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By Electronic Submission

September 19, 2016

Ms. Kimberly D. Bose
Federal Energy Regulatory Commission
Secretary of the Commission
888 First Street NE
Washington, DC 20426

Re: Notice of Proposed Rulemaking on Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, Docket No. RM16-17-000[1]

Dear Ms. Bose:

The Futures Industry Association ("**FIA**")[2] appreciates the opportunity to comment on the Federal Energy Regulatory Commission's ("**FERC**") notice of proposed rulemaking on Data Collection for Analytics and Surveillance and Market-Based Rate Purposes ("**NOPR**") and welcomes the NOPR's substantial improvements on the initial proposal for data collection in September 2015. This letter addresses a discrete issue involving the NOPR that impacts our members. FIA's core constituency consists of Futures Commission Merchants ("**FCMs**") that provide clearing and execution services for customers that trade financial derivatives on global exchanges and OTC markets.[3] Such derivatives include listed and OTC financial energy products that are regulated exclusively by the Commodity Futures Trading Commission ("**CFTC**").

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[1] 156 FERC ¶ 61,045, 81 Fed. Reg. 51,726 (published by FERC on July 21, 2016).

[2] FIA is the leading trade organization for the futures, options, and cleared swaps markets worldwide. FIA's membership includes clearing firms, exchanges, clearinghouses, and trading firms from more than 25 countries as well as technology vendors, lawyers, and other professionals serving the industry. FIA's mission is to support open, transparent, and competitive markets, to protect and enhance the integrity of the financial system, and to promote high standards of professional conduct.

[3] Under the Commodity Exchange Act ("**CEA**"), an FCM is "an individual, association, partnership, corporation, or trust that is engaged in soliciting or in accepting orders for [certain CFTC-jurisdictional products] . . . and in or in connection with [such activity], accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom." 7 U.S.C. § 1a(28).

We respectfully ask FERC to confirm in its final rulemaking that the NOPR's proposed definition of "Connected Entity" does not include FCMs or certain other CFTC registrants on account of their providing clearing and execution services or other activities on behalf of customers with respect to such CFTC-regulated financial products. Although we doubt that FERC intended the NOPR to capture financial intermediaries and service providers that are regulated by the CFTC given the policy goals of the NOPR and the jurisdictional boundaries of FERC and the CFTC, our members and their affiliates who operate in FERC-jurisdictional markets would benefit from clarity on this point.

I. FERC Should Confirm that the Term "Connected Entity" Does Not Include FCMs and Certain Other CFTC-Registrants.

The NOPR provides for the collection of certain data for analytics and surveillance purposes from each market-based rate seller ("**Seller**") and entity trading virtual products or holding financial transmission rights ("**Virtual/FTR Participant**") in FERC-jurisdictional markets. Included in such data submissions would be information relating to entities and persons falling within a proposed definition of "Connected Entity." Under proposed section 35.49(d)(1), the term "Connected Entity" would include an entity that is an affiliate of a Seller or Virtual/FTR Participant and that purchases or sells financial natural gas or electric energy derivative products that settle off of the price of physical electric or natural gas energy products.[4] As currently drafted, the "ownership" component of the "Connected Entity" definition could be interpreted to include a Seller's or Virtual/FTR Participant's affiliated FCM or other CFTC registrants, such as Introducing Brokers ("**IBs**"), Commodity Trading Advisors ("**CTAs**") and Commodity Pool Operators ("**CPOs**"). FIA does not believe FERC intended this result and requests that FERC explicitly foreclose any such interpretation in the rule.

A. Extension of the "Connected Entity" Definition to the CFTC Registrants Would Not Be Consistent with the Purpose of the NOPR.

FCMs, IBs, CTAs and CPOs perform various services that relate to the purchase or sale of CFTC-regulated financial products on behalf of customers. Both FCMs and IBs solicit or accept orders from customers to buy or sell futures contracts, options on futures or swaps, which could include energy derivatives products.[5] CTAs may participate in the purchase or

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[4] Specifically, the "ownership" component of the definition of "Connected Entity" is: "An entity that is an affiliate of a Seller or Virtual/FTR Participant pursuant to 35.36(a)(9), and meets one or more of the following criteria: (i) is an ultimate affiliate owner of the Seller or Virtual/FTR Participant, as defined in § 35.37(a)(2), (ii) participates in organized wholesale electric markets, or (iii) purchases or sells financial natural gas or electric energy derivative products that settle off of the price of physical electric or natural gas energy products." Proposed Rule 35.49(d).

