MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

February 7, 2014

Via Electronic Mail: http://comments.cftc.gov

Melissa D. Jurgens
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: RIN 3038-AD82 Aggregation of Positions

Dear Ms. Jurgens:

Managed Funds Association[1] ("**MFA**") appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "**Commission**" or "**CFTC**") on its notice of proposed rulemaking to modify the Commission's aggregation requirements under its position limits rules[2] (the "**2013 Aggregation Proposal**").[3] MFA members are particularly interested in the impact the 2013 Aggregation Proposal will have on them, in particular because MFA members may implement multiple independent trading strategies, may be invested in "owned entities" (including operating companies that are not commodity pools), and may be passive owners in the fund of funds context.

MFA members are among the most sophisticated institutional investors and play an important role in our financial system. They are active participants in the commodity interest and securities markets, including over-the-counter ("**OTC**") derivatives markets. Our members provide liquidity and price discovery to capital markets, capital to companies seeking to grow or improve their businesses, and important investment options to investors seeking to increase portfolio returns with less risk, such as pension funds trying to meet their future obligations to

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[1] Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants.

[2] *See* 17 C.F.R. Part 151; *and* Position Limits for Derivatives, 78 Fed. Reg. 75,680 (proposed Dec. 12, 2013) (proposing amendments to the position limits regime primarily under 17 C.F.R. Part 150).

[3] Aggregation of Positions, 78 Fed. Reg. 68,946 (proposed Nov. 15, 2013).

600 14th Street, NW, Suite 900 | Washington, DC 20005 | 202.730.2600 | Fax 202.730.2601 | www.managedfunds.org

plan beneficiaries. MFA members engage in a variety of investment strategies across many different asset classes. The growth and diversification of investment funds have strengthened U.S. capital markets and provided investors with the means to diversify their investments, thereby reducing overall portfolio investment risk. As investors, MFA members help dampen market volatility by providing liquidity and pricing efficiency across many markets. Each of these functions is critical to the orderly operation of our capital markets and our financial system as a whole.

MFA member firms implement diverse investment strategies. Member firms may execute multiple, independent trading strategies that are implemented by different and separate business units or employees. Many MFA member firms, as part of their investment strategy, invest in one or more, and sometimes multiple, small-, mid-sized and/or large operating companies. In addition, some MFA member firms use a "fund of funds" structure to make investments, whereby a master fund holds a passive interest and invests in other, separately-managed funds. Without disaggregation relief, such business units and master funds would be required to aggregate all of their positions with those of the separately-managed business units, operating companies or funds. Accordingly, such relief is critical to our members' ability to pursue varying investment strategies to achieve the investment goals of those investing in hedge funds.

MFA generally supports the disaggregation relief for owned entities provided in the 2013 Aggregation Proposal. MFA appreciates the Commission's modification of its position on the sharing of personnel and departmental functions among commonly-owned entities and the Commission's proposed parallel disaggregation relief under the position limit rules of designated contract markets and swap execution facilities.[4] MFA supports the Commission's modified approach toward entities where passive ownership in the owned entity exceeds the 50 percent ownership threshold. However, MFA is concerned that the Commission's conditions for obtaining this relief are too restrictive and will undercut the ability of many entities to avail themselves of such relief. MFA also believes that the Commission should modify the 2013 Aggregation Proposal in certain respects relating to: (1) the conditions for disaggregation relief for greater than 50 percent owned entities and; (2) the condition of disaggregation relief for limited partners, shareholders or other pool participants that prohibits such persons from having a direct or indirect 25 percent or greater ownership or equity interest in a commodity pool where the operator of the pool is exempt from registration under CFTC Rule 4.13. In addition, MFA recommends that the Commission increase the level at which aggregation is required from 10 percent to 25 percent for an entity's passive ownership interest in an operating company. Also, MFA proposes that when aggregation is required based on common ownership and no exemption is available, the Commission should adopt a *pro rata* aggregation scheme so that aggregation would be based on proportionate ownership, rather than automatically attributing 100 percent of

[4] The Commission proposes to require designated contract markets and swap execution facilities to "have uniform aggregation policies that mirror the federal aggregation provisions for all types of commodity derivative contracts, including for contracts that are not subject to federal position limits." Position Limits for Derivatives, 78 Fed. Reg. at 75,756. Proposed rules 150.5(a)(5) and 150.5(b)(8) stipulate that exchanges must maintain aggregation rules that conform to CFTC Rule 150.4. Position Limits for Derivatives, 78 Fed. Reg. at 75,829-30.

the owned entities' positions to the owner. We provide a few comments and recommendations in these respects, which we believe are consistent with the Commission's objectives of the 2013 Aggregation Proposal.

I. EXECUTIVE SUMMARY

MFA has carefully considered the 2013 Aggregation Proposal and is providing its comments and recommendations, which are summarized as follows:

