



June 14, 2018

**Via Electronic Submission**

Christopher Kirkpatrick  
Secretary of the Commission  
U.S. Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

**Re: Petition for Amendment of the Ownership and Control Reports Rule**

Dear Mr. Kirkpatrick:

The Futures Industry Association (“**FIA**”) and Commodity Markets Council (“**CMC**”) respectfully submits this petition (the “**Petition**”) to amend the U.S. Commodity Futures Trading Commission’s (“**CFTC**” or the “**Commission**”) Ownership and Control Reports (“**OCR**”) rule.<sup>1</sup>

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA’s membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry. Many FIA members are reporting entities that are directly impacted by the OCR Rule.<sup>2</sup> FIA has participated actively in the OCR rulemaking process by: (1) serving as a liaison between the Commission and the industry; (2) assisting with industry implementation efforts; (3) filing comments on the proposed rules; and (4) working with Commission Staff on no-action relief that addresses various aspects of the OCR Rule.

CMC is a trade association that brings together exchanges and their industry counterparts. Its members include commercial end-users that utilize the futures and swaps markets for agriculture, energy, metal, and soft commodities. Its industry member firms also include regular users and members of swap execution facilities (each, a “**SEF**”) as well as designated contract markets (each, a “**DCM**”). Along with these market participants, CMC members also include regulated

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<sup>1</sup> Rule 13.2, 17 C.F.R. § 13.2, provides, in part, that “[a]ny person may file a petition with the Secretariat of the Commission for issuance, amendment or repeal of a rule of general application. The petition . . . shall set forth the text of any proposed rule or amendment or shall specify the rule the repeal of which is sought. The petition shall further state the nature of the petitioner’s interest and may state arguments in support of the issuance, amendment or repeal of the rule.”

<sup>2</sup> Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 Fed. Reg. 69,178 (Nov. 18, 2013) (“**OCR Rule**” or the “**Rule**”).

derivatives exchanges and price reporting agencies. The businesses of all CMC members depend upon the efficient and competitive functioning of the risk management products traded on DCMs, SEFs, and over-the-counter (“OTC”) markets.

## **I. Summary of the Petition**

The principal purpose of the Petition is to codify the latest CFTC Staff OCR no-action Relief (“**No-Action Relief**”).<sup>3</sup> In addition, and consistent with the Commission’s KISS initiative, the Petition identifies areas where the Commission can streamline and right-size the OCR data that reporting entities are required to submit.<sup>4</sup> We believe that our proposed amendments to the OCR Rule will provide the Commission with the OCR data that it needs to perform its important market surveillance function.

The Petition also requests that the Commission sunset the Part 20 swaps large trader reporting rule. The Commission designed Part 20 as a temporary initiative for collecting swap position data before the establishment of swap data repositories (“SDRs”). Now that SDRs have been operating for several years, the Commission should withdraw Part 20 to reduce the data reporting burden on reporting entities.

The Petition includes two attachments: (1) recommended revisions to the current OCR Forms (“**Appendix A: Forms**”); and (2) recommended revisions to the text of relevant CFTC rules (“**Appendix B: Rule text**”).

## **II. Modifications to the OCR Forms**

### **A. Form 102A: Codify No-Action Relief and Streamline Reporting**

A futures commission merchant (“FCM”), clearing member, or foreign broker must file a Form 102A if the positions in a trading account, or group of trading accounts under common control, exceed a specified reportable level. Trading accounts that exceed a reportable level are collectively referred to as a “special account.”<sup>5</sup> We recommend that the Commission modify the process for reporting and the content of Form 102A as set forth below.

1. *Eliminate the requirement for clearing members to report natural person controllers.*

Pursuant to the No-Action Relief, clearing members are no longer required to report natural person controllers on the Form 102A.<sup>6</sup> The Commission should codify the No-Action Relief and

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<sup>3</sup> See CFTC Letter No. 17-45 (Sept. 25, 2017).

<sup>4</sup> See FIA Letter to Christopher Kirkpatrick, RIN 3038-AE55 (Sept. 28, 2017).

<sup>5</sup> See Rules 15.00(r) and 17.00(a).

<sup>6</sup> See No-Action Relief, Section II.A.1.b.

eliminate question 10(iii) from the current Form 102A.<sup>7</sup> Furthermore, the Commission should make conforming amendments in Rule 15.00 to remove the definition of a natural person controller.<sup>8</sup>

As the Commission is aware, any requirement that a clearing member report natural person controllers imposes substantial burdens with which clearing members may not be able to comply. In particular, the natural person controller field requires clearing members to report information about their customers that is not in the possession of the clearing member. Furthermore, even if a customer provides the necessary data to the clearing member, we expect that the list of natural person controllers for certain customers will be extensive and change frequently. Rather than require clearing members to report this information, if the Commission needs additional information about the trading activity of a customer, it has the ability to obtain that information directly from the customer (*e.g.*, through a special call).

