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June 29, 2012

Via Electronic Submission

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

Re: Comments on Aggregation, Position Limits for Futures and Swaps (RIN 3038-AD82)

Dear Mr. Stawick:

The Futures Industry Association ("**FIA**") appreciates the opportunity to provide the Commodity Futures Trading Commission (the "**Commission**") with comments and recommendations concerning the Commission's Notice of Proposed Rulemaking on Aggregation, Position Limits for Futures and Swaps (the "**Proposed Rule**").[1] The Commission issued the Proposed Rule, which amends the aggregation requirements in Rule 151.7, in response to the January 19, 2012 Petition of the Working Group of Commercial Energy Firms ("**Working Group**") for exemptive relief from certain aggregation requirements under Part 151 of the Commission's regulations (the "**Position Limits Rule**").[2]

FIA's members, their affiliates, and their customers actively participate in the exchange-traded and over-the-counter derivatives markets as intermediaries, principals, and users.[3] As FIA noted in its comments in support of the Working Group Petition, the Commission's current aggregation requirements for Referenced Contract positions, if not modified, will have a materially adverse effect on FIA's members, their customers, affiliates of FIA's members, and on the efficiency and competitiveness of the U.S. derivatives markets.[4] As a result, FIA and its members have a significant interest in the Proposed Rule.

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1 *Aggregation, Position Limits for Futures and Swaps*, 77 Fed. Reg. 31767 (May 30, 2012).

2 *Position Limits for Futures and Swaps*, 76 Fed. Reg. 71626 (Nov. 18, 2011).

3 FIA's regular membership is comprised of approximately 30 of the largest futures commission merchants ("**FCMs**") in the United States, the majority of which also are either registered with the Securities and Exchange Commission ("**SEC**") as broker-dealers or are affiliates of broker-dealers. 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 80 percent of all customer transactions executed on U.S. designated contract markets.

4 *See* Futures Industry Association, Comment Letter on Position Limits for Futures and Swaps, at 2-3 (Jan. 17, 2012).

FIA largely supports the aggregation relief in the Proposed Rule. However, FIA believes that, as requested in the Working Group's Petition, a parent company should not be required to aggregate its Referenced Contract positions with those of an owned entity if it can demonstrate that their Referenced Contract trading is independently managed and controlled, regardless of the parent company's percentage ownership interest in the owned entity. In addition, FIA provides comments below on the appropriate scope of the proposed aggregation exemptions for: (1) entities subject to law information sharing restrictions; and (2) the ownership interests of broker-dealers acquired in the normal course of dealing.

Separate and apart from its substantive comments, FIA is concerned that its members, their affiliates and other market participants will not have sufficient time to comply with the aggregation requirements of the Proposed Rule as it may be modified based upon the Commission's consideration of public comments. Even if the Commission adopts a modified version of the Proposed Rule prior to the Position Limits Rule's compliance date, market participants will need a transition period to identify their affiliates subject to the modified aggregation requirements, to implement necessary systems, policies and procedures, and to prepare and make the required notice filings to qualify for exemptive relief. Moreover, we understand that Commission Staff intends to develop a process for providing market participants guidance about the many technical compliance issues raised by the Position Limits Rule, including the aggregation requirements. Accordingly, FIA respectfully requests that the Commission provide a reasonable transition period of not less than six months from the compliance date of the Position Limits Rule for market participants to comply with the aggregation requirements.[5]

I. Summary of FIA's Comments and Recommendations

FIA supports the following provisions of the Proposed Rule:

- Disaggregation relief for owned entities, subject to certain criteria demonstrating independent management and control of Referenced Contract trades and positions;
- Extension of the law information sharing restriction exemption to include the reasonable risk of violations of state, federal, or foreign law;
- Expansion of the underwriting exemption to include positions of SEC or foreign regulatory authority-registered broker-dealers acquired "in the normal course of business"; and

[5] FIA also plans to make a separate request for a reasonable transition period for market participants to come into compliance with other requirements of the Position Limits Rule because of, among other things, the many definitional, information technology and operational challenges raised by attempting to comply with what is a new, broad and complex regime governing the trading of Referenced Contracts, including swaps which have never before been subject to position limits.

