

August 21, 2017

**VIA ELECTRONIC SUBMISSION**

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 Interim Final Rule with Request for Comments, *Revisions to Freedom of Information Act Regulations* (RIN 3038-AE57)**

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**") Interim Final Rule with Request for Comments, *Revisions to Freedom of Information Act Regulations* (the "**FOIA Interim Final Rule**").<sup>1</sup>

The Working Group welcomes the opportunity to comment on the FOIA Interim Final Rule as the proper protection of confidential information filed with Commission is of paramount importance. The Working Group has a direct interest in the FOIA Interim Final Rule as many of its members, from time to time, make filings with the CFTC that contain information that is and should be exempt from release under the CFTC's Freedom of Information Act ("**FOIA**") regulations.<sup>2</sup>

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

<sup>1</sup> See Interim Final Rule with Request for Comments, *Revisions to Freedom of Information Act Regulations*, 82 Fed. Reg. 28,001 (June 20, 2017), <http://www.cftc.gov/idc/groups/public/@Irfederalregister/documents/file/2017-12775a.pdf>.

<sup>2</sup> See Part 145 of the CFTC Regulations.

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

### A. The Protections Against Public Disclosure of Confidential Information Should Be Upheld by the Commission.

While the Working Group supports the overarching goal of transparency in government underlying FOIA and Part 145 of the CFTC Regulations, the protections provided against improper disclosure of proprietary or private information under FOIA and Part 145 are equally as important. Given recent incidents where private business information submitted to the Commission, and for which confidential treatment was requested, was improperly disclosed, the Working Group urges the Commission to be careful and measured in its custodianship of such information and with its approach to FOIA disclosure.<sup>3</sup>

Under the “foreseeable harm” standard implemented by the FOIA Interim Final Rule, the Department of Justice has acknowledged that the threshold for releasing private personal or business information is significantly higher than other forms of information potentially protected from disclosure under FOIA. Specifically the Department of Justice stated:

[T]he application of the “foreseeable harm” standard and its accompanying discretionary disclosure principle necessarily will vary according to the nature of the FOIA exemptions, and underlying interests, that are involved. Where “only a government interest would be affected” by a FOIA disclosure, there is a far greater potential for discretionary disclosure than exists where such interests as personal privacy or business confidentiality.<sup>4</sup>

In keeping with this sentiment, any private business information submitted to the Commission for which confidential treatment has been requested should be presumed to be of the nature that, if disclosed, harm to the submitter would be foreseeable.

### B. Part 145 of the CFTC Regulations Should Be Comprehensively Amended.

The FOIA Interim Final Rule makes a number of technical changes to Part 145 of the CFTC Regulations, including removing reference to the now defunct position of Assistant Secretary of the Commission for FOI, Privacy, and Sunshine Acts Compliance (“**Assistant Secretary**”).<sup>5</sup> However, certain provisions of Part 145 not amended by the FOIA Interim Final Rule need to be revised to account for the removal of the Assistant Secretary definition.

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<sup>3</sup> See Shell, Others Fight To Keep Oil Futures Probe Docs Private, Law360 (June 24, 2013), <https://www.law360.com/ip/articles/452388/shell-others-fight-to-keep-oil-futures-probe-docs-private>; see also U.S. Oil Speculative Data Released by Senator, Sparking Ire, Reuters (Aug. 19, 2011), <http://www.reuters.com/article/us-cftc-dataleak-idUSTRE7714NR20110819>.

<sup>4</sup> FOIA Update: OIP Applying the “Foreseeable [sic] Harm” Standard Under Exemption Five, FOIA Update Vol. XV, No. 2 (Jan. 1, 1994), <https://www.justice.gov/oip/blog/foia-update-oip-guidance-applying-foreseeable-harm-standard-under-exemption-five>.

<sup>5</sup> See FOIA Interim Final Rule at 28,001 (referencing CFTC Regulation 145.7(b)).

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For example, CFTC Regulation 145.9, which addresses the process for petitioning for the confidential treatment of information to the Commission, makes frequent reference to the Assistant Secretary. As a consequence of the FOIA Interim Final Rule's removal of the definition of Assistant Secretary and not making conforming changes to CFTC Regulation 145.9, the process for requesting confidential treatment of information is not clearly described in manner that aligns with the Commission's current structure.

The Working Group respectfully requests that the Commission review the entirety of Part 145 and make changes to those regulations to account for the removal of the definition of "Assistant Secretary."

### **III. CONCLUSION**

The Working Group appreciates this opportunity to provide input on the FOIA Interim Final Rule and respectfully requests that the comments set forth herein are considered.

If you have any questions, please contact the undersigned.

Respectfully submitted,  
/s/ Alexander Holtan  
Alexander Holtan

***Counsel to The Commercial Energy Working Group***