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December 28, 2010

Commodity Futures Trading Commission
c/o David A. Stawick, Secretary
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Notice of Proposed Rulemaking on the Prohibition of Market Manipulation
RIN No. 3038-AD27

Dear Mr. Stawick:

The Futures Industry Association (ñFIAò),[1] the Securities Industry and Financial Markets Association (ñSIFMAò)[2] and the International Swaps and Derivatives Associations (ñISDAò)[3](together with FIA and SIFMA, the ñAssociationsò) submit these comments in response to the Notice of Proposed Rulemaking on the Prohibition of Market Manipulation in which the Commodity Futures Trading Commission (the ñCommissionò) solicited comments on its proposed rules to implement new anti-manipulation authority in Section 753 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (ñDodd-Frankò). Specifically, the Associations submit their comments in response to:

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1 FIA is a principal spokesman for the commodity futures and options industry. FIAÕs regular membership is comprised of approximately 30 of the largest futures commission merchants (ñFCMsò) in the United States. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than eighty percent of all customer transactions executed on United States designated contract markets. For more information, visit www.futuresindustry.org.

2 SIFMA brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMAÕs mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sigma.org.

3 The International Swaps and Derivatives Association, or ISDA, was chartered in 1985 and has over 830 member institutions from 57 countries on six continents. Our members include most of the worldÕs major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the risks inherent in their core economic activities. For more information, visit www.isda.org.

(i) the Commissionôs notice of proposed rulemaking to implement a new anti-manipulation rule prohibiting fraud-based manipulative schemes under the new Section 6(c)(1) of the Commodity Exchange Act (ñCEAò) pursuant to Section 753 of Dodd-Frank; and

(ii) the Commissionôs notice of proposed rulemaking to implement a new anti-manipulation rule under the new Section 6(c)(3) of the CEA pursuant to the Commissionôs general rulemaking authority.

I. Summary.

The Associations appreciate the opportunity to comment on the Commissionôs proposed rulemaking on the prohibition of market manipulation. First, we wish to emphasize that we share the Commissionôs commitment to open, fair and competitive markets and look forward to working closely with the Commission to promulgate effective rules which preserve the integrity of the markets.

In adopting rules under its new authority pursuant to Dodd-Frank to prevent abusive financial practices in the futures and derivatives markets, we urge the Commission to provide clear and straightforward guidance to market participants as to what constitutes prohibited conduct. Such guidance should give adequate notice to market participants that transact in the futures and derivatives markets and identify clear principles to market participants by which to distinguish legitimate competitive trading practices from prohibited manipulative conduct. Failure to provide clear and straightforward guidance will only serve to add confusion to the markets and potentially chill legitimate trading activities in a competitive market where traders must make real-time trading decisions in dynamic markets without the benefit of hindsight. The Associations make the following recommendations to the Commission:

- The Commission should not incorporate the standards and case law under Rule 10b-5;

- No new duties of disclosure, inquiry or diligence should be imposed between two sophisticated parties to a bilateral transaction. Such new duties may discourage legitimate trading activities, increase transaction costs and as a result reduce the liquidity and depth of the markets;

- The Commission should clarify that nothing in the proposed rule under Section 6(c)(1) will impede the ability of market participants to take positions and trade on the basis of material, nonpublic information they obtain legitimately;

- Extreme recklessness, not recklessness alone, should be the scienter standard under the Commissionôs proposed rule under Section 6(c)(1);

- The Commission should clarify the scope of the proposed rule under 6(c)(1) and the Commissionôs already existing anti-manipulation authority under CEA Section 9(a)(2); and

- The Commission should clarify that, aside from extending its enforcement authority to cover swaps, Section 6(c)(3) does not extend its enforcement authority beyond the *DiPlacido* precedent.

II. The Commission's Proposed Rule Under Section 6(c)(1) of the CEA.

A. The Commission Should Not Incorporate the Standards and Case Law Under Rule 10b-5 as They Are Inapplicable to the Futures and Derivatives Markets.

