Alternative Investment Management Association

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

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Dear Ms Jurgens,

Aggregation of Positions; Proposed Rule

The Alternative Investment Management Association (**AIMA**)[1] welcomes the opportunity to respond to the Commodity Futures Trading Commission's (**the Commission**) proposed rule on aggregation of positions (**Proposed Rule**).[2]

As a general comment, we note that the Proposed Rule includes a number of modifications to the approach set out in the prior, now vacated, proposals to amend part 151 of the Commission's regulation, which were published in May 2012 (hereafter: **2012 Aggregation Proposal**).[3] We welcome many of the changes that have been made, which we believe will provide market participants with greater certainty as to the application of the rules.[4] In particular, we strongly endorse the proposed exemption from aggregation for ownership by limited partners, shareholders or other pool participants (150.4(b)(1)).

At the same time, there are elements of the rules that we believe could be helpfully refined further:

- We encourage the Commission to revise its approach to ensure that persons who may act as Independent Account Controllers ("IACs") to include all commodity trading advisors ("CTAs"), not only registered CTAs, as well as exempt CPOs. Current regulations provide that certain persons excluded from the definition of the term commodity pool operator ("CPO") may be IACs and the Commission is proposing to expand that group of persons. We believe that CTAs exempt from registration in accordance with the statutory exemptions under Section 4m(1) or 4m(3) of the Commodity Exchange Act ("CEA"), or who have filed a notice of exemption under CFTC Regulation 4.14(a)(8), should be able to act as an IAC. For our members, it will also be important that CTAs exempt from registration under the CEA in accordance with CFTC Regulation 3.10(c)(3) be able to act as an IAC. These non-registered CTAs will be subject to the notice filing required of other IACs, so the Commission will have knowledge of who is acting as an IAC.

- It would be helpful to introduce a grace period of 75 days from the initial compliance date in respect of the owned entity exemption, permitting firms to avail themselves of this exemption if they are in the process of making an exemption claim. This would address the difficulty that is otherwise caused by the fact that "the exemption from aggregation would not be effective retroactively because the filing is a pre-requisite to the exemption."[5]

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1 Founded in 1990, AIMA is the global representative of the hedge fund industry. We represent all practitioners in the alternative investment management industry – including hedge fund managers, fund of hedge funds managers, prime brokers, legal and accounting firms, investors, fund administrators and independent fund directors. Our membership is corporate and comprises over 1,300 firms (with over 7,000 individual contacts) in more than 50 countries. See www.aima.org.

2 Proposed Rule 78 FR68946: 17 CFR Part 150 Aggregation of Positions.

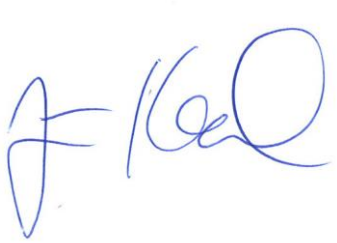
3 Proposed Rule 77 FR 31767: 17 CFR Part 151 Aggregation, Position Limits for Futures and Swaps.

4 We refer in this submission to the comments that AIMA made previously in its response to the 2012 Aggregation Proposal, referred to hereafter as the **July 2012 submission**. The July 2012 submission is filed with Comment Number 58303.

5 78 FR 68962.

AIMA would, of course, be happy to discuss the points raised in this submission further. Please contact Adam Jacobs or myself on +44 20 7822 8380 if you have any questions.

Yours sincerely,



Jiří Król
Deputy CEO
Head of Government & Regulatory Affairs

Annex 1

1. Aggregation of positions

Ownership stakes in investment managers

While we welcome the feedback provided by the Commission in the Proposed Rule, our members would appreciate further guidance on the extent to which an investment manager ("Entity 1") is required to aggregate the positions held in the client accounts that it controls with the client accounts controlled by a separate manager ("Entity 2") in which it has an ownership stake of greater than 50% (assuming that the two investment managers are acting independently of one another and have no control of the trading of or positions controlled by the other). Our understanding is that Entity 1 would not be required to aggregate the positions in client accounts controlled by Entity 2, as, taking the wording from 150.4(a)(1) of the Proposed Rule, Entity 1 does not have an "ownership or equity interest" in those accounts (only in Entity 2 itself) and does not control the trading of those accounts. We would welcome confirmation from the Commission that this reading of the Proposed Rule is correct.

