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A SHAKESPEAREAN GUIDE TO THE REGULATION OF RENEWABLE ENERGY CONTRACTS

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"What's in a name? That which we call a rose
By any other name would smell as sweet;"

William Shakespeare, *Romeo and Juliet*, Act 2, Scene 2

"The . . . label . . . of an agreement . . . [is]
not . . . dispositive in determining whether [it]
has been willfully structured to evade [the definition of swap.]"

The Commodity Futures Trading Commission *CFTC Rule 1.3*, *Swap*, (6) *Anti-Evasion*. (iv)

"That which we call a renewable energy contract
Should not be mislabeled as a swap"

[Anonymous]

I. INTRODUCTION

The Commodity Futures Trading Commission ("CFTC") regulates broad categories of commodity contracts—futures, commodity options and swaps—some of which have no statutory definition (futures and options) and one of which has an elaborate statutory definition (swaps). Other categories of commodity contracts—spot and forward contracts—also lack a statutory definition and are outside of the CFTC's regulatory purview.[1] As one might expect, participants in the physical and financial commodity markets have designed contracts that combine or share one or more elements of each of these types of contracts in an effort to manage price and other risks, or to achieve specific commercial objectives. Not surprisingly, some of these contracts have been developed by persons who are blissfully unaware of the Commodity Exchange Act ("CEA") or the CFTC.

If a contract involves a commodity, which like Gaul is a whole divided into three parts—agricultural, exempt and excluded—it is a safe bet that the parties need to understand whether the contract, the parties and how the contract is formed are subject to the CFTC's jurisdiction. Determining the correct regulatory characterization of a contract under the CEA requires the application of art, science and, yes, some law.

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II. THE MANY FLAVORS OF RENEWABLE ENERGY CONTRACTS

Baskin-Robbins™ is famous for its 31 flavors of ice cream—one for each day of the month. At this point in the development of the renewable energy market, there are just as many flavors of renewable energy contracts. There also are many types of renewable energy commodities. In this article, we discuss one type of renewable energy commodity-a renewable energy certificate or credit ("REC")—and one type of renewable energy contract—a REC purchase agreement ("RPA").[2]

III. THE MATERIAL TERMS AND PRINCIPAL FUNCTIONS OF A REC PURCHASE AGREEMENT

The first step in determining the regulatory treatment of a physical commodity or a financial derivatives contract under the CEA is understanding the material terms of the contract. In this section, we discuss the structure and terms of a typical contract to sell and purchase RECs produced by a specific renewable energy facility.

A. AN RPA IS A CONTRACT TO SELL AND PURCHASE RECS

An RPA is an agreement between a renewable energy facility and a corporate customer for the sale, purchase and deferred delivery of RECs. A REC is a tradeable instrument that represents all of the renewable attributes associated with one megawatt ("MWh") of energy (electricity) production from a renewable energy facility, and any other credits, certificates, allowances, offsets, entitlements or similar renewable attributes created by a governmental authority, independent certification board or group generally recognized in the electric power industry, and generated by or associated with a renewable energy project or the electricity produced by the project. It does not include production tax credits or any other tax benefits. As noted above, the quantity of RECs produced by a renewable energy facility is directly related to the quantity of MWhs of energy produced by the renewable energy facility issuing the RECs. For every one MWh of renewable energy produced by the facility, one REC is created.

