

Virtual PPAs: Forwards Masquerading as Swaps

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The Commodity Futures Trading Commission (“CFTC” or “Commission”) has explicitly recognized that contracts for intangible, non-financial commodities, including environmental commodities, can qualify for the forward contract exclusion if physical delivery is a predominant feature of the contract. However, the historical characterization of “virtual” power purchase agreements (“PPAs”) as contracts-for-differences, and therefore swaps, has led the industry to report most virtual PPAs as swaps even when the predominant feature of many virtual PPAs is the deferred physical delivery of renewable energy certificates (“RECs”).

This article considers the scope of the forward contract exclusion and discusses its potential application to virtual PPAs. Section I discusses virtual PPAs and describes a transition from contracts primarily used as power hedging agreements to agreements primarily for the purpose of the purchase and sale of RECs. Because little has been written about the history of virtual PPAs, this section is based largely on the authors’ personal experience. Section II considers the scope of the forward contract exclusion by (i) examining courts’ attempts to define futures contracts and contrast forward contracts, (ii) exploring the CFTC’s application of and interpretative guidance regarding the exclusion, and (iii) drawing parallels from the CFTC’s guidance regarding “actual delivery” in the context of digital assets. Finally, Section III applies the concepts discussed in Section II and concludes certain virtual PPAs qualify for the forward contract exclusion and therefore should not be regulated as swaps.

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