- We support the Commission's clarification that shared research personnel and research amongst the commonly-owned entities would not violate the condition that the commonly-owned entities do not share employees that control the owned entity's trading decisions. MFA requests that the Commission further clarify that the requirement that research personnel "do not influence (e.g., 'have a say in') or direct the entities' trading decisions" is properly interpreted to mean that research personnel are not precluded from providing market research, including, for example, market fundamentals or technical indicators, support or resistance levels, and trade recommendations, so long as such personnel do not direct or control trading decisions of the owned-entities.
- We believe that aggregation should not be required when an entity has a ten percent or greater passive ownership or equity interest in an operating company. Instead, aggregation of positions under these circumstances should not be required unless the passive ownership interest in such operating company is 25 percent or greater.
- We support providing disaggregation relief for greater than 50 percent owned entities, but the Commission's application process for such entities seeking exemptive relief appears to be highly discretionary and introduces unnecessary uncertainty with its open-ended review period. We recommend that the Commission adopt a notice filing procedure applicable to such relief and more transparent standards for relief.
- We believe that the proposed conditions for exemptive relief from aggregation for persons with a greater than 50 percent ownership interest in an owned entity are unduly restrictive. The Commission has not justified the requirement that all positions be *bona fide* hedging transactions or, if the positions of the owned-entity do not so qualify, the owned-entity's positions must not exceed 20 percent of the applicable speculative position limit.
- We do not believe that consolidated financial statements are a useful way to determine whether common trading control exists amongst commonly-owned entities. Accordingly, we believe that the Commission should eliminate this condition from the requirements for disaggregation relief for persons with a greater than 50 percent ownership interest in an owned entity.
- We support the Commission's proposal to exercise its authority under section 4a(a)(7) of the Commodity Exchange Act (the "**Act**") to provide exemptive relief from aggregation in the event that a greater than 50 percent owned entity does not qualify for the exemptive relief provided in proposed rule 150.4(b)(3). However, the Commission should provide

clear guidance describing the manner it will review requests for exemptive relief made pursuant to section 4a(a)(7) of the Act.

- We believe that the Commission should remove the passive ownership limitation of 25 percent in a commodity pool that applies to a manager that is exempt from registration as a commodity pool operator under CFTC Rule 4.13 in light of the rescission of CFTC Rule 4.13(a)(4). Failure to do so will have the practical effect of creating a trap for passive investors in CFTC Rule 4.13 exempt commodity pools who do not control investment decisions or have the ability to monitor or access information relating to investments in such investee funds.
- MFA believes that general partners, in addition to limited partners, should be eligible for disaggregation relief so long as they do not possess control over the trading decisions of the partnership.
- We believe that, when aggregation is triggered due to common ownership and no exemption is available, it is appropriate to aggregate only an entity's *pro rata* share of the position in an amount proportionate to its ownership interest.

II. THE 2013 AGGREGATION PROPOSAL

The 2013 Aggregation Proposal addresses the portion of the Commission's position limit rules that determine which accounts and positions a person must aggregate for the purpose of determining compliance with the speculative position limit levels.[5] The 2013 Aggregation Proposal would:

A. Require aggregation for persons using substantially identical trading strategies.[6]

B. Adopt the following bright-line tests for the aggregation of a person's accounts and positions with the accounts and positions of any entities that are owned by such person (*i.e.*, the "owned entity"):

1. ownership in the owned entity of under 10 percent would not require aggregation absent common control;[7]

2. ownership in the owned entity from 10 percent up to and including 50 percent would not require aggregation if the person (*i.e.*, the owner of the owned entity) files with the Commission a certification, which would be effective upon filing,[8] demonstrating that it and the owned entity: (1) do not have knowledge of the trading decisions of the other; (2) trade

[5] *See* 17 C.F.R. 151.7; *and* proposed rule 150.4, Aggregation of Positions, 78 Fed. Reg. at 68,976.

[6] Proposed rule 150.4(a)(2), Aggregation of Positions, 78 Fed. Reg. at 68,976.

[7] *Id.*, proposed rule 150.4(a)(1).

[8] *Id.*, proposed rule 150.4(b)(2).

pursuant to separately developed and independent trading systems; (3) have in place and enforce policies and procedures to preclude sharing knowledge of, gaining access to, or receiving data about, trades of the other; (4) do not share employees that control the trading decisions of the other; and (5) maintain a risk management system that does not allow the sharing of trade information or trading strategies between entities; and

3. ownership in the owned entity of over 50 percent would require aggregation (subject to the potential relief described in C, below).

C. Add a new case-by-case exemption for entities owning greater than 50% of another entity (financial or non-financial) so long as certain requirements are satisfied, including: (1) that the owned entity is not required under U.S. generally accepted accounting principles to be, and is not, consolidated on the financial statement of such person; (2) that the owner satisfies the conditions specified for an entity owning 10 percent up to and including 50 percent of the owned entity (*see* B.2, above) and it has procedures in place that are reasonably effective to prevent coordinated trading decisions by such person; (3) that each member of the owned entity's board certifies that he/she does not control the trading decisions of the owned entity; and (4) a certification requirement that either all of the owned entity's positions qualify as *bona fide* hedging transactions or the owned entity's positions that do not so qualify do not exceed 20 percent of any position limit currently in effect. The owner must file a certification with the Commission, but such certification only would become effective when Commission staff, in its discretion, has given the owner affirmative confirmation that the owner satisfies all of the requirements. There is no requirement for staff to review the certification or grant confirmation of the requested relief within a specified time period.[9]

D. Retain certain exemptions with only minor changes, including the passive pool participant (encompassing certain limited partners, shareholders or other pool participants),[10] FCM[11] and Independent Account Controller[12] exemptions. The definition of Independent Account Controller has been expanded to include the managing member of a limited liability company and managers of employee benefit plans under CFTC Rule 4.5. However, the Independent Account Controller exemption would no longer be self-executing, and, under the proposed rule, would require a filing with the Commission. Similarly, passive pool participants and FCMs, to be eligible for disaggregation relief, would be required to file a notice with the Commission.

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[9] *Id*. at 68,976-77, proposed rule 150.4(b)(3).

[10] *Id*. at 68,976, proposed rule 150.4(b)(1).

[11] *Id*. at 68,977, proposed rule 150.4(b)(4).

[12] *Id.*, proposed rule 150.4(b)(5).

