SUTHERLAND

June 29, 2012

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

<u>VIA ELECTRONIC MAIL</u>

Re: *Aggregation, Position Limits for Futures and Swaps,* RIN 3038-AD82

Dear Mr. Stawick:

I. INTRODUCTION

Hunton & Williams LLP, on behalf of The Working Group of Commercial Energy Firms (“WGCEF”), and Sutherland Asbill & Brennan LLP, on behalf of The Commercial Energy Working Group (“CEWG” and together with WGCEF, the “Petitioners”), hereby submit these comments in response to the Commodity Futures Trading Commission’s (the “Commission”) request for public comment set forth in the Notice of Proposed Rulemaking, *Aggregation, Position Limits for Futures and Swaps* (the “Proposed Rules”).[1]

The Petitioners appreciate the Commission responding to some of the concerns set out in the petitions filed by WGCEF[2] pertaining to, *inter alia*, Part 151 of the Commission’s regulations implementing federal position limits for derivatives (the “Final Position Limits Rules”).[3]

The Commission’s proposed modifications to the Final Position Limits Rules are constructive. For example, the Commission’s clarification that the information sharing exemption with respect to Federal law applies to potential violations of such laws where there is a “reasonable risk” thereof is welcomed.[4] Yet, the proposed modifications, in the aggregate, do not achieve a balance where market regulation does not stifle or materially impair the operation of the commercial markets. Absent further relief from the amended aggregation requirements under the Proposed Rules, commercial firms and associated investors will be required to abandon

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[1] *Aggregation, Position Limits for Futures and Swaps*, 77 Fed. Reg. 31,767 (May 30, 2012).

[2] *Petitions for Order to Exempt Owned Non-Financial Entities from Aggregation for Compliance with Position Limits and Order to Broaden and Clarify Rule 151.7(i)*. (Jan. 19, 2012).

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

[4] Proposed Rules at 31,771.

existing "best practices," incur significant costs, and may be forced to engage in material restructurings with potentially adverse affects upon market liquidity. Thus, the Commission should amend the Proposed Rules in the manner set forth below to achieve the proper balance. Further, the Petitioners respectfully request that the Commission act upon this request at the earliest opportunity in order to limit potentially adverse effects in the commercial marketplace from ongoing uncertainty concerning aggregation requirements.

II. COMMENTS OF THE PETITIONERS

A. Proposed Rules—Ownership of Positions Generally

1. The 50 Percent Ceiling for Disaggregation Relief in Part 151.7(b)(1)(ii) should be Eliminated

The Proposed Rules establish a notice filing procedure that permits a person to disaggregate the positions of a separately organized entity ("owned entity") in which that person has a 10 percent or greater interest. That notice filing must demonstrate compliance with certain conditions that preclude the coordination of trading between those persons. However, the proposed relief is not available to persons with a greater than 50 percent ownership or equity interest in the owned entity (the "50 Percent Ceiling").[5]

The Petitioners agree that aggregation is appropriate when one entity controls the trading activity of another entity or has unrestricted access to information about the trading of such other entity that could be used to advance its own trading objectives. Conversely, where such control is absent and information or legal barriers are sufficient, aggregation should not be required even if a person's ownership or equity interest in the owned entity exceeds 50 percent. Entities should be able to avoid aggregation, regardless of the level of common ownership, if they can demonstrate that proper safeguards are maintained to prevent the coordination of trading activities.

The Petitioners, for the reasons set forth below, recommend that the Commission eliminate the 50 Percent Ceiling and extend the Proposed Rules' disaggregation relief to all entities that can demonstrate "independence" according to the prescribed criteria in proposed Part 151.7(b)(1)(i)(A)-(E) (subject to the requested clarifications discussed herein).[6] Should the Commission decline to eliminate the 50 Percent Ceiling, the Petitioners recommend, in the alternative, that the Commission modify the disaggregation relief such that, if an entity holds more than a 50 percent ownership or equity interest in an owned entity, a rebuttable presumption arises. A rebuttable presumption places the burden squarely on the market participant to

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[5] *Id.* at 31,773.

[6] *Id.* at 31,774.

demonstrate why such ownership does not result in trading control or information sharing that would warrant aggregation.