2. *Provide sufficient time for reporting entities to submit a completed Form 102A.*

The Commission should enable reporting entities to submit initial contact information on the Form 102A by 9 AM on the first business day after the account becomes reportable. Thereafter, reporting entities should have three business days after the account becomes reportable to submit a completed Form 102A, including to correct data previously reported. This change to the timeframe to report is addressed in the No-Action Relief.<sup>9</sup>

To implement this modification, we recommend that the Commission amend Rule 17.02(b)(2) to require that reporting entities must submit the special account controller or omnibus account originator by 9 AM the business day after the account becomes reportable.<sup>10</sup> Thereafter, reporting entities should have until 9 AM three business days after the account becomes reportable to submit a completed Form 102A, which may correct data previously reported.

3. *Eliminate the requirement to file an annual refresh.*

Consistent with the No-Action Relief, the Commission should eliminate the requirement in Rule 17.02(b)(4) for reporting entities to submit an annual refresh of Form 102A.<sup>11</sup> The annual refresh requirement is redundant to the requirement that reporting entities must submit change updates. In addition to this redundancy, the annual refresh process imposes substantial burdens on reporting entities to contact customers to refresh existing information. The refresh process also imposes substantial burdens on customers that utilize more than one FCM because the

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<sup>7</sup> See Appendix A, pages 10-11.

<sup>8</sup> Because Rule 15.00 is a list of definitions, the Commission should also consider removing the numbering system for the various terms in order to list the definitions alphabetically. *Cf. Definitions*, 83 Fed. Reg. 7979 (Feb. 23, 2018) (interim final rule).

<sup>9</sup> See No-Action Relief, Section II.A.1.a.

<sup>10</sup> See Appendix B, pages 4-5.

<sup>11</sup> See No-Action Relief, Section II.A.4. See also Appendix B, page 5.

customer would need to refresh its information with each FCM at different times throughout the year.

4. *Clarify that the timeframe for a reporting entity to file a change update starts when the reporting entity is made aware of the change.*

The Commission should amend Rule 17.02(b)(3) to clarify that a reporting entity must file a change update by 9 AM on the business day after the date when the reporting entity is made aware of the change.<sup>12</sup> As FIA has previously commented, a reporting entity can only report a change update to a Form 102A (*e.g.*, a new telephone number) if the reporting entity's customer notifies the reporting entity of the change. Despite this practical limitation, Rule 17.02(b)(3) obligates a reporting entity to file a change update by 9 AM on the business day after the change *occurred*, regardless of whether the reporting entity has been made aware of the change. The current framework puts reporting entities in the untenable position of potentially being accountable for a reporting omission when the reporting entity is not aware of the need to file an update.

5. *Eliminate the condition that a reporting entity notify the Commission that a special account has not been reportable for the prior six months in order to cease submitting change updates.*

We recommend that the Commission remove the condition in Rule 17.02(b)(3) that a reporting entity notify the Commission that a special account has not been reportable for the prior six months in order to cease submitting change updates for the Form 102A.<sup>13</sup> At present, if a special account has not been reportable for six months, a reporting entity is no longer required to file a change update for the Form 102A. However, in order to cease filing change updates, Rule 17.02(b)(3) obligates the reporting entity to notify the Commission via email. This manual notice filing imposes an unnecessary burden on reporting entities because the Commission does not need the notice filing to determine whether a special account has been reportable during the prior six months. Furthermore, the email notice filing framework does not enable reporting entities to automate the process to stop filing change updates.

6. *Clarify that the trading account owner is the holder of the account in the clearing member's books and records.*

The Commission should clarify the definition of a trading account owner in new Rule 15.00(bb), so that a clearing member must report on the Form 102A the holder of the account as identified in the clearing member's books and records.<sup>14</sup> The identity of the account holder should provide

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<sup>12</sup> See Appendix B, page 5.

<sup>13</sup> See Appendix B, page 5.

<sup>14</sup> See Appendix B, page 3.

the Commission with sufficient contact details to enable it to issue a Form 40 for additional information about the reportable trader.

7. *Clarify that the contact person on the Form 102A can be an individual in a legal or compliance role.*

During the implementation process of the Form 102A, certain FIA members received feedback from Staff that the individual contact for a special account on Form 102A should be a person that controls the trading decisions, not an individual in a legal or compliance role. We request that the Commission clarify that the individual contact for a special account on Form 102A can be a person in a legal or compliance role. Because the Form 102A contact person is often the individual who receives a Form 40 special call from the Commission, the Commission should allow a person in a legal or compliance role to be listed to ensure that an entity responds in a timely and appropriate manner to a special call.

