

May 8, 2017

VIA ELECTRONIC MAIL

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Comments on the CFTC's Notice, Agency Information Collection Activities: Notice of Intent to Renew Collection 3038-0103, Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 (Trader and Account Identification Reports) (OMB Control No. 3038-0103)

Dear Mr. Kirkpatrick:

I. INTRODUCTION

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Eversheds Sutherland (US) LLP submits this letter in response to the request for public comment set forth in the Commodity Futures Trading Commission's (the "**CFTC**" or "**Commission**") Notice, *Agency Information Collection Activities: Notice of Intent to Renew Collection 3038-0103, Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 (Trader and Account Identification Reports)* (the "**OCR Notice**").¹

The Working Group welcomes the opportunity to respond to the OCR Notice because of the uncertainty inherent in some of the new regulatory requirements under the CFTC's Final Rule, *Ownership and Control Reports, Forms 102/102S, 40/40S, and 71* (the "**OCR Final Rule**").² Specifically, this comment letter focuses on New Form 40 (which is also used for the 40S filing), and respectfully requests that the CFTC revisit the OCR Final Rule. The Working Group has a direct interest in the OCR Final Rule because Working Group members may be recipients of special calls from the CFTC and required to submit a New Form 40 in response to a special call.

¹ See Notice, *Agency Information Collection Activities: Notice of Intent to Renew Collection 3038-0103, Ownership and Control Reports, Forms 102/102S, 40/ 40S, and 71 (Trader and Account Identification Reports)*, 82 Fed. Reg. 12,944 (Mar. 8, 2017), <http://www.cftc.gov/idc/groups/public/@Irfederalregister/documents/file/2017-04538a.pdf>.

² See Final Rule, *Ownership and Control Reports, Forms 102/102S, 40/40S, and 71*, 78 Fed. Reg. 69,178 (Nov. 18, 2013), <http://www.cftc.gov/idc/groups/public/@Irfederalregister/documents/file/2013-26789a.pdf>.

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. Among the members of the Working Group are some of the largest users of energy derivatives in the United States and globally. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

II. COMMENTS OF THE WORKING GROUP

The Working Group respectfully requests that the CFTC revisit the OCR Final Rule to eliminate certain questions on the New Form 40 that are confusing, not supported by adequate guidance, and possibly serve little or no additional value to the CFTC's pursuit of its market oversight and enforcement functions. These ill-styled questions force commercial firms to expend additional resources on new compliance measures and often seek legal counsel, costs which are not sufficiently accounted for in the OCR Final Rule. In addition, New Form 40's requirement for continual updates is a new requirement that, again, is not sufficiently accounted for in the OCR Final Rule. Moreover, certain of the information that the CFTC seeks in New Form 40 is redundant with information provided to the CFTC through Form 102 submissions.

Given the underweighting of costs and uncertain benefits of the New Form 40, the CFTC's cost-benefit analysis in the OCR Final Rule is not accurate. The Working Group recommends that CFTC make certain revisions to the New Form 40, which, if adopted, should result in the proper balance between regulatory benefits and costs borne by market participants.

A. The CFTC should eliminate certain new questions in New Form 40 that result in unwarranted and unaccounted costs borne by market participants with little value to the CFTC.

The OCR Final Rule updates Form 40 (*i.e.*, New Form 40), which the CFTC would send by special call to individuals and other entities identified on New Form 102A, New Form 102B, or New Form 71.³ Not only does the OCR Final Rule potentially increase the number of entities that may be required to submit a New Form 40, but it also expanded the scope of information that is required to be reported by adding questions in New Form 40.⁴ However, the CFTC styled some of these questions with vague concepts and did not provide sufficient guidance. Accordingly, market participants must spend resources in arriving at interpretations and, as necessary, doing research and establishing compliance measures to respond to such questions. There is accompanying uncertainty with respect to such interpretations and the answers provided (or not), and this uncertainty is a form of inchoate cost not accounted for in the CFTC's cost-benefit analysis in the OCR Final Rule.

³ OCR Final Rule at 69,188.

⁴ *See id.*

As discussed further below, the new questions from New Form 40 of greatest concern to the Working Group are as follows, and should be eliminated:

- New Form 40 Question 12;
- New Form 40 Question 14; and
- New Form 40 Questions 17-19.

i. New Form 40 Question 12 requests a list of the persons (natural persons and legal entities) that directly or indirectly influence, or exercise authority over, some or all of the trading of the reporting trader, other than those that “control” the reporting trader.

