

COMMODITY FUTURES TRADING COMMISSION

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SECURITIES AND EXCHANGE COMMISSION

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RIN 3235-AK65

Forward Contracts With Embedded Volumetric Optionality

AGENCY: Commodity Futures Trading Commission; Securities and Exchange Commission.

ACTION: Final interpretation.

SUMMARY: In accordance with section 712(d)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), the Commodity Futures Trading Commission (the “CFTC”) and the Securities and Exchange Commission (“SEC”), after consultation with the Board of Governors of the Federal Reserve System (“Board of Governors”), are jointly issuing the CFTC’s clarification of its interpretation concerning forward contracts with embedded volumetric optionality.

DATES: This interpretation is effective on [insert date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

I. Introduction

In *Further Definition of “Swap,” Security-Based Swap,” and “Security-Based Swap Agreement”*; *Mixed Swaps; Security-Based Swap Agreement Recordkeeping* (the “Products Release”), the CFTC provided an interpretation, in response to requests from commenters, with respect to forward contracts that provide for variations in delivery amount (*i.e.*, that contain “embedded volumetric optionality”).¹ Specifically, the CFTC identified when an agreement, contract, or transaction would fall within the forward contract exclusion from the “swap” and “future delivery” definitions in the Commodity Exchange Act (the “CEA”)² notwithstanding that it contains embedded volumetric

¹ See 77 FR 48207, 48238-42 (Aug. 13, 2012). As described in the Products Release, the interpretation included the following seven elements:

1. The embedded optionality does not undermine the overall nature of the agreement, contract, or transaction as a forward contract;
2. The predominant feature of the agreement, contract, or transaction is actual delivery;
3. The embedded optionality cannot be severed and marketed separately from the overall agreement, contract, or transaction in which it is embedded;
4. The seller of a nonfinancial commodity underlying the agreement, contract, or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction to deliver the underlying nonfinancial commodity if the optionality is exercised;
5. The buyer of a nonfinancial commodity underlying the agreement, contract or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction, to take delivery of the underlying nonfinancial commodity if it exercises the embedded volumetric optionality;
6. Both parties are commercial parties; and
7. The exercise or non-exercise of the embedded volumetric optionality is based primarily on physical factors, or regulatory requirements, that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity.

² See 7 U.S.C. 1a(47)(B)(ii) (excluding from the definition of “swap” “*any sale of a nonfinancial commodity or security for deferred shipment or delivery*”, so long as the transaction is intended to be

optionality.³ In providing its interpretation, the CFTC was guided by and sought to reconcile agency precedent regarding forward contracts containing embedded options⁴ with the statutory definition of “swap” in section 1a(47) of the CEA, which provides, among other things, that commodity options are swaps, even if physically settled.⁵

In response to requests from market participants,⁶ the CFTC proposed in November 2014 to clarify its interpretation of when an agreement, contract, or transaction with embedded volumetric optionality would be considered a forward contract.⁷ In

physically settled”); 1a(27) (excluding from the definition of “future delivery” “*any sale of any cash commodity for deferred shipment or delivery*”) (emphasis added).

³ See 77 FR at 48238-42 & n.335. As explained in the Products Release, the CFTC interprets the exclusions in CEA sections 1a(47)(B)(ii) and 1a(27) as coextensive and thus requiring a consistent interpretation. See *id.* at 48227-8. See also *id.* at 48227-36 (discussing the CFTC’s interpretation regarding the forward contract exclusion for nonfinancial commodities).

⁴ See *id.* at 48237-39 (citing *In re Wright*, CFTC Docket No. 97-02, 2010 WL 4388247 (CFTC Oct. 25, 2010), and *Characteristics Distinguishing Cash and Forward Contracts and “Trade” Options*, 50 FR 39656 (Sept. 30, 1985) (“1985 CFTC OGC Interpretation”)).

⁵ See *id.* at 48236-37; 7 U.S.C. 1a(47)(A)(i) (defining “swap” to include “[an] option of any kind that is for the purchase or sale, or based on the value, of 1 or more * * * commodities * * *”). CEA section 1a(47)(A)(i) does not differentiate between financially- and physically-settled options. Certain physically-settled options, termed “trade options,” are nevertheless exempt from most requirements applicable to swaps. See 17 C.F.R. 32.3. Additionally, the CFTC is proposing to amend its trade option exemption to further reduce the reporting and recordkeeping requirements applicable to certain commercial end users. See *Trade Options*, 80 FR 26200 (May 7, 2015).