8. *Remove question 6 requesting a “special account” owner.*

The Commission should not require reporting entities to report the special account owner on Form 102A because a special account is a group of trading accounts to which there is no “owner.” Therefore, we recommend that the Commission remove question 6 from Form 102A.<sup>15</sup>

As the Commission is aware, a “special account” is a collection of one or more trading accounts subject to common control. Reporting entities already identify the special account controller(s) associated with a special account in response to current question 7. Furthermore, in certain circumstances, it may be difficult to determine a single special account owner. For example, if there are different trading account owners within a special account (*e.g.*, two subsidiaries, each with a trading account subject to common control), it is unclear which entity should be identified as the special account owner.

9. *Remove the instruction on Form 102A to report based solely on ownership of a reportable position.*

Although current Form 102A includes a box to check if a reporting entity submits a Form 102A based solely on ownership of a reportable position, footnote five states that reporting entities are not required to submit Form 102A based solely upon ownership of a reportable position. Rather than impose a requirement in the body of Form 102A and then remove the requirement in a footnote, the Commission should simply remove the requirement to report Form 102A based solely upon ownership of a reportable position.<sup>16</sup>

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<sup>15</sup> See Appendix A, page 5.

<sup>16</sup> See Appendix A, page 4.

10. *Modify the technical specifications for Form 102A to enable reporting entities to list more than one special account controller.*

Although the definition of “control” in Rule 15.00(t) and the text of Form 102A provide for a reporting entity to identify more than one special account controller, the technical specifications to submit the data enable a reporting entity to submit only one special account controller.<sup>17</sup> The Commission should conform the technical specifications to the rule text and Form 102A, and enable a reporting entity to identify more than one special account controller.

#### **B. Form 102B: Codify No-Action Relief and Streamline Reporting**

Clearing members that clear a trading account that exceeds an intra-day volume threshold must submit a Form 102B identifying the trading account. A trading account that exceeds the intra-day volume threshold is referred to as a “volume threshold account.” We recommend that the Commission modify the process for reporting and the content of Form 102B as set forth below. For the convenience of Staff, items 1 through 7 below related to Form 102B address the same issues as items 1 through 7 above related to Form 102A.

1. *Eliminate the requirement for clearing members to report volume threshold account controllers.*

Consistent with the No-Action Relief, the Commission should remove question 6 on Form 102B regarding natural person controllers (referred to as “volume threshold account controllers”).<sup>18</sup> Furthermore, the Commission should make conforming amendments to Rule 15.00 and Forms 40 and 40S to remove references to volume threshold account controllers.

2. *Provide sufficient time for reporting entities to submit a completed Form 102B.*

Consistent with the No-Action Relief, the Commission should provide for reporting entities to submit initial contact information on the Form 102B by 9 AM on the first business day after the account becomes reportable.<sup>19</sup> Thereafter, reporting entities should have three business days after the account becomes reportable to submit a completed Form 102B, including to correct data previously reported.

To implement this modification, we recommend that the Commission amend Rule 17.02(c)(2) to require that reporting entities submit the volume threshold account owner or omnibus account

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<sup>17</sup> Current question 7 refers to “Special Account Controller(s) Contact Information” (emphasis added).

<sup>18</sup> See No-Action Relief, Section II.A.2.c; and Appendix A, page 14. Our rationale to remove natural person controllers from the Form 102B is the same rationale provided above to remove natural person controllers from the Form 102A.

<sup>19</sup> See No-Action Relief II.A.2.E.

originator by 9 AM on the business day after the account becomes reportable.<sup>20</sup> Thereafter, reporting entities should have until 9 AM three business days after the account becomes reportable to submit a completed Form 102B, which may correct data previously reported.

3. *Eliminate the requirement to file an annual refresh.*

Consistent with the No-Action Relief, the Commission should eliminate the requirement in Rule 17.02(c)(4) for reporting entities to submit an annual refresh to Form 102B.<sup>21</sup> The annual refresh requirement is redundant to the requirement for reporting entities to submit change updates. In addition to the redundancy, the annual refresh process imposes substantial burdens on reporting entities to contact customers to refresh existing information. The refresh process also imposes substantial burdens on customers that utilize more than one clearing member because the customer would need to refresh its information with each clearing member.

4. *Clarify that the timeframe for a clearing member to file a change update starts when the clearing member is made aware of the change.*

The Commission should amend Rule 17.02(c)(3) to clarify that a clearing member must file a change update by 9 AM on the business day after the date when the clearing member is made aware of the change.<sup>22</sup> As noted above concerning Form 102A, a clearing member can only report a change update if a customer informs the clearing member of a change. Accordingly, the regulatory requirement for a clearing member to file a change update should occur only after the clearing member is aware of (or should have been aware of) the change.