- Adding the managing member of a limited liability company to the definition of "eligible entity" for purposes of the independent account controller exemption.

Although FIA supports most aspects of the Proposed Rule, FIA respectfully urges the Commission to incorporate the following modifications and recommendations in the final rule:

- Extend the availability of the owned entity exemption to persons with a greater than 50 percent ownership interest when they demonstrate independent management and control of Referenced Contract trades and positions;

- Establish a single, aggregate notice filing process, with required annual updates for material changes, in which persons claiming the owned entity exemption may list all of their owned entities and certify that appropriate policies and procedures are in place to ensure independent management and control of Referenced Contract trades and positions;

- Adopt the proposed law information sharing restriction exemption for the reasonable risk of violations of state law, regardless of whether a comparable federal law exists or pre-empts state law, and construe "state law" broadly to include state statutes, regulations and state common law;

- Adopt a flexible interpretation of the requirement that market participants obtain an opinion of counsel to support the information sharing restriction exemption;

- Permit SEC or foreign regulatory authority-registered broker-dealers to acquire an ownership interest in an entity "in the normal course of business as a dealer" without requiring aggregation; and

- Provide a reasonable transition period for market participants to comply with the aggregation requirements of the Position Limits Rule.

II. The Commission Should Adopt, with FIA's Recommended Modifications, the Proposal to Provide Disaggregation Relief for Owned Entities

The Proposed Rule would allow entities that have a 50 percent or less ownership interest in a separately organized, owned entity to disaggregate their positions, provided that they can demonstrate independent control and management of trading and positions by meeting certain criteria specified by the Commission (the "**Owned Entity Exemption**"). FIA generally supports the Owned Entity Exemption, as well as the Commission's proposal to make the exemption effective upon the notice filing required under Rule 151.7(h). Making the notice filing effective upon submission appropriately balances the Commission's need for accuracy with the business needs of market participants.[6] Although the proposed Owned Entity Exemption improves the

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[6] *Id*. at 31733.

Commission's current aggregation requirements, FIA recommends that the exemption be expanded and clarified, as discussed below, to make it more consistent with current commercial practices.

A. The Owned Entity Exemption Should Not be Limited to Persons with a 50 Percent or Less Ownership Interest

As FIA has commented previously, the Commission's current aggregation rule, which requires market participants to aggregate all positions of owned entities in which they have a 10 percent or greater ownership interest, even if the owned entities trade and manage their positions independently, is commercially impracticable for many of FIA's members, their affiliates and other commercial companies. The proposed Owned Entity Exemption appropriately provides companies with the opportunity to rebut the presumption that a 10 percent ownership interest establishes actual control over the trading of Referenced Contracts. Nevertheless, FIA believes that, as requested in the Working Group's Petition, the exemption should not be limited to entities with a 50 percent or less ownership interest if they can demonstrate that their trading decisions are subject to independent control and management.[7]

When the Commission originally proposed the owned non-financial entity ("ONFE") exemption in January 2011, it did not limit the ownership interest that a parent company could hold if it could demonstrate that the ONFE's Referenced Contract positions are independently controlled and managed.[8] The Commission explained that the ONFE exemption was designed to permit disaggregation "in the case of a conglomerate or holding company that merely has a *passive ownership interest* in one or more non-financial operating companies."[9] As the Commission noted, "the operating companies may have complete trading and management independence and operate at such a distance from the holding company that *it would not be appropriate to aggregate positions*."[10]