(a) Absent Inquiry into Control of the Owned Entity's Positions, any Limitation on Disaggregation Relief Based on Ownership is Improper

In the Proposed Rules, the Commission states that "[it] has historically viewed, and continues to view, section 4a [of the Commodity Exchange Act (which provides for the general aggregation standard with regard to position limits)] as requiring aggregation on the basis of either ownership *or* control" (emphasis added).[7] In proposing the 50 Percent Ceiling, the Commission further notes that "[t]o the extent that the majority owner may have the ability and incentive to *direct, control or influence* the management of the owned entity, the proposed bright-line test would be a reasonable approach to the aggregation of accounts" (emphasis added).[8] Thus, the rationale for requiring aggregation on the basis of ownership is that sufficient equity ownership equates to control, which may undermine an affiliated entity's independence of trading.

That excessive speculation could result from the circumvention of position limits by entities trading in concert is the Commission's predominant concern. Specifically, the Commission notes, in connection with its proposed "bright-line test," that a person with "a greater than 50 percent ownership interest in multiple accounts would have the ability to hold *and* control a significantly large and potentially unduly large overall position in a particular commodity" (emphasis added).[9] Similarly, the Commission has stated that "[t]he fundamental rationale for the aggregation of positions of accounts is the concern that a single trader, 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."[10] The ability to establish such positions requires an entity to have control of the other entity's trading or have sufficient knowledge of such trading.

The relationship between equity ownership and control, however, is not one in which ownership always equates to control as is discussed below. To the extent that an owner lacks the ability to direct the day-to-day trading activities of the owned entity or sufficient knowledge of the owned entity's trading position, control of the entities' combined overall position in the market is absent and that owner and its affiliate should be treated as independent.

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7 *Id.* at 31,772-73.

8 *Id.* at 31,774-75.

9 *Id.* at 31,775.

10 Final Position Limits Rules at 71,652 (in relation to the independent account controller exemption).

The 50 Percent Ceiling is an entirely new concept in the context of position limits. Prior to the implementation of the Final Position Limits Rules, designated contract markets ("DCMs") generally did not apply aggregation for position limits to contracts for future delivery in energy-related and metals commodities on the basis of ownership but rather on the basis of control. In granting an exemption from aggregation requirements, DCMs generally required a market participant to demonstrate both the absence of information sharing among affiliated entities and an absence of day-to-day trading control among such entities. Disaggregation was not denied, however, solely because ownership of the affiliated entity was greater than 50 percent.

(b) The 50 Percent Ceiling for Disaggregation Relief is Arbitrary

Commercial firms, for a myriad of different reasons, take great care to ensure the implementation and maintenance of functional and legal separation between the parent corporation and the owned entity. This operational separation of certain affiliates negates the ability of the parent or affiliates to direct the day-to-day trading activities of the owned entity. In the context of a limited partnership, for example, a limited partner may own a majority of the partnership and be entitled to the majority of its profits, although day-to-day control of the partnership actually vests in the general partner. Similarly, an investment holding company that owns a majority interest in a utility company may be specifically precluded from exercising control over the owned entity by contract, or even state law.

That majority equity ownership in an owned entity does not necessarily equate to the majority owner's control of the owned entity or, more important, control of its trading activities is particularly true in connection with joint ventures. For example, a greater than 50 percent ownership or equity interest may be held by a party to benefit from a particular tax treatment but without such party having control of the owned entity. Similarly, one party in a joint venture may have an ownership interest in excess of 50 percent, but may also have contractually surrendered control in order to protect the interests of a minority shareholder. Under the Proposed Rules, it is also not clear how the 50 Percent Ceiling would apply where a person has in excess of a 50 percent ownership or equity interest in the outstanding equity of an owned entity but that interest could be readily diluted, for example, by the exercise of convertible stock owned by a minority shareholder or third party.

