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June 29, 2012

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

RE: Aggregation, Position Limits for Futures and Swaps (RIN 3038-AD82)

Dear Mr. Stawick:

Barclays Capital ("Barclays")[1] appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("Commission") proposal to amend the aggregation requirements ("Proposal")[2] in the position limits rule ("Position Limits Rule" or "Rule") that the Commission adopted in November 2011.[3] Barclays continues to be a strong supporter of comprehensive and pragmatic regulation of the commodities markets. Although we continue to share the doubts about the wisdom of the Position Limits Rule as a whole, as expressed in the comment letters of ISDA and SIFMA,[4] we nonetheless believe that the Proposal is a major improvement on the aggregation requirements in the Rule. Barclays therefore urges the Commission to adopt the Proposal, especially with the modifications and enhancements set out in this letter as well as those in the comment letter filed by the Futures Industry Association ("FIA").[5]

By way of background, Barclays' commodities group operates a global risk management business utilizing one of the strongest balance sheets of any commodities trading bank. We have been active in the commodities markets for over 20 years and supported by a strong balance sheet, credit rating, and commodities risk management platform, we have over 300 front office commodities professionals who offer our 1,200+ clients a single point of service for all of their commodity related financing and risk management needs.

Barclays agrees that the Commission has a strong interest in preventing market disruptions.[6] With respect to the Rule's aggregation requirements, we understand that the Commission is concerned that "a single trader,

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1 Barclays Capital is the investment banking division of Barclays Bank, PLC. Barclays Capital provides large corporate, government and institutional clients with a comprehensive set of solutions to their strategic advisory, financing and risk management needs. Barclays Capital has offices around the world and employs over 25,000 people.

2 Aggregation, Position Limits for Futures and Swaps, 77 Fed. Reg. 31,767 (May 30, 2012).

3 Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626 (Nov. 18, 2011).

4 *See* ISDA and SIFMA comment letter, (June [ ], 2012).

5 *See* FIA comment letter, (June [ ], 2012).

6 *See* 76 Fed. Reg. at 71, 627 n. 10.

through common ownership or control of multiple accounts, may establish positions in excess of the position limits and thereby increase the risk of market manipulation or disruption."[7] While other means are available to the Commission to address that risk, to the extent that the Commission's need to change its existing aggregation practices is ultimately upheld, we agree with the Commission that the Proposal would improve the Position Limit Rules' aggregation requirements and should be adopted, with appropriate modifications.

Introduction and Background

The Position Limits Rule imposes limits on speculative positions in 28 futures and options contracts in agricultural and exempt commodities, as well as any economically equivalent contracts (collectively, "Referenced Contracts").[8] To determine compliance with these limits, the Rule requires a market participant to aggregate its own positions with the positions of others in certain enumerated situations that involve control, ownership, concerted action or identical trading strategies.[9] As is relevant here, the Commission interprets the Rule to require a market participant to aggregate the positions of any entity in which the investor holds, directly or indirectly, a 10 percent-or-greater ownership or equity interest (a so-called "owned entity").

The Position Limit Rule made numerous changes to the Commission's current position limits regime. In particular, the Rule's aggregation requirements, especially with respect to owned entities, are fundamentally different in nature and scope than those to which market participants have been accustomed. In response to these new aggregation requirements, the Commission has been made aware of some of the dramatic changes in organizational structure and/or systems development that might be brought about by the Rule's aggregation requirements.[10] For example, the Commodity Markets Council has highlighted that minority interests generally do not confer the managerial control necessary to control the trading of an owned entity.[11] Further, the Working Group of Commercial Energy Firms ("Working Group") has explained that, even if a minority interest did allow an investor to monitor the trading activity of an owned entity, intra-day compliance with the Rule's limits would require the development, testing and implementation of "real-time" systems to monitor such trading activity, and the technology necessary to conduct such monitoring currently does not exist.[12]

In the Proposal, the Commission recognizes the difficulties that market participants would face if required to comply with the Rule's owned entity aggregation requirements and proposes relief from these requirements

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7 76 Fed. Reg. at 71, 652.

8 *See* 17 C.F.R. part 151.

9 17 C.F.R. § 151.7(a).

10 Petitions by the Working Group of Commercial Energy Firms (Jan. 19 2012), at 10-14, available at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/wgap011912.pdf (hereinafter, "Working Group Petitions"); Commodity Markets Council comment letter (Mar. 9, 2012), at 1, available at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/CMCltr030912.pdf (hereinafter, "CMC Letter"); ; Futures Industry Association comment letter (Mar. 26, 2012), at 3-4, available at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/fialtr032612.pdf (hereinafter, "FIA Letter").