⁶ The Products Release included a request for comment on the CFTC’s interpretation regarding forward contracts with embedded volumetric optionality. See 77 FR at 48241-42. CFTC staff also solicited comments in connection with a public roundtable on issues concerning end users and the Dodd-Frank Act. These comments are available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1256> and <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1485>, respectively. In general, commenters asserted that uncertainty with regard to the CFTC’s interpretation, particularly the seventh element, has led to confusion over whether to characterize certain transactions as excluded forward contracts with embedded volumetric optionality or regulated trade options.

⁷ *Forward Contracts With Embedded Volumetric Optionality*, 79 FR 69073 (Nov. 20, 2014) (the “Proposed Interpretation”). Section 712(d)(4) of the Dodd-Frank Act provides that “[a]ny interpretation of, or guidance by either Commission regarding, a provision of this title, shall be effective only if issued jointly by the Commodity Futures Trading Commission and the Securities and Exchange Commission, after consultation with the Board of Governors, if this title requires the Commodity Futures Trading Commission and the Securities and Exchange Commission to issue joint regulations to implement the provision.” While the Dodd-Frank Act requires this interpretation, which was originally included in the Products Release, to be issued jointly by the CFTC and the SEC, it is an interpretation solely of the CFTC and does not apply to the exclusion from the swap and security-based swap definitions for security forwards or to the distinction between security forwards and security futures products.

particular, the CFTC proposed to (a) modify the fourth and fifth elements of its interpretation to clarify that the interpretation applies to embedded volumetric optionality in the form of both puts and calls⁸ and (b) modify the seventh element to clarify that the embedded volumetric optionality must be primarily intended, at the time the parties enter into the agreement, contract, or transaction, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of, the nonfinancial commodity.⁹ The CFTC requested comment on all aspects of its proposal.¹⁰

II. Overview

After a careful review of the comments received, the CFTC has determined to finalize its interpretation as proposed with some additional clarifications. Accordingly, an agreement, contract, or transaction falls within the forward exclusion from the swap and future delivery definitions, notwithstanding that it contains embedded volumetric optionality, when:

⁸ *Id.* at 69074.

⁹ *Id.* at 69074-76.

¹⁰ *See id.* at 69076. The CFTC also requested comment in response to specific questions relating to its proposal. *Id.* The comment file, which includes 22 unique comments and one (1) ex parte communication, is available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1541>. Commenters include American Gas Association; American Petroleum Institute; American Public Power Association, Edison Electric Institute, Electric Power Supply Association, Large Public Power Council, and National Rural Electric Cooperative Association; Americans for Financial Reform; Barnard, Chris; Better Markets Inc.; Business Council for Sustainable Energy; Coalition for Derivatives End-Users; Coalition of Physical Energy Companies; Cogen Technologies Linden Venture LP; Commercial Energy Working Group and Commodity Markets Council; Dairy Farmers of America; EDF Trading North America LLC; Federal Energy Regulatory Commission staff; Fig, Willem; International Energy Credit Association; International Swaps and Derivatives Association Inc.; National Association of Manufacturers; National Corn Growers Association and Natural Gas Supply Association; National Energy Marketers Association; Public Citizen; and Southern Company Services Inc., acting on behalf of and as agent for Alabama Power Co., Georgia Power Co., Gulf Power Co., Mississippi Power Co., and Southern Power Co. None of the commenters requested any revisions to SEC rules or regulations (or interpretations thereof), but rather addressed issues relating solely to the CFTC's interpretation.

1. The embedded optionality does not undermine the overall nature of the agreement, contract, or transaction as a forward contract;
2. The predominant feature of the agreement, contract, or transaction is actual delivery;
3. The embedded optionality cannot be severed and marketed separately from the overall agreement, contract, or transaction in which it is embedded;
4. The seller of a nonfinancial commodity underlying the agreement, contract, or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction to deliver the underlying nonfinancial commodity if the embedded volumetric optionality is exercised;
5. The buyer of a nonfinancial commodity underlying the agreement, contract or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction, to take delivery of the underlying nonfinancial commodity if the embedded volumetric optionality is exercised;
6. Both parties are commercial parties; and
7. The embedded volumetric optionality is primarily intended, at the time that the parties enter into the agreement, contract, or transaction, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of, the nonfinancial commodity.