Pursuant to Section 6(c)(1) of the CEA, as added by Section 753(a) of Dodd-Frank, the Commission has proposed regulations to address fraud-based manipulations that are based on Rule 10b-5, promulgated by the Securities Exchange Commission (the ñSECò) under the Securities Exchange Act of 1934 (the ñExchange Actò). The Commissionôs proposed regulations would apply concepts and standards developed under Rule 10b-5 to the futures and derivatives markets regulated by the Commission.

We urge the Commission not to incorporate the securities standards and case law under Rule 10b-5 that are largely inapplicable and cannot easily be adapted to the futures and derivatives markets, due to the fundamental differences in the structures of the two market frameworks. We are pleased that in the Commissionôs Notice of Proposed Rulemaking, the Commission recognized that there are significant differences in the futures and derivatives markets, when it stated in its proposing release that judicial precedent developed under the securities laws will ñguide, but not controlò the Commission and that the Commission intends to take into account the ñpurposes of the CEA and the functioning of the markets regulated by the Commission.ò[4]

The securities laws are designed to promote the raising of capital by corporations and to protect the public retail investors who may purchase or sell securities. Rule 10b-5 functions as part of a system developed to protect against fraud largely through disclosure of issuer-specific information to ensure that all market participants, including retail investors, have equal access to material information. Underlying securities regulations is the concern that retail investors (except in special contexts involving sophisticated market participants) will not have the resources, capability or bargaining power to independently gather firm-specific or industry-specific material, nonpublic information compared to corporate insiders or market professionals. This is reflected in the structure and practices of securities regulations as enforced by the SEC.[5]

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4 Prohibition of Market Manipulation, 75 Fed. Reg. 67657, 67659 (2010).

5 For example, the SEC requires issuers to write the front and back cover pages, the summary and the risk factors section following a specific set of plain English writing principles such as using: ñshort sentences,ò ñdefinite, concrete, everyday words,ò ñno legal jargon or highly technical business terms,ò and ñno multiple negatives.ò *See* Plain English Disclosures, Securities Act Release No. 7497, Exchange Act Release No. 23011, Investment Company Act Release No. 23011 (Jan. 28, 1998), *see also* Rule 421(b), 17 C.F.R. §230.421.

In addition, the applicability of the securities laws, antifraud provisions, and Rule 10b-5 in particular, is premised on the existence of certain legal duties between the parties to a transaction that may be breached if one party makes material misrepresentations or is responsible for material omissions. Indeed, we submit that the framework established by Rule 10b-5 can only be applied to a market that is similarly structured.

In contrast, participants in the futures and derivatives markets do not rely on analogous issuer-specific information when deciding whether to transact. As an initial matter, there is no ñissuerò in the futures and derivatives markets. Rather, market transactions are typically executed between two counterparties based on market information that is generally equally available to both parties. Futures contracts or swaps do not represent investments made on a particular issuerôs equity and prospects for growth. Moreover, counterparties dealing with each other as equals in the futures and derivatives markets typically do not have duties to each other that would be violated by the failure to make certain disclosures, absent the assumption of such a duty by agreement or course of conduct. We believe that the Commission should adopt an antifraud rule that is appropriately crafted to take into account the nature of material information in these markets and the types of duties that may exist. Unlike the securities antifraud laws and rules, which are designed primarily for investor protection, the antifraud provisions in the futures markets are focused in large part, although not exclusively, on protections against manipulation. This, as well, argues for a separate rule that is designed to address futures and derivatives market practices and relationships, not the wholesale adoption of a rule designed for a different regime.

Incorporating concepts from securities law to a market where such concepts do not apply will subject market participants to increased uncertainty as to their obligations and standards. It is difficult to understand, much less predict, how Rule 10b-5 judicial precedent will translate to the futures and derivatives markets. The danger of importing legal standards from a completely different market that operates on different principles and assumptions will only serve to frustrate the efficient functioning of the futures and derivatives markets. Without clear guidance as to the standards and duties of the proposed rule, market participants will be less willing and less able to compete vigorously in these markets. This, in turn, will adversely impact the liquidity and depth of markets generally, a detrimental and unintended consequence that Congress did not sanction and the Commission should seek to avoid.