11 *See* CMC Letter at 1.

12 *See* Working Group Petition at 11. On this issue, Barclays has itself commented on the difficulty of "real-time" monitoring given the fluid and dynamic environment in which market participants operate. *See* Barclay's comment letter (Mar. 28, 2012), at 4, available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=33804&SearchText=barclays (explaining that the nature of a position can change quickly such that it may no longer be a *bona fide* and highlighting the timing mismatch that will always exist between the entry of an OTC trade and the accompanying hedge of such trade in the futures markets.)

in certain situations.[13] Specifically, the Proposal would provide an exemption from the Rule's owned entity aggregation requirements to investors who own at least 10 percent but no greater than 50 percent of an owned entity.[14] This exemption (the "Owned Entity Exemption") would be subject to the following conditions:

- Neither the person, nor the owned entity, has knowledge of the trading decisions of the other;
- Each entity trades pursuant to separately developed and independent trading systems;
- Each entity has, and enforces, written procedures to preclude the other entity from having knowledge of, gaining access to, or receiving data about, trades of the entity;
- Neither entity shares employees that control trading decisions of the other entity; and
- Neither entity has risk management systems that permit the sharing of trades or trading strategy with the other entity.[15]

As proposed, a market participant seeking to claim the Owned Entity Exemption would be required to file a notice in accordance with CFTC Rule 151.7(h), and the exemption only would become effective upon the filing of such notice (a "Rule 151.7(h) filing").[16]

Proper Basis for Aggregation

The Commission should modify the Rule's aggregation requirements to require aggregation based on the ownership of actual positions or the direct or indirect control of another person's trading. The statutory basis for aggregation for a market participant is limited to "*positions held* and trading done by any persons *directly or indirectly controlled*" by the market participant, as well as situations involving concerted action to trade as if they were a single person.[17] Therefore, unless a market participant actually holds a position, or has direct or indirect control over another person's trading, Congress did not appear to intend for the Commission to require aggregation.

We believe that the Commission's proposal of the Owned Entity Exemption is a positive step in bringing the Rule's aggregation requirements more in line with the plain language of the statute because it allows for control, rather than aggregation, to dictate aggregation. Indeed, as the Commission acknowledges in the Proposal, the use of "ownership" as a standard for requiring aggregation is, at least in part, a function of mere administrative necessity: "Absent aggregation on the basis of ownership, the Commission would have to apply a control test in all cases, which poses significant administrative challenges . . ."[18] By instead using an ownership standard as an admittedly imperfect proxy for control, the Commission is spared from conducting these labor-intensive control analyses of each participant in the commodities markets and is able to establish "a bright-line test that provides certainty to market participants and the Commission."[19]

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13 *See* 77 Fed. Reg. at 31,773.

14 77 Fed. Reg. at 31,782.

15 *Id*.

16 *Id*

17 7 U.S.C. § 6a(1)(a).

18 77 Fed. Reg. at 31,773.

19 *Id*.

We agree that ownership is an imperfect proxy for control, but we do not believe that the Commission must settle for such an onerous and imperfect proxy – especially when the Commission already has a system designed to capture information about the "positions held and trading done by any persons [who are] directly or indirectly controlled" by a market participant.[20] The Commission's large trader reporting system provides an existing framework, in the Form 40 Statement of Reporting Traders ("Form 40"), that allows the Commission to capture information on control of positions or ownership of accounts that would be relevant for aggregation purposes. Specifically, the Form 40 asks:

1. Does the market participant control the futures or option trading of any other persons, and if so, whom?
2. Is the market participant's trading is controlled by any other persons, and if so, whom? and
3. Does the market participant guarantee or have a financial interest of 10 percent-or-greater in futures or option accounts that are not in the market participant's name or have a financial interest of 10 percent or more in another futures or option trader (including interest as a limited partner), and if so, whom?

From a policy perspective, we believe that the information already collected in the Commission's Form 40 provides a ready-made framework for aggregation, at least as it is contemplated by the Commodity Exchange Act ("CEA"). If a market participant answers either of the first two questions in the affirmative, then the Commission should expect the participant to aggregate its positions with the entity whose trading it controls or expect the entity who controls the participant's trading to aggregate the participant's positions. If the market participant answers only the third question in the affirmative, then the Commission can inquire in a targeted manner whether the first two questions were answered incorrectly. If the Commission does not determine that the answers to the first two questions were inaccurate, then consistent with the text of Section 4a(a)(1) of the CEA, the market participant should be exempted from aggregation based on its lack of control of the entity.

Under this system, the Commission would not need market participants to submit Rule 151.7(h) filings because the Commission would have a completed Form 40 that lists all of the entities that would be the subject of any potential aggregation requirement with respect to a market participant. Any concerns about improper aggregation could be resolved in a focused, targeted manner.