5. *Eliminate the condition that a clearing member notify the Commission that a volume threshold account has not been reportable for the prior six months in order to cease submitting change updates.*

Consistent with its recommendation concerning Rule 17.02(b)(3), we recommend that the Commission similarly remove the condition in Rule 17.02(c)(3) that a clearing member notify the Commission that a volume threshold account has not been reportable for the prior six months in order to cease submitting change updates for the Form 102B.<sup>23</sup> At present, if a volume threshold account has not been reportable for six months, a clearing member is no longer required to file a change update for the Form 102B. However, in order to cease filing change updates, Rule 17.02(c)(3) obligates the clearing member to notify the Commission. This manual notice filing imposes an unnecessary burden on clearing members because the Commission does not need the notice filing to determine whether a volume threshold account has been reportable

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<sup>20</sup> See Appendix B, pages 5-6.

<sup>21</sup> See No-Action Relief, Section II.A.4; and Appendix B, page 6.

<sup>22</sup> See Appendix B, page 6.

<sup>23</sup> See Appendix B, page 6.

during the prior six months. Furthermore, the email notice filing framework does not enable reporting entities to automate the process to stop filing change updates.

6. *Clarify that the volume threshold account owner is the holder of the account in the clearing member's books and records.*

The Commission should clarify the definition of a volume threshold account owner in new Rule 15.00(cc), so that a clearing member must report on Form 102B the holder of the account as identified in the clearing member's books and records.<sup>24</sup> The identity of the account holder should provide the Commission with sufficient contact details to enable it to issue a Form 40 for additional information about the reportable trader.

7. *Clarify that the contact person on the Form 102B can be an individual in a legal or compliance role.*

Consistent with our comment concerning Form 102A, the Commission should clarify that the individual contact for a volume threshold account on Form 102B can be a person in a legal or compliance role. Because the Form 102B contact person is often the individual who receives a Form 40 special call from the Commission, the Commission should allow a person in a legal or compliance role to be listed to ensure that an entity responds in a timely and appropriate manner to a special call.

8. *Increase the reportable threshold for Form 102B to 250 contracts.*

Consistent with the No-Action Relief, the Commission should amend Rule 15.04 to increase the reportable level that triggers a Form 102B from 50 contracts to 250 contracts.<sup>25</sup> As FIA has commented in the past, the 50-contract threshold imposes a substantial burden on reporting entities to submit Form 102B, but provides only a limited surveillance benefit to the Commission as compared to the 250-contract threshold established pursuant to the No-Action Relief. Based upon discussions with CME, we understand that a 250-contract threshold should result in approximately 98.41% of contracts traded being reportable. By comparison, the 50-contract threshold would result in 99.56% of contracts traded being reportable, which represents only a incremental 1.15% difference.<sup>26</sup>

9. *Remove volume executed on a swap execution facility from the Form 102B.*

Consistent with the No-Action Relief, the Commission should amend Rule 15.04 to remove contracts traded on a SEF from the intra-day contract threshold that triggers a Form 102B.<sup>27</sup> As the Commission is aware, there are practical limitations that prevent clearing

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<sup>24</sup> See Appendix B, page 3.

<sup>25</sup> See No-Action Relief, Section II.A.2.a; and Appendix B, page 3.

<sup>26</sup> These percentages are based upon volume traded during the first quarter of 2018.

<sup>27</sup> See No-Action Relief, Section II.A.2.b; and Appendix B, page 3.



members from tracking an intra-day contract threshold on a SEF. For example, SEFs have not published product identifiers for their various products, so clearing members cannot aggregate contracts subject to the 50-contract threshold.

**C. Forms 40 and 40S: Develop Separate Form 40 and Form 40S, and Clarify Data Responsive to the Questions**

We continue to support the transition from a hardcopy Form 40 and Form 40S to an electronic form. However, several questions in the 2013 version of the combined Form 40/40S create significant confusion for respondents. Therefore, we recommend modifications to streamline the form to ensure the Commission receives consistent and accurate data from all respondents. In addition to recommending the changes described below, we encourage the Commission to consider comments in the rulemaking process for suggestions about other ways to modify the Form 40 to make it more user-friendly.

- 1. Develop a Form 40 with questions about futures trading, and a separate Form 40S with questions about physical commodity swaps trading.*

The Commission should develop a Form 40 that requests information about a reportable trader's futures trading (including options thereon) and a separate Form 40S that requests information about a reportable trader's physical commodity swaps trading. The current Form 40/40S asks questions about a reportable trader's "derivatives" trading, which includes futures and swaps. Due to the difference in market structure and terminology between futures and swaps, a single question about "derivatives" likely will be difficult to apply within the context of both futures and swaps. Our proposed modifications to the current Form 40/40S remove references to Form 40S and limit Form 40 questions to futures-related activity.<sup>28</sup> These modifications would align the current Form 40 with the historical Form 40 that the Commission utilized successfully for many years.

