2001 Pennsylvania Avenue NW
Suite 600 I Washington, DC 20006

T 202 466 5460
F 202 296 3184

By Electronic Mail

August 22, 2016

Ms. Monica Jackson
Office of the Executive Secretary
U.S. Bureau of Consumer Financial Protection
1700 G Street, NW
Washington DC 20552

Re: Consumer Financial Protection Bureau Proposed Rule on Arbitration Agreements, Docket No. CFPB-2016-0020; RIN 3170-AA51[1]

Dear Ms. Jackson:

The Futures Industry Association ("**FIA**")[2] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("**CFPB**") proposed rule on pre-dispute arbitration agreements (the "**Proposed Rule**"). The Proposed Rule would prohibit covered providers from including class action waiver provisions in consumer contracts and require covered providers to submit certain arbitral records to the CFPB. FIA shares the significant concerns raised by the Securities Industry and Financial Markets Association ("**SIFMA**") in its comment letter,[3] that the Proposed Rule exceeds the authority of the CFPB and risks imposing unnecessary and highly burdensome regulations on financial entities that are already registered with, and regulated by, one or more of the federal authorities identified in Section 1027 of the Dodd-Frank Act, including with respect to the pre-dispute arbitration agreements ("**PDAAs**") that are specifically at issue in the Proposed Rule.

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1 Arbitration Agreements, 81 Fed. Reg. 32830 (May 24, 2016) (proposed rule).

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 Letter from SIFMA to CFPB (July 1, 2016), *available at* http://www.sifma.org/issues/item.aspx?id=8589961211 [hereinafter *SIFMA Comment Letter*].

Of particular interest to our members, the Commodity Futures Trading Commission ("**CFTC**") has plenary jurisdiction over U.S. futures and swaps markets and market participants, including the futures commission merchants ("**FCMs**") that provide execution and clearing services in these CFTC-regulated markets and that comprise the core of FIA's membership.[4] The Dodd-Frank Act recognizes the CFTC's plenary authority in expressly prohibiting the CFPB from enforcing its powers under the Dodd-Frank Act against CFTC-regulated entities. To the extent the CFPB seeks to apply the Proposed Rule to the PDAAs of CFTC-regulated entities, such as FCMs, the CFTC's plenary jurisdiction and the Dodd-Frank Act's plain language bar this result.

If, as the CFPB indicates in the Federal Register accompanying the Proposed Rules, the CFPB believes the CFTC's regulations governing PDAAs are insufficient in certain respects,[5] the Dodd-Frank Act directs the CFPB to "consult and coordinate with" the CFTC.[6] It has no authority to adopt a separate, overlapping rule on the basis that "complying with both rules would not be unduly burdensome for any affected providers."[7]

Moreover, even if the CFPB had authority to apply the Proposed Rule to CFTC jurisdictional activities (which it does not), the CFTC already has rules governing PDAAs with which FCMs must and do comply. We see no reason for the CFPB to second-guess rules that the CFTC has deemed appropriate to safeguard customers in its jurisdictional markets, particularly when the Proposed Rule could impose heavy costs on FCMs that may have to modify, amend, and/or re-execute existing customer agreements to comply with dueling CFPB and CFTC regulations.

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[4] 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).

[5] 81 Fed. Reg. at 32881 (CFTC Regulation 166.5 "does not ensure customers have access to private remedies in class actions and does not provide for transparency of arbitral awards"). As discussed below, although not required by CFTC Regulation 166.5, the National Futures Association ("**NFA**") reports all arbitral awards on its Background Affiliation Status Information Center ("**BASIC**"), which permits any market participant or other member of the public to determine, *inter alia*, whether an individual or firm is registered with the CFTC and the results of any arbitration proceedings in which such person was a respondent (or claimant).

[6] 12 U.S.C. § 517(j)(2). We note that this section of the Dodd-Frank Act requires the agencies to "consult and coordinate" with respect to any rule "regarding an investment product or service that is the same type of product as, or that competes directly with, a consumer financial product or service that is subject to the jurisdiction of the [CFPB] under this title or under any other law." Although we believe no product regulated by the CFTC is of the same type or competes with a product subject to the CFPB's jurisdiction, consultation and coordination between the CFTC and the CFPB is nonetheless the appropriate course of action if the CFPB believes the CFTC's regulations should be revised.

[7] 81 Fed. Reg. at 32881.

To be clear, we do not oppose the CFPB's exercise of its authority under the Dodd-Frank Act to regulate wide aspects of consumer contracts, including the PDAAs contained therein, that Congress meant for it to regulate in the wake of the 2008 Financial Crisis. We merely request that the CFPB respect the carefully prescribed jurisdictional boundaries of it and the CFTC and avoid imposing overlapping regulations where they are neither required nor appropriate.