E. Provide relief from aggregation, similar to the previously-proposed rules,[13] pursuant to:

1. the Underwriter[14] and Broker-Dealer[15] exemptions (which would expand the exemption for the underwriting of securities to include ownership interests acquired through the market-making activities of an affiliated broker-dealers);

2. an exemption for "higher-tier entities"[16] that have an ownership interest in a person filing with the Commission a certification for disaggregation relief to rely on such certification, provided that the higher-tier entity complies with the applicable conditions of disaggregation relief; and

3. an exemption for those entities for whom sharing information to comply with position limits would violate certain laws.[17]

F. Establish a notice filing regime for reliance on the majority of these exemptions.[18] The aggregation exemption would be effective upon submission of the notice to the Commission.

III. COMMENTS TO DISAGGREGATION RELIEF FOR OWNED ENTITIES

A. MFA Supports the Disaggregation Relief for Owned Entities

Overall, MFA believes that the disaggregation relief in the 2013 Aggregation Proposal attempts to strike an appropriate balance between permitting the legitimate trading activity of commonly-owned and independently-operated entities and ensuring that a person does not create an unduly large speculative position through ownership or control of multiple accounts. MFA supports the rule amendments that provide disaggregation relief to owned financial and non-financial entities. MFA believes that asset managers and corporate enterprises should be free to allocate capital efficiently across all types of business lines (including speculative trading ventures and commercial enterprises – both financial and non-financial) and independent

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

[14] Proposed rule 150.4(b)(6), Aggregation of Positions, 78 Fed. Reg. at 68,977.

[15] *Id.*, proposed rule 150.4(b)(7).

[16] *Id*. at 68,978, proposed rule 150.4(b)(9).

[17] *Id*. at 68,977-78, proposed rule 150.4(b)(8).

[18] *Id*. at 68,978, proposed rule 150.4(c). Notice filings would be required for exemptive relief made on behalf of: (1) a principal or affiliate of a commodity pool operator; (2) entities with an ownership interest in an owned entity between 10 percent and 50 percent, inclusive; (3) FCMs; (4) independent account controllers; and (5) a person where information sharing would violate a law or regulation.

managers without fear that this independent trading will be subject to aggregated position limits, possibly affecting their ability to participate in a given market.[19]

MFA supports the 2013 Aggregation Proposal's relief for "higher-tier" entities, which would permit the parent company of an entity relying on the owned entity exemption to rely on the exemption as well, without having to separately make a notice filing. The parent company, however, would need to comply with the other conditions of the exemption. MFA does not believe that the proposed filing relief would adversely affect the Commission's ability to see how exemptions are applied in the market because it retains the right to require the higher-tier entity to provide information regarding its claim for exemption.[20] MFA supports this proposed filing relief for "higher-tier" entities because it would eliminate filing redundancies by entities within the corporate structure without compromising the integrity of the speculative position limits regime.

MFA acknowledges and appreciates that the Commission incorporated many of MFA's recommendations[21] in its 2013 Aggregation Proposal. MFA is pleased that the Commission has stated that the sharing of attorneys, accountants, risk managers, compliance, other mid- and back-office personnel, board or advisory committee members, research personnel or other employees for training, operational or compliance purposes would not compromise independence and would not result in a violation of the criteria if such employees do not control, direct, influence or participate in the entities' trading decisions.[22] MFA believes that the 2013 Aggregation Proposal is consistent with the Commission's longstanding position on the sharing of employees, including research personnel, and the sharing of research. For example, in the Commission's 1979 Aggregation Policy Statement, the Commission stated that "research information concerning fundamental demand and supply factors and other data should be readily available to a person who directs trading in a customer account or programs."[23]

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[19] *See* Letter from Richard H. Baker, President and CEO, Managed Funds Association, to David A. Stawick, Secretary, Commodity Futures Trading Commission (Mar. 28, 2011), *available at* http://www.managedfunds.org/wp-content/uploads/2011/06/3.28.11-MFA_Position_Limits_final.3.28.pdf.

[20] Proposed rule 150.4(b)(9), Aggregation of Positions, 78 Fed. Reg. at 68,978.

[21] *See* Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, Managed Funds Association, to David A. Stawick, Secretary, Commodity Futures Trading Commission (Jun. 28, 2012), *available at* https://www.managedfunds.org/wp-content/uploads/2012/06/MFA-Position-Limit-Aggregation-final-6-28-12.pdf. This letter was submitted in response to the Commission's 2012 aggregation proposal. Aggregation, Position Limits for Futures and Swaps, 77 Fed. Reg. 31,767 (proposed on May 30, 2012).

[22] Aggregation of Positions, 78 Fed. Reg. at 68,961. The Commission clarified that the sharing between entities of attorneys, accountants, risk managers, compliance and other mid- and back-office personnel "would generally not compromise independence so long as the employees do not control, direct or participate in the entities' trading decisions." *Id*. at 68,962. The Commission further stated: "Similarly, sharing of board or advisory committee members, research personnel or sharing of employees for training, operational or compliance purposes would not result in a violation of the criteria if the personnel do not influence (e.g., 'have a say in') or direct the entities' trading decisions." *Id.* (emphasis added).

[23] 1979 Aggregation Policy, 44 Fed. Reg. 33,839, 38,844 (June 13, 1979).

MFA agrees that the sharing of research as to market fundamentals, or technical indicators, does not itself constitute a trading decision or the exercise of trading control. The sharing of non-trading personnel, such as non-trading research personnel allows for operating efficiencies and administrative convenience and does not create a substantial risk that the affiliated entities will knowingly create a large speculative position. As a result, disaggregation should be allowed when the research personnel do not have trading control over either entity, are not making trading recommendations for one entity based on its knowledge of the positions of the other entity, and the trading programs of the related entities have been separately developed and independently implemented. MFA appreciates that the Commission has clarified its stance on this issue; however, MFA requests that the Commission further clarify that the requirement that research personnel "do not influence (e.g., 'have a say in') or direct the entities' trading decisions" is properly interpreted to mean that research personnel are not precluded from providing market research, including, for example, market fundamentals or technical indicators, support or resistance levels, and trade recommendations, so long as such personnel do not direct or control trading decisions.