As set forth in Section V of the Petition, the Commission should sunset the Part 20 swaps large trader reporting rule. In order to enable the Commission to issue Form 40S to collect data about a market participant's physical commodity swaps trading, we suggest amending Rule 18.04 to provide the Commission with the authority to issue a special call for the Form 40S.<sup>29</sup> The threshold to issue a special call for a Form 40S is consistent with the process in Part 20. That is, the Commission can issue the special call if a market participant holds futures-equivalent paired swap positions that meet or exceed the reportable level for futures specified in Rule 15.03.

We also request that the Commission clarify that the questions on the Form 40S relate to physical commodity swaps activity. The use of the term "derivatives" in the combined Form 40/40S significantly expanded the scope of questions about swaps activity compared to the prior version of the Form 40S. The prior Form 40S requested information about physical commodity

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<sup>28</sup> For example, Appendix A removes the Form 40/40S questions regarding commodity index trading.

<sup>29</sup> See Appendix B, page 7.

swaps activity covered under Part 20, whereas the combined Form 40/40S requests information about all swaps activity. Because the preamble to the OCR Rule did not acknowledge the change in scope, and the OCR Rule did not modify the rule text to Part 20, we believe that the expansion of the questions about swaps activity on the combined Form 40/40S was unintentional.

2. *Require reporting traders to update the Form 40 or Form 40S in response to a special call and remove the instruction to update data if and when the information changes.*

Consistent with the No-Action Relief, the Commission should obligate a reporting trader to update the Form 40 or the Form 40S upon a request from the Commission.<sup>30</sup> This approach to updating the data on each form is consistent with the Commission's historical approach to obtaining updated forms. In order to remove ambiguity about the scope of a reporting trader's obligation to update, the Commission should remove the instruction in the Forms 40 and 40S to update the forms if and when the information changes.<sup>31</sup>

3. *Enable reporting traders to submit information for a single contact for all parents and subsidiaries identified on the Form 40 or Form 40S.*

Consistent with the No-Action Relief, a reportable trader should be able to submit on Form 40 or Form 40S the same contact information for all parents, subsidiaries, persons with a 10% or greater ownership interest in the reporting trader, and persons in which the reporting trader holds a 10% or greater ownership interest ("**Identified Persons**").<sup>32</sup> If a reporting trader submits information for a single contact for Identified Persons, the reporting trader should be obligated to provide contact information for each Identified Person upon request from the Commission.<sup>33</sup>

4. *Limit the parents and persons that must be identified in response to question 8 to the ultimate parent as well as parents and persons that the reporting trader is aware, or should be aware, trades futures (Form 40) or physical commodity swaps (Form 40S).*

At present, question 8 requires a reporting trader to list all parents and 10 percent or greater owners regardless of whether the parent or the owner trades derivatives. We agree that a reporting trader should identify its ultimate parent regardless of whether the ultimate parent trades derivatives. However, for other parents or 10 percent or greater owners that are not the ultimate parent, the reporting trader should identify only persons that engage in futures trading when responding to a Form 40 or physical commodity swaps trading when responding to a Form

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<sup>30</sup> See No-Action Relief, Section II.B.4.

<sup>31</sup> See Appendix A, page 28.

<sup>32</sup> See No-Action Relief, Section II.B.1.

<sup>33</sup> See Appendix A, pages 33-35.

40S.<sup>34</sup> Furthermore, consistent with our proposed modifications to question 9 discussed below, a reporting trader should only list such non-ultimate parents or 10 percent or greater owners that the reporting trader is aware, or should be aware, engage in futures trading (Form 40) or physical commodity swaps trading (Form 40S).<sup>35</sup>

The proposed modification would streamline question 8 to require information that the Commission needs to conduct surveillance about the trading of futures or swaps. The modification also makes question 8 consistent with question 9, which is already limited to subsidiaries and owned entities that trade derivatives.