As stated in the Proposed Interpretation, the first six elements of this interpretation are largely unchanged from the Products Release.¹¹ Among them, only the fourth and fifth elements have been modified, as proposed, to clarify that the CFTC's

¹¹ See 77 FR at 48238.

interpretation applies to embedded volumetric optionality in the form of both puts and calls.¹² Accordingly, the CFTC’s discussion of these six elements in the Products Release remains relevant and applicable.¹³ The seventh element of the interpretation is discussed further below.

As a general matter, the CFTC clarifies that its interpretation with respect to forward contracts with embedded volumetric optionality should not be read to alter or expand the historic interpretation of the forward contract exclusion. As the first two elements affirm, the interpretation presupposes the existence of an underlying forward contract, as determined by applying the historic interpretation of the forward contract exclusion.¹⁴ The CFTC’s interpretation, as provided herein, merely identifies the circumstances under which volumetric optionality embedded in such a forward contract would not operate to take the contract outside the forward contract exclusion.¹⁵ As explained in the Products Release, the historic interpretation of the forward contract exclusion remains relevant and applicable.¹⁶

¹² As described in the Products Release, the fifth element did not appear to contemplate circumstances where the seller of the nonfinancial commodity might exercise the embedded volumetric optionality. *See* 77 FR at 48238 (“The buyer of a nonfinancial commodity underlying the agreement, contract or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction, to take delivery of the underlying nonfinancial commodity if *it exercises* the embedded volumetric optionality.”) (emphasis added).

¹³ *See* 77 FR at 48238-39.

¹⁴ *See id.* at 48227-36.

¹⁵ The CFTC’s interpretation only addresses when a forward contract with embedded volumetric optionality would be excluded from the swap or future delivery definitions in the CEA; it does not address whether a contract would otherwise fall within the swap definition. In other words, a contract that does not meet one or more elements of the CFTC’s interpretation may or may not be a swap depending on the characteristics of the contract. *See, e.g., id.* at 48246-52 (discussing application of the swap definition to consumer and commercial agreements).

¹⁶ *See, e.g., id.* at 48228.

In response to commenters, the CFTC clarifies that the fourth and fifth elements of the interpretation do not preclude bandwidth (a.k.a. “swing”) contracts, which provide for delivery of a nonfinancial commodity within a certain minimum and maximum range, from falling within the forward contract exclusion from the swap and future delivery definitions.¹⁷ As indicated in the Products Release, the fourth and fifth elements merely require that the intent to make or take delivery (as applicable) required of the underlying forward contract extends to the embedded volumetric optionality, such that both parties to the contract intend to make or take delivery (as applicable) of the nonfinancial commodity under the contract if the embedded volumetric optionality is exercised.¹⁸ The embedded volumetric optionality may therefore operate to increase and/or decrease the quantity delivered under the underlying forward contract and still not take the contract out of the forward exclusion provided that all elements of the CFTC’s interpretation, as provided herein, are satisfied.

III. The Seventh Element

As stated in the Proposed Interpretation, the seventh element addresses the primary reason for including embedded volumetric optionality in a forward contract.¹⁹ Embedded volumetric optionality offers commercial parties the flexibility to vary the

¹⁷ See Letter from Coalition of Physical Energy Companies (Dec. 22, 2014) at 4; Letter from Commercial Energy Working Group and Commodity Markets Council (Dec. 22, 2014) at 3-4; Letter from EDF Trading North America LLC (“EDFTNA”) (Dec. 22, 2014) at 15-17; Letter from International Energy Credit Association (“IECA”) (Dec. 22, 2014) at 4-5; Letter from International Swaps and Derivatives Association Inc. (Dec. 22, 2014) at 3 (each requesting clarification that the fourth and fifth elements permit both increases and decreases in volume).