B. The Commission Should Clarify that Its Proposed Rule Will Not Impose Any New Duties

The proposed rule should not impose new duties of disclosure, inquiry or diligence as this was not mandated or intended under Dodd-Frank and will serve only to increase the transaction and operational costs of legitimate trading activities. Section 747 of Dodd-Frank makes it ñunlawful for any person to enter into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap as part of a device, scheme or artifice to defraud any third partyò under the new Section 4c(a)(7) of the CEA. The Commissionôs intention to adopt Rule 10b-5 precedent under its proposed rule in addition to Section 4c(a)(7) potentially creates new duties of inquiry and diligence on parties to bilateral transactions to limit exposure to fraud claims. We urge the Commission to make it explicit that the regulation will be violated only if a party violates a pre-existing duty arising under contract, common law or some other non-CEA source.

The Associations support the Commissionôs clarification that:

> Nothing in [the proposed rule] shall be construed to require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.[6]

We further urge the Commission to similarly clarify that no additional implied duties should be inferred from the proposed rule.

The Associations seek clarification from the Commission that its proposed rule will not impede the ability of market participants to take positions and trade on the basis of nonpublic information that they obtain legitimately (i.e., not through the breach of a pre-existing duty to keep such information confidential or through another partyôs similar breach of a pre-existing duty). The Commissionôs proposed rule should not change the current state of the law, which does not require the disclosure of such information to a counterparty or to the market at large, nor should it prohibit legitimate trading based on such information.

Additional clarification should be provided with respect to entities trading on their own information. This is a critical point for commercial entities engaged in trading activitiesð these entities will simply not be able to function if they cannot trade on the basis of their own nonpublic information regarding the assets or liabilities being hedged. These entities cannot conduct their businesses in light of the uncertainty with respect to the legal standards governing their trading which will result from the Commissionôs incorporation of securities law concepts and case law. This will serve only to prevent commercial entities from engaging in legitimate and necessary trading activity.

In 1984, the Commission, based upon an extensive study of the nature, extent and effects of futures trading while in possession of material, nonpublic information, observed that:

> The ability of any person to capture the value of his or her proprietary information is a traditional prerogative of commercial enterprise. Because the futures markets are derivative, risk-shifting markets, it would defeat the marketôs basic economic function ï the hedging of risk ï to question whether trading based on knowledge of oneôs own position were permissible.[7]

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[6] Prohibition of Market Manipulation, 75 Fed. Reg. 67657, 67662 (2010).

[7] Commodity Futures Trading Commission, *A Study of the Nature, Extent and Effects of Futures Trading by Persons Possessing Material, Nonpublic Information*, Submitted to H.R. Comm. on Agriculture and Sen. Comm. on Agriculture, Nutrition and Forestry, at 8 (Sept. 1984).

This remains equally true, if not more so, today. It would clearly be inimical to the risk-shifting function of the futures and derivatives markets if market participants were not allowed to continue to trade in such circumstances, or if they were uncertain about their ability to trade, under the Commissionôs proposed rule. As the 1984 report makes clear, contrary to the securities markets and laws, in which an ñinsiderò with material, nonpublic information about his or her corporation is expressly prohibited from trading while in possession of that information, commercial hedgers routinely trade in the futures markets based precisely on that type of information. In fact, that is what defines commercial hedging in these markets. Prohibiting this activity, or casting uncertainty on its permissibility, will severely undermine the performance by these markets of their central function.

C. Extreme Recklessness, Not Recklessness Alone, Should Be the Scienter Standard Under the Commission's Proposed Rule.

In enacting Dodd-Frank Section 753, Congress used the same language (i.e., making it unlawful for any person ñto use or employ . . . any manipulative device or contrivanceò) that it has used in other contexts and that courts have consistently interpreted to require scienter (i.e., intent to deceive, manipulate or defraud). As the Supreme Court held, in interpreting identical language in Section 10(b) of the Exchange Act, ñThe words ómanipulative or deceptiveô used in conjunction with ódevice or contrivanceô strongly suggest that [Congress] intended to proscribe knowing or intentional conduct . . .ò because it ñconnotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.ò[8]