5. *Confirm that in responding to question 9, a reporting trader should not include an owned entity about which it is not aware (and should not be aware) of the owned entity's derivatives trading activity.*

Pursuant to CFTC Rule 150.4, a market participant must aggregate positions subject to limits (a) which the participant controls, and (b) in which the participant holds a 10 percent or greater ownership interest. Rule 150.4(b)(2) establishes an exemption from aggregation if an owner holds a 10 percent or greater ownership interest in an entity (“**Owned Entity**”), provided that the owner and the owned entity meet certain conditions for independence (“**Owned Entity Exemption**”). Furthermore, to the extent the owner is not aware, and should not be aware, of the owned entity's trading activity, then only the owner must meet the independence conditions (“**Streamlined Owned Entity Exemption**”).<sup>36</sup> If an owner is relying upon the Streamlined Owned Entity Exemption to disaggregate one or more Owned Entities, we request that the owner not be required to list those Owned Entities in response to question 9 on the Form 40 or Form 40S because the owner is not aware (and should not be aware) of the trading activity of the Owned Entity.<sup>37</sup>

6. *Modify question 10 to request information about “unaffiliated third parties” that control trading as opposed to persons “outside” the reporting trader that control trading.*

Question 10 of the current Form 40/40S requests information about persons “outside” of the reporting trader that “control some or all of the derivatives trading of the reporting trader.” The Commission did not define or otherwise provide guidance about when a person is considered to be “outside” of the reporting trader. We believe the question is referring to unaffiliated third

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<sup>34</sup> See Appendix A, page 33.

<sup>35</sup> *Infra* Petition Section II.C.5. See also Appendix A, page 33.

<sup>36</sup> CFTC Letter No. 17-37 (Aug. 10, 2017) further addresses the circumstances under which a market participant is eligible for the Streamlined Owned Entity Exemption.

<sup>37</sup> See Appendix A, page 34. As noted above, the Commission should make conforming edits to question 8. See Appendix A, page 33.

parties that control trading, so we recommend that the question refer to “unaffiliated third parties” rather than persons “outside” of the reporting trader.<sup>38</sup>

7. *Remove question 12 regarding persons that “influence” trading.*

Consistent with the No-Action Relief, the Commission should delete question 12 regarding persons who “influence” trading.<sup>39</sup> The Form 40 does not define the term “influence” other than to note that influence does not include a person who exercises “control” of trading. The term “influence” is vague and has created confusion about the scope of persons who are considered to influence trading and therefore should be listed in Form 40.

8. *Enable reporting traders to choose “other” when identifying a business sector(s).*

The Form 40 requires that a reportable trader review Supplemental List I to identify all “business sectors and subsectors that pertain to the business activities or occupation of the reportable trader.” We recommend that the Commission include an “other” category in Supplemental List I that enables a reportable trader to specify its business to the extent that there is no applicable business identified in Supplemental List I.<sup>40</sup>

9. *Provide a mechanism for reportable traders to upload data into Forms 40 and 40S.*

At present, respondents to the current Form 40/40S must log into a Commission portal and input responses to the various questions on the Form. We appreciate the efforts of Commission Staff to address our concerns about this process by, for example, increasing the timeframe before an online session times out and an individual must restart the process of completing the Form 40/40S. To further streamline the process, the Commission should provide a mechanism for respondents to upload data into the online portal. For example, the Commission should enable respondents to upload data from an excel spreadsheet into the Form 40 and Form 40S. This enhancement to the reporting process would significantly reduce the timeframe to input data into the Form 40 and Form 40S, particularly for individuals who need to complete more than one Form 40 or Form 40S for a corporate group.

### **III. Eliminate Form 71**

Although the Staff did not address Form 71 in the No-Action Relief, we understand that the Commission has yet to issue a Form 71 to an omnibus account originator. We believe that the Commission should remove Form 71 because it is unclear why or how the form is necessary for the Commission’s surveillance efforts.<sup>41</sup> In addition, because it requires the disclosure of

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<sup>38</sup> See Appendix A, page 35.

<sup>39</sup> See No-Action Relief, Section II.B.2; and Appendix A, pages 36-37.

<sup>40</sup> See Appendix A, page 42.

<sup>41</sup> See Appendix A, page 20; and Appendix B, page 4.

personally identifiable information, the form is likely to trigger privacy law concerns in foreign jurisdictions.

#### **IV. Proposed Modifications to the Recordkeeping Requirements in Rule 18.05**

The Commission's recordkeeping rule in Rule 18.05 incorporates various terms referenced in the CFTC's OCR Rule. To implement our recommended changes to the OCR Rule, the Commission should make certain conforming amendments to Rule 18.05. We also recommend additional amendments to Rule 18.05 to update the recordkeeping rule to account for significant changes to the Commission's regulations since the Commission adopted the swap recordkeeping provisions in Rule 18.05. Our recommended modifications are detailed below.