The proposed 50 Percent Ceiling is therefore arbitrary. A greater than 50 percent ownership or equity interest is only one indicium of control, but should not *per se* be sufficient to require aggregation. As Commissioner Sommers noted in her statement appended to the Proposed Rules, "[i]n the absence of knowledge of, and control over, trading of an owned entity, is there any real difference between owning 49 percent and owning 50 percent? I don't think

there is."[11] Moreover, as the Commission has previously stated, in connection with its overall aggregation policy, "control is a question of fact in each case."[12]

The Petitioners also note that the availability of the independent account controller ("IAC") exemption, which requires a similar demonstration of independence of trading between two entities, is not predicated on the application of a 50 percent ownership test. And although the Commission has previously noted that "[t]he lack of affiliation remains a bright-line test in establishing the independence of [IACs],"[13] it has nonetheless expanded the IAC exemption to commodity trading advisors ("CTA") that "trade professionally on behalf of others and which . . . have a multi-advisor structure that separates ownership from the day-to-day control of trading," subject to such affiliated IACs "specifically demonstrat[ing] their actual independence.[14] Multi-advisor structures may be created through the acquisition by one CTA of an equity interest in a second CTA. Such a situation is directly comparable to that of many commercial energy firms and their affiliates. But the IAC exemption is not available to commercial energy firms as they generally do not fall within the definition of "eligible entities." The extension of the disaggregation relief requested by the Petitioners therefore remedies a regulatory imbalance that would otherwise arbitrarily exist and unfairly and unnecessarily burden commercial energy firms.

(c) Complying with the Aggregation Requirement is Costly and Impractical with Potentially Significant Adverse Consequences in the Marketplace

The costs associated with the Commission's aggregation requirements will be significant. The Commission asks in the Proposed Rules release for market participants to compare (a) the costs of developing systems necessary to aggregate position across entities with (b) the costs of filing a notice of disaggregation.[15] This request for comment suggests that market participants could evaluate such costs separately and choose to incur one cost and avoid the other. Market participants, however, will likely incur both costs, regardless of the percentage of ownership interest one entity has in another. Thus, the Commission should understand the costs to be cumulative.

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11 Proposed Rules at 31,783.

12 *Statement of Policy on Aggregation of Accounts and Adoption of Related Reporting Rules*, 44 Fed. Reg. 33,839, 33,843 (Jun. 13, 1979).

13 *Exemption from Speculative Position Limits for Positions which have a Common Owner, but which are Independently Controlled*, 55 Fed. Reg. 30,926, 30,930 (Jul. 30, 1990).

14 *Id.* at 30,929.

15 *See* Proposed Rules at 31,779 ("[H]ow would the cost of filing a notice for disaggregation relief compare with the cost of developing systems necessary to aggregate the positions of owned entities under the current version of part 151?").

The Proposed Rules will force commercial firms to incur costs in the following manner, again, regardless of the actual percentage of ownership interest held:

> *First*, each commercial energy firm must evaluate its corporate structure and business processes to determine whether it qualifies for disaggregation relief, either by virtue of meeting the criteria set out in Part 151.7(b)(1)(i)(A)-(E) or under the information sharing exemption. In both cases, a commercial firm will likely engage counsel to advise it in connection with the availability of any exemptive relief and possibly to also render an opinion in connection with its filing for relief with the Commission.
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> *Second*, commercial energy firms will have to undertake preliminary planning for being compelled to aggregate the positions of any owned entity. This is true even when a commercial firm anticipates meeting the criteria for disaggregation relief under the Proposed Rules as the criteria for relief and the explanation thereof are ambiguous.[16] Given these ambiguities, firms, as a commercially prudent measure, will identify and determine the technological requirements associated with (a) continued satisfaction with the enumerated criteria or (b) aggregating positions should the Commission ultimately reject its relief filing.
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> *Third*, those entities that cannot avail themselves of disaggregation relief in any form must incur the burden and cost of designing, testing and implementing systems that work across multiple entities, often across several jurisdictions, to ensure intraday compliance with position limits.
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> *Fourth*, market participants that are required to aggregate and those that qualify for disaggregation relief will both incur the as yet unknown and ongoing cost of complying with the Proposed Rules' aggregation requirements.