In terms of the type of ñrecklessnessò that satisfies this standard, the only appropriate level of scienter for the futures and derivatives markets is ñextreme recklessness,ò because this is the form of recklessness that effectively constitutes an affirmative intention.[9] The Commissionôs proposed rule, therefore, should require ñan extreme departure from the standards of ordinary care . . . to the extent that the danger [of misleading buyers or sellers] was either known to the defendant or so obvious that the defendant must have been aware of it,ò as the Seventh Circuit has held to be necessary for a violation of Rule 10b-5.[10]

By adopting the extreme recklessness standard, the Commission will join almost all the circuit courts which have considered the same question in the securities context, including Judge Posner from the Seventh Circuit.[11] The Associations recommend that the Commission be

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8 *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197-99 (1976).

9 For an excellent discussion of intent as the only factor that distinguishes manipulative trading *see* Daniel R. Fischel & David J. Ross, *Should the Law Prohibit "Manipulation" in Financial Markets*, 105 Harv. L. Rev. 503, 510-512, 544-547 (1991).

10 *See SEC* v. *Lyttle*, 538 F.3d 601, 603, quoting *Makor Issues & Rights, Ltd.* v. *Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008).

11 *See id.*, *see also Phillips* v. *LCI Int'l, Inc.*, 190 F.3d 609, 621 (4th Cir. 1999); *SEC* v. *Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992); *Hollinger* v. *Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (*en banc*); *Ross v. Bank South, N.A.*, 885 F.2d 723, 730 n.10 (11th Cir. 1989); *Hackbert* v. *Holmes*, 675 F.2d 1114, 1118 (10th Cir. 1982); *Broad* v. *Rockwell*, 642 F.2d 929, 961 (5th Cir. 1981) (*en banc*); *McLean* v.

guided by the Federal Trade Commissionôs (the ñFTCò) experience when considering what the appropriate threshold level of scienter should exist for a violation of its anti-manipulation rules. In 2009, the FTC announced its final rule on the prohibition of market manipulation promulgated pursuant to Section 811 of Subtitle B of Title VIII of the Energy Independence and Security Act of 2007.[12] The FTCôs rule requires that ña showing of *extreme recklessness* is, at a minimum, necessary to prove the scienter element.ò[13] As such, the FTC concluded that proving scienter in market manipulation cases in the wholesale petroleum markets requires a showing that a personôs conduct presents a danger of misleading buyers or sellers that is either known to the actor or is so obvious that the actor must have been aware of it.[14] The Associations agree with the FTC that ñwhereas standards of ordinary care are well developed in the context of securities markets, they are less well defined in the context of wholesale petroleum markets,ò and would submit that the same applies equally to all other futures and derivatives markets.[15]

The extreme recklessness standard is the only appropriate level of scienter because it provides for both effective rule enforcement and clarity to market participants. Congress sought to protect the integrity of competitive markets but not at the expense of discouraging legitimate competition. The most appropriate way to ensure that the Commissionôs proposed rule punishes wrongdoers in the futures and derivatives markets, involving sophisticated commercial parties making decisions in real time and in many instances without perfect information, is to target those parties whose goal it is to create artificial prices through manipulative or other intentional conduct. In some cases, ñscienter is the only factor that distinguishes legitimate trading from improper manipulation.ò[16] Indeed, one commentator has noted that there is no objective definition of manipulation, and that therefore, ñ[e]verything turns on the intent of the trader.ò[17] While a lower standard of scienter might be appropriate in the retail securities markets, the futures and derivatives markets involve sophisticated entities that can negotiate on an armôs-length basis to protect their own interests, and hence the Commission should require an extreme recklessness standard for a violation of its proposed rule.

The Associations urge the Commission to adopt the extreme recklessness standard to ensure that its proposed rule does not sweep too broadly and prohibit routine and legitimate trading strategies.[18] Implementing a mere ñrecklessnessò standard for the imposition of

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Alexander, 599 F.2d 1190, 1197 (3d. Cir. 1979); *Mansbach* v. *Prescott, Ball, & Turben*, 598 F.2d 1017, 1025 (6th Cir. 1979); *see also Greebel* v. *FTP Software*, 194 F.3d 185, 198 (1st Cir. 1999); *Camp* v. *Dema*, 948 F.2d 455, 461 (8th Cir. 1991).

