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August 17, 2009

VIA EMAIL: SECRETARY@CFTC.GOV

David Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

C.F.T.C.
OFFICE OF THE SECRETARY
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Re: Advanced Notice of Proposed Rulemaking: **Account Ownership and Control Report**, 74 Fed. Reg. 31642 (July 2, 2009).

Dear Mr. Stawick:

Paul, Hastings, Janofsky & Walker LLP ("Paul Hastings") appreciates the opportunity to comment on the Commodity Futures Trading Commission's (the "CFTC" or the "Commission") Advanced Notice of Proposed Rulemaking regarding the proposed Account Ownership and Control Reports¹ (the "Advanced Notice"). Paul Hastings is an international law firm with eighteen offices in major business centers across the U.S., Asia and Europe. We provide regulatory and commercial representation to several market participants who are engaged in the business of trading energy commodities and derivatives on designated contract markets and other electronic exchanges, and who would be directly impacted by the implementation of proposed rules regarding Account Ownership and Control Reports ("OCRs") as detailed in the Advanced Notice. We would like to offer these comments on the content of the proposed OCRs.

In particular, there is serious concern that the term "controller" is undefined and that it might be interpreted so broadly as to entail the collection and transmission to the Commission of the names, addresses and social security numbers of individual traders who are merely carrying out their jobs on behalf of their employers. While some individuals at trading desks or large energy companies may exercise discretion over certain aspects of trading on a day-to-day basis, such individuals are acting entirely within the scope of their employment, and their personal information should not be captured as if they were individuals trading on their own accounts. Rather, the terms "owner" and "controller" should be defined appropriately to capture only those entities or individuals who own the accounts, and to whom trading decisions and responsibilities can be properly attributed. In the case of a trader working for an energy company or other enterprise, it is the employing entity that owns and controls the account and that is

¹ 74 Fed. Reg. 31642 (July 2, 2009)

responsible for trading decisions. Trading employees may have discretion but they are not acting for their own accounts or pursuant to their own policies or strategies. In the event that a given account is owned and controlled by individual persons, their personal information would properly be captured by the proposed OCRs. However, where an account is owned by a company such as an oil and natural gas exploration and production company or commodity merchant/marketer, the terms "owner" and "controller" should be limited to the entity. An employee whose trading activities are solely in the scope of his or her employment duties should not be subject to reporting of personal information on an OCR. The Commission's regulatory objectives can be met through the submission of OCRs that contain only company information and do not require the submission of intrusive personal information of individual employees merely undertaking their employment duties.

Proposed Content of the OCRs

The Commission currently receives daily trade data via Trade Capture Reports from trade registers detailing significant information concerning trades made on reporting contract markets, including trade dates, products, price, quantity and account numbers. The Advanced Notice characterizes this trade data as reflecting "unknown individuals directing trades on behalf of unnamed accounts."² Separately, the Commission receives large trader reports from reporting firms showing open end-of-day positions above specified levels set by the Commission. The Commission seeks to better integrate the information it currently receives from the market in the form of Trade Capture Reports and large trader reports, and to close the gaps that currently exist between these sets of data that make it difficult to determine what market participants are actually directing specific trading activity across the spectrum of electronic markets monitored by the Commission. Indeed, as noted in the Advanced Notice, one main goal of the OCRs is to "bridge the gap between individual transactions reported on exchange trade registers and aggregate positions reported in large trader data."³

In order to bridge this gap and enable the OCRs to illustrate the trading activity by specific market participants that leads, for example, to their inclusion in large trader reports, the Advanced Notice suggests that inclusion of ownership information of a given account would provide useful information. However, it would not serve the stated purpose of the OCRs if the data collected redundantly included both the name of the entity that owns a given account, as well as individuals who work for that entity and may direct trading activity solely within the scope of their employment. This constitutes an unnecessary intrusion and collection of personal information of individuals who are merely acting as the instruments of their employers. Indeed, there is serious concern that the collection of such personal information could lead to legitimate employee complaints about invasion of privacy and potential public sharing of the information, given the

² *Id.* at 31643.

