into the trade option if it reasonably believes that the offeree meets certain requirements outlined in the exemption; the offeree “must be a producer, processor, or commercial user of, or a merchant handling the commodity which is the subject of the commodity option transaction, or the products or byproducts thereof, and be entering into the transaction solely for purposes related to its business as such.” In general, trade options would not likely meet requirements for the Commission’s bona fide hedge exemption, as outlined in the CFTC proposed rule regarding position limits. This makes a separate exemption for trade options necessary and appropriate.

Given these concerns, AGA believes that the potential impacts of trade options being subject to position limits include: a limitation on the availability of peaking supply contracts AGA members rely on to provide safe, reliable and cost-effective service to customers; a limitation on AGA members’ ability to take advantage of the conditional spot month limits for financially-settled referenced contracts; significant confusion as to the definition of a “referenced contract”, including whether or not physical points other than the physical delivery point underlying the core referenced futures contract (Henry Hub) would be subject to position limits, and what other points may be economically equivalent; and substantial administrative burdens for monitoring and reporting physical energy transactions, with little or no public policy benefit in preventing excessive speculation or market manipulation.

Q2: Conflicting Interpretations: We understand there are frequent disagreements re: how to characterize contracts with EVO (as forwards or TOs). How often? Are the disagreements focused on certain issues, types of contracts and/or market participants? We have been told that some people are taking what market participants have described as “aggressive interpretations” to win business away from more conservative, compliance – oriented market participants. How often does this occur? What types of market participants do this? Are there certain contracts where this tends to happen more than others? Can you give us examples?

A: Many AGA members and their trading counterparties (most of which are also end-users such as small and mid-size producers, independent storage operators, marketers and asset managers, midstream suppliers), are still in the process of negotiating amendments to contracts and protocols governing their trading relationships to be compliant with the Dodd-Frank rules – particularly for physical contracts to serve upcoming summer heating season needs. This process has been substantially delayed because parties are attempting to apply the swap regulations to natural gas supply agreements with terms regarding performance obligations, commodity pricing and
reservation charges, and quantity delivery terms which are highly complex and customized to the physical demand for gas on a daily or monthly basis. Many AGA members have noted protracted negotiations with counterparties to come to an agreement on the reporting of trade options. The following are examples of the types of negotiation documentation that counterparty suppliers have proposed in an attempt to mitigate conflicting interpretations about the appropriate analysis for peaking supply and swing contracts:

- A potential supplier suggests including a special trade option representation in all transaction confirmation language that combines the definition of a “forward contract with embedded volumetric optionality” with the definition of a “trade option”, even though only one of those categories of transactions is reportable. If agreed to, this representation would essentially require that all commodity options, including forwards, be treated as reportable trade options. The language has been drafted to avoid having to apply the separate seven-factor test for forwards with volumetric optionality to the counterparties’ gas supply transactions.

- A potential supplier proposes a representation that would treat any contract intended to be physically settled as an exempt forward contract, without distinguishing forwards and trade options.

- A potential supplier proposes to report all physical option contracts as “end user swap transactions” (referring to “Trade Options”) and requires that either all such data be reported by the non-reporting counterparty on Form TO, or by the supplier. (By contrast, the current interim final trade option exemption and staff guidance require that Form TO data be reported by both counterparties to the subject transaction where both are end-users, and reported only under Part 45 rules if one counterparty is a Swap Dealer).

This sampling of conflicting interpretations points to the significant challenge market participants have experienced in applying CFTC interpretations to physical natural gas contracts with embedded volumetric optionality. Regulatory uncertainty is creating tremendous confusion and disagreement in the energy industry and disrupting contracting practices, resulting in market participants not offering or entering into certain physical contracts and agreements because those agreements may or may not be classified as “swaps.” AGA members note, for example, that on requests for proposals for summer and fall natural gas peaking supply requirements, the number of counterparties responding to these requests and the types of offerings from these counterparties propose have declined. In other cases, counterparties have sought representations or modifications that eliminate any flexibility or “peaking” provisions that may lead to the contract’s characterization as a trade option. Some AGA members have restructured physical delivery contracts to satisfy seasonal heating load requirements so that any additional quantities that may or may not be required are incorporated into another agreement for “baseload” supply that ensures a “minimum” delivery obligation. In this manner, the long-standing cost-effectiveness and commercial flexibility provided by peaking supply and swing demand management contracts is significantly diminished, creating serious impacts including reduced physical natural gas market liquidity and a decline in innovative contracting practices.