Modifications to the Proposed Owned Entity Exemption

To the extent the Commission determines to retain the Rule's basic approach to aggregation based on ownership interests (that is, basing it on a 10 percent-or-greater threshold instead of direct or indirect control of a person's trading), we agree with the Commission that the Proposal would improve the Rule's aggregation requirements and, with appropriate modifications, should be adopted. Therefore, under those circumstances Barclays would support the Commission's proposal to adopt an Owned Entity Exemption, subject to the following modifications.

1. **Aggregation based solely on ownership should never be required unless an investor has an interest of 50 percent-or-greater.**

The Commission should modify its proposed Owned Entity Exemption to (1) move the standard of presumptive control from a 10 percent ownership interest to a 50 percent ownership interest, and (2) allow that presumption to be rebutted by certifying in a Rule 151.7(h) filing that the five conditions in the proposed Owned Entity Exemption are satisfied.

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[20] *Supra* at n. 17.

Underlying the proposal to aggregate based on a 10 percent-or-greater ownership interest is a single question: at what level of ownership should the Commission inquire as to whether an ownership interest confers direct control, or amounts to indirect control, of another person's trading? We respectfully submit that the 10 percent threshold is not the correct level. As proposed, we believe that the Owned Entity Exemption would still result in aggregation requirements that are over-inclusive and unduly costly without achieving a countervailing regulatory benefit. Contrary to the Commission's intent behind the Proposal, the Rule's aggregation requirements, even if softened by the Owned Entity Exemption, would continue to unnecessarily require changes in organizational structure and/or the development of systems in situations that present little or no risk to the commodities markets.

For example, under the Owned Entity Exemption, we will be required to monitor the exact percentage of our ownership interests in every entity in which Barclays has a position that could potentially mature into a 10 percent-or-greater ownership interest. This is because the Rule's aggregation requirement is triggered whenever an ownership interest crosses the 10 percent-or-greater threshold. And because position limit violations can occur on an intra-day basis, we will need to know with certainty on an intra-day basis if our ownership percentage is either 10 percent-or-greater with respect to each of our owned entities. Such compliance systems currently do not exist, either within Barclays or its "owned entities", would be complex to develop, and difficult-to-impossible to coordinate with entities that are not controlled.

To the extent that the Commission decides it must rely on an ownership threshold, we believe that a 50 percent ownership interest is a more appropriate point at which to presume control than a 10 percent interest. At or above 50 percent, a market participant's ownership interest could be used by the Commission as a surrogate for control, establishing a rebuttable presumption in favor of aggregation that could be overcome by satisfying each of the five conditions enumerated in the proposed Owned Entity Exemption.

2. The Owned Entity Exemption should be self-executing or should provide a safe harbor before the Rule 151.7(h) filing is submitted.

If the Commission is unwilling to raise the ownership threshold for aggregation to 50 percent, then Barclays requests that the Owned Entity Exemption be made self-executing, with an option of submitting a Rule 151.7(h) filing. We also request that, if a Rule 151.7(h) filing is required to claim the Owned Entity Exemption, the Commission provide market participants with a 90-day safe harbor during which they could identify the change in percentage of their ownership interest, conduct the diligence needed to ensure they satisfy the five conditions of the Owned Entity Exemption and prepare and submit their Rule 151.7(h) filings without being found unintentionally to have violated the Commission's aggregation requirements. This would allow companies to ensure this process was part of a standard quarterly review.

As the Commission is aware, ownership interests in some entities (like large publicly traded companies) are generally more stable and predictable, while ownership interests in other entities (like small, privately offered companies) may be more dynamic or transient. In the event that a market participant, like Barclays, has an ownership interest in an entity whose ownership is more dynamic or transient, it is easy to envision a situation in which Barclays' position could cross the 10 percent threshold. However, in the context of a global integrated financial institution like Barclays, it is also easy to envision a communication delay between one division or affiliate and another (especially where the divisions are located on different continents) that would result in an unintentional violation. This could also occur, for example, in situations involving privately offered companies retiring shares without timely notifying existing shareholders.

Indeed, even if it were possible to immediately notify our US commodities compliance professionals of changes in ownership interests, there could still be some period of potentially several weeks needed for a

senior officer to conduct the due diligence required to certify a Rule 151.7(h) filing.[21] Imagine the communication difficulties that could occur in a situation in which a market participant takes a minority interest (but still greater than 10 percent) in several companies by acquiring the interests of an existing minority shareholder in each of the companies. The participant will not typically be in a position to compel an immediate response with respect to the conditions in the filing, and because the participant's senior officer in required to certify the Rule 151.7(h) filing, the participant will be reticent to submit any such filing unless it can feel confident that the representations therein are the product of sufficient diligence. This process will take time.