MFA welcomes the Commission's new willingness to consider disaggregation relief for persons that own more than 50 percent of an owned entity, and believes that a specific policy under which Commission staff may grant relief is appropriate for these entities. However, as discussed below, MFA has concerns about some of the terms and conditions of the proposed disaggregation rules.

B. MFA Recommendations

1. The 10% Threshold for Aggregation Should Be Increased to 25% in the Context of a Passively-Owned Operating Company for Disaggregation Relief to Be Meaningful

The Commission's rules provide that any person owning a 10 percent or greater ownership or equity interest in an owned entity must aggregate its positions with those of the owned entity, absent applicable relief. Fundamentally, MFA believes that a passive ownership interest in operating companies should be exempted from the Commission's aggregation rules absent other indicia of common trading control. A passive owner of an operating company should not be required to investigate into the trading activity of an owned-operating company, and, a small passive owner will find it very difficult to do so and to obtain the information required by the Commission to satisfy the disaggregation criteria under proposed rule 150.4(b)(2) because small passive owners are not large or important enough to garner the attention of the operating company. Thus, as a practical matter, most small passive owners in operating companies will not be able to avail themselves of the relief under proposed rule 150.4(b)(2). MFA believes that to provide meaningful disaggregation relief to passive owners of operating companies, the Commission should increase the 10 percent aggregation threshold to 25 percent with respect to passive ownership in an owned operating company.

The Commission has articulated its concerns that an ownership or equity interest of 10 percent or greater in an account or position that is controlled by another person who makes discretionary trading decisions "results in control over trading or can be used indirectly to create a large speculative position through ownership interests in multiple accounts."[24] While a 10 percent aggregation threshold may be appropriate where common trading control is present, such as when commonly-owned entities share information about trading decisions or employ the same individual(s) for the purpose of directing trades, MFA believes that these concerns are not well-founded in the context of a purely passive ownership or equity interest of less than 25 percent in an owned operating company that is independently controlled by another person and where such other indicia of common trading control are not present.

Although the Commission provides exemptive relief for entities with ownership interests greater than 10 percent under proposed rule 150.4(b)(2),[25] the requisite conditions for such relief are onerous for entities that have a low ownership or equity interest in an operating company. An owner with just over a 10 percent and up to a 25 percent ownership interest in an operating company will not possess the ability to readily garner the attention of the operating company's board of directors or control the operating company's trading decisions. As a result, such owner likely will not be able to access the necessary data to assess whether it has a potential aggregation issue because the owner is such a small shareholder. Thus, the owner will not know whether the owned entity trades in referenced contracts and will be able to make a certification to the Commission only with respect to its own activities and not that of the owned entity. On the other hand, owners of 25 percent or more of an operating company should be able to obtain the information necessary to comply with proposed rule 150.4(b)(2). Specifically, MFA suggests that the Commission adopt a 25 percent threshold for disaggregation relief for passively-owned operating companies. MFA suggests that the Commission modify proposed rule 150.4(b)(2) so that the relief would become available to an entity with an ownership interest of 25 percent or greater and up to 50 percent in an operating company (instead of the current proposal providing aggregation relief to an entity with an ownership interest of 10 percent or greater but not more than 50 percent in any type of entity).

2. Exemptive Relief for Certain Ownership of Greater than 50 Percent in an Owned Entity Should Not Be Subject to an Open-Ended Approval Period

MFA commends the Commission's willingness to allow disaggregation relief for persons where ownership in an owned entity is greater than 50 percent. MFA appreciates that the Commission's proposed rules would allow commonly-owned entities to consolidate their notice filings into one filing, so long as the scope of the filing is made clear. However, MFA is concerned that the proposed rules are unduly restrictive. MFA's concerns are described below.

The Commission's proposed rules do not establish a specified time period within which Commission staff must act on an application for relief for a greater than 50 percent owned entity and do not establish clear criteria for Commission staff to evaluate, approve or reject such applications. This aspect of the 2013 Aggregation Proposal is inconsistent with the spirit of the Dodd-Frank Act, *i.e.*, to provide transparency in the derivatives marketplace. The proposed rules

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[24] Aggregation of Positions, 78 Fed. Reg. at 68,951.

[25] Proposed rule 150.4(b)(2), Aggregation of Positions, 78 Fed. Reg. at 68,976.

fail to describe the types of circumstances that would bar an entity from obtaining relief even when such entity has on its face satisfied the elements specified in the Commission's rule for this relief, instead permitting the Commission to use its "discretionary" authority to deny applicants seeking exemptive relief. MFA recommends that the Commission adopt rules that stipulate a definite review period, a clear administrative process and standard for reviewing such applications, procedures requiring staff to issue a detailed written justification for any rejection of an application for exemptive relief, and an opportunity to cure any deficiency in an application.

In the vacated position limits rules,[26] the Commission described the reasons it chose to eliminate the proposed application requirement for the enumerated disaggregation exemptions, and why it instead adopted a notice filing procedure by which exemptive relief would be effective immediately upon filing.[27] The Commission stated its belief that the new notice process "represents a less burdensome, ***yet effective***, alternative to the proposed application and pre-approval process."[28] The adoption of the notice filing process instead of the application process would "allow market participants to rely on aggregation exemptions ***without the potential delay of Commission approval***, thus lessening the burden on both market participants and the Commission to respond to such applications," yet still providing the Commission with the authority to make calls for information to ensure compliance with the conditions for disaggregation relief.[29] MFA believes that these same considerations and policies should apply to the exemptive relief available to a person applying for relief with respect to a greater than 50 percent owned entity, and urges the Commission to adopt a notice filing procedure applicable to such relief.