Additionally, there are unquantifiable costs associated with addressing possible future violations of federal, state or other law, notably in the area of antitrust. While, as a general matter, the Petitioners believe that the cost of designing, testing, implementing and maintaining

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[16] *See, e.g.,* Proposed Rules at 31,774 (The Commission indicates that it "does not consider knowledge of overall end-of-day position information to necessarily constitute knowledge of trading decisions, so long as the position information cannot be used to dictate or infer trading strategies." Yet, it is not clear what constitutes "knowledge of trading decisions" or who may or may not have such information. Commercial energy firms will often share non-trading personnel with joint venture affiliates who, for a variety of reasons - for example, risk management - will have knowledge of each entity's overall end-of-day positions, as well as an understanding of the specific trading strategies underlying such positions. This knowledge, obtained after the execution of a trade, should not preclude such entities from obtaining disaggregation relief. The critical distinction missing from the Commission's explanation is that such non-trading personnel should be prevented by suitable barriers from sharing such information with trading personnel capable of acting thereon.)

an information technology system to comply with the aggregation requirement will far outweigh the costs of filing a notice for disaggregation relief (even if an opinion of counsel is necessary), it is the Petitioners' view that the two courses of action are not mutually exclusive. In each case, firms will bear significant and overlapping costs. Thus, while it is difficult to estimate the aggregate total for complying with the Proposed Rules, the Petitioners believe that the ultimate cost incurred by market participants will be far in excess of the $5.9 million estimated by the Commission.[17] Furthermore, such costs will often be incurred without the corresponding benefit of reducing speculative activity in the market place. In many instances, for example, commercial energy firms and their affiliates are able to independently utilize the availability of the *bona fide hedging* exemption, in which case, requiring aggregation by those entities will impose significant additional compliance costs with no corresponding benefit.

In the absence of control, the automatic application of the aggregation requirements to persons holding in excess of a 50 percent ownership or equity interest in an owned entity will force market participants to share information and coordinate trading contrary to existing best practices that prevail among commercial energy firms, and in a manner that disregards functional and legal barriers erected to protect the interest of other stakeholders therein. This is especially the case in the context of joint ventures. Affiliated entities that presently trade independently of, and in competition with, each other will be required to assign position limits among themselves intraday thereby leading to the very coordination of trading between them that the Commission is seeking to prevent. The Petitioners are also concerned that the continuous correspondence and negotiation between affiliated entities that is necessary in assigning such allocations will expose such entities to potential allegations of anticompetitive behavior. The determination of whether a violation of federal antitrust law has occurred is a facts and circumstances inquiry. Given the nature of trading, the relevant facts and circumstances are subject to constant change, and it is highly impractical to seek the opinion of counsel as to whether the sharing of information at any point during the trading day gives rise to a "reasonable risk" that federal antitrust law may be violated. In practice, therefore, such affiliated entities will be unable to avail themselves of the protection seemingly afforded by the information sharing exemption, as it is currently constructed, in Part 151.7(i) of the Proposed Rules.

Further, holding companies and firms that invest in commercial firms, but which may or may not trade on their own behalf, will be obliged to actively monitor the day-to-day trading activities of their affiliates in spite of the passive nature of their ownership. In each case, the relevant investor might choose to withdraw from ownership of the owned entity, or alternatively dissolve it, with a potentially adverse impact upon the number of participants in any one market, as well as a concomitant reduction in liquidity and possibly increased volatility in the price of the underlying commodity. Similarly, the rigid application of the 50 Percent Ceiling may have a chilling effect upon new joint venture formation and thus prevent additional capital and liquidity from being allocated to the market place.

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[17] Proposed Rules at 31,779.

The Petitioners also recognize the potential for inadvertently inaccurate position reports being submitted to the Commission. Financial and physical positions across multiple entities will be reported to the Commission on an aggregated basis that may not provide an accurate insight into the constituent entities' trading portfolios. Permitting disaggregation pursuant to the exemption being proposed by the Petitioners would provide the Commission with a more granular and accurate view of each entity's portfolio and will better assist the Commission in fulfilling its market oversight responsibilities.

(d) Availability of the Information Sharing Exemption is not Sufficient

The Petitioners support the modifications to the information sharing exemption. However, the Proposed Rules fail to account for the needs of commercial market participants. While the information sharing exemption provides one avenue by which a commercial firm may avoid having to aggregate accounts with an owned entity, there must first be a "reasonable risk" that a violation of the relevant law would occur. Yet, there are many legitimate commercial reasons – beyond avoiding the violation of law – why commercial entities choose to establish functional and legal barriers that prevent information sharing. As discussed above, joint ventures are but one common example where the entity or entities having an ownership or equity interest in the owned entity, might wish to avoid sharing information between affiliates pursuant to recognized best practices and to the overall benefit of the marketplace.