¹⁸ See 77 FR at 48239 (“The fourth and fifth elements are designed to ensure that both parties intend to make or take delivery (as applicable), subject to the relevant physical factors or regulatory requirements, which may lead the parties to deliver more *or less* than originally intended.”) (emphasis added).

¹⁹ See 79 FR at 69074-75.

amount of the nonfinancial commodity delivered during the life of the contract in response to uncertainty in the demand for or supply of the nonfinancial commodity.²⁰

The seventh element ensures that this purpose, consistent with the historical interpretation of a forward contract,²¹ is the primary purpose for including embedded volumetric optionality in the contract. In other words, the embedded volumetric optionality must primarily be intended as a means of assuring a supply source or providing delivery flexibility in the face of uncertainty regarding the quantity of the nonfinancial commodity that may be needed or produced in the future, consistent with the purposes of a forward contract.²²

As indicated in the Proposed Interpretation, the focus of the seventh element is the intent of the party with the right to exercise the embedded volumetric optionality at the time of contract initiation.²³ In line with the CFTC's historical interpretation of the

²⁰ See, e.g., Letter from the Commodity Markets Council, the National Corn Growers Association, and the Natural Gas Supply Association ("CMC/NCGA/NGA") (April 17, 2014) at 2 ("Physical end-users need these contracts to address supply input or production output uncertainty associated with the operation of a physical business."); Letter from the Plains All American Pipeline, L.P. (April 17, 2014) at 2 ("Such contracts provide us with the ability to allow our customers flexibility to increase or decrease the amount of purchase or sale of a commodity in response to prevailing market conditions.").

²¹ See 77 FR 48228 (describing a forward contract as a "commercial merchandising transaction" in which delivery is delayed for "commercial convenience or necessity").

²² See 77 FR at 48228 ("The primary purpose of a forward contract is to transfer ownership of the commodity and not to transfer solely its price risk."). See also Letter from the CMC/NCGA/NGA (April 17, 2014) at 2 ("[Contracts with volumetric optionality] exist to permit end-users to have agreements in place so that they can effectively and economically manage the purchase or sale of commodities related to their commercial businesses, not as a substitute for a financially settled contract or for speculative purposes."); Letter from ONEOK, Inc. (July 22, 2011) at 7 (stating that "[a]lthough the amounts that can be taken on delivery may vary, the primary intent of the contracts is not to provide price protection").

²³ For example, in choosing whether to obtain additional supply by exercising the embedded volumetric optionality under a given contract or turning to another supply source – whether storage, the spot market, or another forward contract with embedded volumetric optionality – commercial parties would be able to consider a variety of factors, including price, provided that the intended purpose for including the embedded volumetric optionality in the contract at contract initiation was to address physical factors or regulatory requirements influencing the demand for or supply of the commodity. See also Letter from

forward contract exclusion, as discussed in the Products Release, such intent may be ascertained by the relevant facts and circumstances surrounding the contract, including the parties' course of performance thereunder.²⁴ Nevertheless, commercial parties may rely on counterparty representations with respect to the intended purpose for embedding volumetric optionality in the contract provided they do not have information that would cause a reasonable person to question the accuracy of the representation. In response to commenters, the CFTC clarifies that commercial parties are not required to conduct due diligence in order to rely on such representations.²⁵

The CFTC clarifies that the seventh element's reference to "physical factors" should be construed broadly to include any fact or circumstance that could reasonably influence supply of or demand for the nonfinancial commodity under the contract. Such facts and circumstances could include not only environmental factors, such as weather or location, but relevant "operational considerations" (*e.g.*, the availability of reliable transportation or technology) and broader social forces, such as changes in demographics or geopolitics.²⁶ The CFTC further clarifies that the parties' having some influence over

EDFTNA (Dec. 22, 2014) at 20 (requesting further clarification that the seventh element only addresses the intent of the party with the right to exercise the embedded volumetric optionality.)

²⁴ See 77 FR 48228 ("In assessing the parties' expectations or intent regarding delivery, the CFTC consistently has applied a 'facts and circumstances' test."). For example, if one party has an option to settle a contract financially based upon a value change in an underlying cash market, then the contract may be a swap. See *id.* at 48241 n. 370. See also Letter from ONEOK, Inc. (July 22, 2011) at 6 (acknowledging that "[t]he intent of the parties to defer delivery of a varying amount can be ascertained based on objective criteria, such as the pattern of deliveries in relation to variation in weather, customer demand, or other similar factors.").