12 Prohibitions on Market Manipulation, 74 Fed. Reg. 40686 (Aug. 12, 2009).

13 *Id.* at 40691 (emphasis added).

14 *Id.* at 40692 (Aug. 12, 2009).

15 *Id*.

16 *ATSI Communiciations, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d. Cir. 2007).

17 *See* Fischel & Ross, *supra* note 9, at 512.

18 *See ATSI Communications, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007) (stating ñin some cases scienter is the only factor that distinguishes legitimate trading from improper manipulationò).

substantial civil penalties could have myriad unintended adverse consequences. Traders may find it necessary to reduce their participation for fear that competitive trading strategies currently adopted may be misconstrued by the regulators with the benefit of hindsight. Similarly, potential entrants may decide that regulatory risks outweigh potential benefits and not enter the market at all, significantly reducing the liquidity and depth of markets. By requiring a showing of extreme recklessness, rather than ordinary recklessness, the Commission will provide assurance that the final rule does not capture inadvertent conduct or mere mistakes and is consistent with legal standards in other similar contexts. We urge the Commission not to go beyond Congressôs intent in Dodd-Frank and to prevent any unintended detrimental effects on the liquidity of the markets.

Additionally, we note that the rule proposed by the Commission is much broader than Rule 10b-5 and the anti-manipulation rules of the FTC and the Federal Energy Regulatory Commission (ñFERCò). The Commissionôs proposed rule imposes liability on the intentional or reckless ñuse or employ[ment], or attempt[ed] . . . use or employ[ment of], any manipulative device, scheme, or artifice to defraud.ò[19] Neither Rule 10b-5 nor the FTCôs rule contain the language regarding ñattempts.ò Similarly, FERC declined to add ñattemptsò in its rule on the prohibition of energy market manipulation.[20] Under current law, to satisfy a claim for attempted manipulation the CFTC must show: (1) an intent to affect market prices and (2) an overt act in furtherance thereof.[21] It is not entirely clear what set of facts would constitute a reckless attempt within the meaning of the Commissionôs proposed rule. The Associations urge the Commission to remove this language and clarify that the requirements for attempted manipulation remain consistent with current law, and that the prohibitions under the Commissionôs antifraud rule do not sweep more broadly than other comparable antifraud rules.

The Associations stress that they disagree with the final promulgated rules by both the FTC and FERC. The rules promulgated by both the FTC and FERC are not sufficiently tailored to reflect the futures and derivatives marketsô distinct features from the securities markets. We note that the Commissionôs jurisdiction in the futures markets is far more expansive than that of the FTC and FERC, and thus, the potential for damaging the efficient functioning of an entire financial segment is much greater than either the FTCôs or FERCôs rules. The Commissionôs expansive jurisdiction requires that it seriously undertake an effort to tailor the final rule to the distinct characteristics of the futures and derivatives markets.

Nevertheless, the Associations endorse the FTCôs approach insofar as it makes it a violation of its rule to

> intentionally fail to state a material fact that under the circumstances renders a statement made by such person

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[19] Prohibition of Market Manipulation, 74 Fed. Reg. at 67658 (Nov. 3, 2010).

[20] Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244, 4258 (Jan. 26, 2006) (codified 18 C.F.R. 1c).

[21] *U.S. Commodity Futures Trading Comm'n* v. *McGraw-Hill Cos.*, 507 F. Supp. 2d 45, 51 (D.D.C. 2007) (stating ñAttempted manipulation is demonstrated by the intent to affect market prices and some óovert actô in furtherance thereof.ò) (internal citations omitted).

misleading, provided that such omission *distorts or is likely to distort market conditions for any product* (emphasis added).[22]

We urge the Commission to require a similar showing that its rule would prohibit only those misrepresentations or omissions that can be expected to have a distorting effect on the market. We submit that similar to the FTCōs rule, the Commission should include the language ñthat affect or tend to affect the price of any commodityò that is currently in Section 180.1(a)(4) of its proposed rule to each of the other prongs of its proposed rule under Section 6(c)(1). In so doing, it would give market participants the certainty that representations or statements with material omissions will not be challenged if they do not have a distorting effect on the market.