The Petitioners therefore respectfully request that the Commission facilitate such commercial activity by recognizing the benefits of structuring vehicles in such a manner and extending disaggregation relief to such entities. Such relief would, however, be available only where the owned entity and its affiliate(s) could demonstrate "independence" according to the prescribed criteria in proposed Part 151.7(b)(1)(i)(A)-(E). Thus, the Commission would have the information necessary to evaluate whether or not affiliated entities are acting in a collusive manner. In the event that the Commission believes that it lacks the resources to evaluate such applications for relief, the Petitioners respectfully suggest that such responsibility be delegated to the National Futures Association.

2. <u>Disaggregation Relief Criteria in Part 151.7(b)(1)(i)(A)-(E) Require Refinement</u>

The Petitioners support the Proposed Rules' effort to establish an exemption from aggregation where the relevant entities can demonstrate the absence of control over and coordination of trading activities between entities. In order to exert such control and to coordinate trading generally trading personnel who make the relevant trading decisions must access the necessary information. Commercial energy firms often have other non-trading employees (*i.e.*, attorneys, accountants, risk managers, compliance and other mid- and back-office personnel), who may have knowledge of trading activities across a series of affiliated entities but who have no ability to coordinate their trading. The barriers to information sharing required by the Proposed Rules therefore ought principally to be concerned with preventing the

flow of trade related information to and from trading personnel at affiliated entities. Such an approach is consistent with that applied by other federal regulatory agencies in analogous circumstances.[18]

In light of that aim, the Petitioners suggest the following clarifications and modifications in connection with the disaggregation relief criteria in the Proposed Rules:[19]

(a) *Part 151.7(b)(1)(i)(A)*: requires that a person with a 10 percent or greater ownership or equity interest in an owned entity not have knowledge of the trading decisions of the other. There is, however, no indication of whether this is prior, concurrent or after-the-fact knowledge of such trading decisions. The Petitioners ask the Commission to clarify that such knowledge (i) refers to knowledge of trading decisions that would allow either entity to trade in anticipation of or in concert with the other entity's trading activities, and (ii) is limited to personnel with prior knowledge of trading strategies or the ability to direct or participate in the trading decisions of the other person.[20] The Petitioners also ask that the Commission clarify that such trading decisions may be shared after the trading activity has taken place with non-trading personnel for risk management, accounting, legal, compliance and other such purposes that are unrelated to effecting trading decisions on behalf of any relevant person.

(b) *Part 151.7(b)(1)(i)(B)*: requires that a person with a 10 percent or greater ownership or equity interest of an owned entity trade pursuant to a separately developed and independent trading systems. The Petitioners note that this seems to have been drafted with the development and profusion of algorithmic trading systems. However, it should not be applied to commercial energy companies where there is no coordination of trading between the relevant entities and there are suitable technological safeguards in the trading system to prevent the sharing of trading and hedging strategies. Furthermore, it is unnecessarily duplicative and burdensome to require separate development of a new trading system when firms can modify

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[18] Certain Federal Energy Regulatory Commission ("FERC") regulations, for example, prescribe information sharing restrictions, but provide for certain exceptions with respect to particular classes of employees. *See, e.g.,* 18 C.F.R. § 35.39(d) (although a franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, "permissibly shared support employees" common to each entity (*e.g.*, legal, accounting and risk personnel) may have access to such information provided that they do not act as a conduit of the information to employees not permitted to receive it); additionally, while FERC imposes standards of conduct that prohibit the sharing of non-public "transmission function information" with the public utility's "marketing function employees" (*See* 18 C.F.R. § 358.6), an exception exists for shared employees such as legal, accounting and risk personnel, so long as they do not engage in marketing or transmission functions on a day-to-day basis. *See Standards of Conduct for Transmission Providers*, Order No. 717, 125 FERC ¶ 61,064 (2008) at P 131.

[19] Proposed Rules at 31,782.