²⁵ See Letter from EDFTNA (Dec. 22, 2014) at 22-23 (arguing that requiring counterparties to conduct due diligence in order to ensure that facts suggesting an alternate purpose for the embedded volumetric optionality are not present would be "infeasible" and may undercut the utility of the Proposed Interpretation).

²⁶ As stated in the Products Release, system reliability issues that lead to voluntary supply curtailments would be considered "physical factors" within the scope of the seventh element. See 77 FR at 48239 n.345.

such physical factors (*e.g.*, the scheduling of plant maintenance, plans for business expansion) would not be inconsistent with the seventh element, provided that the embedded volumetric optionality is included in the contract at initiation primarily to address potential variability in a party's supply of or demand for the nonfinancial commodity, consistent with the purposes of a forward contract.

The CFTC reiterates, however, that if the embedded volumetric optionality is primarily intended, at contract initiation, to address concerns about price risk (*e.g.*, to protect against increases or decreases in the cash market price), the seventh element would not be satisfied absent an applicable regulatory requirement, including guidance, whether formal or informal, received from a public utility commission or other similar governing body, to obtain or provide the lowest price (*e.g.*, the buyer is an energy company regulated on a cost-of-service basis).²⁷ The CFTC recognizes that, as commenters have pointed out, price is likely to be a consideration when entering into any contract, including a forward contract.²⁸ However, to ensure that, as required by the first element, the overall nature of the contract as a forward is not undermined,²⁹ the embedded volumetric optionality must, as stated above, be primarily intended as a means

²⁷ The CFTC confirms that, as stated in the Proposed Interpretation and in the Products Release, the deliverable quantities allowable under embedded volumetric optionality may be justified by a combination of regulatory requirements and physical factors, such that the quantity provided for by the embedded volumetric optionality may reasonably exceed quantities required by regulation. *See* 77 FR at 48238 n.340.

²⁸ *See* 77 FR at 48228 (“The primary purpose of a forward contract is to transfer ownership of the commodity and not to transfer *solely* its price risk.”) (emphasis added). *See also* Letter from American Gas Association (“AGA”) (Dec. 22, 2014) at 8-10; Letter from Coalition for Derivatives End-Users (Dec. 22, 2014) at 6; Letter from American Public Power Association, Edison Electric Institute, Electric Power Supply Association, Large Public Power Council, and National Rural Electric Cooperative Association (“Joint Associations”) (Dec. 22, 2014) at 4-5; Letter from Southern Company Services Inc., acting on behalf of and as agent for Alabama Power Co., Georgia Power Co., Gulf Power Co., Mississippi Power Co., and Southern Power Co. (Dec. 22, 2014) at 2-3.

²⁹ *See* 77 FR at 48227-36.

of securing a supply source in the face of uncertainty (arising from physical factors or regulatory requirements, such as an obligation to ensure system reliability) regarding the volume of the nonfinancial commodity to be needed or produced.³⁰

Additionally, as stated in the Proposed Interpretation, the CFTC understands that in certain retail electric market demand-response programs, electric utilities have the right to interrupt or curtail service to a customer to support system reliability.³¹ The CFTC clarifies that, given that a key function of an electricity system operator is to ensure grid reliability, demand response agreements, even if not specifically mandated by a system operator, may be properly characterized as the product of regulatory requirements within the meaning of the seventh element.³²

Finally, in response to requests from commenters, the CFTC clarifies that commercial parties may choose to either rely on their good faith characterization of an existing contract (e.g., as an excluded forward contract with embedded volumetric

³⁰ See 1985 CFTC OGC Interpretation, 50 FR at 39658. *But see* supra note 23; Letter from National Corn Growers Association and Natural Gas Supply Association (Dec. 22, 2014) (recognizing that price concerns are acceptable “if they arise subsequent to execution or are motivated by an applicable regulatory requirement”).

³¹ See Letter from the National Rural Electric Cooperative Association, the American Public Power Association, the Large Public Power Association, and the Transmission Access Policy Study Group (Oct. 12, 2012) at 9.