The Commission's reasoning when it proposed the ONFE exemption applies equally to the proposed Owned Entity Exemption. Passive ownership interests, regardless of the level of ownership, pose little risk of coordinated trading. Many companies in the course of their legitimate commercial activities acquire ownership interests in operating companies that also happen to trade Referenced Contracts. They make these passive investments because of their anticipated profitability, typically without regard to the owned entity's Referenced Contract trading. More often than not, the owners do not exercise any control over, or have knowledge of,

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[7] *See* Futures Industry Association, Comment Letter on Position Limits for Futures and Swaps, at 18 (Jan. 17, 2012); Comment Letter in Support of Petitions for Exemptive Relief from Certain Requirements of Part 151 of the Commission's Regulations, at 3 (March 16, 2012).

[8] *Position Limits for Derivatives, Proposed Rule*, 76 Fed. Reg. 4752, 4762 (Jan. 26, 2011).

[9] *Id*. (Emphasis added).

[10] *Id*. (Emphasis added).

the owned entity's Referenced Contract trading or positions.[11] Requiring aggregation based upon an ownership interest in excess of 50 percent, even when the owner can demonstrate independent management and control of the owned entity's Referenced Contract trading, likely will inhibit legitimate commercial activity unrelated to the trading of Referenced Contracts.

Permitting disaggregation of owned entities in which the parent has a passive interest and does not control the owned entity's trading of Referenced Contracts is consistent with the underlying purpose of the Commission's aggregation policy – to prevent a single trader from using multiple entities or accounts to establish positions in excess of position limits.[12] Accordingly, FIA respectfully requests that the Commission permit persons, regardless of their percentage ownership interest in an operating company, to rely upon the Owned Entity Exemption whenever they are able to demonstrate that their trading activities and positions are independently controlled and managed.

B. The Commission Should Confirm that "Trading Systems" Means Systems that Direct Trading Decisions

As a condition of claiming the Owned Entity Exemption, entities must demonstrate that they "trade *pursuant to* separately developed and independent trading systems."[13] The Commission explains that this requirement is designed to ensure that trading is not coordinated through the development of similar trading systems, but also states that disaggregation should be permitted "if there is independence of trading between the two entities."[14] FIA interprets the "pursuant to" language in this condition to apply to trading systems that direct trading decisions, either through algorithmic codes, the generation of buy or sell signals, or other similar means.[15] However, CFTC Rule 151.7(d) already provides that any person who holds, or controls the trading of, positions in accounts with "identical trading strategies must aggregate all such accounts or positions," regardless of any other aggregation exemption provided under Part 151.[16] The similarity between these two requirements may create ambiguity regarding the definition of

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[11] For example, financial holding companies may hold ownership interests in excess of 50 percent in non-financial, operating companies under the merchant banking provisions of the Bank Holding Company Act. They acquire these passive investments in connection with legitimate banking activity. Significantly, however, the merchant banking rules prohibit the financial holding company from becoming involved in, or exercising control over, the day-to-day operations and management of the portfolio company. *See* 12 C.F.R. §225.171. FIA believes that financial holding companies should not be required to aggregate Referenced Contract positions with those of a portfolio company regardless of their percentage ownership if they can demonstrate independent management and control of the portfolio company's daily trading decisions.

[12] *Position Limits for Futures and Swaps*, 76 Fed. Reg. at 71652.

[13] Proposed CFTC Rule 151.7(b)(1)(i)(B) (emphasis added).

[14] *Proposed Rule*, 77 Fed. Reg. at 31774.

[15] For example, the CME defines an automated trading system as "a system that automates the generation and routing of orders to Globex." *See* CME Group Advisory Notice 09-392.

[16] The only difference between the two requirements appears to be that CFTC Rule 151.7(d) prohibits disaggregation when the entities trade pursuant to *identical* trading strategies whereas the Proposed Rule's condition would prohibit disaggregation when entities trade pursuant to *similar* or "*non-independent*" trading systems.