B. AN RPA IS SIMILAR TO A TRADITIONAL POWER PURCHASE AGREEMENT

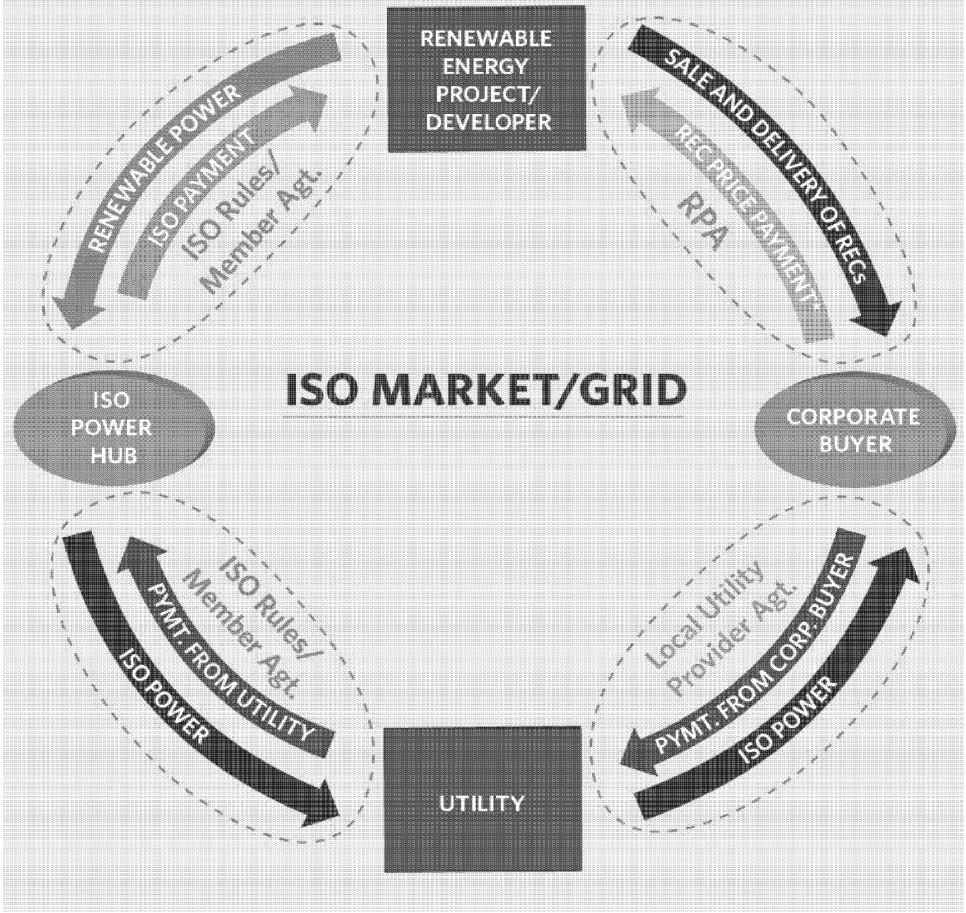
A typical Power Purchase Agreement ("PPA") is a contract between two commercial parties (*e.g.*, a generator and a power marketer or an investor-owned utility) for the sale and purchase of an agreed quantity of electric energy usually at a fixed price for delivery at a specific delivery point and over a specified term. A PPA often includes milestones related to the construction and commercial operation date of the power generation facility, affirmative and negative covenants, payment terms, events of default, remedies, and other commercial terms. The fixed price paid by the purchaser for the power produced by the facility provides the project developer with a guaranteed and consistent stream of revenue with which to repay the loan used to construct the project.

The material terms of an RPA are substantially similar to those of a traditional PPA. An RPA is a long-term contract between commercial parties for the delivery of all or an agreed percentage of the RECs produced by the renewable energy fa-

cility (but not the energy itself) at a specified price, usually based upon a formula, over a specified term. Like a PPA, an RPA usually includes milestones related to the construction and commercial operation date of the renewable energy facility, affirmative and negative covenants, payment terms, events of default, remedies, and other commercial terms. Furthermore, as is the case with a PPA, there is a fixed price component of the REC price paid by a corporate purchaser that provides the project developer with a steady stream of payments with which to repay the loan used to construct the project. By assisting with the construction and financing of new renewable energy facilities, corporate customers are able to refer to their purchases of RECs in their sustainability plans.