³ *Id.*

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pervasive fear of identity theft and other misuses of this kind of information. The goal of identifying the holders of accounts in order to integrate information about daily trading activity with large trader reports would be met by simply collecting the information about the account holders via the OCRs. The terms "owner" and "controller" should therefore be defined with appropriate narrowness so as not to unnecessarily entail the collection of files on individual traders who do not own any accounts and are simply employed by the actual owners and controllers. If "owner" and "controller" information were to be collected only at the company or organizational level, the Commission might find it useful to require those companies providing data to certify that none of their traders executes trades on any other account other than that for which the data is being collected. In this way, the Commission could be certain that the information being collected regarding account owners and controllers is not leaving any gaps in which traders at those entities might be engaging in trading on other accounts without being captured by the OCRs.

As currently explained in the Advanced Notice, it appears that the OCRs would require inclusion of the names, addresses and last four digits of the social security numbers of individuals who work on the trading desks of large companies and who may have responsibility for certain day-to-day trading decisions. However, these individuals are not trading for their own accounts, and would not have unfettered discretion to determine the overall plans and strategies that govern trading by that desk. Moreover, since the entities by which such individuals are employed would also be captured and listed for the same account numbers in the OCRs, the inclusion of individual employees' personal information would add nothing to the OCRs and would not advance the goal of greater transparency and integration of trade data explicated by the Advanced Notice. For these reasons, unless the definitions of "owner" and "controller" are tailored to exclude unnecessary personal information of traders, the OCRs could become unwarranted and unhelpful intrusions into the personal information of individuals who are simply employed by the entities that the OCRs are intended to capture.

We are not commenting on the rationale set forth in the Advanced Notice for seeking ownership and control information with respect to trading accounts via the proposed collection of OCRs. Rather, these comments focus on the definition of the term "controller", and we wish to convey our understanding that companies that are regular participants in CFTC-regulated markets are concerned about the adverse impact on their employees (and thus on the companies) that might result if traders' personal information were required to be submitted to the Commission. The goal of integrating the data currently available to the Commission and supplementing it by pairing names and other information with trading account numbers would not be served by a definition of the term "controller" that unnecessarily sweeps up the personal information of employees who work for entities that are otherwise captured and accounted for by the OCRs.

By capturing the relevant information with respect to the company for which a trader works, in cases where a given trader does not trade for his/her own account, all of the regulatory goals set forth in the Advanced Notice would be met without resorting to

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unnecessarily mining the personal data of the trader. This would still allow the Commission to follow the trading practices and patterns of trading accounts with reference to the actual names of the account holders, and enable this data to be matched up with the appearance of the same accounts on the daily large trader reports.⁴ Similarly, the OCRs would still enable the aggregation of accounts under common control, and further enable the linkage of traders' intraday transactions with end-of-day positions, thereby aiding the Division of Enforcement's investigations of Commodity Exchange Act violations.⁵ As long as the Commission can be satisfied that the traders who work for a given reporting entity are not trading on their own accounts or otherwise trading for different accounts than those captured by their employers, the OCRs would give a complete picture of the ownership and control of all relevant accounts. As stated previously, the Commission could seek assurance or certification by the entities holding accounts that their traders are not executing trades for their own accounts or other accounts not captured by the employer's reports. Where an individual trader does indeed own and control a given account, then it would be appropriate for that individual's information to be captured by the OCRs as designed.

Conclusion

There is deep concern that the lack of a clear definition of the term "controller" could lead to the wholly unnecessary collection of the personal information of individual traders who may exercise some degree of trading discretion within the scope of their employment, but who are not truly "controllers" of any account in any reasonable sense. Except for cases in which an individual person is trading for his/her own account, the regulatory objectives set forth by the Commission in the Advanced Notice can be met by limiting the reach of the OCRs to the entities that actually own and are ultimately responsible for trading decisions for a given account.

Sincerely,

/s/ Mark K. Lewis
Mark K. Lewis
of Paul, Hastings, Janofsky & Walker LLP

cc: Chairman Gary Gensler
Commissioner Michael Dunn
Commissioner Jill E. Sommers
Commissioner Bart Chilton
Daniel Berkovitz, General Counsel

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⁴ See *id.* at 31644.

⁵ See *id.* at 31645.