New Form 40 Question 12 should be eliminated for several reasons.

First, the utility of the information that the CFTC will collect in response to New Form 40 Question 12 is questionable. The request for a list of, and contact information for, natural persons and legal entities that “directly or indirectly influence, or exercise authority over, some or all of the trading of the reporting trader, but who do not exercise ‘control’” is ambiguous, subjective, overly broad, and may continuously change. Notably, the CFTC does not appear to provide guidance as to the definition of “influence” or indicia that such influence exists and is of such an extent to be significant for regulatory purposes. In light of the aforementioned, the utility of the information is questionable, especially considering that the CFTC will have significant information regarding ownership, control, and interconnectedness from responses to other questions on New Form 40.

Second, the information the CFTC will collect in response to New Form 40 Question 12 is not necessary for the CFTC to properly perform its functions. Historically, the CFTC has focused on concepts of control. Questions 8 and 10 of New Form 40 already solicit this information. We also note that the CFTC receives information about natural person controllers through the Form 102 submissions that it receives. Arguably, such information is sufficient in itself for the CFTC to meet its regulatory objectives.

ii. New Form 40 Question 14 requests indication of whether the reporting trader is engaged in commodity index trading⁵ and, if so, (i) whether the reporting trader is, in aggregate, pursuing long exposure or short exposure with respect to such commodities or commodity groups, and (ii) when the reporting trader first became engaged in commodities index trading.

New Form 40 Question 14 should be eliminated because the information the CFTC will receive in response to New Form 40 Question 14 is not necessary for the CFTC to

⁵ “Commodity index trading” is defined on New Form 40 as an investment strategy that consists of (a) investing in an instrument (e.g., a commodity index fund, exchange-traded fund for commodities, or exchange-traded note for commodities) that enters into one or more derivatives contracts to track the performance of a published index that is based on the price of one or more commodities, or commodities in combination with other securities; or (b) entering into one or more derivative contracts to track the performance of a published index that is based on the price of one or more commodities, or commodities in combination with other securities.

properly perform its market oversight function. The information regarding commodity index trading this question seeks to obtain appears to be too vague, potentially subject to frequent change, and too tenuous to be of any measurable benefit. While the CFTC has provided a definition of “commodity index trading,” the definition is too broad and potentially captures far too many market participants, thus undermining whether the question has utility at all.

Specifically, many derivatives referencing commodities refer to indexes, and commercial firms use these instruments frequently for a variety of purposes. For example, a fixed for floating natural gas contract arguably “track[s] the performance of a published index that is based on the price of one or more commodities.” Also, the CFTC may have believed “investment strategies” was a distinguishing term, but again did not provide sufficient guidance as to the meaning of the term or identifying criteria.

- iii. New Form 40 Questions 17-19 request identification of (by selecting options from supplemental lists) (i) the business activities of the reporting trader, (ii) the commodity groups or individual commodities that the trader presently trades or expects to trade in the near future in derivatives markets, and (iii) for each individual commodity identified, the business purpose(s) for which the trader uses derivatives markets.***

New Form 40 Questions 17-19 should be eliminated because the information the CFTC will collect in response may actually hinder the CFTC from properly performing its functions. The information the CFTC will receive in response to New Form 40 Questions 17-19, which pertain to business purpose and anticipated trading strategy, is complex, subjective, evolving, and may be subject to continuous updates. This is particularly concerning considering that the CFTC has indicated it will use this information in New Form 40 to compare it to subsequent market activity.⁶ If they do not correspond, the CFTC may request additional information or “take other appropriate action.”⁷ Given the complex, evolving, and subjective nature regarding business purpose and anticipated trading strategy, there is significant potential that the CFTC may find a mismatch in reported information and subsequent market activity of a reporting trader. In other words, the mismatches are more likely to be a red herring that drains the CFTC’s limited resources rather than an actual indicator of misconduct. Moreover, given the duty of a respondent to continually update information on its New Form 40 submission, New Form 40 Questions 17-19 add new regulatory requirements that may not be intuitive when a company begins trading in new commodity classes or begins using different strategies. Considering these issues, the information the CFTC will collect in response to New Form 40 Questions 17-19 may actually hinder the CFTC from properly performing its functions.