C. CORPORATE BUYERS TYPICALLY CANNOT RESELL POWER IN THE WHOLESALE MARKETS

An RPA enables a corporate buyer to purchase RECs directly from a renewable energy generator without also requiring that the buyer purchase the electricity generated by the renewable energy facility. For several practical and regulatory reasons explained below, the renewable energy facility sells the power it produces to an organized wholesale electricity market, such as an Independent System Operator or Regional Transmission Organization, not to the purchaser of the RECs. The diagram below shows the flows of payments, RECs, and electricity among the renewable energy facility, the REC buyer, a utility, and the ISO.



* REC Price Payment = FP – Power LMP.

As shown in this diagram, a corporate buyer uses electricity at its load node (*i.e.*, where it needs the power to operate its business), not at the resource node (*i.e.*, where the renewable energy project connects to the electricity grid). Setting aside the regulatory obstacles for the moment, the buyer would have to purchase transmission in order to move the power from the resource node to the load node; something that may not be cost-effective, especially for a corporate purchaser with operations at many different geographic locations. Moreover, these buyers usually already have long-term contracts to purchase power from their local utility or another retail electric provider and, thus, do not need to purchase additional power from the renewable facility.

In addition to these practical obstacles, the more significant obstacles to direct power sales between a renewable energy facility and a corporate buyer are the required regulatory approvals. A renewable energy facility usually is not a state-licensed retail energy provider (and would have no commercial or practical need to be). Consequently, it is precluded by state law from selling power directly to a commercial or industrial buyer. Furthermore, purchasing electricity from a renewable energy producer at the resource node

in an ISO effectively would require the buyer to resell the power in the wholesale market. However, selling wholesale power requires power marketing authorization from either the Federal Energy Regulatory Commission ("FERC") or the Public Utility Commission of Texas ("PUCT"), depending upon the ISO or RTO involved. It typically is too burdensome for a corporate buyer to become a FERC- or PUCT-authorized power marketer just so it can purchase RECs. For these practical and regulatory reasons, a renewable facility typically does not sell power to the REC buyer at either an ISO resource node or hub.

D. THE PRICE ADJUSTMENT MECHANISM GUARANTEES A MINIMUM PRICE TO THE SELLER

The price the buyer pays for the RECs usually includes a price adjustment mechanism or formula which guarantees that the renewable energy developer receives a minimum price for the RECs (and the associated power sold to the ISO). The REC buyer pays (or receives) the difference between (a) a fixed price per MWh of power and, therefore, the RECs generated by the facility, and (b) an index price tied to the real-time price of energy at a specific location (typically an ISO hub).[3] The quantity of power used in the price adjustment mechanism generally does not exceed the buyer's anticipated need for power from all of its local retail electricity providers across the buyer's various locations. The price paid per REC is a net payment payable by or due to the buyer, *i.e.*, a "settlement amount," equal to the fixed price (times the quantity) payment due from the buyer, plus or minus the index price (times the quantity) payment. If the locational marginal price ("LMP") of power is below the fixed price, the buyer pays the difference to the seller. If the LMP is above the fixed price, the seller (project developer) pays the difference to the buyer. The parties sometimes include a floor on the price to be paid for the RECs.

IV. THE MISLABELING OF SOME RENEWABLE ENERGY CONTRACTS

A. VIRTUAL POWER PURCHASE AGREEMENTS

Some people in the renewable energy industry have referred to various types of renewable energy purchase agreements, for example "Virtual" Power Purchase Agreements ("VPPAs"), as swaps.[4] One reason for this may be because VPPAs, like RPAs, typically include an embedded fixed-for-floating price mechanism tied to the price of wholesale electricity in one of the organized wholesale electricity markets. In addition, some VPPAs and other renewable energy agreements include references to "contracts for differences," "financial settlement," and obligations to report the transaction to a swap data repository. This type of language creates issues when attempting to determine the correct regulatory characterization of these types of agreements.

