

February 25, 2016

The Honorable J. Christopher Giancarlo
Commissioner
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Dear Commissioner Giancarlo:

Today the CFTC's Energy and Environmental Markets Advisory Committee (EEMAC) presented a final report that is critical of the CFTC's proposed rule on position limits for commodities futures and swaps.¹ Instead of producing a meaningful examination of a serious issue that will help determine the safety and security of America's financial markets, the Committee has assembled a report that is little more than a list of talking points for an industry that hopes to escape meaningful regulation. I note three principal problems:

- The Committee consists almost entirely of energy industry insiders, which appears to be a direct violation of section 751 of the Dodd-Frank Act.
- The record of the Committee's work reflects significant procedural irregularities that resulted in major flaws and mischaracterizations in the report.
- The report's conclusions were not supported by the record before the Committee, and the report was adopted without any public discussion of its findings and conclusions and with no public vote.

Because you are the CFTC's sponsor of the EEMAC report, I write today to ask that you withdraw this report until you reconvene a Committee that complies with the law and that addresses both the procedural and factual errors in the present product.

The remainder of this letter provides additional detail about my concerns.

I. The Committee Fails to Meet Statutory Requirements to "Represent A Broad Spectrum of Interests"

In order to prevent speculation and to ensure market stability, the Dodd-Frank Act requires the CFTC to set limits on positions that entities can hold on physical commodity futures

¹ CFTC Energy and Environmental Markets Advisory Committee (EEMAC), Report on EEMAC's 2015 Review and Consideration of the CFTC's Proposed Rule on Position Limits, Feb. 25, 2016 (EEMAC Report).

and swaps.² The CFTC published a proposed rule in 2013 on position limits for derivatives that would, if finalized, affect many energy trades.³ The position limits rule is critical to addressing speculation that can drive up the price of oil and gas for consumers. For example, a five-year investigation by the Senate Permanent Subcommittee on Investigations found in 2006 that “there is substantial evidence that the large amount of speculation in the current market has significantly increased prices.”⁴

The EEMAC was established under the authority of Section 751 of the Dodd Frank Act, which states that the CFTC “shall appoint members [to the EEMAC] with a wide diversity of opinion and who represent a broad spectrum of interests, including hedgers and consumers.”⁵ You convened the EEMAC to begin a review of the proposed rule in February 2015; however, the membership of the Committee fails to meet its clear statutory obligation to reflect diverse views. With the exception of one member from one public interest organization, and one academic with substantial ties to industry, all members and associate members of the committee represent industry interests exclusively. Twenty-five of twenty-eight members of the committee were drawn directly from affected industries, including oil and gas producers, electric utilities, and traders and exchanges for commodity and financial markets.⁶

The problematic EEMAC membership is exacerbated by the limited perspectives of witnesses assembled for EEMAC’s two meetings on February 26, 2015 and July 29, 2015. Of the 13 total witnesses who appeared at these meetings, 10 represented industry interests, including oil and gas producers, electric utilities, and traders and exchanges for commodity and financial markets.⁷ The other three witnesses were two representatives from the CFTC itself and one outside academic, Dr. Craig Pirrong, who has strong industry ties.⁸ The EEMAC appears to have reached its conclusions without hearing from a single objective economic expert witness without ties to the industry or government, let alone anyone representing the interests of consumers or the general public.

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 737(a)(2) (2010) (codified at 7 U.S.C. § 6(a)(2)).

³ Position Limits for Derivatives, 78 Fed. Reg. 75680 (Dec. 12, 2013) *available at* <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-27200a.pdf>.

⁴ The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat, Senate Permanent Subcommittee on Investigations (June 27, 2006), at 2, *available at* <file:///C:/Users/br45196/Downloads/SenatePrint10965MarketSpecReportFINAL.pdf>.

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 751 (2010) (codified at 7 U.S.C. § 2(a)).

⁶ Members of EEMAC as of February 17, 2016, *available at* http://www.cftc.gov/About/CFTCCcommittees/EnergyEnvironmentalMarketsAdvisory/emac_members; EEMAC Associate Members as of February 17, 2016, *available at* http://www.cftc.gov/About/CFTCCcommittees/EnergyEnvironmentalMarketsAdvisory/eemac_associatemembers.

⁷ CFTC Energy and Environmental Markets Advisory Committee, Agenda for February 26, 2015 Meeting, *available at* http://www.cftc.gov/About/CFTCCcommittees/EnergyEnvironmentalMarketsAdvisory/eemac_022615agenda; CFTC Energy and Environmental Markets Advisory Committee, Agenda for July 29, 2015 Meeting, *available at* http://www.cftc.gov/About/CFTCCcommittees/EnergyEnvironmentalMarketsAdvisory/eemac_072915agenda.