³² The CFTC further clarifies that its interpretations regarding full requirements and output contracts, as provided in the Products Release, remain relevant and unaffected by the discussion herein. See 77 FR at 48239-40. Similarly, the CFTC reiterates that, depending on the relevant facts and circumstances, capacity contracts, transmission (or transportation) service agreements, tolling agreements, and peaking supply contracts, as discussed in the Products Release, may qualify as forward contracts with embedded volumetric optionality provided they meet the elements of the CFTC’s proposed interpretation. See 77 FR 48240.

optionality or an exempt trade option) and or recharacterize it in accordance with this final interpretation.³³

The CFTC believes that these modifications are appropriately measured to clarify the meaning of certain language in the seventh element and should not be construed as a shift in the CFTC's longstanding precedent on the difference between forward contracts and options.

By the Securities and Exchange Commission.

Brent J. Fields
Secretary

Dated: May 12, 2015

³³ Letter from AGA (Dec. 22, 2104) at 12, 19 (requesting relief for market participants who reported transactions as trade options that, following adoption of the Proposed Interpretation, they would consider excluded forwards); Letter from EDFTNA (Dec. 22, 2014) at 5-7 (arguing that reassessment of the legal character of an existing contract is impractical) Letter from IECA (Dec. 22, 2014) at 3 (arguing that requiring parties to reclassify their existing contracts following adoption of the Proposed Interpretation would be unduly burdensome); Letter from Joint Associations (Dec. 22, 2014) at 11 (requesting that the CFTC allow counterparties to reclassify their transactions following adoption of the Proposed Interpretation).

Issued in Washington, DC, on May 12, 2015, by the Commodity Futures Trading Commission.

Christopher J. Kirkpatrick,
Secretary of the Commission.

Commodity Futures Trading Commission (CFTC) Appendices to Forward Contracts With Embedded Volumetric Optionality – Commission Voting Summary, Chairman’s Statement, and Commissioner’s Statement

Appendix 1 – Commodity Futures Trading Commission Voting Summary

On this matter, Chairman Massad and Commissioners Wetjen, Bowen, and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

Appendix 2 – Statement of Support of CFTC Chairman Timothy G. Massad

I support the staff’s recommendations to finalize a proposal we made in November regarding contracts with embedded volumetric optionality – a contractual right to receive more or less of a commodity at the negotiated contract price.

As I said in my statement on the proposal, with reforms as significant as these, it is inevitable that there will be a need for some minor adjustments. And that is what we are doing. The changes we are proposing today help ensure that as we regulate the potential for excessive risks in these markets, we make sure that the commercial businesses—whether they are farmers, ranchers, manufacturers or others—that rely on these markets to hedge routine risks can continue to do so efficiently and effectively.

Specifically, we proposed to clarify when a contract with embedded volumetric optionality will be excluded from being considered a swap. We received a number of comments on this and we have incorporated some of the concerns in the final clarification. Today, following action by the SEC last week, we are posting to the Federal Register the final interpretation. By clarifying how these agreements will be treated for regulatory purposes, the interpretation should make it easier for commercial companies to continue to use these types of contracts in their daily operations.

In certain situations, commercial parties are unable to predict at the time a contract is entered into the exact quantities of the commodity that they may need or be able to supply, and the embedded volumetric optionality offers them the flexibility to vary the quantities delivered accordingly. The CFTC put out an interpretation, consisting of seven factors, to provide clarity as to when such contracts would fall within the forward contract exclusion from the swap definition, but some market participants have felt this interpretation, in particular the seventh factor, was hard to apply. In some cases, the two parties would reach different conclusions about the same contract.

Today we are finalizing clarifications to the interpretation that I believe will alleviate this ambiguity and allow contracts with volumetric optionality that truly are intended to address uncertainty with respect to the parties' future production capacity or delivery needs, and not for speculative purposes or as a means to obtain one-way price protection, to fall within the exclusion.

Appendix 3 – Concurring Statement of CFTC Commissioner Sharon Y. Bowen

Today we are approving a final interpretation regarding forward contracts with embedded optionality. This interpretation is improved compared to the proposed

interpretation and I am voting in favor of it. However, I am concerned that this interpretation does not provide the clarity that may be required.