Another challenge for regulatory characterization is that some drafters of these agreements may not be familiar with the nuances of the CFTC's and SEC's joint final rule defining "swap" and the CFTC's updated forward contract interpretation (the "*Final Products Definitions*").[5] They may, for example, have overlooked the CFTC's guidance on embedding price optionality in forward contracts or the transfer of an ownership interest in an asset exclusion from the third prong of the swap definition.[6] Alternatively, they may simply have elected to take a very con-

servative approach to characterizing a particular renewable energy contract.[7]

B. CONSEQUENCES OF MISCHARACTERIZING RPAS

Mischaracterizing an RPA as a swap produces a litany of regulatory consequences, some of which are relatively easy to navigate while others are more challenging. The regulatory issues implicated by treating an RPA as a swap include:

- Both parties must be eligible contract participants;
- Both parties must have legal entity identifiers;
- One party must agree to report the RPA-swap to a swap data repository;
- If the RPA-swap is a "dealing" swap and the accommodating party enters into multiple RPAs, the swap should be tracked against the *de minimis* level for swap dealer registration;
- Providing advice for a fee about the value of or advisability of trading in an RPA-swap may trigger a requirement to register as a commodity trading advisor; and
- Matching parties to an RPA-swap for a fee may trigger a requirement to register as an introducing broker.

If a renewable energy contract is a swap (as opposed to being mislabeled as a swap), parties must ensure they comply with all applicable swap regulations. In recent years, the CFTC has brought enforcement actions against persons (primarily swap dealers) obligated to report swaps for incomplete or inaccurate swap data reporting. Additionally, the CFTC has pursued actions against market participants for failing to register as an intermediary or advisor because of their swap-related activities.[8]

V. AN RPA SHOULD BE CHARACTERIZED AS A FORWARD CONTRACT

We believe that a properly drafted RPA should be characterized as a forward contract that is excluded from regulation by the CFTC under the CEA.

A. THE FORWARD CONTRACT EXCLUSION

The forward contract exclusion from CFTC regulation has been in the CEA and its predecessor, the Grain Futures Act, since 1922.[9] For the past 100 years, Congress has preserved the forward contract exclusion in every amendment of the CEA, including in 2010, when it applied the exclusion to the elaborate definition of swap in the Dodd-Frank Act. As a result, commodity forward contracts are excluded from the definition of "future delivery" in CEA section 1a(27) and the definition of "swap" in CEA section (47)(B)(ii). In the *Final Products Definitions*, the CFTC explained that a forward contract is: (1) a contract; (2) between commercial market participants; (3) for the sale of a nonfinancial commodity; (4) for deferred shipment or delivery; (5) that the parties intend to settle by physical delivery.[10] In determining whether a contract is eligible for the forward contract exclusion, the CFTC applies a "facts and circumstances test," which entails an analysis of "the transaction as a whole with a critical eye toward its underlying purpose."[11]

B. APPLICATION OF THE ELEMENTS OF A FORWARD CONTRACT TO AN RPA

Below we apply the five elements of the forward contract exclusion to the type of RPA described above. Application of these five elements demonstrates, in our view, that the RPA should be characterized as a forward contract that is excluded from all but the anti-manipulation and anti-fraud provisions of the CEA and the CFTC's regulations. Additionally, we explain why the inclusion of an embedded price adjustment mechanism in the RPA should not affect its characterization as a forward contract under the CEA.

1. A CONTRACT

The RPA satisfies the contract element of the forward contract exclusion because, once executed, it will include mutually binding performance obligations and promises for valuable consideration.