⁸ *Id.*

I am particularly concerned about the decision to include two specific witnesses. The first is a representative from the CME Group, an energy derivatives exchange. I wrote to you in February 2015 regarding concerns that the CME Group's effort to purchase your former employer, combined with the unusual timing of sales of stock you held in that employer, raised questions about the appearance of a conflict of interest as you served on the CFTC—the federal agency charged with regulatory supervision over both your former employer and the CME Group.⁹ You compounded this problem when you subsequently included a CME official on the EEMAC and then invited another CME official to appear as a witness at both EEMAC meetings in 2015. The EEMAC then produced a report that was remarkably friendly to CME's interests.

The second panelist I am concerned about is Dr. Pirrong. According to the New York Times, "Mr. Pirrong has positioned himself as the hard-nosed defender of financial speculators — the combative, occasionally acerbic academic authority to call upon when difficult questions arise in Congress and elsewhere about the multitrillion-dollar global commodities trade. ... [who] has reaped financial benefits from speculators and some of the largest players in the commodities business," and played a key part in "a sweeping campaign [by the financial industry] to beat back regulation."¹⁰

With specific regard to the position limits rule, Dr. Pirrong served as a consultant for the International Swaps and Derivatives Association – a lead plaintiff suing to block the very rule he was asked to provide his views on for the EEMAC.¹¹ There is no record indicating that these conflicts were even disclosed by Dr. Pirrong when he served as a witness, let alone addressed by the EEMAC.

Based on the failure of the committee to comply with the statutory requirements under which it was authorized and based on the potential conflicts of interest of key participants, the grounds for withdrawing the report are conclusive.

II. Concerns with Committee Procedures

The EEMAC's process for writing and adopting the report appears to have numerous problems. Among them is the fact that the 2015 EEMAC meeting transcripts do not contain a single mention of a final report, let alone detailed discussions of potential report findings or conclusions or public discussion of a vote on the report.

⁹ Letter from Elizabeth Warren, U.S. Senator, and Elijah E. Cummings, Member of Congress, to J. Christopher Giancarlo, Commissioner, Commodity Futures Trading Commission (Feb. 20, 2015) *available at* http://www.warren.senate.gov/files/documents/2015-02-20_Letter_to_CFTC_Commissioner_Giancarlo_re_GFI_severance_agreement.pdf.

¹⁰ David Kocieniewski, *Academics Who Defend Wall St. Reap Reward*, N.Y. TIMES, Dec. 27, 2013, *available at* http://www.nytimes.com/2013/12/28/business/academics-who-defend-wall-st-reap-reward.html?_r=0.

¹¹ *Id.*

The report is listed as written by Dr. Pirrong and James Allison, but Dr. Pirrong was not an EEMAC member in February 2015 when the EEMAC meetings began.¹² Instead, he was listed as a witness and presented before the EEMAC at the meeting.¹³ Although Dr. Pirrong was listed as an attendee at the July 2015 meeting, it was not until February 17, 2016 – just over one week before the report was released – that Dr. Pirrong was even listed as an EEMAC committee member.¹⁴

There appears to have been no public discussion of this change in status, and it is not clear why Dr. Pirrong was able to formally join the panel after both 2015 meetings had concluded, whether his industry conflicts and financial ties were disclosed at any point before, during, or after he joined the panel, or why he was chosen to draft the EEMAC report.

Based on the EEMAC's own record of its proceedings, the irregularities in the procedures provide additional substantial grounds for withdrawing the report.

III. Substantive Flaws with the EEMAC Report

Given the pro-industry composition of the EEMAC and its slipshod process for drafting and adopting the final report, it is hardly surprising that the report reflects very little real analysis of the position limits rule.

My staff reviewed all 467 pages of transcripts of the EEMAC's two meetings on the position limits rule. Instead of documenting a rigorous effort to analyze the need and impact of CFTC position limits, these transcripts detail meetings that appear to be self-congratulatory, back-slapping sessions of like-minded industry officials and their close allies who fancy themselves “in the business of providing modern civilization”—an actual quote from the proceedings.¹⁵

The Committee failed to conduct a robust discussion or to delve deeply into even the most critical issues before it. For example, in support of the final report's first finding that the proposed position limits rule is “not necessary,” the report cites information from only two non-industry witnesses – Dr. Pirrong and Energy Information Agency (EIA) Administrator Adam Sieminski.¹⁶

¹² EEMAC Members as of January 2015, *available at* https://web.archive.org/web/20160112115627/http://www.cftc.gov/About/CFTCCcommittees/EnergyEnvironmentalMarketsAdvisory/emac_members.

¹³ CFTC Energy and Environmental Markets Advisory Committee, Agenda for February 26, 2015 Meeting, *available at* http://www.cftc.gov/About/CFTCCcommittees/EnergyEnvironmentalMarketsAdvisory/eemac_022615agenda

¹⁴ Members of EEMAC as of February 17, 2016, *available at* http://www.cftc.gov/About/CFTCCcommittees/EnergyEnvironmentalMarketsAdvisory/emac_members

¹⁵ Transcript of CFTC EEMAC February 26, 2015 Meeting, at 199, *available at* <http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/emactranscript022615.pdf>.