MFA notes that the Commission permits a notice filing procedure in a number of contexts, including filings for hedge exemptions. The Commission's proposed *bona fide* hedging exemption is self-executing, with no indefinite review period. Rather, all that is required of a *bona fide* hedger is compliance with the recordkeeping requirements and Part 19 reporting obligations.[30] Additionally, under the Commission's proposed rules, certain hedgers would be required to submit a form ten days before they exceed the position limits. The proposed rules would require the submission of Form 704 ten days before exceeding the current position limits of those hedgers wishing to rely on the *bona fide* hedging exemption as it relates to hedges of: (1) unfilled anticipated requirements; (2) unsold anticipated production; (3) anticipated royalties; or (4) services.[31]

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[26] Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626 (adopted Nov. 18, 2011) (vacated by *International Swaps and Derivatives Association v. United States Commodity Futures Trading* Commission, 887 F.Supp.2d 259 (D.D.C. 2012).

[27] Position Limits for Futures and Swaps, 76 Fed. Reg. at 71,654.

[28] *Id.* (emphasis added).

[29] *Id.* at 71,654-55 (emphasis added).

[30] Proposed rule 150.5(a)(2)-(3), Position Limits for Derivatives, 78 Fed. Reg. 75,680, 75,828 (proposed Dec. 12, 2013).

[31] Proposed rule 150.5(a)(1)(i), Position Limits for Derivatives, 78 Fed. Reg. at 75,828-29.

MFA recommends that the Commission implement a similar procedure for persons owning greater than 50 percent in an owned entity that seek exemptive relief by permitting such persons to submit a notice filing ten days before they begin to disaggregate their positions. Under this procedure, the Commission would continue to possess the authority to make calls for information pursuant to proposed rule 150.4(c)(3).[32] By instituting a ten-day notice submission procedure, the Commission would give market participants certainty as to the date on which they could begin to disaggregate their positions, establish a less burdensome process for all parties, and act in a manner consistent with the spirit of the Dodd-Frank Act and Commission precedent. MFA encourages the Commission to consider and implement this recommendation.

Alternatively, in the event that the Commission determines not to establish a ten-day notice submission procedure, then MFA requests the Commission to establish a prescribed time period for the staff review of applications for exemptive relief filed pursuant to proposed rule 150.4(c)(2). Providing for a specified review period is not unusual or unique. For example, pursuant to CFTC Rule 40.5, when a registered entity files a rule amendment for Commission approval, the rule amendment is "deemed approved by the Commission under section 5c(c) of the Act 45 days after receipt by the Commission."[33] The Commission also provides stipulated review periods for foreign boards of trade that submit certain products to the Commission for its approval. Pursuant to CFTC Rule 30.13, a foreign board of trade may request expedited review of a product submission under certain conditions.[34] The expedited review consists of a 45-day review period after which the product is "deemed to be in conformance" with the Act.[35] Yet another example of a specified review period is in CFTC Rule 40.10, which provides for a 60-day review period for rule changes proposed by systemically important derivatives clearing organizations that "could materially affect the nature or level of risks presented by [such clearing organization]."[36] Pursuant to CFTC Rule 40.10, the Commission may request "further

[32] Proposed rule 150.4(c)(3) states: "Upon call by the Commission, any person claiming an aggregation exemption under this section shall provide such information demonstrating that the person meets the requirements of the exemption, as is requested by the Commission. Upon notice and opportunity for the affected person to respond, the Commission may amend, suspend, terminate, or otherwise modify a person's aggregation exemption for failure to comply with the provisions of this section." Aggregation of Positions, 78 Fed. Reg. at 68,978.

[33] 17 C.F.R. 40.5(c). The regulation further provides that the Commission may extend the review period for: (1) an additional 45 days if the proposed rule amendment raises "novel or complex issues that require additional time for review or is of major economic significance" or (2) any period beyond the additional 45 days to which the registered entity agrees in writing. 17 C.F.R. 40.5(d).

[34] 17 C.F.R. 30.13(e).

[35] 17 C.F.R. 30.13(g). Similar to the "novel or complex" extension for rule submissions made pursuant to CFTC Rule 40.5, the Commission may extend the 45-day review period under CFTC Rule 30.13 for an additional 45 days or for any period the foreign board of trade requests in writing. 17 C.F.R. 30.13(h).

[36] 17 C.F.R. 40.10(a). Under CFTC Rule 40.10, a systemically important clearing organization ("**SIDCO**") may ask for expedited approval on the grounds that the change would materially decrease risk. Thus, the 60-day review period may be shortened by such a request, or when the Commission notifies the SIDCO in writing that it has "no objection" to the proposed rule change (which may be done at any point during the 60-day review period). 17 C.F.R. 40.10(e)-(g).

information" about the rule change, which has the effect of stopping the 60-day review period and restarting it anew upon the Commission's receipt of the requested further information.[37]

The lack of a specified time period for the review of an application for exemptive relief is contrary to the procedures that the Commission has adopted in other regulatory contexts, and fails to provide adequate transparency to applicants.

MFA also is concerned that the Commission may choose not to exercise its authority pursuant to proposed rule 150.4(b)(3). In the 2013 Aggregation Proposal, the Commission states that "relief would be available ***only if and when*** the Commission acts on a particular request for relief."[38] Thus, it appears that the Commission may determine to not exercise its authority to grant relief even when an entity satisfies all of the criteria that the Commission has set forth in the proposed rule. The Commission should specify in its rules the types of circumstances under which the Commission would choose not to exercise its authority to grant relief.

