



# AMERICAN PUBLIC GAS ASSOCIATION

June 4, 2015

*Submitted Electronically to: <http://comments.cftc.gov>*

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

Re: Trade Options, 80 Fed. Reg. 26200, RIN 3038-AE26 (May 7, 2015)

Dear Mr. Kirkpatrick:

The American Public Gas Association (“APGA”) appreciates the opportunity to submit this comment on the Commodity Futures Trading Commission’s (“Commission” or “CFTC”) Notice of Proposed Rulemaking (“NPR”)<sup>1</sup> which proposes to amend the trade option exemption under Part 30 of the Commission’s rules. The Commission is proposing to reduce certain reporting and recordkeeping requirements for trade option counterparties that are not swap dealers (“SDs”) or major swap participants (“MSPs”).

## **I. Introduction**

APGA is the national association for publicly-owned natural gas distribution systems. There are approximately 1,000 public gas systems in 37 states and over 700 of these systems are APGA members. Publicly-owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities.

As explained in greater detail below, APGA supports the Commission’s proposed changes to Part 32 of the Commission’s regulations, including in particular the easing of reporting requirements for non-SD/MSP counterparties. However, APGA believes that further refinements relating to trade options would be helpful in enabling trade options to be used to their full potential by commercial end-users. These include excluding trade options from any future speculative position limit rules and from rules relating to the calculation of capital requirements for SD/MSPs.

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<sup>1</sup> Trade Options, 80 Fed. Reg. 26200, RIN 3038-AE26 (May 7, 2015).

## **II. APGA supports the proposed amendments to Part 32**

The Commission is proposing to amend rule 32.3(b) so that that a non-SD/MSP will not be subject to part 45 reporting requirements with respect to its trade options activities.<sup>2</sup> In addition, the Commission is proposing to amend rule 32.3(b) to eliminate the requirement that otherwise non-reporting entities report trade options on Form TO.<sup>3</sup> Finally, the Commission is proposing that such non-SD/MSPs either notify the Commission's Division of Market Oversight ("DMO") within 30 days after entering into trade options, whether reported or unreported, having an aggregate notional value in excess of \$1 billion during any calendar year or provide notice to DMO that the non-SD/MSP reasonably expects to enter into such trade options having an aggregate notional value in excess of \$1 billion during any calendar year.<sup>4</sup>

APGA supports these proposed amendments and recommends that they be promulgated without change. As noted by the Commission, many non-SD/MSPs face technical and logistical impediments that make compliance with the current requirements difficult and burdensome.<sup>5</sup> These proposals will reduce the reporting and recordkeeping burden on non-SD/MSPs trade option counterparties. APGA's members also believe that the \$1 billion notification threshold is an appropriate level that will not result in excessively burdensome reporting obligations.<sup>6</sup>

## **III. Speculative Position Limits**

The Commission is also proposing to amend rule 32.3(c) by deleting the reference to the vacated part 151 position limits.<sup>7</sup> APGA supports this technical amendment. Although APGA supports this amendment to regulation 32.3(c), we also urge the Commission to ensure that position limits not be applied to trade options in any future Commission rulemaking.

As discussed in our comment to the Commission regarding proposed position limits rule, APGA believes that trade options should receive the same regulatory treatment as forward contracts with respect to position limits.<sup>8</sup> That is, trade options themselves should be excluded from the application of speculative position limits but may be the basis against which a hedge exemption applies. As APGA previously noted, because trade options are only available to an offeree that is a producer, processor, or commercial user of or a merchant handling, the commodity, it is an exceedingly remote possibility that trade options would be part of any manipulative activity by a trader, and because trade options are often difficult to distinguish from certain types of forward contracts, it is reasonable to treat them the same as forward contracts for the purpose of speculative position limits.

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<sup>2</sup> Trade Options, 80 Fed. Reg. at 26203.

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

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

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 26204.

<sup>8</sup> See APGA Letter to CFTC, Position Limits, RIN Number 3038-AD99 (February 10, 2014), available at <http://www.apga.org/files/APGA%20Final%20Comment%20Letter%20Position%20Limits.pdf>.