[5] See note 3 for definition of FCM under the CEA. The CEA defines an IB as "any person (except [an associated person of an FCM]) who is engaged in soliciting or accepting order for [certain CFTC-jurisdictional products]; and does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom . . . ." 7 U.S.C. § 1a(31).

sale of futures contracts, options on futures or swaps, by virtue of advising others as to the advisability of trading in such products.[6] In connection with a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, CPOs solicit, accept, or receive from others, funds, securities, or property for the purpose of trading in futures contracts, options on futures or swaps.[7] The purpose of the proposed rule suggests that FERC did not intend to capture these CFTC-registered entities as Connected Entities.

The NOPR suggests that its purpose is to assist FERC in identifying financial or legal relationships to enable FERC to more readily identify potential collusion by affiliated parties to manipulate the markets within FERC's jurisdiction. This purpose is understandably met when a Seller or Virtual/FTR Participant is transacting in the FERC-jurisdictional organized wholesale electric markets, and its affiliate is buying and selling energy derivatives positions for its own account. However, in the case of FCMs, IBs, CTAs and CPOs (collectively, "**CFTC Registrants**") acting in their capacity as such under the CEA, they are each acting on behalf of unaffiliated customers to which they owe certain duties and are subject to extensive regulation by the CFTC and various self-regulatory agencies. For example, an FCM acting in its capacity as such may provide clearing and execution services for customers who wish to transact in energy derivatives products. Under the CEA and CFTC regulations, these derivative positions are customer property. Because the FCM is not transacting for its own account, and because the FCM is comprehensively regulated by the CFTC, as well as self-regulatory organizations, such as the National Futures Association and the exchanges that list the financial energy product (designated contract markets ("**DCMs**") and swap execution facilities ("**SEFs**")), the affiliated relationship with a Seller or Virtual/FTR Participant does not pose the type of risk of collusion that the NOPR appears intended to identify and mitigate.

FIA notes that there are circumstances in which a customer grants an FCM discretion to trade in the customer's name. In such cases, the FCM has a fiduciary duty owed to the client.[8] Because of this fiduciary duty, these discretionary accounts are subject to a high degree of regulatory scrutiny by the CFTC and the self-regulatory organizations. As such, the affiliated relationship between the FCM on the one hand and a Seller or Virtual/FTR Participant on the other hand does not pose the type of risk of collusion that the NOPR appears to be intended to address.

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[6] The CEA defines a CTA as "any person who for compensation of profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value or advisability of trading in [certain CFTC-jurisdictional products] for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any [such activities] . . . ." *Id.* § 1a(12).

[7] The CEA defines a CPO as "any person engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including in [certain CFTC-jurisdictional products] . . . ." *Id.* § 1a(11).

[8] *Independent Order of Foresters v. Donaldson, Lufkin & Jenrette, Inc.*, 157 F.3d 933 (2d Cir. 1998).

There are also circumstances in which an FCM may have temporary ownership of a position in an energy derivative product in connection with effecting a transaction with a customer pursuant to the rules of a DCM or SEF. For example, some DCMs have rules that permit the transfer of a futures position pursuant to a block trade, a cross trade or an exchange for a related position. To facilitate a customer's desire to acquire or dispose of a futures position outside of the purview of open outcry or the central order book, an FCM might take the opposite side of the customer in effecting such a transaction. Such exchange rules are highly prescriptive for the protection of the customer and the futures market. Similarly, in the rare case that an FCM's customer has defaulted and the FCM must liquidate its defaulting customer's account, the FCM may need to assume the energy derivatives position as it liquidates those positions in the market in an orderly manner.[9] In doing so, FCM documentation customarily requires it to act in a commercially reasonable manner, and its actions could be subject to further scrutiny by the CFTC and applicable self-regulatory organizations. The fact that as part of liquidating a defaulting customer's derivatives account, an FCM may need to assume the energy derivatives positions as it liquidates those positions in an orderly manner does not pose the type of risk identified in the NOPR as the purpose of the data collection, namely that the FCM might collude with its affiliated MBR seller and/or Virtual/FTR participant to manipulate the market. In fact, because the NOPR would require the Seller or Virtual/FTR Participant to submit data relating to a change of status relating to a Connected Entity within 30 days, the circumstances surrounding the FCM's acquisition of the defaulting customer's energy derivatives position and the liquidation of those positions is likely to have been completed long before the report is submitted, only to have the report amended by removal of such data during the next monthly submission.