##### **A. Remove References in Rule 18.05 to Volume Threshold Account Controllers, Reportable Sub-Account Controllers, and Reportable Sub-Accounts**

Our recommended modifications to the Form 102B and recommendation to remove Form 71 mean that the references to the recordkeeping requirements for volume threshold account controllers, reportable sub-account controllers, and reportable sub-accounts are no longer necessary. Therefore, we recommend removing these terms from Rule 18.05.<sup>42</sup>

##### **B. Eliminate Outdated Swap Recordkeeping Requirements and Clarify the Scope of Required Records**

In 2007, the Commission adopted swap recordkeeping requirements in Rule 18.05.<sup>43</sup> As a result of Dodd-Frank Act amendments to the CEA and the Commission's new rules implementing those amendments, Rule 18.05 currently refers to rules (*e.g.*, Part 35) and terms (*e.g.*, exempt commercial markets and exempt boards of trade) that no longer are in effect. Furthermore, the swap recordkeeping requirements in Rule 18.05 are redundant and unnecessary now that the Commission has adopted new swap recordkeeping requirements in Rules 45.2 and 23.201-23.203.<sup>44</sup> Therefore, the Commission should remove the outdated swap recordkeeping requirements in Rule 18.05.

The Commission should also redraft Rule 18.05 to clarify the scope of records that market participants must retain. Our suggested revisions are intended to state the recordkeeping requirements more concisely, and to provide rule text that more closely reflects the intended scope of records as articulated in the preamble of a prior Rule 18.05 rulemaking.<sup>45</sup> For example, we propose removing references in Rule 18.05 that a market participant retain "all details concerning positions and transactions" in the relevant commodity or swap as specified in the rule. The modified language would require a market participant to retain "books and records that

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<sup>42</sup> See Appendix B, page 9.

<sup>43</sup> See *Maintenance of Books, Records and Reports by Traders*, 72 Fed. Reg. 60767 (Oct. 26, 2007).

<sup>44</sup> See Appendix B, page 9.

<sup>45</sup> See 72 Fed. Reg. at 60770 ("Records required to be retained under Regulation 18.05 consist of accurate records of positions and actual transaction documentation created in the ordinary course of business.").

are maintained in the course of their regularly conducted business activity” concerning the relevant positions and transactions.

**C. Require Non-Natural Persons with a Reportable Futures Position or that Have a Volume Threshold Account to Obtain an LEI**

The Commission should require that non-natural persons with a reportable futures position or volume threshold account obtain a legal entity identifier (“**LEI**”) if they do not already have one.<sup>46</sup> The LEI database provides significant efficiencies for reporting entities to submit a Form 102 because information in the database can be incorporated by reference on the Form 102.<sup>47</sup>

**V. Codify No-Action Relief that Addresses Conflicts with Foreign Privacy Laws**

We appreciate the Staff’s effort to issue no-action relief that addresses when the Commission’s reporting rules (including OCR) conflict with the privacy laws of a foreign jurisdiction.<sup>48</sup> We urge the Commission to codify existing no-action relief to provide legal certainty around the reporting process when a reporting entity has a reasonable belief that a conflict with foreign law may exist.

**VI. Sunset Part 20 Swaps Large Trader Reporting**

We request that the Commission implement the sunset provision in the swaps large trader reporting rule in Part 20 (“**Swaps LTR**”). The Commission designed Swaps LTR as a temporary data collection measure until SDRs became operational. In the interim, swap dealers, clearing members, and the Commission have expended considerable resources implementing the technologically challenging requirements of Swaps LTR. Moreover, because of the many interpretative issues raised by Swaps LTR, DMO Staff issued and revised, on multiple occasions, a 90-page Swaps LTR Guidebook.

In recognition of the temporary nature of Swaps LTR, Rule 20.9 provides that the Commission may render all or part of Swaps LTR “ineffective and unenforceable” if it finds that “operating [SDRs] are processing positional data and that such processing will enable the Commission to effectively surveil trading in paired swaps and swaptions and paired swap and swaption markets.” SDRs have been processing swap data for more than five years. Furthermore, Rule 49.12(e) requires that an SDR “establish policies and procedures to calculate positions for position limits and any other purpose as required by the Commission.” Accordingly, there is no

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<sup>46</sup> See Appendix B, page 10.

<sup>47</sup> Our edits to the OCR Forms include modifications to various footnotes that describe how to report an LEI in lieu of other data fields. See Appendix A, pages 2 (fn. 4), 6 (fn. 16), 7 (fn. 20), 9 (fn. 25), 10 (fn. 30), 12 (fn. 39), and 14 (fn. 44). These modifications are designed to remove references to outdated terms (*e.g.*, CFTC Interim Compliant Identifier or CICI). In addition, the modifications clarify that OCR reporting entities do not submit the data underlying an LEI to an LEI provider, and OCR reporting entities are not responsible to ensure that the data reported to an LEI provider are kept up-to-date. See Rule 45.6.