B. The prior regime for submissions on Form 40 was sufficient and less costly.

Legacy Form 40 provided significant market insight that adequately enabled the CFTC to perform its core function of fostering open, transparent, competitive, and financially-sound markets for the trading of derivatives. Even if the CFTC does find some

⁶ OCR Final Rule at 69,213.

⁷ *Id.*

practical use of the new information collected under New Form 40, its limited utility will not justify the substantial burden on market participants.

Further, entities required to submit a New Form 40 now have a continuing obligation to update and maintain the accuracy of the information submitted on New Form 40.⁸ This requires the design, implementation, and operation of new compliance measures, adding to the complex web of measures incurred by commercial firms following enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act.⁹

C. The CFTC should rely on the existing requirements for Form 102 submissions to gather information about natural person controllers.

The CFTC should eliminate the requirements in New Form 40 for reporting firms to submit any information about natural person controllers.¹⁰ The CFTC should, for the most part, already have that information about a responding party in connection with receiving Form 102 submissions. Currently, many commercial firms already submit such information about natural person controllers to their futures commission merchants; however, there is currently no functionality whereby such information could also be submitted to update a company's Form 40 submission. Accordingly, commercial firms expend resources to submit information that is ultimately received by the CFTC through two different paths. This redundancy serves no reasonable purpose. Also, considering that such information may have to be updated daily, the redundancy can be time consuming. This unnecessary cost is particularly acute in large organizations where a daily new hire or employment cessation is frequent.

In the alternative to eliminating the requirement for natural person controller information in New Form 40, the CFTC might: (i) suspend the requirement until a technological solution allows reporting firms to efficiently enter natural person controller information in one path for both New Form 102 and New Form 40 purposes; (ii) clarify that, for New Form 40, only one natural person need be identified for each account, such as a compliance officer; or (iii) clarify that a reporting firm can update its natural person controller information on a monthly or less frequent basis.

D. The CFTC significantly underestimated the burden of the proposed collection of information in terms of both time and cost.

The CFTC estimated that the annualized burden per response for New Form 40 would be 3 hours at a cost of \$70.07 per hour.¹¹ Considering the complexities involved in determining what must be reported under the New Form 40's ambiguously worded questions and taking into account the continuing obligations to update New Form 40, the CFTC has significantly underestimated the burden. The issues surrounding the OCR Final Rule are evidenced by the CFTC's no-action letters and monthly calls aimed at helping

⁸ *Id.* at 69,188.

⁹ H.R.4173, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010), <https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf>.

¹⁰ See New Form 40 Questions 10-13.

¹¹ See OCR Notice at 12,945.

market participants come into compliance with the new obligations under the OCR Final Rule.¹²

Notably, the CFTC did not consider several materially relevant factors in its cost-benefit analysis, which would particularly impact entities located in a larger corporate family. Factors the CFTC should have considered include: (i) the continuing obligations to update New Form 40; (ii) that multiple individuals from an entity are realistically going to be involved; (iii) outside counsel fees; (iv) internal counsel cost; (v) systems and other operational costs; and (vi) opportunity cost.

E. Suggestions for improvements that would increase efficiency and benefits with respect to New Form 40.

The Working Group respectfully offers additional suggestions with respect to New Form 40 that would increase efficiency and benefits.

First, the CFTC should revise New Form 40 to add the ability for respondents to include explanatory text. This is important as some respondents may need to clarify responses to certain questions that cannot adequately be answered in the format provided. This issue is particularly acute with respect to the “yes or no” questions included on New Form 40. Such explanatory text should provide greater clarity to the CFTC.

Second, the CFTC should revise the platform for New Form 40 to add a function that would allow a respondent to save its progress on partially completed responses. This is an important function since many responses may require the collective knowledge of multiple individuals, which may take time to both collect and obtain proper approval.

Third, the CFTC should revise the platform for New Form 40 to add a function that would allow a respondent to share preliminary responses internally before submitting a finalized version to the CFTC. This is an important function because the person filling out New Form 40 may not be the person with authority to submit the information.

III. CONCLUSION

The Working Group appreciates this opportunity to provide input on the OCR Notice and respectfully requests that the comments set forth herein are considered.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ David T. McIndoe
David T. McIndoe
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¹² While compliance with the OCR Final Rule was set to become effective August 15, 2014, the CFTC issued a series of no-action letters providing certain relief from the OCR Final Rule. See Ownership and Control Reporting, CFTC.gov, <http://www.cftc.gov/Forms/OCR/index.htm> (last visited May 8, 2017).