For these reasons, we do not believe the NOPR's purpose supports extending the definition of "Connected Entity" to FCMs and the other CFTC Registrants, nor do we see any meaningful practical benefit in doing so.

B. Including the CFTC Registrants in the "Connected Entity" Definition Would Likely Result in Unhelpful Duplicative Reporting and Could Even Force CFTC Registrants to Violate CFTC Rules.

Inclusion of FCMs and other CFTC Registrants as Connected Entities would likely result in duplicative reporting to FERC that may cause unnecessary confusion with respect to the same activity. For example, assume Seller A has an FCM whose customer places an order to purchase or sell an energy derivatives product and that such customer is an affiliate of Seller B. Under the NOPR, Seller B would be required to report information about the customer as one of its Connected Entities. Notably, if the FCM also is included within the definition of Connected Entity solely by virtue of its execution and clearing services on behalf of the

[9] FCMs bear responsibility to the futures exchange and their clearinghouses for positions taken by their customers. This assumption of responsibility, in turn, necessitates the ability of FCMs to maintain control over the accounts in the event of the customer's default. *See Pompano–Windy City Partners, Ltd. v. Bear Stearns & Co., Inc.*, 794 F. Supp. 1265, 1275–76 (S.D.N.Y. 1992).

customer, FERC would receive reports of both the FCM and the customer as Connected Entities of two different Sellers as a result of the same activity of purchasing and selling energy derivatives products. This duplicative reporting of entities related to the same activity could obfuscate the nature and scope of activity that FERC is attempting to assess and ultimately undermine the NOPR's analytics and surveillance objectives.

Additionally, whether as a result of a regulation or practices designed to protect an FCM's customers, an FCM and the other CFTC Registrants often are required to adhere to information barriers between themselves and affiliates that may transact in the same or related markets for their own account. For example, if a Seller or Virtual Market/FTR Participant is registered with the CFTC as a swap dealer or major swap participant, CFTC Rule 1.71 requires an affiliated FCM to adopt policies and procedures to establish an information barrier between it and the swap dealer or major swap participant.[10] Yet, any FCM or other CFTC Registrant that is affiliated with a Seller or Virtual/FTR Participant would need to create internal reporting programs so its affiliate can comply with its FERC reporting obligation under the NOPR. Not only would this be burdensome, but it also could cause the FCM to violate CFTC rules.

II. It Would Be Inappropriate to Interpret the "Connected Entity" Definition So Broadly as to Encompass FCMs and the Other CFTC Registrants Based on the Clear Jurisdictional Boundaries between the CFTC and FERC.

A. The CFTC Has Plenary Authority Over U.S. Futures and Swaps Market Activities.

Of particular interest to our members, the CFTC has plenary jurisdiction over U.S. futures and swaps markets, including the FCMs that provide execution and clearing services in these CFTC-regulated markets. Congress has granted the CFTC exclusive federal jurisdiction over futures and swaps trading in the CEA. Notably, Congress codified a specific legislative finding that transactions involving commodity futures are "affected with a national public interest,"[11] and based on that finding, vested the CFTC with plenary power, within its exclusive jurisdiction, "to make or promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the" CEA, the CFTC's governing statute.[12] Congress' decision to vest absolute authority in the CFTC to regulate futures and swaps reflects its judgment that a single expert regulator should regulate activities in those markets without the threat of intrusion by other governmental authorities.

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[10] 17 C.F.R. § 1.71.

[11] 7 U.S.C. § 5(a).

[12] *Id.* § 12a(5).