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

Congress has granted the CFTC exclusive federal jurisdiction over futures and swaps trading.[8] Notably, Congress codified a specific legislative finding that transactions involving commodity futures are "affected with a national public interest,"[9] 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" Commodity Exchange Act ("**CEA**"), the CFTC's governing statute.[10] In contrast to federal regulation of securities, the CFTC's authority also preempts state law.[11] Congress' decision to vest plenary 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 federal or state authorities.

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.[12] As noted above and explained in detail below, Congress has not determined to make an exception in the case of the CFPB. To the contrary, Congress has explicitly determined that the CFPB will have no authority with respect to a CFTC-regulated person when engaged in CFTC-regulated activities.[13]

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8 7 U.S.C. § 2(a)(1)(A) ("The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving swaps or contracts of sale of a commodity for future delivery, traded or executed on a contract market designated or derivatives transaction execution facility . . . or any other board of trade, exchange, or market . . . .").

9 7 U.S.C. § 5(a).

10 *Id.* § 12a(5).

11 *Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980) (Friendly, J.); *see also Stuber v. Hill*, 170 F. Supp. 2d 1146, 1150-51 (D. Kan. 2001).

12 7 U.S.C. §§ 2(A)(1)(C), (D) (delineating CFTC and Securities and Exchange Commission (**"SEC"**) jurisdiction and establishing authority of SEC over security futures).

13 The decision of the U.S. Court of Appeals for the District of Columbia in *Brian Hunter v. Federal Energy Regulatory Commission*, 711 F.3d 155 (D.C. Cir. 2013), is particularly relevant here. In that case, the Court held that the CEA's exclusive jurisdiction clause prohibited the Federal Energy Regulatory Commission ("**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. Citing its earlier decision in *Agri Processor Co. v.*

II. The Dodd-Frank Act Bars the CFPB From Regulating Activities Subject to CFTC Jurisdiction.

Consistent with the CFTC's plenary authority to regulate the futures and swaps markets and the activities therein, Section 1027(j) of the Dodd-Frank Act, titled "Limitations on Authorities of the Bureau," states that the "[CFPB] shall have no authority to exercise any power to enforce [Title X – Bureau of Consumer Financial Protection] with respect to a person [or entity] regulated by the Commodity Futures Trading Commission."[14] Because the CFPB is issuing the Proposed Rule pursuant to its authority under the Dodd-Frank Act, it may not, by the Act's clear terms, apply the Proposed Rule to a CFTC-regulated entity.

The legislative history of the Dodd-Frank Act further confirms that Congress did not intend for the CFPB to regulate activities that are subject to CFTC jurisdiction:

> *Clarification for the Record: Consumer Bureau vs. SEC/CFTC Powers, Provided by Rep. Dennis Moore (KS- 03), June 30, 2010, H.R. 4173, Dodd-Frank Conference Report. It was the conference committee's intent to avoid gaps in oversight, but also to avoid creating duplicative or competing rulemaking and supervisory authorities, one vested in the Consumer Bureau and the other in the [Securities and Exchange Commission] or CFTC. As such, the final report provides exclusive authority to the SEC and the CFTC over persons they regulate to the extent those persons act in a "regulated capacity." If such persons are not acting in a regulated capacity, their activities relating to the offering and provision of consumer financial products or services may be subject to the authority of the Bureau instead of the SEC or CFTC. But to the extent they are acting in a "regulated capacity," only their functional regulator the SEC or the CFTC-has rulemaking, supervisory, examination or enforcement authority over the regulated person or such activities. To that end, the conference report specifically states that "the Bureau shall have no authority to exercise any power to enforce this title with respect to any person regulated by the Commission" or the CFTC. It was not the*

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", the Court rejected FERC's assertion that the Energy Policy Act effectively granted FERC shared jurisdiction. 514 F.3d at 4.

[14] 12 U.S.C. § 5517(j). The Dodd-Frank Act defines a "person regulated by the Commodity Futures Trading Commission" as "any person that is registered, or required by statute or regulation to be registered, with the Commodity Futures Trading Commission, but only to the extent that the activities of such person are subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act." 12 U.S.C. § 5481(20). As discussed further in Section III, CFTC registrants' activities with respect to PDAAs are clearly subject to the statutory jurisdiction of the CFTC within the meaning of that definition. The CFTC has implemented and enforces rules governing PDAAs. *See* 17 C.F.R. § 166.5.