#### **IV. The Commission should ensure that the capital rules of SD/MSPs do not impose additional costs on nonfinancial end users.**

Under the Commission's proposal, SDs and MSPs that enter into trade options would be subject the Commodity Exchange Act's capital and margin requirements provided for in Section 4s(e).<sup>9</sup> APGA remains extremely concerned with the Commission's NPR re-proposing margin and capital requirements for certain SDs and MSPs (collectively, "Covered Swap Entities") requiring that each covered swap entity must take a capital charge for all of its uncleared swaps.<sup>10</sup>

APGA noted in its comment letter in response to the 2011 proposed rulemaking on Margin and Capital Requirements for Covered Swap Entities ("Margin and Capital NPR"),<sup>11</sup> Congress was clear that (margin and) capital costs must not be imposed on nonfinancial end users and that there is "substantial public interest in keeping [end user derivatives] costs low."<sup>12</sup> The Dodd-Lincoln letter is explicit in this regard: "Congress clearly stated in this bill that the margin and capital requirements are not to be imposed on end users."<sup>13</sup> APGA applauds the Commission for recognizing Congressional intent in its margin proposal and not requiring covered entities to exchange margin with non-SDs/MSPs.<sup>14</sup> However, as APGA noted in its comment letter on the 2011 NPR on Margin and Capital, the same treatment as accorded to margin should be accorded with respect to capital charges, and believes that this is particularly true with respect to the application of capital charges to trade options. Accordingly we urge the Commission to delete the applicability of Section 4s(e) of the Act to trade options under proposed rule 32.3(c)(3).

#### **V. Forwards with embedded volumetric optionality**

Commissioner Bowen in a concurring statement requested comment on whether the Commission should consider exempting certain trade options from swap reporting and recordkeeping requirements.<sup>15</sup> We applaud Commission Bowen for raising this issue and concur that greater legal certainty would be welcome with respect to the treatment of forward contracts with embedded volumetric optionality. However, APGA believes that greater certainty could better be achieved by adopting a rule that recognizes that such volumetric options are *bona fide* forward contracts rather than attempting to re-define them as exempt trade options. This rule could be in the form of a non-exclusive safe harbor and based on current Commission interpretation.<sup>16</sup>

<sup>9</sup> See Trade Options, 80 Fed. Reg. at 26208.

<sup>10</sup> Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 Fed. Reg. 59898 (October 3, 2014).

<sup>11</sup> APGA Letter to the CFTC, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, RIN 3038—AC97 (November 24, 2014), available at [http://www.apga.org/files/public/federal%20filings/7963172\\_2.pdf](http://www.apga.org/files/public/federal%20filings/7963172_2.pdf).

<sup>12</sup> See Letter from Chairmen Christopher Dodd and Blanche Lincoln to Chairmen Barney Frank and Colin Peterson ("Dodd-Lincoln Letter") (June 30, 2010).

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

<sup>14</sup> Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 Fed. Reg. 59898, 59906 (October 3, 2014).

<sup>15</sup> See Trade Options, 80 Fed. Reg. at 28243-244.

<sup>16</sup> For example, such a rule could codify the Commission's recently finalized seven-part interpretation of forward contracts with embedded volumetric optionality. See Forward Contracts With Embedded Volumetric Optionality, 80 Fed. Reg. 28239 (May 18, 2015).

## **VI. Conclusion**

Natural gas is a lifeblood of our economy and millions of consumers depend on natural gas every day to meet their daily needs. It is critical that public gas systems that use swaps to hedge against price fluctuations and other business risks be allowed to continue these crucial risk mitigating activities without the imposition of prohibitive costs. We thank the Commission for the opportunity to comment on these issues.

We would be happy to discuss our comments at greater length with the staff. Please feel free to contact Bert Kalisch, President and CEO of APGA, David Schryver, Executive Vice President at 202-464-2742, or Paul M. Architzel of Wilmer Cutler Pickering Hale and Dorr LLP at 202-663-6240, outside counsel to APGA.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Bert Kalisch", written in a cursive style.

Bert Kalisch,  
President and CEO

cc: CFTC Chairman Timothy G. Massad  
CFTC Commissioner Mark P. Wetjen  
CFTC Commissioner Sharon Y. Bowen  
CFTC Commissioner J. Christopher Giancarlo