In those rare instances in which Congress has determined to make an exception to the grant of exclusive jurisdiction, Congress has amended the CEA to carefully define the scope of the shared jurisdiction.[13] Moreover, as to the potential for conflicts concerning overlapping jurisdiction between FERC and the CFTC, Congress expressly mandated that FERC and the CFTC negotiate a memorandum of understanding ("**MOU**") to avoid overlapping regulations where they are neither required nor appropriate and a second MOU to provide for the sharing of information where either agency is conducting an investigation into potential manipulation, fraud, or market power abuse in markets subject to such agency's regulation and oversight.[14] Such legislative action clearly evidences Congress' intent for the CFTC and FERC to carefully consider, delineate and respect the extent of their jurisdictions and to avoid duplicative regulations. By entering into the MOUs on January 2, 2014,[15] both FERC and the CFTC acknowledged the importance placed by Congress on recognizing the carefully prescribed jurisdictional boundaries.

The jurisdictional boundaries likewise have been recognized by the federal courts. The U.S. Court of Appeals for the District of Columbia in *Brian Hunter v. Federal Energy Regulatory Commission*[16] held that the CEA's exclusive jurisdiction clause prohibited FERC from bringing an action against Brian Hunter for attempting to manipulate the natural gas market through his purchase of futures contracts on natural gas and explicitly rejected FERC's assertion that the Energy Policy Act effectively granted FERC shared jurisdiction.[17]

FIA understands that the NOPR purports to impose the data collection and submission obligations on Sellers and Virtual/FTR Participants that are subject to FERC's jurisdiction. However, if the definition of "Connected Entity" is not clarified, the NOPR risks imposing unnecessary and potentially burdensome reporting obligations on FCMs and the other CFTC Registrants solely for conduct that is within the exclusive jurisdiction of the CFTC. Clearly, legislative and judicial precedent counsels against this outcome. We ask that FERC clarify that "Connected Entity" should not be interpreted to include the CFTC Registrants.

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[13] *Id.* § 2(A)(1)(C), (D) (delineating CFTC and Securities and Exchange Commission jurisdiction and establishing authority of SEC over security futures).

[14] 15 U.S.C. § 8308.

[15] Memorandum of Understanding Between the Commodity Futures Trading Commission and the Federal Energy Regulatory Commission (Jan. 2, 2014), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcfercjmou2014.pdf; Memorandum of Understanding Between the Commodity Futures Trading Commission and the Federal Energy Regulatory Commission Regarding Information Sharing and Treatment of Proprietary Trading and Other Information (Jan. 2, 2014), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcfercismou2014.pdf.

[16] 711 F.3d 155 (D.C. Cir. 2013).

[17] The Court cited its earlier decision in *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008), which held that repeals of statutory provisions by implication "will not be found unless an intent to repeal . . . is clear and manifest," 514 F.3d at 4.

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For the reasons stated above, FIA respectfully requests that FERC confirm in its final rulemaking that the NOPR's proposed definition of "Connected Entity" does not include FCMs' clearing and execution services, or the activities of IBs, CTAs or CPOs, that are performed on behalf of customers with respect to CFTC-regulated financial energy products. Failure to provide such clarification may create confusion as to respective reporting obligations and the jurisdictional boundaries of FERC and the CFTC. In the wake of such uncertainty, the decision by affiliated enterprises to include FCMs andother CFTC Registrants in their data collection requirements may pose a threat to the integrity of the information barriers established by the FCM and other CFTC Registrants to meet regulatory obligations or customer expectations. Finally, the decision to include FCMs and the other CFTC Registrants may result in the unnecessary duplication of reporting to FERC of information that is otherwise reported to the CFTC under its comprehensive system of collecting information on market participants as part of its market surveillance program.[18]

If FERC or any member of its staff has any questions regarding the matters discussed herein, please contact Allison P. Lurton, Senior Vice President and General Counsel, at 202.466.5460 or alurton@fia.org.

Sincerely,

Walt L. Lukken

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President and CEO

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[18] See Parts 15, 16, 17, 18, 19, and 21 of the CFTC's regulations. 17 C.F.R. pts. 15–19, 21.