"trading system" under the Proposed Rule. FIA requests, therefore, that the Commission confirm that "trading systems" as used in the Proposed Rule are limited to systems that direct trading decisions, and do not include trade capture systems, trade risk systems or trading systems that facilitate trade execution, but that do not direct trading decisions.

Trade capture, trade risk and trade execution systems are distinguishable from trading systems because they do not increase the risk of coordinated trading between the related entities. A person cannot trade *pursuant to* a trade capture, trade risk, or trade execution system. Trade capture systems enable traders to enter all of the relevant information relating to an executed trade into a central system. Trade risk systems feed the net exposures resulting from trades into a firm-wide trade risk system.[17] The use of a single trade capture or single trade risk system across related entities serves legitimate business and risk management objectives that cannot otherwise easily be achieved.[18] Trade execution or routing systems provide a means to transmit independently generated bids and offers to a trading facility. For these reasons, FIA asks that the Commission confirm that "trading systems" do not include trade capture, trade risk and trade execution systems, and that such systems may be used across affiliates, provided that appropriate information access barriers are in place.[19]

C. Related Entities Should be Permitted to Share Virtual Documentation Storage Provided that They Have Appropriate Information Sharing Safeguards in Place

The Commission requires persons seeking disaggregation with owned entities to demonstrate that they "have and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data, about trades of the other."[20] FIA requests that the Commission clarify that these policies and procedures could permit firms to share virtual documentation storage, provided that access to different levels of information (*e.g.*, position information) is restricted to persons who do not manage or control the trading of Referenced Contracts. The ability to share electronic storage of trade information on a firm-wide basis reduces costs and enhances risk management. As long as individuals with authority over trading decisions are precluded from seeing another entity's position data, the use of shared virtual documentation storage does not undermine the entities' trading independence, and should be permitted.

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[17] In the case of an electronic platform, a trade capture system will automatically capture the trade information. In the case of trade risk systems, once the risk system receives the exposure data, it calculates the firm's aggregate exposures to various market risks, enabling the firm to better monitor and manage its risk.

[18] As discussed further below, FIA believes that trade risk management systems should be permitted to provide trade and position data to a central Market Risk Department.

[19] FIA believes that it would be appropriate for a firm to aggregate its position information and market risk information generated by the trade capture or trade risk system when necessary for prudent risk management.

[20] Proposed CFTC Rule 151.7(b)(1)(i)(C). These procedures must also address document routing and security arrangements, including requiring "separate physical locations," in order to maintain the independence of the entities' activities. *Proposed Rule*, 77 Fed. Reg. at 31774.

D. Related Entities Should be Permitted to Provide Trade and Position Data to a Central Market Risk Department

The Commission, by permitting end-of-day position information to be shared among disaggregated affiliates (provided that such information cannot be used to dictate or infer trading decisions), has recognized that certain trade information may be shared among affiliates for legitimate risk management purposes.[21] While FIA supports the Commission's proposal, FIA respectfully recommends that the Commission permit the continuous sharing of position information among affiliates, provided that it is used solely for legitimate risk management and surveillance purposes. Continuous sharing of position information among risk management personnel, including with a centralized market risk department, does not present a risk of coordinated trading as long as entities demonstrate that their risk management and surveillance systems preclude the sharing of trades, positions or trading strategies with trading personnel.[22]

As long as disaggregated affiliates have independent traders and trading systems, allowing risk management systems to feed trade data to a centralized market risk group or department does not compromise the entities' trading independence. The use of shared trade risk management and surveillance systems enables a conglomerate or holding company to measure more accurately its overall exposure to a specific market price risk, and to conduct appropriate regulatory surveillance. This type of sound risk management limits a firm's aggregate net exposure and enhances compliance, which is consistent with many of the Commission's rulemakings to implement the Dodd-Frank Act, including the Position Limits Rule. Accordingly, FIA requests that the Commission permit disaggregated entities to share trade and risk data across affiliates.[23]