2. BETWEEN COMMERCIAL MARKET PARTICIPANTS

In the *Final Products Definitions*, the CFTC explained that the forward contract exclusion applies to "commercial merchandising transactions," and that, to rely on the exclusion, both parties to the transaction must be "commercial" market participants.[12] According to the CFTC, "commercial" means related to the business of a "producer, processor, fabricator, refiner, or merchandiser of a commodity." Commercial market participants "regularly make or take delivery of the referenced commodity in the ordinary course of their business."[13] In addition to listing the types of entities included in the CFTC's commercial market participant guidance, the CFTC has said in similar contexts that a "commercial user of" and a "merchant handling" a commodity qualify as commercial market participants.[14]

Under the RPA, RECs will be produced and sold by commercial solar and wind energy developers / generators ("producers" as noted above) and will be purchased by commercial end users of RECs. The RPA also contains representations by both parties that they are commercial participants in the wholesale market for the sale and purchase of RECs. Accordingly, parties transacting under an RPA qualify as commercial market participants.

3. FOR THE SALE OF A NONFINANCIAL COMMODITY

In order to qualify as a forward contract, the transaction must require delivery of a nonfinancial commodity.[15] In the *Final Products Definitions*, the CFTC explained that it "interprets the term 'nonfinancial commodity' to mean a commodity that can be physically delivered and that is an exempt commodity or an agricultural commodity."[16]

A REC is an exempt commodity because it is neither an excluded commodity nor an agricultural commodity.[17] Indeed, the CFTC specifically identified an "environmental commodity" as an example of a "nonfinancial commodity."[18] Environmental commodities, such as RECs, are deliverable instruments. The CFTC noted in the *Final Products Definitions* that "environmental commodities . . . can be delivered through electronic settlement or contractual attestation."[19] Consequently, the CFTC concluded that "an agreement, contract or transaction in an environmental commodity may qualify for the forward exclusion

from the swap definition if the transaction is intended to be physically settled."[20]

4. FOR DEFERRED SHIPMENT OF DELIVERY

The forward contract requirement of deferred shipment or delivery means, generally, that the underlying commodity must be delivered more than two days after the trade or transaction date.[21] The RPA requires the quarterly delivery of RECs over a multi-year period. Therefore, it satisfies the deferred delivery element of a forward contract.

5. THAT THE PARTIES INTEND ON THE TRADE DATE TO SETTLE BY PHYSICAL DELIVERY

Although a contract must satisfy all of the elements of a forward contract to be eligible for the forward contract exclusion, intent to physically settle the transaction, at least on the trade date, is probably the most important element. In the *Final Products Definitions*, the CFTC stated that "the primary purpose of a forward contract is to transfer ownership of the commodity and not to transfer solely its price risk."[22] The CFTC further explained that:

> 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 [congressional] 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.[23]

There are several reasons why the RPA should satisfy the intent to physically settle element of the forward contract exclusion. First, the CFTC explained in the *Final Product Definitions* that "[i]ntent to make or take delivery can be inferred from the *binding delivery obligation* for the commodity referenced in the contract and the fact that the parties to the contract do, in fact, regularly make or take delivery of the referenced commodity in the ordinary course of their business."[24] The RPA by necessity contains a binding delivery obligation because that is how the RECs are retired (delivered) in the purchaser's name. Furthermore, once the RPA is executed, the parties will be able to establish a course of dealing by regularly making and taking delivery of RECs through the registry as provided in the agreement. Second, in the RPA, the parties represent that they intend to settle the transaction by physical delivery of RECs. Third, there is no provision in the RPA that gives either party the right to cash-settle or book-out their respective delivery obligations. Any cash-settlement or book-out would have to be separately negotiated and agreed by the parties at a separate time in the future.[25]

C. THE PRICE ADJUSTMENT MECHANISM

The inclusion of a formula or mechanism for adjusting the price of RECs in an RPA—sometimes referred to as an embedded pricing option—should not affect the regulatory characterization of the RPA as a forward contract. The price adjustment mechanism in the RPA is similar to price adjustment provisions in many types of commodity forward contracts. For example,

agricultural and energy forward contracts often use futures contract prices to adjust the prices of forward sales and purchases of those commodities.