3. The Commission Should Provide Clear Guidance on the Manner it Will Review Requests for Exemptive Relief Made Pursuant to Section 4a(a)(7) of the Act

MFA appreciates that an entity with a greater than 50 percent ownership interest in an owned entity that fails to satisfy the Commission's regulatory criteria pursuant to proposed rule 150.4(c)(2) may seek relief from aggregation under section 4a(a)(7) of the Act. This section of the Act grants to the Commission the authority to provide relief from the speculative position limits regime. The Commission specifically requested comments on the facts and circumstances that it should consider during its review of requests made pursuant to section 4a(a)(7) of the Act.[39] MFA believes that relief from aggregation under section 4a(a)(7) of the Act should be available to persons with greater than 50 percent ownership of owned entities who cannot meet the conditions in proposed rule 150.4(b)(3), but notes that the same concerns described above are present under this proposal, namely: (i) the lack of a specific time period for Commission staff to review and act on an application for relief; and (ii) the discretionary basis for granting or denying relief with no description of the factors the Commission may consider to be relevant in determining whether to grant relief.

For this relief to be meaningful, the Commission should adopt substantive guidance for staff to follow during its review of any request made pursuant to section 4a(a)(7) of the Act. The guidance should include staff adherence to a specified review period when considering requests for relief made pursuant to section 4a(a)(7) of the Act. Also, the guidance should include factors relevant to trading control. In determining whether to grant relief, the most important criterion the Commission should consider is whether the entity with the ownership

[37] 17 C.F.R. 40.10(c).

[38] Aggregation of Positions, 78 Fed. Reg. at 68,960 (emphasis added).

[39] Aggregation of Positions, 78 Fed. Reg. at 68,965 ("Also, what are the facts and circumstances that commenters believe would justify relief under CEA section 4a(a)(7)?").

interest actually controls or directs the trading decisions of the owned entity. If the trading decisions of the owner and the owned-entity are made independent of one another, then those entities' positions should not be aggregated. The absence of common trading control amongst the entities should be the determining factor in the Commission's decision to grant relief. Where the owner of an owned entity can demonstrate independence of control, the Commission should grant disaggregation relief.

4. Exemptive Relief for Certain Ownership of Greater than 50 Percent in an Owned Entity Should Not be Conditioned on Any *Bona Fide* Hedging Requirements or a 20 Percent Limit on Speculation

MFA respectfully recommends that the Commission eliminate the condition that either: (i) all of the owned entity's positions qualify as bona fide hedging transactions; (the "***Bona Fide* Hedging Condition**") or (ii) the owned entity's positions that do not so qualify do not exceed 20 percent of any position limit currently in effect (the "**20 Percent Limit Condition**") for relief from aggregation pursuant to proposed rule 150.4(b)(3). MFA believes that the *Bona Fide* Hedging Condition may be unnecessary because *bona fide* hedging transactions already are exempt from speculative position limits. Moreover, it is difficult to comment on this condition because the definition of *bona fide* hedging is unclear at this point in light of the Commission's recently proposed amendments to the definition of *bona fide* hedging,[40] and, therefore, MFA urges the Commission to reconsider this condition once it finalizes the definition of *bona fide* hedging.

Regarding the 20 Percent Limit Condition, MFA is concerned that it would unnecessarily restrict the ability of fund managers to diversify their investment strategies. Investors hire fund managers to invest their assets, and to diversify their economic risk exposure by applying multiple investment strategies. A fund manager may invest in separately managed trading strategies, and/or invest in independently managed operating companies. The 20 Percent Limit Condition likely would unduly constrain a fund manager's investments in owned entities, such as affiliated funds or independently managed operating companies. The Commission has not explained the reasons it deems the alternative conditions in proposed rule 150.4(b)(3) to be necessary or how it determined that the 20 percent level is the appropriate cap on speculative positions. Given the requirement that an owned entity demonstrate independence of trading control between it and the owner, the *Bona Fide* Hedging Condition and the 20 Percent Limit Condition appear to be arbitrary and unnecessary.

[40] Position Limits for Derivatives, 78 Fed. Reg. 75,680, 75,706 (proposed Dec. 12, 2013) (describing the proposal to delete Rule 1.3(z), the current definition of *bona fide* hedging, and replace it with a new definition of "*bona fide* hedging position" in proposed rule 150.1).

5. Exemptive Relief for Certain Ownership of Greater than 50 Percent in an Owned Entity Should Permit Consolidation of the Financial Statements of the Owner

The Commission solicited comments on financial consolidation related to certain ownership of greater than 50 percent in an owned entity. Specifically, the Commission asked whether it is appropriate "to condition such relief on the owned entity not being, and not being required to be, consolidated on the financial statements of the owner."[41] The Commission asked whether financial consolidation is a "relevant consideration in this regard" or a "useful proxy for other characteristics that are relevant to the position limits regime, such as ownership and control."[42] The Commission has not, however, made clear its policy basis for this condition. MFA believes that a consolidated financial statement is not relevant to the determination of whether one entity controls another entity's trading decisions.

MFA contends that financial consolidation is <u>not</u> a useful proxy for relevant considerations related to disaggregation and, as a result, recommends that the Commission eliminate this condition from the final rules. Despite the fact that financial statements of affiliated entities may be consolidated, there is no reason necessarily to assume that one entity controls the other consolidated entities' trading decisions. In fact, consolidation does not mean that the company that consolidated the other company operates the consolidated company. To avoid a court's "piercing the corporate veil" and holding a parent liable for the subsidiary's obligations, parents and subsidiaries operate separately. If a parent company made day to day decisions for its subsidiary, such as decisions relating to the subsidiary's trading activities, the parent would run the risk of a court piercing the corporate veil and holding the parent responsible for the subsidiary's obligations. Accordingly, generally parents do not make day to day decisions for their subsidiaries. Furthermore, parents have no ability to access the resources of their consolidated entities unless the consolidated entity first satisfies its creditors and lenders. Consolidation is not based on the exercise of day to day control over another entity or the ability of a parent to have ready access to the subsidiary's resources.

