Main Office: 64 Central Street, Southborough, MA 01745
DC Office: 1629 K Street. N.W, Washington D.C., 20006
Phone: (617) 924-1000 • Fax: (508) 373-2740 • www.nefi.com

May 15, 2020

Via Electronic Submission

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

RE: Position Limits for Derivatives, RIN 3038–AD99

Dear Mr. Kirkpatrick:

Thank you for the opportunity to submit comments on the proposed rule concerning position limits or derivatives ("proposed rule"). These comments are being submitted on behalf of the New England Fuel Institute, now doing business as the National Energy & Fuels Institute ("NEFI"), a non-profit and non-partisan 501(c)(6) direct-to-member trade association. Since 1942, NEFI has been a leading national voice for retail marketers of liquid heating fuels, including home heating oil and related biofuel blends.

These businesses, often referred-to as "fuel dealers" are mostly small, multi-generational Main Street family businesses that serve more than 6.5 million homes and business nationwide.[1] For decades our members have utilized commodity derivatives and other financial products to protect their businesses and consumers from market volatility and price risks. They rely on the Commodity Futures Trading Commission ("the Commission" or "CFTC") to preserve market integrity and functionality and ensure that prices do not become unhinged from supply and demand fundamentals. It is the CFTC's responsibility to establish prudent rules and regulations that guarantee transparency, accountability while deterring fraud, manipulation, and abuse.

Then-President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") into law on July 21, 2010.[2] Section 737 requires the Commission to establish position limits on previously exempt commodities within 180 days of enactment, or by Monday, January 17, 2011.[3] In the 3,771 days since that deadline, this Congressional mandate has been subject to opposition, litigation, and delay. We commend the CFTC and its Commissioners and staff for their valiant efforts to complete a position limits rule and fulfill one of the last remaining requirements under Dodd-Frank. Unfortunately, this rule falls far short of meeting both the intent of the law and fulfilling Commission's responsibilities to small hedgers and, importantly, American consumers.

---

[1] U.S. Census Bureau, 2013-2017 American Community Survey (ACS) 5-Year Estimates, primary heating fuel by occupied housing unit.

[2] Pub.L.111-203

[3] Ibid., §737(a)(4)

I. Position Limits are Necessary

Following the commodity price bubble of 2008-2009, Congress decided on a bipartisan basis to include the position limit mandate in the Dodd-Frank Act after holding dozens of hearings on the matter between 2006 and 2010. Lawmakers heard testimony from scores of organizations representing American businesses, farmers, consumers, and their trade associations and advocacy groups.[4] These organizations expressed concern over market opacity and extreme volatility, the lack of oversight in the swap markets, and the absence of a speculative position limits in most futures and swaps markets. Many witnesses testified that they had lost confidence in price discovery and that the markets had become unhinged from supply and demand fundamentals. They were also alarmed by a flurry of enforcement actions against market manipulation. In the five years leading up to Dodd-Frank (2007-2010), the Commission took more than twenty enforcement actions against manipulation in the natural gas, crude oil, gasoline, heating oil, propane, cattle, dairy, and metals markets. This list does not even include alleged manipulation, particularly in the opaque and unregulated over the counter and offshore markets.

Since January, 2009, the CFTC has now proposed a total of six position limits rules; held dozens of open comment periods, public hearings, roundtables, forums, and advisory committee meetings on the subject; and received tens-of-thousands of substantive comment letters. It has held hundreds of private meetings with market stakeholders and consumer advocates. Commissioners and their staff have reviewed scores of academic studies and expert analyses that conclude that any failure to properly monitor and limit speculative activity can exacerbate price volatility, unhinge markets from real world supply and demand fundamentals, and create the opportunity for market manipulation.

The law states that the CFTC "*shall* set limits" to "diminish, eliminate, or *prevent* excessive speculation" and to "deter and *prevent* market manipulation" [emphasis added].[5] Congress clearly commands the Commission to impose limits to cease the kind of dubious activity uncovered in its countless hearings, investigations, and reports. Unfortunately, the proposal rule shuns Congressional intent and reverses decades of precedent. In effect, the proposed rule determines that speculative position limits are in and of themselves unnecessary; and imposes them in a limited scope because it presumes that some sort of action is necessary to fulfill its obligations under the Dodd-Frank Act.[6]

II. The Proposed Rule is Too Limited in Scope

Despite a clear mandate from Congress to establish limits on all commercially traded energy derivatives, the proposed rule only covers 25 referenced contracts, including just four referenced energy contracts.[7] As noted above, it is the express intent of Congress that the CFTC broadly impose position limits as a preventative measure to deter market disruption and harm from excessive speculation, and importantly, to deter market manipulation such as corners and squeezes. Further, the proposal exclusively focuses on spot-month where it suggests a very high 25-percent limit, with an emphasis on preventing corners and squeezes. NEFI agrees with comments by Commissioner Berkovitz that distributing limits across all months is preferable, as it would protect market convergence and mute

---

[4] In the years leading-up-to and immediately after the enactment of Dodd-Frank Act, NEFI led the Commodity Markets Oversight Coalition, a broad alliance of commodity and related derivative end-users including airlines, trucking companies, fuel marketers, farmers, and ranchers, and consumer advocacy organizations.