[20] Consequently, the Petitioners anticipate that the fact that an entity enters into inter-affiliate swaps with an owned entity will not in and of itself constitute "knowledge of trading decisions," unless such activity results in information sharing that can be used by either entity to dictate or infer the trading strategies of the other.

currently existing systems to prevent affiliated entities from sharing trading strategies. The Petitioners also ask the Commission to clarify that trade capture systems, which facilitate the processing of executed trades, do not come within the meaning of "trading systems" in Part 151.7(b)(1)(i)(B).

(c) *Part 151.7(b)(1)(i)(C)*: requires the promulgation and enforcement of written procedures to preclude each entity that would otherwise be aggregated from having knowledge of, gaining access to, or receiving data about, trades of another affiliated entity.[21] Such measures should be limited to ensuring that personnel directing or participating in trading decisions are prevented from acquiring such knowledge. The Petitioners ask that the Commission clarify that this requirement does not apply to shared back-office employees or non-trading personnel who do not have the ability to direct the trading or to participate in the trading decisions of any of the affiliated entities. The Petitioners additionally request that the Commission clarify that the requirement for separate physical locations contained therein should be limited to ensuring that each entity's trading personnel do not have access to the vicinity of the other entity's (or entities') trading floor(s). A requirement that such personnel occupy a separate address is unduly burdensome and not appropriate.[22]

(d) *Part 151.7(b)(1)(i)(D)*: requires a person with a 10 percent or greater ownership or equity interest in an owned entity not share employees that control the trading decisions of either entity. The Petitioners seek clarification from the Commission that this requirement does not include non-trading employees. The sharing of employees between affiliated entities is a financially prudent course of action. Thus, there are often several employees (who are not traders) shared between commercial energy companies that may have knowledge of each entity's trading decisions after-the-fact, but do not control or make specific trading decisions. The criteria for disaggregation relief should make clear that the sharing of such employees will not preclude the availability of the aggregation exemption. Nor should the non-sharing requirement apply to senior management who have knowledge across various entities' trading portfolios in the absence of their ability to influence the trading decisions of those entities.

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[21] A person with a 10 percent or greater ownership or equity interest in an owned entity may be unable to insist that its affiliate adopt the various safeguards contemplated in proposed Part 151.7(b)(1)(i), and in proposed Part 151.7(b)(1)(i)(C) in particular. For example, where a US entity holds a minority interest in a foreign joint venture, it may be unable to compel that owned entity to promulgate and enforce such written procedures. In such situations, the application of the disaggregation relief criteria should be sufficiently flexible so as to accommodate comparable procedures and information barriers. Such as where, for instance, the US entity imposes an absolute ban on communications related to trading with the foreign owned entity, thereby precluding information sharing or coordinated trading activity between the affiliated entities.

[22] Although FERC standards of conduct prohibit marketing function employees from having access to the transmission system control center or similar facilities that differ in any way from other transmission customers, separate addresses are not required. *See* 18 C.F.R. § 358.5(b)(ii).

(e) Part 151.7(b)(1)(i)(E): requires that a person with a 10 percent or greater ownership or equity interest in an owned entity not share risk management systems that permit the sharing of trades or trading strategy. The Petitioners ask that the Commission clarify this requirement extends only to the ability of trading personnel to access such systems. As long as non-trading personnel with access to risk management systems at one entity do not provide a conduit for such information to trading personnel at another entity, they should have such access. This is cost effective both in terms of developing the relevant risk management systems and in employing staff with the requisite skills.

The Petitioners recommend that the final rule in this proceeding should be cognizant of the widely differing nature of relationships between affiliated entities. Thus, the application of the criteria required to demonstrate the independence of trading activities should be sufficiently flexible so as to impose only those procedures and information barriers that are appropriate to the facts and circumstances of a particular affiliate relationship. For example, the safeguards needed to ensure that two active affiliated trading entities do not coordinate their trading activities are likely different to those of a central hedging entity and its end-user affiliate. In the latter case, the end-user affiliate likely relies on its central hedging affiliate for all of its financial hedges, and has no market-facing derivatives activities at all. Furthermore, there is no risk that the affiliated entities will circumvent position limits by coordinating their trading. The rationale for imposing the aggregation requirement is therefore absent. In such a scenario, imposing the same procedures and information barriers that are appropriate for affiliated trading firms would be costly, wasteful and result in no regulatory benefit.[23]