> *intent of the conference committee to impose the regulatory authority of the Bureau over the activities of broker-dealers and investment advisers otherwise subject to regulation by the SEC and CFTC.*[15]

Both the text of the Dodd-Frank Act and its legislative history instruct that the Proposed Rule cannot, and should not, be applied to activities of CFTC-regulated entities that fall within the jurisdiction of the CFTC. Therefore, the CFPB may not extend the Proposed Rule's requirements for PDAAs to FCMs' PDAAs with their futures and swaps customers. To reach an opposite conclusion would be to submit FCMs to the "duplicative or competing rulemaking and supervisory authorities" that Congress explicitly sought to avoid.[16]

III. The CFPB Should Defer to CFTC Rules Governing Arbitration Agreements.

A. ***The CFTC Has Rules Governing Arbitration Agreements with Customers.***

The CFTC has issued and enforces rules governing PDAAs that obviate the need of the CFPB to impose additional rules on FCMs. As the Proposed Rule notes, CFTC Regulation 166.5 "requir[es] that [PDAAs] in customer agreements for products and services regulated by the CFTC be voluntary, such that the customer receives a specified disclosure before being asked to sign the [PDAA], is not required to sign the [PDAA] as a condition of receiving the product or service, and is only subject to the [PDAA] if he or she separately signs it, among other requirements."[17] The Proposed Rule, however, goes on to reject these protections as inadequate.[18]

That the CFTC has rules governing PDAAs in FCMs' customer agreements – whether or not deemed adequate by the CFPB – demonstrates that such PDAAs are precisely the kind of activity in a "regulated capacity" over which Congress intended that the CFTC maintain exclusive jurisdiction. But, even assuming the CFPB has authority to regulate such PDAAs (which it does not, for all the reasons noted above), we strongly believe that it should defer to the CFTC's regulatory regime for PDAAs. As the exclusive regulator of futures and swaps markets, the CFTC is uniquely qualified and best positioned to determine the rules necessary and appropriate to protect FCM customers, including with respect to PDAAs in FCM customer agreements.

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[15] Congressional Record – House, Report on Resolution Providing for Consideration of Conference Report on H.R. 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act, H5212, H5216 – 5217 (June 30, 2010), *available at* https://www.congress.gov/crec/2010/06/30/CREC-2010-06-30-pt1-PgH5212-3.pdf.

[16] We incorporate herein the additional jurisdictional arguments noted in SIFMA's comment letter with respect to Congress' carving out securities-related services from the regulatory ambit of the CFPB. Those jurisdictional arguments protecting the SEC's authority apply equally to services rendered in the futures and swaps markets, where Congress similarly empowered a federal regulatory agency, the CFTC, to exclusively and comprehensively regulate such markets.

[17] 81 Fed. Reg. at 32,880.

[18] See note 5, *supra*.

The CFTC enacted such rules in CFTC Regulation 166.5.[19] Among other requirements, these rules provide that: (i) the use of a dispute settlement procedure must be voluntary[20]; (ii) signing the PDAA may not be a condition to using the services provided by the registrant[21]; and (iii) the customer may not waive its right to seek reparations under CEA Section 14.[22] In addition, a CFTC-registrant must advise a customer executing a PDAA, *inter alia*, that, in addition to arbitration and reparations, the customer may pursue a claim through civil litigation. In this regard, we note that CEA Section 22 provides an explicit private right of action for actual damages resulting from commodity transactions that were caused by a person that, in connection therewith, has violated the CEA or has willfully aided, abetted, induced or procured such violation.[23]

The CFPB should not graft additional rules for FCMs on top of the CFTC's regulation, precisely the type of regulatory overlap that Congress specifically declined to provide the CFPB in the Dodd-Frank Act.

The CFTC also oversees NFA's arbitration rules, which provide a forum for futures and swaps customers to resolve disputes with FCMs and other CFTC registrants.[24] The CFTC initially approved the rules governing NFA's arbitration program in connection with its registration as a registered futures association, is required to approve any amendments to these rules that NFA may propose, and inspects NFA's implementations of its arbitration program. Further, as noted earlier, the results of all NFA arbitration proceedings are available to the public on NFA's BASIC.

Thus, there is no regulatory gap with respect to PDAAs that justifies overlapping CFPB regulations. Consistent with Section 1027(j) of the Dodd-Frank Act and the accompanying legislative history referenced above, therefore, the CFPB should respect the CFTC and NFA's expertise and historical role in providing an arbitral forum for customers and CFTC registrants, and in setting the rules governing the dispute resolution process for participants in its markets.

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19 The CFTC first promulgated its rules governing PDAAs in 1976 as Part 180 of its regulations. 41 Fed. Reg. 27520 (July 2, 1976). The regulations, with modifications not relevant here, were re-codified at CFTC Regulation 166.5 in 2001. 66 Fed. Reg. 42256 (Aug. 10, 2001).