In the *Final Products Definitions*, the CFTC updated the Office of General Counsel's long-standing Interpretative Statement which explained that forward contracts with embedded pricing options are eligible for the forward contract exclusion provided that the price adjustment terms "cannot be severed or marketed separately from the hybrid contract, and particularly from that contract's requirement of delivery."[26] The CFTC's updated interpretation provides that a forward contract that contains an embedded pricing option qualifies as an excluded nonfinancial commodity forward contract—and not a swap—if the embedded option:

1. Is "used to adjust the forward contract price, but do[es] not undermine the overall nature of the contract as a forward contract;

2. Do[es] 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 [it is] embedded."[27]

Rather than using futures prices to adjust the price of RECs, the RPA uses cash market LMPs published by an ISO or RTO, which itself is exempt from all but the anti-manipulation and anti-fraud provisions of the CEA, to adjust the purchase price of the RECs. It would also be permissible to use the prices of cash-settled electricity futures contracts to adjust the REC purchase price in the RPA.[28] In either case, the REC price adjustment formula in the RPA is not severed or marketed separately from the RPA and has no impact on the requirement to physically deliver RECs.

The fact that the price adjustment mechanism may, in some circumstances, provide a hedge against the price risk of a corporate purchaser's retail power purchases should not, by itself, affect the RPA's character as an excluded forward contract. The same is true about the embedded pricing options in agricultural commodity forward contracts discussed in the 1985 Interpretative Statement of the CFTC's Office of the General Counsel referenced above. Furthermore, the primary purpose of an RPA, including the price adjustment mechanism, is "not to transfer *solely* [the contract's] price risk."[29] In any event, the pricing mechanism in an RPA would only serve as a hedge against a corporate purchaser's retail power price risk *if* the large corporate purchaser paid its retail power provider a variable price linked to a hub or load zone LMP that closely tracked the hub LMP used in the RPA for the power it uses in its commercial operations.

VI. RPAs SHOULD NOT BE CHARACTERIZED AS SWAPS

There are several straightforward reasons why an RPA should not be characterized as a swap. First, section 1a(47)(B)(ii) of the CEA expressly provides that "the term 'swap' does not include—any sale of a nonfinancial commodity . . . deferred shipment or delivery, so long as the transaction is intended to be physically settled."[30] Because an RPA satisfies the elements of a forward contract as set forth in the CFTC's forward contract interpretation in the *Final Products Definitions*, it is excluded from the definition of

"swap" in the CEA. Second, an RPA does not fall within the first two prongs of the definition of swap because it is not an option or an event contract.[31] Third, and this is a critical point that may have been overlooked by some industry participants, an RPA does not fall within the third prong of the definition of swap because it "convey[s] a current or future direct . . . ownership interest in an asset;" namely RECs.[32]

The definition of swap also includes "an agreement, contract, or transaction that *is, or in the future becomes, commonly known to the trade as a swap*."[33] This catch-all prong of the swap definition is potentially problematic for the regulatory characterization of an RPA because some people in the industry have referred to various types of renewable energy purchase agreements, such as VPPAs, as swaps. Some VPPAs include swap-like terminology and references such as "contracts for differences," "financial settlement," "eligible contract participants," and obligations to report the transaction to a swap data repository. Although VPPAs and other renewable energy agreements may bear similarities to an RPA, they also may differ in material respects. Nevertheless, it is possible that some market participants mistakenly have referred, or could in the future refer, to an RPA as a swap and, thereby, create the risk that an RPA becomes "commonly known to the trade as a swap."

There is very limited guidance on the meaning of the term "commonly known to the trade as a swap" in the swap definition. The CFTC has referenced marketing materials, transaction documentation and definitions provided by professional organizations as possible but not determinative indicia of a contract possibly being known as a swap.