¹⁶ EEMAC Report at 2, 5.

I have already described my concerns with the committee's reliance on Dr. Pirrong's views. As for Dr. Sieminski, the EEMAC report appears to dramatically mischaracterize his presentation."¹⁷ A review of the presentation and transcript indicates that Dr. Sieminski made a straightforward discussion of current oil prices, current supply and demand levels, estimated changes in consumption and production, and economic impacts of oil prices. His presentation did not address or identify potential speculation, nor did it address or identify the potential need for position limits. Indeed, Dr. Sieminski was never asked about the risks of speculation or the costs and benefits of the position limits rule.

In fact, as Dr. Sieminski noted quite clearly in his statement before the Committee, he was speaking on behalf of EIA in its capacity as "a statistical organization," and he noted that an entirely different set of EIA experts – the office of energy and financial markets – was responsible for "looking at ... position limits ... speculation, and manipulation."¹⁸ The EEMAC might have turned to these experts for their views about such issues, but they were not questioned by the Committee. It is simply not credible for the Committee to reach a conclusion about the need for the position limits rule based on an EIA presentation that does not address the issue and testimony that explicitly disclaims any ability to speak directly about this critical issue.

Similarly, the final committee report concludes that in lieu of the position limits rule, market participants should engage in "an expanded accountability regime" administered by the designated contract markets.¹⁹ In other words, the industry should just police itself. Not a single independent, non-industry affiliated expert provided testimony before the committee supporting this view. The chief proponents of this "accountability regime" proposal were witnesses from the CME Group and ICE, each of which runs contract markets.²⁰ It ought to be no surprise that the trading industry thinks self-regulation works just fine, but history tells us otherwise and self-serving assumptions to the contrary do not constitute evidence.

Finally, the final EEMAC report dramatically mischaracterizes the recorded positions of its members. The report states that "the overwhelming majority of members of the EEMAC" express support for the self-policing approach.²¹ But the report cites only four out of nine EEMAC members, one of whom said vaguely that "if we can engage the expertise of the exchange to make this work better, then there ought to be a prudent course;"²² a second who said

¹⁷ Presentation by Adam Sieminski, U.S. Energy Information Administration, Feb. 26, 2015, *available at* http://www.cftc.gov/ido/groups/public/@newsroom/documents/generic/eemac022615_sieminski.pdf.

¹⁸ Transcript of CFTC EEMAC February 26, 2015 Meeting, at 16-17, *available at* <http://www.cftc.gov/ido/groups/public/@aboutcftc/documents/file/emactranscript022615.pdf>.

¹⁹ EEMAC Report at 10.

²⁰ *Id.*

²¹ EEMAC Report at 11.

²² Transcript of CFTC EEMAC July 29, 2015 Meeting, Gill at 86, *available at* <http://www.cftc.gov/ido/groups/public/@aboutcftc/documents/file/emactranscript072915.pdf> (July Meeting).

only that “we think it’s a good idea to have the exchanges involved in this;”²³ and a third who said merely that the Commission “should evaluate” such an approach.²⁴

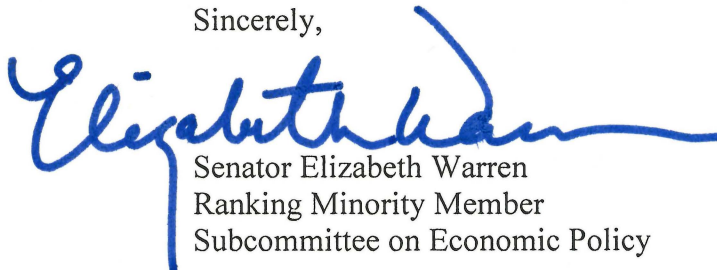
Based on the Committee’s own evidentiary record, the absence of recorded support for the conclusions published in the Committee report provide additional grounds requiring the withdrawal of the report.

Conclusion

Congress directed the CFTC to establish the Energy and Environmental Markets Advisory Committee so that the agency could benefit from a diverse set of views on the possible impacts of CFTC actions. The committee that has been constituted under that authority – and the final report that was released earlier today – fails that test. The Committee itself did not meet the statutory requirements to represent a “broad spectrum of interests,” instead forming an industry-insider group that produced a product reflecting the highest hopes of the industry for as little regulation as possible. The meeting transcripts indicate that the Committee failed to conduct a robust investigation of the key issues in question, and the final report mischaracterizes key aspects of the Committee’s recorded discussions.

This report, which bears the official stamp of a CFTC committee, is nothing more than a recitation of industry talking points, and it should be treated as such. Because of the legal, substantive, and procedural irregularities, I ask that you withdraw this report and refrain from submitting it to the CFTC for consideration.

Sincerely,



Senator Elizabeth Warren
Ranking Minority Member
Subcommittee on Economic Policy

cc: Chairman Timothy Massad
Commissioner Sharon Bowen

²³ July Meeting, Wiggins at 89.

²⁴ July Meeting, McCoy at 111-112.