AGA is also concerned that conflicting interpretations of the CFTC’s guidance are leading to the unintentional regulation of significant physical transactions for the transportation and storage of natural gas on an interstate pipeline, such as: (i) contracts for transportation or storage services on an interstate pipeline that have a two-part rate, pursuant to a pipeline or storage tariff (although guidance from the CFTC exists on this issue, these contracts are not excluded from the embedded volumetric optionality analysis), (ii) contracts for transportation or storage services on an interstate
pipeline where the capacity has been released subject to recall, pursuant to a pipeline or storage tariff, and (iii) contracts for transportation or storage services on an interstate pipeline that qualify as asset management arrangements, pursuant to Order No. 712 of the Federal Energy Regulatory Commission. AGA requests that in a revised interpretation regarding forward contracts with embedded volumetric optionality, the Commission should comprehensively address these concerns and incorporate the Office of General Counsel’s guidance for commercial supply agreements such as natural gas pipelines and storage.7

Q3: Workarounds: Have market participants come up with any workarounds? Might any be long term solutions?

A: In addition to the temporary workarounds described above, some natural gas market participants have “agreed to disagree” on the status of a physical natural gas contract by employing representations that give the reporting counterparty the right to determine whether a contract is reportable, but reserving the right of the non-reporting party to make its own determination. This practice is becoming increasingly common in the physical energy commodity marketplace. For example, standardized language from the International Energy Credit Association Dodd-Frank Act Representations and Reporting Amending Agreement states:

“The parties shall seek to agree at the time a transaction is executed whether the transaction is a swap, a trade option or a contract excluded from the defined term “swap” or otherwise exempt from reporting. If the parties fail to so agree, the Reporting Counterparty shall determine and advise the other party prior to or concurrently with the execution of such transaction that it will report the transaction as a Swap Transaction or a Trade Option; provided however, a determination made solely by the Reporting Counterparty shall not preclude the other party from making its own determination, and shall not constitute an agreement by the parties, as to whether the transaction is a Swap, Trade Option, or a contract excluded from the defined term “swap” or otherwise exempt from reporting.”8

None of these workarounds are long-term solutions, because they cannot ensure regulatory certainty for energy market participants or alleviate the unintended regulatory consequences of CFTC rules on commercial end-users. The CFTC must provide a final rule or revised interpretation that clearly defines metrics that can be applied by market participants to determine contract eligibility for forward status, and do so by responding to concerns raised by commercial end-users in comments filed in the CFTC’s forward contract interpretation and interim final commodity trade option rulemaking dockets.

Q4: Possible Issues to Clarify: Would it help (and, if so, how much), if staff provided some clarifying examples to help market participants with their “facts and circumstances” analyses of whether certain products are forwards or TOs? (a) Stand-alone options. Would it be helpful to clarify that, in staff’s view, stand-alone options with no delivery obligation are not forwards (but would be eligible for the TOE if the TOE conditions are satisfied)?

A: The Commission should clarify that a natural gas supply contract that gives the purchaser the right, but not the obligation, to schedule a delivery quantity to cover the purchaser’s demand in the course of commercial operations, would be consistent with forward contract status. In a request for


8 See International Energy Credit Association, IECA Dodd-Frank Act Representations and Reporting Amending Agreement, at Article 4, Clause 6 (available online).
interpretative guidance and comments, AGA has already provided the Commission with detailed recommendations regarding the specific clarifications that should be made. AGA has also included several exhibits in its request for guidance, as examples demonstrating how transaction confirmations may be arranged to allow a gas utility to take anywhere from “zero” to a specified maximum daily quantity amount of firm peaking gas supplies for a specified delivery period. These examples include other terms for the transaction specific to the gas utility’s needs, such as: terms related to nomination times, delivery location, and the number of days in the delivery period the volumes can be nominated. AGA requests that the Commission clarify through a final rule or revised interpretation that such contracts are exempt from the Commission’s regulations pertaining to “swaps”.