E. The Commission Should Simplify the Notice Filing Process for Claiming the Owned Entity Exemption

FIA supports the Commission's proposal to make the notice filing for the Owned Entity Exemption effective upon submission. FIA recommends, however, that the Commission adopt an annual filing requirement, subject to required annual updates for material changes in relevant information, in which persons seeking to claim the exemption would list all of their owned entities eligible for disaggregation and certify that they have adopted appropriate policies and procedures, including information barriers, to ensure the independent management and control of the owned entities' Referenced Contract trading and positions. An annual notice and certification would significantly reduce the cost and complexity of applying for the exemption for market participants that may have scores of owned entities eligible for the exemption while

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[21] *Proposed Rule*, 77 Fed. Reg. at 31774.

[22] Proposed CFTC Rule 151.7(b)(1)(i)(E).

[23] FIA recognizes that any time disaggregated entities share trade or position information, the entities must ensure that personnel responsible for the trading decisions of Referenced Contracts are precluded from accessing such information. These safeguards would be included in the firm's written policies and procedures required under proposed CFTC Rule 151.7(b)(1)(i)(C).

simultaneously satisfying the Commission's need to ensure that the relevant entities' maintain their trading independence. FIA also requests that the Commission clarify that the notice filing would be effective retroactively to the beginning of the prior filing period. If, at some point in the future, the Commission becomes concerned that particular disaggregated entities are engaging in coordinated trading, it can require the entities to provide additional evidence that their Referenced Contract positions are independently controlled and managed.

F. The Commission Should Permit Sister-Affiliates to Rely on an Affiliate's Notice-Filing for the Owned Entity Exemption

Proposed Rule 151.7(j) provides notice-filing relief for higher-tier entities because a middle-tier entity's filed notice for the owned entity exemption demonstrates the independence between the owned entity and all of its higher-tier owners. The CFTC has recognized that, in such situations, it is unnecessary to require higher-tier owners to file separate notice-filings claiming the exemption. Similarly, some sister-affiliates have ownership interests in the same owned entity whose management and control of the trading of Referenced Contracts is independent of either sister-affiliate owner. For example, company A and company B, which are sister affiliates, may both have a 30 percent ownership interest in company C. The management and control of company C's trading and positions may be completely independent of both company A and company B. Under such circumstances, if company A submits a notice-filing for the owned entity exemption demonstrating that company C's trading and positions are independent of company A and company B by meeting the Commission's independence criteria, then company B should be permitted to rely on company A's notice-filing. Permitting a single notice-filing that addresses the independence of all sister-affiliate owners from the owned entity would simplify and streamline the exemption process. Accordingly, FIA requests that, in the circumstances described above, the Commission permit a sister-affiliate to rely on the notice-filing of another sister-affiliate for the owned entity exemption under proposed CFTC Rule 151.7(j).

III. The Commission Should Adopt the Proposed Extension of the Law Information Sharing Exemption

The Position Limits Rule permits disaggregation if the sharing of Referenced Contract position information would cause a person to violate Federal law (the "**Information Sharing Exemption**"). FIA supports the Commission's proposed expansion of the Information Sharing Exemption to include situations presenting a reasonable risk of a violation of state or federal law or the law of foreign jurisdictions. As FIA noted in its letter in support of the Working Group's Petition, a "reasonable risk" of violating a law is the appropriate standard for claiming the exemption and ensures that market participants are not forced to choose between potentially

violating the Position Limits Rule's aggregation requirement or violating state, federal, or foreign law.[24]

Although FIA supports the Commission's proposed modifications to the Information Sharing Exemption, FIA requests that the Commission adopt the following recommendations to further clarify and simplify the exemption.