There no doubt are marketing materials used by renewable energy industry participants that refer to some types of renewable energy contracts as "financially-settled" contracts and include other swap-like descriptions. However, marketing materials should not be sufficient to overcome the actual material terms of a contract that transfers an ownership interest in an asset or that otherwise qualifies for the forward contract exclusion from the definition of swap. In this regard, the CFTC emphasized in the *Final Product Definitions* that if "[a] . . . transaction is not a swap . . . as . . . defined in the CEA . . . *the fact that the parties refer to it, or document it, as a swap* . . . will not subject that . . . transaction to regulation as a swap . . . ."[34]

In May 2021, ISDA, the principal international swaps trade association, published the ISDA U.S. Renewable Energy Certificate Annex to the ISDA Master Agreement ("ISDA REC Annex"). Although it differs from the type of RPA discussed herein because it is designed for the purchase and sale of RECs unrelated to the construction of a specific renewable energy facility, the ISDA REC Annex, like an RPA and the other ISDA physical commodity annexes, contains detailed delivery and transfer of title provisions that do not apply to swaps. The definitions and other material terms of the ISDA REC Annex support the conclusion that a renewable energy transaction that transfers an ownership interest in an asset or that qualifies for the forward contract exclusion is not, and in the future will not become, commonly known to the trade as a swap.

We do not believe that a possible mistaken impression among some participants in the trade that an RPA is a swap should be sufficient to overcome the many factors which demonstrate

that the underlying purpose of an RPA is to transfer title to RECs from the seller to the buyer over the term of the contract. Furthermore, such a mistaken impression should not be legally sufficient to overcome the fact that an RPA should qualify for the express exclusion from the definition of swap applicable to contracts that are intended to be physically settled.

VII. CONCLUSION

Participants in the renewable energy market need the flexibility, within the contours of existing law, to structure contracts in a manner that achieves their commercial objectives. Neither regulators nor market participants should apply an overly broad interpretation of the definition of swap, particularly the "commonly known to the trade as a swap" prong of the definition, to RPAs or other renewable energy contracts because of misplaced concerns about regulatory evasion. Instead, they should focus on the substance of the contract and its underlying commercial purpose. As Shakespeare previewed for us more than 500 years ago, just as a name does not define the scent of a rose, so too a label does not define the regulatory treatment of a renewable energy contract.

ENDNOTES:

[1]They still are subject to the CFTC's anti-fraud and anti-manipulation enforcement authority. *See* CEA § 6(c) and 17 C.F.R. § 180.1.

[2]Jeremy D. Weinstein, *What are Renewable Energy Certificates*?, 41 Fut. & Derivatives L. Rep. 1 (2021).

[3]The variable leg of the price adjustment mechanism is tied directly to the "locational marginal price" of energy published by the ISO for a given interval (*e.g.*, hours, 15 minutes, etc.) during a monthly settlement period.

[4]See, e.g., Kansal, Rachit, *Introduction to the Virtual Power Purchase Agreement*, Rocky Mountain Institute, Nov. 2018, at 8. https://rmi.org/wp-content/uploads/2018/12/rmi-brc-intro-vppa.pdf.

[5]CFTC and SEC, *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement;" Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48,208 (Aug. 13, 2012).

[6]*See* CEA § 1a(47)(B)(ii) and *Final Products Definition* at 48,228; *see also id.* at 48,237 (describing embedded price optionality in excluded forward contracts).

[7]*Id.*

[8]*See, e.g.*, *In the Matter of Symphony Communication Services, LLC*, CFTC Docket No. 21-35 (Sept. 29, 2021) and *In the Matter of TradingForexPay*, CFTC Docket No. 21-32 (Sept. 29, 2021).

[9]Pub. L. No. 67-331, 42 Stat. 998, § 2(a) (1922).

[10]*See Final Products Definitions* at 48,227-45.

[11]*See Final Products Definitions* at 48,228 & nn.214, 215. Furthermore, "the CFTC may consider other contextual factors when determining whether a contract qualifies as a forward, such as a demonstrable commercial need for the product, the underlying purpose of the contract (*e.g.* whether the purpose of the claimed forward was to sell physical commodities, hedge risk, or speculate), the regular practices of the commercial entity with respect to its general commercial business and its forward and swap transactions more specifically, or whether the absence of physical settlement is based on a change in commercial circumstances." *Id.* at 48,231.