In a similar vein, the Commission should clarify that transactions that allow a gas utility to take anywhere from “zero” to a specific maximum quantity, described above as “stand-alone options with no delivery obligations” can in fact be considered forwards when such transactions exclusively provide for physical delivery of any daily quantity the gas utility chooses to take. Even as there is no specific obligation on the gas utility to take delivery under such contracts, a supplier’s obligation to deliver remains contingent on the utility’s exercise of its contractual right to compel delivery – therefore, the Commission should specifically clarify that the predominant feature of such contracts remains actual delivery, absent a mechanism providing for financial settlement. In its request for interpretative guidance, AGA used examples of alternative contractual language from AGA members’ commercial supply agreements, to demonstrate that a “baseload” contract with a guaranteed minimum delivery required, with allowance for optional delivery of “zero” up to a maximum quantity, has the same commercial purpose and intent to be physically settled as a contract that only contains the “zero” “up to a maximum quantity” language. AGA explained that the reasoning behind this alternative structuring was one of commercial purpose and flexibility to meet commercial needs, stating:

“Certain baseload and/or peaking gas supply volumes needed to meet an upcoming demand spike are typically scheduled for firm delivery9 from the gas supplier under the process set forth in the applicable transaction confirmation…[C]ommon natural gas industry transaction confirmations reflect a specific transaction between a seller and buyer and are executed pursuant to and incorporate the terms of a master supply agreement between the parties. These agreements note the specific price, quantities, performance obligation, and delivery location, and may also include any special conditions that must materialize in order for the buyer to be able to schedule gas. In some cases, peaking supplies with delivery flexibility will be part of a larger transaction that includes an agreement by the supplier to provide a daily baseload portion of firm gas supplies. Typically, baseload transactions are those were a specified fixed quantity of gas to be delivered that, once the amount is agreed upon, the parties agree that said volume is to be sold and purchased daily on a firm basis between the parties during the specified delivery period. In other cases, a peaking supply contract will be a stand-alone transaction that specifies a daily quantity from “zero” to a maximum daily quantity, or “up to” a maximum daily quantity – which gives the purchaser the ability to nominate any quantity of natural gas to be delivered on a firm basis on a given day up to the maximum daily quantity specified for the delivery period… [T]hese confirmations include other certain terms for the transaction specific to the gas utility’s needs, including, without limitation, terms related to nomination times, delivery location, and the number of days in the delivery period the volumes can be nominated.”10

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9 See infra, note 14.
AGA’s request for guidance also provides examples of common fact scenarios describing gas utility contracts for firm natural gas supplies with the right but not the obligation to nominate various quantities for delivery. AGA explained that while the seller must always stand ready to deliver these on a firm basis,11 the buyer-utility retains the right to nominate the delivery of the firm natural gas quantities, primarily based on the occurrence or non-occurrence of factors outside its control that affect its ability to meet customer demand and satisfy regulatory obligations to provide service. These factors may include the management of daily swings in winter heating season loads, providing a higher level of service on the coldest days in the winter heating season, managing unexpected warm or cold weather events, and ensuring sufficient supplies during operational or maintenance periods which create expected or unexpected supply constraints or disruptions.

AGA contends that whether the terms for peaking or swing supply contracts are structured as “stand-alone” or as “combined” provisions, these contracts should be categorically exempt from the Commission’s regulations pertaining to swaps or trade options because they have commercial attributes that do not undermine the intended nature of the transaction as a forward.12 Fundamentally, a gas utility’s decision to enter into “stand-alone” or “combined” transactions with either a “zero” or a “minimum” quantity, respectively, depends on the variety of assets available to respond to changes in customer demand that are caused by a variety of factors outside the gas utility’s control.