In proposing the Owned Entity Exemption, we presume that the Commission recognized that in many situations a delay will necessarily exist between the event triggering the aggregation requirement (that is, an ownership interest crossing the 10 percent threshold) and the certification and subsequent submission of the Rule 151.7(h) filing or the recognition that such a filing cannot be certified. The Proposal does not address this timing mismatch, but we understand that the intent of the Owned Entity Exemption is to provide market participants with a safe harbor during which they can identify the change in the percentage of their ownership interest, conduct the diligence needed to certify a Rule 151.7(h) filing and prepare and submit the filing to the Commission. In the alternative, a market participant may conduct its diligence and realize that aggregation would be required. Either way, during this window, we understand the proposed Owned Entity Exemption to operate such that a market participant would not be required to aggregate the owned entity's positions, nor would it be in violation of the Commission's rules for failing to aggregate such positions.[22]

We believe that the best way to resolve this timing mismatch simply would be to make the proposed Owned Entity Exemption self-executing, but to leave market participants with an option to submit a Rule 151.7(h) filing if they feel it necessary to demonstrate their lack of control clearly and on-the-record to the Commission. If the Commission leaves the ownership threshold for aggregation at 10 percent-or-greater, then in most cases, a market participant's lack of control will be clear-cut and neither the Commission nor the market participant should be interested in a Rule 151.7(h) filing.[23] However, we recognize that in the situations where a market participant may have greater involvement with an owned entity, the participant's compliance with the five conditions of the Owned Entity Exemption may be less obvious. In these situations, prudence would dictate a market participant having the option to submit a Rule 151.7(h) filing to ensure that it has documented its lack of control with the Commission in order to avoid any possible enforcement issues. And in those situations where a market participant cannot satisfy each of the 5 enumerated conditions, the market participant would begin aggregating upon discovery of its inability to qualify for the Owned Entity Exemption. In either case, by making the Owned Entity Exemption self-executing, neither the Commission nor market participants would need to worry about issues arising from the timing mismatch.

If the Owned Entity Exemption is not made self-executing, then in the alternative, the Commission should modify the Owned Entity Exemption to provide market participants with a 90-day window to identify the

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[21] *See* 17 C.F.R. § 151.7(h)(ii) (requiring a senior officer to certify that the conditions of the Owned Entity Exemption are satisfied).

[22] This is to say, if a market participant's interest in an owned entity crosses the 10 percent threshold on Monday, but the market participant's commodities compliance staff doesn't learn about the change in ownership percentage until Wednesday and the market participant cannot certify and submits its Rule 151.7(h) filing until Friday, the intent of the Owned Entity Exemption is that the market participant would not be subject to an enforcement action for failing to aggregate the owned entity's positions between the triggering event on Monday and the submission of the filing on Friday.

[23] Where a market participant's lack of control is clear-cut, the Commission's legitimate regulatory interests would not be furthered by having such market participants certify their lack of control over owned entities.

change in percentage in their ownership interest, conduct the diligence needed to ensure they satisfy the five conditions of the Owned Entity Exemption and prepare and submit their Rule 151.7(h) filings, during which time the market participants would be exempt from aggregation.

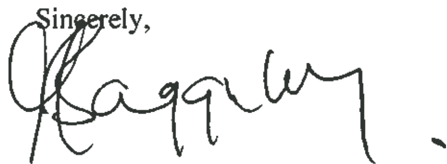
Pro Rata Aggregation

Ultimately, if aggregation is to be required based on an ownership interest, Barclays strongly believes that market participants should only be required to aggregate only their pro rata interest in any owned entities positions. Requiring a market participant to aggregate 100 percent of the positions in an owned entity will result in multiplicative counting of the owned entity's positions, as aggregation occurs up a large chain of ownership with different entities each consolidating 100 percent of the positions. This policy, especially where passive minority interests are concerned, does little to accomplish the Commission's goal of preventing "a single trader, through common ownership or control of multiple accounts, [from establishing] positions in excess of the position limits and thereby increase the risk of market manipulation or disruption."[24]

Conclusion

In the past, Barclays has raised concerns about the Commission's approach to its Position Limit Rules. However, we applaud the Commission for taking action on suggestions from market participants on how those Rules could be improved to avoid unintended consequences and costs. The Proposal is a major improvement. To that end, we support the adoption of the Proposal, especially with the modifications set out in this letter and those of the FIA letter.

Sincerely,



Mike Bagguley
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Barclays Capital

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[24] *Supra* at n. 7.