Substantially identical trading strategies

Proposed rule 150.4(a)(2) would track the vacated rule 151.7(d), with the addition of the word "substantially," so that irrespective of any ownership threshold, trading positions in more than one account or pool with "substantially identical trading strategies" must be aggregated. Our understanding is that proposed rule 150.4(a)(2) will primarily be relevant for passively managed index funds. However, given the qualification of the language through the addition of "substantially", it would be helpful if the Commission could provide further guidance on the situations that will be covered by proposed rule 150.4(a)(2) and, specifically, whether the Commission believes that there are situations in which this might be relevant for entities other than index funds. Similarly, we understand that, according to the proposed rule, accounts placed in separate performance composites would not be treated as having substantially identical trading strategies.

We further note that the term "trading strategies" is not defined in the regulatory text or described in the preamble. The term "trading program" is defined in Regulation 4.10(g) and it may be preferable to use that defined term in this context. If the Commission has something else in mind, it would be helpful to provide further guidance in the regulatory text as to the meaning of "substantially identical trading strategies" and whether that could apply to entities other than index funds. At the very least, some additional description of the application of the phrase "substantially identical trading strategies" in the preamble of the final regulations would be valuable in enabling our members to comply with the regime.

2. Exemptions

2.1 Exemption for pool participants

The Proposed Rule establishes an exemption from aggregation for ownership by limited partners, shareholders or other pool participants (150.4(b)(1)), something that AIMA strongly supports. We believe that it would be reasonable to extend this exemption to include the beneficiary of a trust. Further, we believe that this exemption would benefit from drafting amendments to clarify:

- That the reference to "limited member" is to a person who is not a managing member;[6]
- That the reference to the commodity pool operator of the pooled account under proposed rule 150.4(b)(1)(i) should be construed as a reference to the person discharging the function of commodity pool operator, to account for situations where the function has been delegated from one person to another.

We further understand that an entity does not need to make a relief filing in order to rely on this exemption, unless seeking to rely on the exemption for principals/affiliates of the operator of the pooled account in accordance with 150.4(b)(1)(ii); we would be grateful if the Commission could provide confirmation of this.

2.2 Owned entity exemption

As a general comment, we note that the Commission has adopted a number of helpful changes and clarifications to the owned entity exemption in comparison with the 2012 Aggregation Proposal. We comment in detail on the criteria below, but would also highlight our view that the criteria should be designed in such a way as make the

[6] We note that the Limited Liability Company Act of the State of Delaware does not include the defined concept "limited member".

investor, rather than the owned entity, primarily responsible for ensuring that appropriate controls exist to prevent sharing of position information.

We further believe that there is a strong case for revisiting the 10% threshold, particularly for passive investments in operating companies (as can be seen in the fund of funds context), and believe that 25% would be a more appropriate threshold in this context.

Knowledge of the trading decisions

Proposed rule 150.4(b)(2)(i)(A) would condition aggregation relief on a demonstration that the person filing for aggregation relief and the owned entity do not have knowledge of the trading decisions of the other. In line with our comment above, we believe that this condition should be reframed so as to ensure that it is the person filing for aggregation relief, rather than the owned entity, that has primary responsibility for developing and administering the necessary controls. This will help ensure that the regime is proportionate, whilst delivering its objectives.

Separately developed and independent trading systems

Proposed rule 150.4(b)(2)(i)(B) would condition aggregation relief on a demonstration that the person seeking disaggregation relief and the owned entity trade pursuant to separately developed and independent trading systems. In our July 2012 submission, we queried proposed requirements in respect of "separately developed systems", given the prevalence of off-the-shelf systems that are used by investment managers to execute orders. We therefore welcome the Commission's statement that it "does not expect that this criterion would prevent an owner and an owned entity from both using the same "off-the-shelf" system that is developed by a third party".[7]

At the same time, we believe it would be helpful to consider further what this criterion might mean in situations where the person seeking disaggregation relief and the owned entity use systems which are based at least in part on shared architecture (*i.e.* their trading software might have in common programming that has been developed in-house, rather than acquired on licence), and yet nevertheless have completely separate trading strategies. We believe that the key test is whether the entities are running distinct trading strategies, rather than whether the software is completely distinct. We believe that when in-house software is being used to pursue separate trading strategies, it should be considered to be "separately developed and independent".