AGA therefore contends that it is not helpful for staff to merely clarify that “stand-alone options with no delivery obligations” are trade options. Rather, AGA requests that staff clarify that stand-alone physical delivery options that exclusively provide for physical delivery if exercised, but do not require delivery of any amounts unless exercised, should be considered forward contract status under the CFTC’s interpretations. AGA has made the same request in comments filed responding to the interim final interpretation further defining a “swap.”13

Q5: Multiple Supply Sources. Would it be helpful to address whether contracts involving the choice between exercise or non-exercise among a group of supply agreements or among those agreements, storage and the spot market, can be consistent with forward status (based on, e.g., increased/decreased demand, best price, the reliability of the supplier, physical proximity of the commodity to the delivery point, or any combination)? Would any such clarification still be helpful if we placed some conditions on it, such as: A limitation to end users or market participants with a legal obligation to serve customers, and those customers themselves? The optionality excluding the right to cash settle rather than physically settle? Any other conditions? What if just one party meets one of those conditions?

A: The CFTC should issue a revised rule or interpretation stating that natural gas supply contracts intended to be physically settled, involving the choice between the exercise or non-exercise of

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11 As commonly used in the natural gas industry natural gas commodity contracts, the term “firm service” is a performance obligation under which neither party may interrupt performance to the other without liability except in a Force Majeure event. In a similar context, the Federal Energy Regulatory Commission defines “service on a firm basis” for pipeline transportation and storage as a service that is “not subject to a prior claim by another customer or another class of service and receives the same priority as any other class of firm services.” See 18 C.F.R. § 284.7(a)(3).

12 These terms may be used interchangeably to describe a physical contract under which the gas utility retains a right to elect delivery of anywhere between zero and a maximum daily quantity of gas supplies for a specified time period, to meet anticipated or unanticipated increases in demand.

13 Comments of the American Gas Association Responding to Request for Comment on an Interpretation; Further Definition of “Swap,” “Security-Based Swap (October 12, 2012) (available online).
delivery rights among a group of peaking supply agreements, swing supply agreements, or as between such agreements and other physical portfolio management tools (e.g., baseload quantity agreements with “minimum quantity” delivery terms, withdrawals from storage and spot market purchases), can be consistent with the CFTC’s forward contract exclusion. To provide necessary clarity, the revised rule or guidance must specify that forward contract status extends to natural gas supply contracts whether or not the purchasing counterparty has the right to take “zero” quantity of gas under one or more of such peaking or swing contracts. The CFTC should also specify that the regulatory status of a contract can be determined solely based on that contract’s terms, conditions, and intended physical settlement as a forward contract, and not upon a party’s choice to exercise delivery on one contract with volumetric optionality versus other such contracts or other sources of physical supply.

AGA supports the CFTC providing factors and conditions that provide market participants additional compliance certainty as to what contracts may avail of forward status – AGA noted several of these factors in its request for interpretative guidance, explaining that the decision to exercise or not exercise delivery rights is based on a combination of commercial and operational factors in light of expected or unexpected changes in demand, including the price of certain supplies given other available sources of supply, the reliability of available supply, operational constraints, and physical proximity to customers. However, it is essential that in providing any conditions or factor-based approaches to determining eligibility for forward status, the Commission specify that these factors and conditions can be satisfied at the time a physical transaction is executed or entered into. The Commission did provide a list of factors in its interim final interpretation for forwards, as well as a seven-factor test and several footnotes explaining this interpretation. However, this guidance did not clearly provide that such conditions could be demonstrably satisfied as of the time of entering into the agreement.

As AGA and others have described in comment letters and during the Staff Roundtable, the result is widespread confusion as to whether counterparties must demonstrate forward contract status as of the time of entering into an agreement, or as of the time of exercise or non-exercise of delivery rights under the agreement. In the many cases where it has proven impracticable or impossible for commercial counterparties to determine that the CFTC’s conditions for forward contract status are met at the time of exercise of a delivery right under numerous contracts, market participants have taken the route of reporting all such transactions as trade options. For these reasons, AGA contends that further regulatory guidance will only be helpful if the Commission specifies that forward contract status, and any related required conditions, may be determined as of the time commercial counterparties execute an agreement.

AGA thanks the Commission for the opportunity to share these concerns. Please contact us with any additional questions or requests for further information.

Respectfully Submitted,

[Signature]

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CC: Chairman Mark Wetjen
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