Staff has done a remarkable job in considering the comments received and drafting this final interpretation and they deserve ample praise for their hard work. Yet, staff, and this Commission, face statutory restrictions regarding the definitions of forwards and options that place limits on the relief available through interpretations of the forward contract exclusion. There is no interpretation, by this Commission or its staff, which can turn an option into a forward.

Given the interpretive questions about the final rule defining “swap” and the difficulties in classifying forward contracts with embedded optionality, I think it is important to be clear on what this interpretation can and cannot do – I do not want people to make business decisions based upon a mistaken belief that they have received relief when they have not.

The central issue industry faces is that, in the manufacturing, agriculture and energy sectors, a wide variety of physically-delivered instruments are used to secure companies’ commercial needs for a physical commodity. These instruments often contain elements of both a forward contract and a commodity option. These contracts, particularly in the energy sector, are all commonly referred to as physical contracts, and they, according to what I have been told, often receive similar treatment from both a business operations and an accounting standpoint within the entities that use them.

Furthermore, my understanding is that these physical contracts are often handled and accounted for separately from other derivatives, such as futures contracts or cash-settled swaps. Treating some portion of these physical contracts as swaps simply because

they may contain some characteristics of commodity options can lead to significant costs and difficulties. For instance, companies may have to reconfigure their business systems to parse transactions where there was, before Dodd Frank, no need to undertake such a reconfiguration.

I have studied this issue closely, meeting with industry and the public and reviewing the comments we have received. In the case of these transactions which are used to address physical commodity needs, I have doubts about whether any public interest is served by requiring manufacturing, agricultural and energy companies to undertake such a burden and reconfigure processes to comply with Commission swap regulations.

The limits on relief through this interpretation flow from the statutory lines drawn between options and forward contracts. Under the CEA, options and forwards are discrete, mutually exclusive categories. Options are subject to the Commission's plenary, exclusive jurisdiction. Forward contracts, on the other hand, are almost entirely excluded from the Commission's jurisdiction. If a contract, or some portion of a contract, meets the definition of an "option," that portion which is an option inherently cannot be a forward contract.

Under the CEA, a critical difference between a physically-delivered option and a forward contract is the nature of the delivery obligation. A forward contract binds both parties to make and take delivery of a commodity at some date in the future. The contract may only be offset through a separate negotiation of the parties. In a physically-settled option contract, only the party offering the option is bound to make or take delivery at the time of contract.

The forward contract exclusion from the swap definition, applies only to a “[A] sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.” The key part of this definition is that it only applies to a “sale” of a commodity. A “sale” means that one party has agreed to make and the other to take delivery of that commodity.¹

An option, in contrast, is only the option to undertake such a “sale”, not the sale itself. The sale occurs only when the option is exercised. The option to buy or sell a commodity at some later point simply is not the same thing as the sale of that commodity itself. The Commission’s Office of the General Counsel memorialized this interpretation in 1985:

[T]he [forward] contract must be a binding agreement on both parties to the contract: one must agree to make delivery and the other to take

¹ The phrase, “so long as the transaction is intended to be physically settled,” has been interpreted by the Commission to be consistent with its traditional approach to determining whether an instrument is a forward contract. As was stated in the Commission’s proposed rule,

The CFTC believes that the forward contract exclusion in the Dodd-Frank Act with respect to nonfinancial commodities should be read consistently with th[e] established, historical understanding that a forward contract is a commercial merchandising transaction.

Many commenters discussed the issue of whether the requirement in the Dodd-Frank Act that a transaction be “intended to be physically settled” in order to qualify for the forward exclusion from the swap definition with respect to nonfinancial commodities reflects a change in the standard for determining whether a transaction is a forward contract. Because a forward contract is a commercial merchandising transaction, intent to deliver historically has been an element of the CFTC’s analysis of whether a particular contract is a forward contract. In assessing the parties’ expectations or intent regarding delivery, the CFTC consistently has applied a “facts and circumstances” test. Therefore, the CFTC reads the “intended to be physically settled” language in the swap definition with respect to nonfinancial commodities to reflect a directive that intent to deliver a physical commodity be a part of the analysis of whether a given contract is a forward contract or a swap, just as it is a part of the CFTC’s analysis of whether a given contract is a forward contract or a futures contract. Proposed Rule on “*Further Definition of ‘Swap,’ ‘Security-Based Swap,’ and ‘Security-Based Swap Agreement’; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 76 FR 29818, 29828 (May 23, 2011) (“*Proposed Products Release*”).