20 17 C.F.R. § 166.5(b).

21 *Id.* § 166.5(c)(1).

22 *Id.* § 166.5(c)(3).

23 7 U.S.C. § 25.

24 CEA Section 17(b)(10) requires any registered futures association to have in place rules that "provide a fair, equitable, and expeditious procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof." 7 U.S.C. § 21(b)(10).

B. The CFPB's Overlapping PDAA Rules Pose Undue Burdens for FCMs.

Contrary to the CFPB's finding in the Proposed Rule,[25] overlapping CFPB rules could be highly burdensome for FCMs. FCMs have carefully drafted their customer agreements, including PDAAs contained therein, to conform to CFTC Regulation 166.5 and other applicable CFTC rules. Such agreements also in many cases reflect negotiations with individual customers. If the Proposed Rule is applied to such agreements, they may need to be modified, amended, and/or re-executed. Repapering customer agreements is a timely and costly endeavor for FCMs.

At a minimum, the CFPB should demonstrate in a thorough cost-benefit analysis that the Proposed Rule provides substantial benefits to FCM customers before subjecting FCMs to heavy compliance costs and burdens. We question whether the CFPB could ever make this showing given the protections already afforded customers by CFTC Regulation 166.5, which was specifically tailored to the business of CFTC registrants, and the limited circumstances in which FCMs could be said to be "engag[ing] in offering or providing a consumer financial product or service" within the meaning of the Proposed Rule.[26] The CFPB itself acknowledges in the Proposed Rule that it "does not believe it is common for commodities merchants subject to CFTC jurisdiction to extend credit to consumers."[27] Requiring FCMs that are already subject to the CFTC's plenary jurisdiction to comply with additional CFPB rules on a service-by-service basis is at best cumbersome and very likely unnecessary. We urge the CFPB to consider the significant costs to FCMs and disruptions to their customer relationships of applying the Proposed Rule to CFTC-jurisdictional PDAAs.[28]

Finally, we note that the CFTC has jurisdiction over the extension of credit by FCMs to customers to secure their trades in CFTC-regulated markets. In this regard, the CFTC has adopted Regulation 1.30, which specifically prohibits an FCM from making loans to customers on an unsecured basis or secured by the customer's futures or cleared swaps account. The regulation provides that an FCM is only permitted to make loans that are fully-secured by securities or other assets pledged by such customers pursuant to a specific written

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[25] 81 Fed. Reg. at 32881 ("The Bureau also believes that complying with both rules would not be unduly burdensome for any affected providers . . . .").

[26] SIFMA's comment letter describes the limited applicability of the Proposed Rule with respect to broker-dealers and investment advisors' activities in securities markets. SIFMA Comment Letter at 4-7. The Proposed Rule's applicability is limited within the context of FCM business models for many of the same reasons, as FCMs act much like broker-dealers in derivatives markets.

[27] *Id.* at 32917.

[28] The CFPB notes in the Proposed Rule that the CFTC lacks jurisdiction over spot transactions, including FX spot transactions. *Id.* at 32917 n. 492. To the extent the CFPB seeks to regulate PDAAs in connection with such transactions, we implore it to weigh the significant costs to FCMs identified in this letter against the limited circumstances in which the Proposed Rule might offer protections to FCMs' customers. We submit that the costs substantially outweigh the benefits insofar as FCMs' activities are concerned.

agreement with the customer.[29] Further, the proceeds of any such loan must be held by the FCM in a customer segregated account, in accordance with the CEA and the CFTC's regulations thereunder.[30] In light of these limitations, we understand that FCM loans to customers are infrequent.

There is no regulatory gap created by FCMs' extension of credit to customers that justifies overlapping CFPB's regulations.

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We appreciate the CFPB's consideration of these comments. If the CFPB 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,

Allison Lurton
Senior Vice President and General Counsel

cc: Honorable Timothy G. Massad, Chairman
Honorable Sharon Bowen, Commissioner
Honorable J. Christopher Giancarlo, Commissioner
Eileen T. Flaherty, Director, Division of Swap Dealer and Intermediary Oversight

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[29] Pursuant to CFTC Regulation 1.17(c)(3), a loan is "secured" if the collateral is readily marketable, otherwise unencumbered and can be readily converted into cash.

[30] Although CFTC Regulation 1.30 pertains specifically to customer segregated funds held to margin, guarantee or secure futures and options on futures contracts traded on U.S. designated contract markets, the provisions of Regulation 1.30 are made applicable to cleared swaps customer collateral by CFTC Regulation 22.10. Further, CFTC Regulation 30.7(j) imposes the same restrictions with respect to customer funds held to margin, guarantee or secure futures and options on futures contracts traded on foreign boards of trade.