[12]*See Final Products Definitions* at 48,228-29.

[13]*Id.* at 48,229.

[14]*See* 17 C.F.R. § 32.3(a)(2); *Commodity Options Final Rule and Interim Final Rule*, 77 Fed. Reg. 25,320, 25,326 (Apr. 27, 2012).

[15]*See Final Products Definitions* at 48,227, n.205 (limiting the discussion of the forward contract exclusion to "nonfinancial commodity forwards").

[16]*See Final Products Definitions* at 48,232.

[17]7 U.S.C.A. § 1a(20) (Exempt Commodity).

[18]*See Final Products Definitions* at 48,233.

[19]*See Final Products Definitions* at 48,234.

[20]*Id.*

[21]*Id*. at 48,257; *CFTC Report: Exchanges of Futures for Physicals* at 110 (Oct. 1, 1987).

[22]*Final Products Definitions* at 48,228.

[23] *Id*.

[24]*See id.* at 48,229 (emphasis added). *See also In re Wright*, Comm. Fut. L. Rep. (CCH) ¶ 32,008 (CFTC Oct. 25, 2010) ("In assessing the parties' expectations regarding delivery, the Commission applies a 'facts and circumstances' test rather than a bright-line test focused on the contract's terms. . . . .[T]he cases indicated that in assessing intent, *evidence of the parties course-of-performance conduct under the contract generally would be given at least as much weight as evidence of the words they used to express their agreement*.") (emphasis added).

[25]In the *Final Products Definitions*, the CFTC reaffirmed its long-standing interpretation that "[b]ook-out transactions . . . that are effectuated *through a subsequent, separately negotiated agreement* qualify for the safe harbor under the forward exclusion." *Final Products Definitions* at 48,228 (emphasis added).

[26]*Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options*, 50 Fed. Reg. 39,656, 39,660 (Sept. 30, 1985); *see also* CFTC*, Interpretative Letter No. 98-13. (Re: Variation of Minimum Price Guarantee Contracts are Cash Forward Transactions)*, Comm. Fut. L. Rep. (CCH) ¶ 27, 264 (Dec. 3, 1997); Michael S. Sackheim, *Federal Regulation of Agricultural Trade Options*, 4 DRAKE J. AGRIC. L. 443, 454-55 (1999).

[27]*Final Products Definitions* at 48237. The Commission explained that, "[i]n evaluating whether an agreement . . . qualifies for the forward contract exclusion[] from the swap definition for nonfinancial commodities, [it] will look to the specific facts and circumstances of the transaction as a whole to evaluate whether any embedded optionality operates on the price or delivery term of the contract, and whether an embedded commodity option is marketed or traded separately from the underlying contract." *Id*.

[28]CFTC Staff have taken the position "as a general prudential matter," not as a legal requirement, that when adjusting the price of a commodity in a forward contract based upon futures contracts, "the reference month used to establish the price of the commodity should be one that will reflect the commercial value of the commodity at the time of delivery." *Division of Economic Analysis Statement of Policy in Connection With the Unwinding of Certain Existing Contracts for the Delivery of Grain and Statement of Guidance Regarding Certain Contracting Practices*, CFTC Staff Letter Number 96-41, Comm. Fut. L. Rep. (cch) ¶ 26,691 (May 15, 1996). The same prudential reasoning presumably would apply to any type of price reference used to adjust the price of a commodity in a forward contract.

[29]*Final Products Definitions* at 48228 (emphasis added).

[30]CEA § 1a(47)(B)(ii).

[31]*Id*. §§ 1a(47)(A)(i), (ii).

[32]*Id*. § 1a(47)(A)(iii).

[33]*Id*. § 1a(47)(A)(iv).

[34]*Final Products Definitions* at 48260 (emphasis added).