This interpretation was ratified in the final rule, “*Further Definition of ‘Swap,’ ‘Security-Based Swap,’ and ‘Security-Based Swap Agreement’; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR 48208, 48227-48228 (August 13, 2012) (“*Products Release*”).

delivery of the commodity. Second, because forward contracts are commercial, merchandizing transactions which result in delivery, the courts and the Commission have looked for evidence of the transactions' use in commerce. Thus, the courts and the Commission have examined whether the parties to the contracts are commercial entities that have the capacity to make or take delivery and whether delivery, in fact, routinely occurs under such contracts

Thus, an option is a contract in which only the grantor is obligated to perform. As a result, the option purchaser has a limited risk from adverse price movements. This characteristic distinguishes an option from a forward contract in which both parties must routinely perform and face the full risk of loss from adverse price changes since one party must make and the other take delivery of the commodity. In contrast, in an option, only the grantor of a call (put) is required to sell (buy) a given quantity of a commodity (or a futures contract on that commodity) on or by a specified date in the future if the option is exercised. “*Characteristics Distinguishing Cash and Forward Contracts and ‘Trade Options’*”, 50 FR 39656-02 (September 30, 1985)

The Commission ratified this interpretation in 1990 in its “*Statutory Interpretation Concerning Forward Transactions*”, 55 FR 39188-03 (September 25, 1990) (“*Brent Interpretation*”) and again in 2012 its final rule, “*Further Definition of ‘Swap,’ ‘Security-Based Swap,’ and ‘Security-Based Swap Agreement’; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*”, 77 FR 48208, 48227-48235 (August 13, 2012) (“*Products Release*”). In doing so, the Commission explicitly rejected the argument that physically-delivered commodity options could fall within the forward contract exclusion.²

The interpretation being promulgated today does not change this, and therein lays my concern regarding this interpretation’s limits.

² See also, *Products Release* at 4236-37.

I think much of the confusion regarding the seven-part test has been based upon a failure to recognize the difference between forward and option contracts under the Commodity Exchange Act. The fact that a forward contract element and a commodity option are packaged together does not change the regulatory treatment of the different components. Hybrid or packaged instruments are common throughout the industry. There are hybrid or packaged instruments which may have characteristics of futures contracts and securities, swaps and security-based swaps, futures and forward transactions, and even forward contracts and commodity options. Each portion of the contract might be subject to different regulatory treatment. A security does not become a future, nor does a future become a security simply by virtue of being packaged in the same instrument.

Relevant to the instruments we are discussing today, forward contracts with embedded volumetric optionality, it seems that most of them, as described in the comments, have at least two separate, identifiable contractual obligations, each of which must be considered on their own merits. There is a forward contract element which binds the parties to make and take delivery of a set amount of a commodity. In addition, there is an embedded volumetric optionality element that binds the forward contract offeror to make or take delivery of an additional amount of the commodity if the embedded volumetric optionality is exercised by the forward contract offeree. The latter contractual obligation looks like a classic option.

The difficulty this interpretation faces in providing the relief industry seeks is this: even though the embedded optionality has the form of an option, can it somehow fit within the forward exclusion? The answer this interpretation gives is, essentially, yes, it

can, if it can be demonstrated that, despite the embedded optionality having the form of an option, it is utilized, in practice, as a forward contract. While the seven-prong test and the interpretive guidance around it do not provide an exact roadmap for determining when embedded volumetric optionality included in a forward contract may or may not fall into the option definition, or when embedded volumetric optionality may undermine a forward contract, I think it does provide a good sense of the factors that parties must consider in making those determinations for themselves.

Such a test, however, is necessarily a facts and circumstances test with no bright lines. Ensuring compliance with this interpretation poses a challenge, and, therefore, that is an area where I would like to see greater legal certainty for these contracts.

In closing, I support this final interpretation, but I think industry would benefit from broader relief that provides greater legal certainty. I look forward to continuing to work with my fellow Commissioners and staff to make sure that commercial entities have access to the tools they need to manage the commercial risks of their operations.