D. The Commission Should Clarify the Scope of the Proposed Rule Under Section 6(c)(1) and the Commission's Already Existing Anti-Manipulation Authority Under CEA Section 9(a)(2) and Broad Antifraud Authority Under CEA Section 4b.

The Associations seek clarity and additional guidance from the Commission regarding the scope of the proposed rule under Section 6(c)(1) and how it relates to the Commissionōs anti-manipulation authority under Section 9(a)(2) and broad antifraud authority under Section 4b.

The Commission has historically relied on other provisions of the CEA, including Section 9(a)(2) and the prior Section 6(c), in its administrative and civil enforcement actions against fraud-based manipulation and attempted manipulation, requiring some form of deception, such as reporting of false prices or the making of false statements. Section 6(c)(1) of the CEA now grants the Commission anti-manipulation authority over swap transactions. It also significantly broadens the Commissionōs anti-fraud authority to include any kind of materially false or deceptive conduct that is intended to create an artificial price. While Section 9(a)(2) is limited to ñfalse or misleading or knowingly inaccurate reports concerning crop or market information or conditions,ò Section 6(c)(1) of the CEA now extends the prohibition to ñany untrue or misleading statementò which significantly augments the Commissionōs authority in this area Dodd-Frank subsection 6(c)(1)(B) states that nothing in the new law shall affect, or be construed to affect, the applicability of CEA Section 9(a)(2).

While Section 6(c)(1) expands and clarifies the Commissionōs anti-fraud authority, it is unclear to market participants whether or to what extent the proposed rule under Section 6(c)(1) of the CEA, will grant to the Commission any new antifraud authority that it did not already have either under Section 9(a)(2) of the CEA or the broader antifraud provision Section 4b of the CEA. The Commission has expressly stated in its proposing release that its authority under Section 9(a)(2) remains unaffected by the proposed rule and thus will remain available as an enforcement mechanism which may be used in concert with the proposed rule.[23]

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[22] Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244, 4258 (Jan. 26, 2006) (codified 18 C.F.R. § 317.3(b)). §317.3(b) is limited to omissions; nonetheless, we believe the Commission should apply this limitation to misrepresentations as well omissions.

[23] Prohibition of Market Manipulation, 75 Fed. Reg. at 67658 (Aug. 12, 2009).

This causes confusion and uncertainty to market participants who require straightforward guidance about the types of behavior that are prohibited. Market participants faced with overlapping and potentially inconsistent rules relating to the same activities are likely to reduce their participation because of the risk that activity permitted by one provision may be penalized under another. Therefore, the Commission should clearly delineate the differences between the relevant provisions and provide unequivocal guidance as to the type of conduct prohibited under each.

III. The Commission's Proposed Rule Under Section 6(c)(3) of the CEA.

Because the CEA was only recently amended to extend the antifraud prohibition in Section 4b of the CEA to certain principal-to-principal transactions in 2008[24] and to grant the Commission authority over swaps by the elimination of Section 2(g) in 2010,[25] the Commission should examine whether its existing authority is sufficiently broad and clear enough before it pursues any new and vague rulemaking under Section 6(c)(3). Unlike Section 6(c)(1) of the CEA, Section 6(c)(3)ôs own terms do not require that the Commission promulgate rules. The Commission has nonetheless proposed to exercise its general rulemaking authority under Section 8(a)(5) to promulgate a rule under Section 6(c)(3). This decision is unwarranted, given the Commissionôs already expansive and well-developed authority under Section 9(a)(2) of the CEA.

