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**FINAL**

May 8, 2017

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Christopher Kirkpatrick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
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Washington, DC 20581  
Telefacsimile: (202) 418-5521

**Re: Comments on 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. 12944, published on March 8, 2017, in OMB Control No. 3038-0103**

Dear Mr. Kirkpatrick:

The International Energy Credit Association (“IECA”) respectfully submits these comments to the Commodity Futures Trading Commission (“CFTC” or “Commission”) on the above-captioned “Notice of Intent to Renew Collection, *Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 (Trader and Account Identification Reports)*” (“OCR Information Collection Extension”), published on March 8, 2017, at 82 Fed. Reg. 12944, in OMB Control No. 3038-0103. Pursuant to Section 3506(c)(2)(A) of the Paperwork Reduction Act (“PRA”), 44 U.S.C. 3506(c)(2)(A), Federal agencies are required to provide a 60-day notice in the Federal Register concerning each proposed collection of information before submitting the collection to OMB for approval.

#### **Concerns about new Form 40 and 40S Filings**

This OCR Information Collection Extension is a request by the CFTC for OMB to approve an extension of a currently approved information collection by the CFTC under the CFTC’s Final Rule: *Ownership and Control Reports, Forms 102/102S, 40/40S, and 71* (the “OCR Final Rule”), 78 Fed. Reg. 69178 (published on November 18, 2013). Under this OCR Final Rule, the CFTC authorized the electronic submission of a new Form 40 (and its equivalent for swaps under a 40S filing) after a special call by the CFTC or its Staff.

Note particularly, that Sections 18.04(a) and (b) of the CFTC’s Regulations (17 C.F.R. 18.04(a) and (b)) require every trader holding a “reportable futures and option position” to file with the CFTC a “Statement of Reporting Trader on the Form 40” if that trader receives a “special call” from the CFTC or the CFTC Staff.

Similarly, Section 20.5(b) of the CFTC’s Large Trader Reporting for Physical Commodity Swaps regulations (17 C.F.R. 20.5) specifies that “every person subject to books or records under Section 20.6 shall, after a special call upon such person by the [CFTC] file with the [CFTC] a 40S filing at such time and place as directed in the call. A 40S filing shall consist of the submission of a Form 40, which shall be completed by such person as if any references to futures or option contracts were references to paired swaps or swaptions as defined in Section 20.1.”

We note that the CFTC’s imposition of this electronic submission of a new Form 40/40S was generally the subject of conditional, time-limited relief until November 17, 2016. So the regulatory burdens arising from the Commission’s use of its new electronically-submitted Form 40 and 40S filings has only recently become imminent and apparent for commercial end-users.

### **Onerous and Unnecessary Burdens and Ambiguous Questions**

The IECA objects to the CFTC’s new Form 40, in effect under the OCR Final Rule, as unduly and unnecessarily burdensome due, in part, to its imposition of a “continuing obligation, per direction in the special call, to update and maintain the accuracy of the information it provides.” We are unaware of any analysis by the Commission demonstrating the regulatory benefit or other necessity of the Commission’s imposition on any commercial end-user submitting a new Form 40 of a “continuing obligation to update and maintain the accuracy” of the information submitted in that new Form 40.

In addition, the IECA objects to several of the questions currently asked of persons submitting new Form 40 (and related 40S filings) as particularly troublesome, because the meaning of those questions are too vague and unclear. In particular, we direct your attention to the following questions that are asked in new Form 40:

Question 12. “List any other person(s) that **directly or indirectly influence**, or exercise authority over, some or all of the trading of the reporting trader ...”

Question 13. “Is some or all of the derivatives trading of the reporting trader **subject to an express or implied agreement or understanding** with any other person(s) not addressed in questions 10, 11, or 12, above?”

Question 14ii. “Is the reporting trader engaged in commodity index trading as defined in paragraph (b) of the definition of CIT above? YES/NO”

Sub-Question “a” to Question 14ii. “If the reporting trader is engaged in CIT (as defined in paragraph (b)) with respect to one or more commodities or commodity groups appearing on Supplemental List II, **indicate whether the reporting trader is, in the aggregate, pursuing long exposure or short exposure** with respect to such commodities or commodity groups.”

Note: We understand that the CFTC Staff believe that CIT applies to hedging, not just investing, so question 14ii will apply to most energy swaps since they are often priced to a published index or futures contract. However hedgers do not use derivative contracts to “**pursu[e]**” long exposure or short exposure in commodities, they only seek to ‘mitigate’ or ‘hedge’ against such long or short commercial exposures. Consequently, **there is no correct way to answer this question for a hedger**, only for an investor.

Question 19. “For each selected individual commodity identified in question 18, indicate the **business purpose(s)** for which the reporting trader uses derivative markets. If the reporting trader has more than one business purpose for trading in an individual commodity, also indicate the predominant business purpose.” ... “Choose from Supplemental List III.”

The “business purposes” available to answer Question 19 are as listed in Supplemental List III to Form 40, but those “business purposes” are unclear and it is not readily apparent whether and how to apply those “business purposes” to many of the commercial end-users that make up a substantial portion of the membership of the IECA.

### **Relief Recommended**

To relieve the unnecessary burden of the “continuing obligation to update” information submitted in the new Form 40 and to remove the ambiguities and uncertainties raised by the practically unanswerable questions in the new Form 40 noted above, the IECA respectfully recommends that the Commission suspend the electronic submission of new Form 40 and 40S filings.

Further, until such time as the electronic submission of new Form 40 can be reissued without the unduly burdensome provisions noted above, we suggest that the Commission accept the old Form 40 (including for 40S filings).

### **About the IECA**

The IECA is an association of over 1,400 credit, risk management, legal and finance professionals that is dedicated to promoting the education and understanding of credit and other risk management-related issues in the energy industry. For over ninety years, IECA members have actively promoted the development of best practices that reflect the unique needs and concerns of the energy industry.

The IECA seeks to protect the rights and advance the interests of a broad range of domestic and foreign energy market participants, representatives of which make up the IECA’s membership. These entities finance, produce, sell, and/or purchase for resale substantial quantities of various physical energy commodities, including electricity, natural gas, oil and other energy-related physical commodities necessary for the healthy functioning of the energy markets and the “real economy”. Many of these energy market participants rely on cleared and uncleared swap transactions to help them mitigate and manage (i.e., hedge) the risks of physical energy commodity price volatility to their

commercial energy businesses, which millions of Americans and the American economy rely on for safe, reliable and reasonably-priced energy supplies.

**Conclusion**

The IECA appreciates the opportunity to provide these Comments and would welcome the opportunity to discuss these comments further should you require any additional information on any of the topics discussed herein.

Please direct correspondence concerning these comments to:

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Yours truly,  
INTERNATIONAL ENERGY CREDIT ASSOCIATION

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