A. The Information Sharing Exemption Should Extend to All Situations Creating a Reasonable Risk of a Violation of State Law

Where the sharing of information between entities creates a reasonable risk of violating a state law, the Commission should permit disaggregation.[25] Limiting the Information Sharing Exemption to situations where a "comparable" federal law exists, or where state law has not been pre-empted, introduces unnecessary complexity and uncertainty into the exemption process. For example, it is unclear what criteria market participants should apply to determine if a state and federal law are "comparable" or when state law has been pre-empted by federal statute. The public policy reason behind extending the Information Sharing Exemption to state law extends to situations where a comparable federal law does not exist. Regardless of whether a federal law forbids information sharing, the Proposed Rule should not force market participants to choose between violating state law or violating the Commission's aggregation requirements. Therefore, the Commission should adopt the Information Sharing Exemption for state law as proposed.

In addition, FIA recommends that the Commission interpret "state law" broadly to encompass state statutes, regulations and common law. For example, information sharing between related entities may violate fiduciary duties owed by one entity to another under state common law. For this reason, FIA requests that that the Commission clarify that violations of "state" law include violations of any state law regardless of whether its source is a statute, regulation, or common law.

B. The Commission Should Be Flexible In Interpreting the Requirement to Obtain a Legal Opinion

Under the Proposed Rule, in order to claim the Information Sharing Exemption, market participants must obtain an opinion of counsel stating "that the sharing of information creates a reasonable risk" of violating a state, federal, or foreign law.[26] FIA understands that the legal opinion requirement is intended to ensure that persons trading Referenced Contracts do not abuse the Information Sharing Exemption to evade the Position Limits Rule's aggregation

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[24] Futures Industry Association, Comment Letter in Support of Petitions for Exemptive Relief from Certain Requirements of Part 151 of the Commission's Regulations, at 5 (March 16, 2012).

[25] The Commission has requested comments on whether it should limit the proposed Information Sharing Exemption for state law violations to state laws with a comparable provision at the federal level. The Commission has also asked if it should rely on the doctrine of preemption in the administration of its aggregation policy. *Proposed Rule*, 77 Fed. Reg. at 31722.

[26] Proposed CFTC Rule 157.7(i).

requirement.[27] However, FIA is concerned that market participants may find it costly and time-consuming to obtain a legal opinion that information sharing creates a "reasonable risk" of violating a law information sharing restriction.

FIA recommends that the Commission adopt a flexible approach when interpreting its legal opinion requirement. For example, given the significant time and expense of obtaining a formal legal opinion from outside counsel and the likelihood that market participants will need to obtain multiple legal opinions addressing different laws, the Commission should confirm that a formal legal opinion or memorandum of law prepared by either internal or outside counsel would satisfy this requirement.[28]

Furthermore, in cases where a legal opinion addresses a law that generally prohibits information sharing under recurring or common circumstances or between certain types of counterparties, firms should be able to rely upon the same legal opinion to address all of those particular circumstances or counterparties. For example, ISDA netting opinions are generally applicable legal opinions that are specific to the laws of a particular jurisdiction, yet applicable to multiple situations and counterparties within that jurisdiction. Under the Proposed Rule, market participants should be permitted to rely on a general legal opinion that delineates the extent of permissible and impermissible information sharing between competitors who are parties to a joint venture, and in other similar circumstances. If the Commission does not permit firms to rely upon generally applicable legal opinions, firms will be forced to obtain essentially duplicative legal opinions, at great expense, to address circumstances that only vary based on immaterial differences.

C. The Commission Should Adopt the Proposed Exemptions Rather Than Use a Case-by-Case Approach To Granting Aggregation Exemptions

FIA respectfully requests that the Commission retain the proposed generally applicable exemptions rather than adopt a case-by-case process for seeking exemptions.[29] The proposed exemptions are more efficient and less costly for FIA's members than a case-by-case approach. Generally applicable exemptions afford market participants and the Commission with maximum flexibility to address any situation arising under the Information Sharing Exemption. Under the Proposed Rule, market participants have more certainty regarding the specific requirements of the exemption and are able to rely upon the exemption immediately upon filing the required notice. At the same time, the Commission has all of the information it needs in the filed notice,

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[27] *Proposed Rule*, 77 Fed. Reg. at 31775.