<sup>48</sup> See CFTC Letter No. 17-16 (Mar. 10, 2017).

longer a need for the temporary Swaps LTR requirement. Rather than continuing to require reporting entities and the Commission to invest scarce resources in Swaps LTR, we request that the Commission rely instead on SDR data to monitor positions.<sup>49</sup>

We understand that Form 102S and Form 40S are part of Swaps LTR, so a sunset of Swaps LTR would result in an elimination of the authority to obtain some of the information currently provided in these two forms. In order to ensure that the Commission continues to receive information important to its surveillance function, we recommend, as noted above, that the Commission issue Form 40S under new authority in Rule 18.04, and use another existing data collection to obtain information currently provided in Form 102S.

**A. Utilize Legal Entity Identifier Data Reported to an SDR in Lieu of Form 102S**

Pursuant to the No-Action Relief, when a swap dealer or clearing member submits a Form 102S for an entity with a reportable swaps position, the swap dealer or clearing member identifies the “counterparty” on the Form 102S.<sup>50</sup> However, the Commission already has access to the identify of a swap counterparty through the reporting of LEIs to SDRs. Furthermore, the Commission can obtain the contact information for a swap counterparty via the Global Legal Entity Identifier Foundation (“GLEIF”). We recommend that the Commission eliminate the redundant counterparty information collected through the Form 102S, and instead rely upon the GLEIF to identify counterparties to swap transactions.

**B. Incorporate the Commission’s Authority to Issue Form 40S in Rule 18.04**

As noted above, to enable the Commission to issue a special call for Form 40S after the sunset of Swaps LTR, we recommend that the Commission amend Rule 18.04 to include the authority to issue a Form 40S.<sup>51</sup> To ensure that the same scope of market participants file a Form 40S compared to the process under Swaps LTR, we recommend that Rule 18.04 also incorporate the swaps that are economically equivalent to the swaps covered by Swaps LTR. Following this framework, if a market participant holds swap positions that are economically equivalent to a reportable position in the covered futures contracts, the Commission could issue a special call for a Form 40S.

As noted above, the Commission should develop a Form 40S that is independent of the Form 40. The new Form 40S should incorporate questions relevant to the swaps market and not simply borrow terms from the futures markets. We are willing to assist the Commission in the development of a separate Form 40S.

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<sup>49</sup> As FIA commented in its Project KISS letter, the Commission should dedicate resources to improving the SDR reporting rules rather than continuing to invest resources in Swaps LTR. *See* FIA Letter to Christopher Kirkpatrick, Section II.C, page 10 (Sept. 28, 2017).

<sup>50</sup> *See* No-Action Relief, Section II.A.3.

<sup>51</sup> *See* Appendix B, page 7.

**C. Incorporate the Swaps LTR Recordkeeping Requirements for Transactions in the Cash Commodity and Commercial Activity Hedged by Physical Commodity Swaps into Rule 18.05**

Swaps LTR obligates market participants with a reportable swaps position to retain records of the cash commodity (including products and byproducts) underlying reportable swap positions and all commercial activity hedged by reportable physical commodity swaps.<sup>52</sup> We recommend that the Commission move these recordkeeping requirements to Rule 18.05(b). However, as noted in Section IV.B above, we propose to remove the requirement in Rule 18.05 to retain records of physical commodity swaps because the CFTC already imposes swap recordkeeping requirements in Rule 45.2 (applicable to all market participants) and Rules 23.201 to 23.203 (applicable to swap dealers).

Our recommended rule text modifies the threshold that triggers the requirement to retain records of the cash commodity and commercial activity hedged by physical commodity swaps.<sup>53</sup> In particular, we recommend that the recordkeeping requirement apply if a person holds futures-equivalent paired swaps positions that meet or exceed the reportable thresholds for futures listed in Rule 15.03 as opposed to the 50-contract threshold in Rule 20.6(c).

**VII. Implementation Period**

As the Commission is aware, modifications to reporting rules require extensive lead time for the development and testing of reporting processes. This lead time enables the Staff to develop technical specifications, and provides the industry with time to develop and test reports to the Commission. We recommend, therefore, that any rule that results from this Petition incorporate a transition period of 12 months after the effective date of a final rule to enable the necessary time for testing and development in order to comply with the rule.

**VIII. Conclusion**

For the foregoing reasons, we respectfully request that the Commission publish for notice and comment our requested amendments to the OCR Rule, and thereafter adopt them as appropriate. Please contact FIA or CMC if the Commission or Staff have any questions about our Petition.

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<sup>52</sup> See Rule 20.6(c).

<sup>53</sup> See Appendix B, page 9.



Mr. Christopher Kirkpatrick  
June 14, 2018  
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Respectfully submitted,



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/s/ Kevin K. Batteh

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General Counsel  
Commodity Markets Council

Attachments

cc: Honorable J. Christopher Giancarlo, Chairman  
Honorable Brian D. Quintenz, Commissioner  
Honorable Rostin Behnam, Commissioner  
Amir Zaidi, Director