Consolidation is required by generally accepted accounting principles ("**GAAP**") when an entity has a controlling financial interest in another entity.[43] Generally, a controlling financial interest is based on equity ownership of more than 50% of the other entity's equity. A controlling financial interest can also be found for accounting purposes even when a parent does not have equity in the other entity. Consolidation may be required based on contractual relationships, a court decree, or the obligation of an entity to absorb expected losses or receive expected residual returns of a legal entity, such as a variable interest entity. In the case of limited partnerships, a general partner may be required to consolidate the limited partnership based on its operational responsibilities for the limited partnership even though the general partner has no equity interest in the limited partnership.

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[41] Aggregation of Positions, 78 Fed. Reg. at 68,963.

[42] *Id*.

[43] Financial Accounting Standards Board Accounting Standards Codification ("**ASC**") PART 810, "Consolidation."

Given the various different requirements in GAAP relating to consolidation, the basic consolidation requirement for a controlling financial interest, and the legal requirement that companies operate subsidiaries and other consolidated entities separately to avoid a court holding that the parent is responsible for the subsidiary's obligations, we believe that consolidation is not relevant to the objectives of this proposal. Consolidation does not imply that there is common trading control amongst the entities. The critical issue for position limit aggregation is whether there is *de facto* common trading control. The consolidation of financial statements is irrelevant and not conclusive to the determination of the presence or absence of de facto trading control. Therefore, the fact that a company is reflected for accounting purposes in another entity's consolidated financial statements should not disqualify an entity that has a greater than 50 percent ownership interest in another entity from obtaining disaggregation relief.

6. The Restriction on Passive Ownership of Greater than 25 Percent of Pools Operated by a CFTC Rule 4.13 Exempt CPO Should be Eliminated

Commission rules currently provide for exemptive relief from aggregation for limited partners, limited members, shareholders or other similar types of pool participants, with certain conditions.[44] Proposed rule 150.4(b)(1)(iii) retains the current condition that does not provide disaggregation relief for a passive investor that holds a direct or indirect 25 percent or greater ownership or equity interest in a commodity pool where the operator of the pool is exempt from registration under CFTC Rule 4.13.[45] MFA respectfully requests that the Commission eliminate this restriction from the final rule or in the alternative, eliminate the restriction with respect to CFTC Rule 4.13(a)(3) exempt pools.

As stated previously, trading control is the most important factor to consider when determining whether disaggregation relief is appropriate. A limited partner, limited member, shareholder or other passive pool participant has only a *passive* investment and, as a result, does not possess the ability to control or direct the owned entity's trading decisions. When an owner is a passive owner, it should not be required to aggregate positions, regardless of such owner's ownership interest. An ownership interest greater than 25 percent, especially in this context, does not demonstrate trading control. Accordingly, this restriction should be eliminated from the final rules, which instead should focus on actual trading control.

The ownership restriction for passive investors in a commodity pool should be removed from the final rules for other important reasons. Before CFTC Rule 4.13(a)(4) was rescinded, the passive ownership condition may have been logical because CFTC Rule 4.13(a)(4) exempt pools had no restrictions on the amount of commodity interests in which they could invest. However, there is no need to apply this restriction to funds that rely on CFTC Rule 4.13(a)(3), which by definition are permitted only to invest in a *de minimis* amount of commodity interests, *i.e.*, a 5% initial margin limitation, or a 100% net notional value limitation, which should protect against concerns about excessive speculation by such funds.

[44] 17 C.F.R. 150.4(c).

[45] Proposed rule 150.4(b)(1)(iii), Aggregation of Positions, 78 Fed. Reg. at 68,976.

Further, in the case of a fund of funds, investment managers of underlying investee funds are generally unwilling to provide to the manager of a fund of funds the type of detailed portfolio information that such manager would need to monitor compliance with the aggregation rules. In fact, in response to a request[46] by MFA and the Investment Adviser Association relating to registration and exemption questions in the fund of funds context, the Commission acknowledged this problem. The Commission noted that, for a manager of a fund of funds, there may be a "lack of visibility…regarding the positions of an Investee Fund" and that "such opaqueness" may not allow such manager to perform the direct calculations required to determine whether it qualifies for an exemption from CPO registration.[47] Further, even those investment managers of underlying investee funds that provide full position-level transparency to the manager of a fund of funds rarely (if ever) do so on a real-time basis. As a result, even if the manager of a fund of funds could look through to the positions of underlying investee funds, it would be virtually impossible for it to do so on a real-time basis. Thus, there is a potential for an inadvertent violation of the 25 percent condition.

Moreover, the monitoring of ownership percentages in a pool is burdensome, impractical and creates a potential trap for investors who may unintentionally violate the 25 percent limit. Many commodity pools offer investors the opportunity to contribute capital and make withdrawals on a quarterly or monthly basis, and in some instances, more frequently. As a result, the investor, who has no investment discretion and whose investment in the commodity pool has not changed, could unwittingly violate position limits due to the required aggregation. The effect would be to severely limit the investor's ability to diversify its allocations and meet any obligations to its underlying customers.

