



May 12, 2015

The Honorable K. Michael Conaway
Chairman
Committee on Agriculture
U.S. House of Representatives
1301 Longworth House Office Building
Washington, DC 20515

DELIVERED VIA ELECTRONIC MAIL

Dear Chairman Conaway:

The American Gas Association strongly supports the *Commodity End User Relief Act*, a bill to reauthorize the Commodity Exchange Act (CEA) that would improve Commodity Future Trading Commission (CFTC) operations and provide much-needed marketplace certainty and regulatory relief for natural gas utilities and the American homes and businesses to which they deliver natural gas.

The American Gas Association (AGA), founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 71 million residential, commercial and industrial natural gas customers in the U.S., of which 94 percent — over 68 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets more than one-fourth of the United States' energy needs.

The *Commodity End User Relief Act* will help the CFTC become a more responsive and well-equipped regulator. Commercial market participants currently lack basic procedural opportunities to hold the CFTC accountable for arbitrary and capricious actions. The lack of good process is self-evident in the haphazard pattern of rulemaking and non-rule “guidance” issued by the Commissioners or staff. Just yesterday, the CFTC answered a critical industry question about whether “swaps” (financial derivatives) include non-financial natural gas delivery contracts through an “Interpretation” rather than through formal regulation. Even this action is five months late: The CFTC asked for comments on this draft in November 2014 and closed the comment period in December 2014. The goal was to provide time-sensitive response to market participants. And yet, it took five months to finalize.

The *Commodity End User Relief Act* will help fix several problems described above -- changes that can neither be made by the CFTC's evolving leadership nor by revisions to internal rules.

1. Direct Review in Federal Appellate Courts: The bill would allow the federal appellate courts to directly review CFTC rules, replacing the protracted and expensive trial court process currently in effect as the default rule for judicial review. This change will not increase litigation nor will it disrupt the CFTC. Rather, it will incentivize the CFTC to write better rules and avoid challenge altogether. Also, any inevitable legal challenges will be more swiftly decided by appellate courts, benefitting the regulator and the regulated community. All of the key federal rulemaking agencies are subject to direct appellate review – including the Securities Exchange Commission and Federal Energy Regulatory Commission. There is no logical justification to treat the CFTC differently.

- 2. Strict Compliance with the Administrative Procedures Act (APA):** The CFTC's administrative process suffers from vague and varying levels of compliance with federal procedural laws. Strict compliance with federal laws requiring due process and notice should not be contingent on how the Commission leadership directs staff, shares information among Commissioners, or chooses between a legal rule, non-binding guidance, or interpretation for resolving a public concern. This bill would eliminate subjectivity and require strict compliance with the APA and Executive Orders that instruct agencies to ensure public notice-and-comment on rules or guidance that have legally-binding effects.
- 3. Give the CFTC Comprehensive Authority to Exempt End-Users' Physical Contracts from "Swaps" and "Options" Regulation:** The CFTC undertook a tortuous four-year path of issuing interim final rules, policy guidance, and no-action letters, to arrive yesterday at yet another "interpretation" regarding how much of the physical marketplace will not be regulated as "swaps". In the interim, gas utilities have seen their physical gas counterparties (natural gas suppliers) exit the marketplace. Those that remain, offer less flexible and more costly contracting terms to avoid any confusion generated by CFTC policies that suggest these physical transactions are "swaps". In the past year alone, many AGA members' counterparties have abstained from providing the physical delivery flexibility that is needed to manage customer demand during hard winters and cold snaps. For AGA's rate-regulated utilities, cost increases for flexible gas supplies are passed directly to consumers.

Yesterday's Interpretation does help clarify the morass of regulatory guidance that the CFTC has issued in prior years. However, confusion remains as at least two Commissioners disagree about what the CFTC has actually accomplished (*see statements from CFTC [Chairman](#) Massad and [Commissioner](#) Bowen*). Natural gas utilities cannot afford to wait any longer for policy clarity because energy consumers are paying the price for the CFTC's confusion. The *Commodity End User Relief Act* will definitively clarify that non-financial energy delivery agreements, that ensure physical delivery of natural gas to homes and businesses, will not be treated by the CFTC as speculative, financial instruments. The bill will help restore liquidity to the physical energy marketplace, which gas utilities rely on to mitigate commercial risk on behalf of consumers.

Congress certainly did not intend to provide the CFTC a tremendous regulatory mandate without giving it the necessary guidance and authority to do its job. Furthermore, Congress did not intend for the CEA to constrain liquidity in the physical natural gas marketplace, create business-changing impacts on regulated natural gas utilities, or increase the costs of reliable service for natural gas consumers. As such, AGA supports the *Commodity End User Relief Act* because it provides the CFTC the tools necessary to be a responsive regulator and restores the regulatory confidence that natural gas utilities rely on to procure natural gas supplies at the lowest reasonable cost for the benefit of America's natural gas consumers.

Sincerely,



Dave McCurdy
President and CEO
American Gas Association