While it is unclear what Section 6(c)(3) adds to the Commissionôs enforcement authority beyond an already expansive authority under Section 9(a)(2), the Commission should not use Section 6(c)(3) as a springboard from which to lower the specific intent standard traditionally required in manipulation cases. Instead, the Commission should issue clarifying guidance that conforms to the traditional framework of enforcement. Most importantly, specific intent should remain a required element for enforcement actions under Section 6(c)(3), because nothing in Section 6(c)(3)ôs plain terms implies that a lesser level of intent is necessary than the comparable Section 9(a)(2) authority. And as was explained above, ñ[d]efinitions that do not include intent fail to distinguish manipulative conduct from legitimate market activity.ò[26]

Should the Commission nonetheless decide to promulgate a rule under Section 6(c)(3) of the CEA, it should do so consistently with recent judicial precedent. Rulemaking under Section 6(c)(3) should clarify that it is limited to the theory of liability that was upheld by the Second Circuit in *DiPlacido*.[27] Moreover, the Commission should clarify that, aside from extending its enforcement authority to cover swap transactions, it is not articulating any new

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[24] CFTC Reauthorization Act of 2008 §13001 (Title XIII of the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923, 1428-29) (2008).

[25] Dodd-Frank § 723(a)(1)(A).

[26] Fischel & Ross, *supra* note 9, at 545.

[27] *In re DiPlacido*, Comm. Fut. L. Rep. (CCH) ¶ 30970, 2008 WL 4831204 (CFTC 2008), affôd in pertinent part, *DiPlacido* v. *Commodity Futures Trading Comm'n*, Comm. Fut. L. Rep. (CCH) ¶ 20,271 at 21,477, 364 Fed. Appx. 657, 2009 WL 3326624 (2d Cir. 2009).

standards or expanding beyond any of its existing authority relating to manipulative conduct, given the *DiPlacido* precedent.

The Associations support the Commissionôs statement reaffirming that the traditional four-part test, developed from manipulation cases involving ñcornersò and ñsqueezes,ò needed to impose liability under its proposed rule, which requires the Commission to establish that: (1) the alleged manipulator had the ability to influence market prices; (2) the alleged manipulator specifically intended to do so; (3) artificial prices existed; and (4) the alleged manipulator caused the artificial prices. This is a long-standing test that market participants are familiar with and provides some guidance for their trading activities. The Commission further correctly recognizes that nothing in Dodd-Frank changes the Commissionôs authority with respect to the Commissionôs anti-manipulation authority under Section 9(a)(2) over manipulative conduct that exploits market power, such a ñcornerò or a ñsqueeze.ò

However, the Associations are concerned that the Commission may be misreading Section 6(c)(3) to provide the Commission with authority that Congress did not intend it to have. The Associations believe that the Commissionôs statement ï ñthe conclusion that prices [are] affected by a factor not consistent with normal forces of supply and demand will often follow inescapably from proof of the actions of the alleged manipulatorò is an overly aggressive reading of judicial precedent like *DiPlacido*. To the extent that the Commissionôs proposed rule attempts to create a presumption that a price is artificial merely because one or more isolated transactions are deemed uneconomic, without proof of specific intent to create artificial prices, it would constitute an over-reading of judicial precedent and is unwarranted.

Moreover, there are a variety of *bona fide* commercial reasons for conducting trades that may appear on their face to lack economic rationale but which are not specifically intended to create artificial prices (e.g., hedging activities during the closing period). These legitimate trading activities can be distinguished from the concentrated, aggressive and unusual pattern of trading that the defendants in *DiPlacido*[28] or in *Henner*[29] had engaged in, and the Commission should clarify that these activities are not prohibited by the Commissionôs proposed rule.

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[28] *In re DiPlacido*, Comm. Fut. L. Rep. (CCH) ¶ 30970, 2008 WL 4831204, at *2-4 (CFTC 2008).

[29] *In re Henner*, 30 Agric. Dec. 1151, 1157 (1971).

We appreciate the opportunity to provide comments to the Commission regarding the proposed rules on the prohibition of market manipulation, and we would be pleased to discuss any questions the Commission might have with respect to this letter.

Very truly yours,

John M. Damgard
President, FIA

Robert G. Pickel
Executive Vice Chairman, ISDA

Kenneth E. Bentsen, Jr.
Executive Vice President, Public Policy and Advocacy, SIFMA

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Robert Pease, Counsel to the Director of Enforcement
Mark D. Higgins, Counsel to the Director of Enforcement