MFA recommends that the Commission reconsider this policy as it is unnecessary to apply it to CFTC Rule 4.13 exempt pools in light of the rescission of CFTC Rule 4.13(a)(4) and will have the practical effect of creating a trap for passive investors. Specifically, MFA requests that the Commission eliminate clause (iii) of proposed rule 150.4(b)(1). The Commission should not treat passive investments in a 4.13(a)(3) exempt pool differently from passive investments in other pools for purposes of disaggregation relief. A passive investor in a commodity pool (whose operator and manager is unaffiliated with the investor), including pools operating pursuant to a CFTC Rule 4.13 exemption – who has no investment control over the fund in which it invests and, thus, has no ability to distort or manipulate the market – should be permitted to exceed 25 percent ownership.

[46] MFA and Investment Adviser Association, Request for Delayed Compliance Date of Amended Part 4; Former Appendix A of the CFTC's Part 4 Regulations, 17 CFR Part 4 (Nov. 9, 2012), *available at* https://www.managedfunds.org/wp-content/uploads/2012/11/IAA-MFA-Comment-Letter-to-CFTC-re-Extension-of-Compliance-Date-of-Former-Appendix-A-11-9-12.pdf.

[47] MFA and Investment Adviser Association, CFTC No-Action Letter (Nov. 29, 2012), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-38.pdf.

7. Owned Entity Relief Should be Available to Partnerships

Proposed rules 150.4(b)(2) and 150.4(b)(3) provide exemptive relief from aggregation for persons with an ownership or equity interest in an owned entity of (i) 10 percent up to and including 50 percent; and (ii) greater than 50 percent, respectively. However, the proposed rules do not allow partnerships to be eligible for owned entity disaggregation relief.[48] The Commission states that a partnership could not satisfy the condition for owned-entity relief that requires information barrier procedures.[49] The Commission paints with too broad a brush in this respect. The Commission's position appears to be based on certain over generalizations regarding the control of partnerships, and it fails to consider that some partners do not possess actual control over the trading decisions of the partnership or information or knowledge about the partnership's trading decisions.[50] The Commission automatically disqualifies all partnerships and natural persons from availing themselves of owned-entity disaggregation relief.

The positions of two entities should not be aggregated simply because there are non-trading personnel or owners (including general partners) that may have the right to obtain information about the positions of both entities, provided that such individuals do not actually exercise their right to obtain and do not obtain position level information about the affiliated entities, and have no actual control or do not exercise any de facto control over the trading decisions of either entity. The absence of common trading control should be the determining factor in granting disaggregation relief and, where no such control actually exists, such relief should be granted. MFA respectfully requests the Commission to revise its stance on the issue of partnerships and natural persons to permit partnerships or individual general partners to seek relief pursuant to the Commission's owned entity exemptions from aggregation.

8. A *Pro Rata* Aggregation Approach Should Be Adopted

In the event that aggregation is required due to common ownership and the affiliated entities do not qualify for disaggregation relief, MFA believes that it is appropriate to use a *pro rata* aggregation of the position based on the person's ownership interest in the owned entity, rather than aggregating 100 percent of the owned entity's position with the owner's positions. For example, where Company A owns 40% of Company B, and Company B owns 1,000 contracts in a reference commodity, 400 contracts would be attributed to Company A and all

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[48] Aggregation of Positions, 78 Fed. Reg. at n. 113, 68,960 ("It is impossible for a natural person or a partnership to satisfy the criterion that the person does not control the trading of the owned entity, with the person showing that it and the owned entity have procedures in place that are reasonably effective to prevent coordinated trading in spite of majority ownership, because "it is not possible separate knowledge and control of the person from that of the owned entity.").

[49] *Id.*

[50] *See, e.g.*, *id*. Moreover, the Commission's proposed rules, which prohibit the consolidation of financial statements of owned entities seeking disaggregation relief, explain that a limited partner holding a greater than 50 percent ownership interest in a limited partnership could qualify for relief because a limited partnership "is controlled by the general partner." Again, the Commission does not consider that a particular individual general partner may not control trading decisions or have information related to trading decisions. Aggregation of Positions, 78 Fed. Reg. at 68,960.

1,000 contracts would be attributed to Company B. The Commission's aggregation scheme should be based on proportionality and should not unnecessarily limit trading or investment decisions of traders and other market participants. A *pro rata* aggregation approach attributes a quantity of contracts in proportion to the ownership interest of a person in an owned entity, thus reflecting the beneficial ownership of the owner while still achieving the Commission's stated goal of preventing evasion of prescribed position limits.[51] Moreover, *pro rata* aggregation minimizes "double counting" of positions and artificial limits on trading that could adversely affect liquidity that otherwise would be caused if 100% of the owned entity's positions were attributed to the owner and to the owned entity.

The implementation of a *pro-rata* aggregation regime would not be unduly burdensome on the owner of the owned entity or on the Commission. The adoption of *pro rata* aggregation will require that the owner know the quantity of the position owned by the owned entity to enable it to calculate the *pro rata* percentage that should be attributed to the owner. The Commission will have this information by virtue of large trader reporting and its ability under Form 40 and under its special call authority to obtain information related to the ownership interest of the owner in the owned entity. MFA recommends using these procedures to obtain ownership interest information because they are well-established and not overly burdensome on either the owner or the Commission.

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We appreciate the opportunity to offer suggestions to the 2013 Aggregation Proposal. We would be happy to discuss our comments or any other issues raised in the 2013 Aggregation Proposal at greater length with the Commission or its staff. If the staff has any questions, please do not hesitate to contact Jennifer Han or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & Managing Director,
General Counsel

Cc: The Hon. Mark Wetjen, Acting Chairman
The Hon. Scott O'Malia, Commissioner
The Hon. Bart Chilton, Commissioner
Mr. Stephen Sherrod, Senior Economist, Division of Market Oversight

[51] Aggregation of Positions, 78 Fed. Reg. at 68,969.