[28] Permitting internal counsel, who are more familiar with the facts and the operations of the firm, to provide the required opinions likely will be less expensive and time-consuming than seeking a legal opinion from outside counsel.

[29] The Commission asked for comments on whether it should adopt a case-by-case approach toward granting exemptions for situations where information sharing creates a reasonable risk of violating foreign, federal, or state laws. *Proposed Rule*, 77 Fed. Reg. at 31772.

along with the legal opinion, to assess whether a market participant should be able to claim the exemption, and, if so, what the scope of the exemption should be. For these reasons, the Commission should adopt the current generally applicable exemptions rather than adopt a case-by-case exemption process.

IV. The Commission Should Permit SEC and Foreign Regulatory Authority-Registered Broker-Dealers to Acquire an Ownership Interest in an Entity "In the Normal Course of Business as a Dealer" Without Requiring Aggregation

FIA supports the Commission's proposed expansion of the underwriting exemption to apply to an SEC-registered broker-dealer's positions or accounts in an owned entity, if the ownership interest is based on the acquisition or disposition of securities acquired "in the normal course of business as a dealer."[30] However, FIA recommends that the Commission eliminate the requirement that the ownership interest be acquired "as part of [the] reasonable activity" of the SEC-registered broker-dealer. Further, FIA requests that the Commission clarify that the broker-dealer's shares of the owned entity would not be aggregated with any shares of the owned entity held by the broker-dealer or one of its affiliates in another capacity.[31]

A. The Commission Should Eliminate the Requirement that an SEC-Registered Broker Dealer Acquire Its Ownership Interest as Part of "Reasonable Activity"

The Proposed Rule limits the extension of the underwriting exemption to instances where the broker-dealer acquires its ownership interest in an entity "in the normal course of business as a dealer." This limitation ensures that the broker-dealer's ownership interest in the entity occurs as a result of its brokering or dealing activities and, therefore, is likely to be transitory and not for investment purposes.[32] Although FIA concurs with the "normal course of business" limitation, the additional requirement that the ownership interest be acquired "as part of reasonable activity" creates uncertainty about the scope of the "normal course of business" limitation, which should be sufficient, by itself, to establish that an ownership interest was not acquired for investment purposes. The Proposed Rule should not raise the possibility that broker-dealers, which are regulated by the SEC or a foreign regulatory authority, will have the reasonableness of their "normal course of business" activities questioned by the Commission. Accordingly, FIA recommends that the Commission eliminate the "reasonable activity" requirement to reduce uncertainty about the scope of the underwriting exemption.

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[30] Proposed CFTC Rule 151.7(g)(1).

[31] Futures Industry Association, Comment Letter on Position Limits for Futures and Swaps, at 16 (Jan. 17, 2012). As FIA has commented previously, there are sound public policy reasons for permitting SEC-registered broker-dealers to disaggregate the positions of owned entities which were acquired in connection with their underwriting activities.

[32] *Proposed Rule*, 77 Fed. Reg. at 31776.

B. The Commission Should Not Restrict the Underwriting Exemption for Broker-Dealers to 50 Percent or Less Ownership Interests

FIA recommends that the Commission permit broker-dealers to rely upon the underwriting exemption for ownership interests acquired in the "normal course of business" as a broker-dealer, regardless of the level of ownership interest. The rationale behind providing the exemption extends to all situations where the broker-dealer acquired the ownership interest as part of its brokering or dealing activities in the normal course of business. However, if the Commission decides to retain the 50 percent ownership limitation, FIA requests that the Commission clarify that it will not aggregate the broker-dealer's ownership interest acquired in the normal course of business with ownership interests held by the broker-dealer or one of its affiliates in another capacity. FIA is concerned that the availability of the underwriting exemption could be artificially limited if broker-dealers are forced to aggregate their ownership interests in an owned entity with ownership interests unrelated to their underwriting activities. For example, an affiliate may own a 46 percent stake in a company as part of its investment activities, but this investment should not limit the ability of an affiliated broker-dealer to acquire more than five percent of the company in its normal course of business. In such cases, the 50 percent limitation should be calculated based solely on the broker-dealer's holdings in the owned entity.