[5] 7 USC §6a(a)(3)

[6] 85 Fed. Reg. 11659-11670

[7] Referenced energy contracts covered by the proposed rule include NYMEX Henry Hub Natural Gas, Light Sweet Crude Oil, NYH ULSD Heating Oil; and NYH RBOB Gasoline.

disruptive signals from large speculative trades.[8] It is important to note that unlike trading in energy commodities, "hard" (or legacy) agricultural contacts were not deregulated. In these markets, position limits are generally 10-percent and in many cases much lower, and yet have demonstrated more resistance to excessive speculation.

III. Cash-Settled Futures and Options are "Economically Equivalent"

NEFI welcomes the definition of referenced contract to include all cash-settled futures and options as "economically equivalent to physical-delivery contracts in the same commodity."[9] We have consistently argued this move is essential to guard against manipulation by a trader who holds positions in both physically-settled and cash-settled contracts for the same underlying commodity. However, the definition of "economically equivalent swap" is narrower than in previous proposals.[10] The narrowness of this definition allows for easy avoidance.

IV. The Commission Should Not Cede Authority to Exchanges

The proposed rule seeks to cede CFTC authority to impose speculative position limits to the exchanges. Notably, the proposed rule arbitrarily fails to establish limits for non-spot month referenced energy contracts and leaves this decision to the exchanges. The exchanges are permitted to establish accountability limits, which are effectively voluntary limits. A government regulator would never set voluntary speed limits on the highway, no would it leave the discretion on whether to impose speed limits to local law enforcement or highway engineers. It is for this reason Dodd-Frank explicitly mandates that the Commission, not the exchanges, set the "rules of the road."

Further, unlike the CFTC, commodity exchanges are not regulatory agencies established under law to protect the public interest. They are publicly traded firms that benefit from higher trading volumes and large numbers of market participants. In writing Dodd-Frank, Congress recognized the exchanges' profit motive. Its authors feared they would institute broad hedge exemptions that may include non-commercial market participants (such as financial speculators). We therefore oppose the ceding of any statutory authority to establish position limits to the exchanges or self-regulatory organizations. Sole statutory authority for setting all position limit levels, including single- and all-month contracts, and any bona fide hedge exemptions rests solely with the CFTC.

V. Recent Market Events Must be Considered

The ongoing coronavirus pandemic has caused an unprecedented collapse in the global energy markets unlike anything since the conclusion of the Second World War.[11] Crude oil demand is projected to drop by at 9 million barrels per day, or nine percent, for the year.[12] This sent shockwaves through the energy sector, creating high levels of uncertainty and market volatility. Paper traders with contracts in hand but no capacity to take physical delivery looked to jettison their holdings. In a mind-shattering moment, the West Texas Intermediate ("WTI") contract for May delivery traded lower than negative

---

[8] *Statement by Commissioner Dan M. Berkovitz Regarding Proposed Rule on Position Limits for Derivatives*, U.S. Commodity Futures Trading Commission, January 30, 2020.

[9] 85 Fed. Reg. 11620

[10] Ibid., 11622

[11] International Energy Agency, *Flagship Report: Global Energy Review 2020,* A

[12] Ibid.

$37 per barrel on April 20, 2020. As recent as this week, the CFTC warned market participants that a similar market event could occur when the June WTI contract expires.[13]

We commend the CFTC for its decision to conduct a full investigation into the anomalies in the crude oil market. CFTC Commissioner Dan Berkovitz rightly notes that "all possible explanations" need to be considered in such an extreme price move.[14] NEFI has long-held concerns that speculative actors in crude oil and other markets continue to hold highly leveraged positions that are exposed when market conditions suddenly turn against them, harming bona fide commercials. In this case, small independent producers and refiners and thousands of workers in the U.S. petroleum sector.

VI. Conclusion

We commend the CFTC and its Commissioners and staff for their tireless efforts to fully comply with its mandate to implement Section 737 and other vital market protections as enumerated in the Dodd-Frank Act. This is especially true given external political and legal obstructions and historically insufficient Congressional appropriations. Yet, there continues to be acknowledgement from Commissioners and market participants alike that speculative position limits are a historically proven necessity for maintaining market integrity and functionality. As CFTC Chairman Heath Tarbert rightly notes, excessive speculation has a "damaging impact" on the market, and position limits are a valuable tool in diminishing their most harmful effects.[15]

Unfortunately, the proposed rule is not in keeping with the spirit of the law or the intent of Congress, nor does it prioritize interests and concerns of small hedgers such as Main Street energy marketers and their consumers. The rule should be withdrawn and reconsidered after the national coronavirus pandemic emergency has been resolved. Doing so would have the added benefit of providing all market participants affected by this deadly pandemic and its economic effects to review and comment on the rule. It would also allow the Commission to fully commit its time and resources to a thorough investigation of factors contributing to recent turbulence in the crude oil futures market.

Thank you again for the opportunity to comment on this important proposed rule.

Sincerely,

Sean Cota
President & CEO
National Energy & Fuels Institute

---

[13] https://markets.businessinsider.com/news/stocks/oil-price-wti-could-go-negative-again-regulator-warns-traders-2020-5-1029202506

[14] https://www.reuters.com/article/usa-cftc-oil-idUSL2N2CC0TS

[15] Statement of Chairman Heath P. Tarbert in support of Proposed Rule on Speculative Position Limits, U.S. Commodity Futures Trading Commission, January 30, 2020.