Nonetheless, recognizing the Commission's concern that "an ownership interest greater than 50 percent presents heightened concerns for coordinated trading," the Petitioners respectfully suggest that the Commission consider adopting an additional criterion that persons holding in excess of a 50 percent ownership or equity interest in an owned entity be required to fulfill in order to obtain disaggregation relief.[24] Specifically, both the person holding in excess of a 50 percent ownership or equity interest in an owned entity and the owned entity would be required to certify on an annual basis that there have been no material changes to the information provided in the notice filed pursuant to Part 151.7(h) with respect to the relevant circumstances that warrant disaggregation, and that to the best of its knowledge, there have been no material breaches of the applicable information sharing restrictions during the preceding twelve months. A senior officer of each entity would be required to sign that entity's annual certification, which would be filed with the Commission. Such a condition is consistent with the Petitioners' belief that aggregation should not be required by persons holding in excess of a 50 percent ownership

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[23] It may also cause inefficiencies in the way that commercial energy firms work together for purposes unrelated to financial transactions, for example, where two affiliated entities have personnel co-located in order to coordinate the transportation logistics for energy commodities.

[24] Proposed Rules at 31,775.

or equity interest in an owned entity in the absence of control thereof, and with addressing the Commission's regulatory mission and concern that the circumvention of position limits by entities trading in concert could result in excessive speculation.

3. <u>Commission Requests for Additional Information from a Person claiming an Aggregation Exemption</u>

The Petitioners respectfully request that the Commission clarify that the information which it may seek pursuant to Part 151(h)(2) and (j)(3) from a person requesting an exemption from the aggregation requirements of the Proposed Rules will be limited to such information as is necessary for, and directly related to, establishing that a person meets the criteria for exemption, and that any such information will be treated confidentially by the Commission and not disclosed except as otherwise required by law.

B. Proposed Rules—Information Sharing Restriction

The Petitioners regard the Commission's clarification that the information sharing exemption under Part 151.7(i) includes a scenario where there is a "reasonable risk of violation" of federal law, state law or the law of a foreign jurisdiction as constructive.[25] However, as discussed above, the Petitioners are concerned that it does not fully address the requirements of the marketplace. Given the constantly changing nature of the commercial energy markets and the positions held by market participants therein, as well as the impracticality of obtaining an opinion of counsel in many circumstances, the Petitioners request that a person seeking relief under the information sharing exemption be allowed to submit an internally prepared memorandum rather than a formal opinion of counsel. Such a memorandum, prepared by counsel, would contain an analysis of the relevant facts and circumstances and include a recommended course of action for the relevant entity's management. The information contained in that memorandum would be sufficient for the Commission to review the legal basis for the relevant entity's actions, but it would not be a formal legal opinion, which would be neither practical nor appropriate given the constantly changing nature of the underlying facts and circumstances.

The Petitioners believe that the availability of the information sharing exemption in connection with state law violations should not be limited to a "case-by-case" basis but that due deference to state legislatures requires that it should apply in the same manner as to federal and foreign law matters, and that such state law should not be narrowly construed so as to require a comparable provision at the federal level.

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[25] *Id.* at 32,782.

Additionally, the Petitioners seek the Commission's confirmation that the "knowledge" referenced in the phrase, "provided that such person does not have actual knowledge of information associated with such aggregation" in Part 151.7(i),[26] is the same as that referred to in Part 151.7(b)(1)(i)(A), and as with the clarification sought in II.A.2.(a) above, is similarly limited in scope.

Finally, the Commission requests comment as to whether the information sharing exemption should include local law. The Petitioners request the Commission provide for an avenue for market participants to demonstrate that a local law legitimately prohibits aggregation. For example, there may be limitations with regards to information sharing imposed when trading with certain municipalities. As such, the Commission should not preclude the availability of the information sharing exemption with regards to local law.

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[26] *Id.*

III. Conclusions

The Petitioners appreciate the opportunity to provide comments on the Proposed Rule and respectfully requests that the Commission consider the comments set forth herein as it develops a final rule in this proceeding.

If you have any questions, please contact the undersigned.

Respectfully submitted,

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