V. Multiple Entities Holding Minority Interests in an Owned Entity that Trades Referenced Contracts Should Only be Required to Aggregate a *Pro Rata* Portion of the Owned Entity's Positions

Under the existing Position Limits Rule, even as modified by the Proposed Rule, if several persons own a 10 percent or greater share of an owned entity that trades Referenced Contracts, they must aggregate their Referenced Contract positions with *all* of the Referenced Contract positions of the owned entity, unless an aggregation exemption applies. This requirement results in the double (actually multiple) counting of the Referenced Contract positions of owned entities, which unnecessarily restricts the Referenced Contract positions of the entity's owners and provides misleading data to the Commission. Instead, FIA recommends that the Commission permit persons owning a portion of a company that trades Referenced Contracts to aggregate only their *pro rata* share of the owned entity's Referenced Contracts. Adopting the policy of aggregating by *pro rata* shares will ensure that traders are not artificially limited in their Referenced Contract trading, which might adversely affect the liquidity of Referenced Contracts. It also will ensure that the Commission will have accurate position data that is not artificially enlarged by multiple counting of the Referenced Contract positions of owned entities.

VI. The Commission Should Provide Market Participants with a Reasonable Transition Period to Comply with the Final Aggregation Requirements

Although the Proposed Rule, if adopted and modified based upon public comments, should provide market participants with greater flexibility to disaggregate the positions of owned

entities in appropriate circumstances, it will not be final for some time and still will raise a number of complex issues. Once the aggregation requirements are final, market participants will need time to determine which of their owned entities may be eligible for aggregation relief, ensure that they have in place appropriate policies and procedures, including information barriers, that satisfy the final independence requirements adopted by the Commission, and to prepare the requisite notice filings. In the case of owned entities that may be eligible for the modified Information Sharing Exemption, market participants will need time to obtain the required opinions of counsel, a process that will require time to apply the relevant facts to the applicable law. Moreover, if the Commission adopts FIA's recommendation to allow market participants to rely upon opinions that are broadly applicable to recurring or common circumstances or between certain types of counterparties, they will need time to develop appropriate protocols for obtaining, defining the scope of, adhering to and submitting those opinions to the Commission.

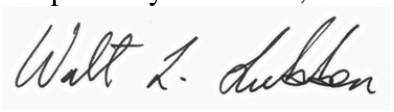
Based on FIA's experience helping its members implement procedures to comply with other final Commission rules, it expects that members and other market participants will need to request guidance from Staff on many technical issues raised by the yet to be finalized aggregation requirements. Indeed, FIA understands that Commission Staff intends to develop a process for providing market participants with position limits implementation guidance. FIA looks forward to working with Staff to assist FIA's members and their affiliates to implement the requirements of the Position Limits Rule.

For all of these reasons, FIA requests that the Commission provide market participants a reasonable transition period to comply with the aggregation requirements of the Position Limits Rule. FIA believes that a transition period of not less than six months from the compliance date of the Position Limits Rule would be an appropriate initial transition period. It also would be helpful if the Commission delegated to the Staff the discretion to extend the transition period if necessary to enable market participants to come into compliance.

VII. Conclusion

FIA appreciates the opportunity to comment on the Proposed Rule. Please contact Barbara Wierzynski, General Counsel of the FIA at 202-466-5460, if you have any questions about FIA's comments or recommendations.

Respectfully submitted,



Walt Lukken
President

cc: Honorable Gary Gensler, Chairman
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