encana™
natural gas

July 22, 2011

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Comments of Encana Marketing (USA) Inc. on the Proposed Rule on Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, RIN Number 3038-AD46

Dear Secretary Stawick:

Encana Marketing (USA) Inc. (EMUS) hereby files comments on the Notice of Proposed Rulemaking and Proposed Interpretations (NOPR) issued by the Commodity Futures Trading Commission (Commission) in this proceeding.[1] EMUS is an indirect, wholly-owned subsidiary of Encana Corporation (Encana). Its principal U.S. office is located in Denver, Colorado. EMUS' marketing activities include selling and purchasing natural gas, natural gas liquids, other related energy commodities and services in the U.S. wholesale energy markets. As part of EMUS' marketing activities, Encana, for itself and its subsidiaries, enters into hedging transactions or swaps to manage and mitigate commercial risks associated with EMUS' sales, purchases and movement of these energy commodities. It considers itself to be a non-financial end-user of swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act).

Comments

Under the Commission's proposed interpretive guidance, a forward contract that contains an embedded commodity option or options would be considered an excluded non-financial commodity contract (*i.e.*, not a swap) if the embedded option(s): (1) may be used to adjust the forward price, but do not undermine the overall nature of the contract as a forward contract; (2) do not target the delivery term, so that the predominant feature of the contract is actual delivery; and (3) cannot be severed and marketed separately from the overall forward contract in which they are embedded. Conversely, the proposed interpretative guidance provides that, where the embedded commodity option(s) render

1 *Further Definition of "Swap," "Security-Based Swap", and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 76 Fed. Reg. 29,818 (May 23, 2011).

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delivery optional, the predominant feature of the contract cannot be actual delivery and, therefore, the embedded option(s) to not deliver preclude treatment of the contract as a forward contract for a non-financial commodity. The Commission states that it would look to the specific facts and circumstances of the transaction as a whole to evaluate whether an embedded commodity option is marketed or traded separately from the underlying contract, to determine whether that transaction qualifies for the forward contract exclusion from the swap definition for non-financial commodities.

The Commission poses a number of questions on the proposed interpretative guidance regarding the forward contract exclusion. In Question 35, the Commission solicits comments on how its proposed interpretative guidance on the forward contract exclusion would affect full requirements contracts, reserve sharing agreements, tolling agreements, energy management agreements and ancillary services. The Commission also requests comments on whether these agreements, contracts or transactions have optionality as to delivery, and if so, whether they, or any other agreement, contract, or transaction in a non-financial commodity which has optionality as to delivery, should be excluded from the definition of "swap."

EMUS urges the Commission to revise its proposed interpretative guidance in order to make the forward contract exclusion available to forward contracts with embedded delivery optionality. Many of the contracts currently used by participants in the wholesale natural gas market contain an option for the physical delivery of natural gas. For example, the following delivery "options" can accompany a transaction under the North American Energy Standards Board (NAESB) Base Contract for the sale and purchase of natural gas:

1. Full requirements contract where the seller agrees to provide all requirements for a specific customer's location or delivery point. Thus, if the customer's load is weather related, the delivery will vary with weather. Likewise, if the customer's load is week day only and not weekends, then deliveries will be made only during the week and not on weekends. There are other variations to a full requirements sale.
2. Full requirements contract where a buyer agrees to take all of a seller's natural gas production from a specific well or production or processing plant.
3. "Swing" sale where a seller agrees to provide the incremental delivery requirements above a base load sale by others.
4. "Call on Gas" where a seller agrees to provide a quantity of natural gas up to a certain amount for a Gas Day upon receipt of a "Call" by 6 p.m. on the day prior to the Gas Day.
5. "No-Notice" sale where the seller agrees to sell natural gas to a customer with No-Notice transport service to meet its load. The seller typically meets this requirement with storage service arrangements.

The delivery options in such transactions are similar the embedded pricing options in forward contracts which were addressed by the Commission's Office of General Counsel in an interpretative statement in 1985[2] and more recently in an adjudicatory order issued by the Commission.[3] A forward contract that contains an embedded commodity option for delivery should be excluded from the definition of "swap" if

[2] *See Characteristics Distinguishing Cash and Forward Contracts and "'Trade"' Options*, 50 Fed. Reg. 39,656 (Sept. 30, 1985).

[3] *In re Wright*, CFTC Docket No. 97–02, 2010 WL 4388247 at *3 (CFTC Oct. 25, 2010).

the embedded delivery option: (1) operates on the pricing term of the contract, and (2) is integral to the forward contract such that delivery option cannot be severed and marketed separately from the overall forward contract in which it is embedded.

Conclusion

EMUS appreciates the opportunity to file comments on the NOPR, and encourages the Commission to take the comments and recommendations set forth above into consideration in this rulemaking.

Sincerely,

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