Written procedures

Proposed rule 150.4(b)(2)(i)(C) would condition aggregation relief on a demonstration that the person seeking relief and the owned entity have, and enforce, written procedures to preclude the one entity from having knowledge, or gaining access to, or receiving data about, trades of the other. Such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities. In our July 2012 submission, AIMA encouraged the Commission to provide additional guidance on the application of the terms "document routing" and "separate physical locations". The Proposed Rule explains that separate physical locations would not necessarily require personnel to be located in separate buildings, but that there should be a physical barrier between the personnel that prevents access between the personnel that would impinge on their independence (the Commission notes that this could include locked doors, rather than merely separate desks). In line with our comment above, we believe that the owner should have primary responsibility for ensuring that appropriate controls exist, in order to ensure the proportionality of the regime.

Shared employees

Proposed rule 150.4(b)(2)(i)(D) would condition aggregation relief on a demonstration that the person does not share employees that control the owned entity's trading decisions, and the employees of the owned entity do not share trading control with such persons. We welcome confirmation from the Commission that "the sharing 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."[8] While it is helpful to specify the types of roles that might be relevant in this regard, it is also worth bearing in mind the difficulty of providing an exhaustive list of the categories of employees that should not be considered to exercise control over the entities' trading decisions; accordingly, we would welcome

[7] 78 FR 68962.
[8] 78 FR 68962.

confirmation from the Commission that the categories of employees set out in the Proposed Rules are not intended to be restrictive. For example, it is conceivable that firms could share sales staff without leading to knowledge of the other's trading decisions.

Risk management systems

Proposed rule 150.4(b)(2)(i)(E) would condition aggregation relief on a demonstration that the person and the owned entity do not have risk management systems that permit the sharing of trades or trading strategies with the other. We believe that this criterion could be refined in order to take into account whether the individuals who have access to such risk management systems exercise control over trading decisions. If they do not exercise control over trading decisions, then we believe that there is no need to restrict the sharing of trades or trading strategies via shared risk management systems.

2.3 Exemption for Ownership of Greater Than 50 Percent

We note that proposed rule 150.4(b)(3) would permit a person with a greater than 50 percent ownership of an owned entity to apply to the Commission for relief from aggregation on a case-by-case basis. We view this as a welcome change relative to the Commission's 2012 Aggregation Proposal, and believe that it will help to ensure that relief from aggregation is available in appropriate situations.

The Commission sets out the criteria that will need to be met in order to qualify for case-by-case relief, which include the requirement that the "owned entity is not required to be, and is not, consolidated on the financial statement of the person" (proposed rule 150.4(b)(3)(i)). We note that consolidation of an owned entity on the financial statement of the owner will not necessarily entail sharing of position information in all situations. Even when consolidation does lead to sharing of information, this does not necessarily imply that the information is available to those employees who are responsible for trading decisions. Accordingly, we believe that this criterion could be helpfully modified so that it does not exclude the possibility of balance sheet consolidation, and only restricts the availability of the exemption to the extent that consolidation leads to sharing of information between the persons who have control over trading decisions (paralleling the shared employees criterion more closely).

We further encourage the Commission to revise the framework for filing for an exemption under 150.4(b)(3) in order to provide a specific timeframe within which the Commission would grant or refuse an exemption. A short review period would be preferable, in order to maximize certainty for market participants seeking relief.

2.4 Independent Account Controller for Eligible Entities

In our July 2012 submission, we expressed our concern that the exemption for Independent Account Controllers ("IACs") would not be available to foreign investment funds that are not structured as limited liability companies or limited partnerships. We therefore welcome the Commission's approach under proposed rule 150.4(b)(5), whereby the exemption will be available to any person "with a role equivalent to a general partner in a limited liability partnership or a managing member of a limited liability company".[9] This will ensure that the regime does not unfairly disadvantage foreign investment funds that are not structured as limited liability companies or limited partnerships.

At the same time, however, we encourage the Commission to revise its approach to ensure that persons who may act as IACs include all commodity trading advisors ("CTAs"), not only registered CTAs, as well as exempt CPOs. We believe that CTAs exempt from registration in accordance with the statutory exemptions under Section 4m(1) or 4m(3) of the Commodity Exchange Act ("CEA"), or who have filed a notice of exemption under CFTC Regulation 4.14(a)(8), should be able to act as an IAC. For our members, it will also be important that CTAs exempt from registration under the CEA in accordance with CFTC Regulation 3.10(c)(3) be able to act as an IAC. These non-registered CTAs will be subject to the notice filing required of other IACs, so the Commission will have knowledge of who is acting as an IAC.

For example, if an eligible entity is a collective investment vehicle that is not required to be operated by a registered CPO, we believe that there should be no requirement that a CTA trading a portion of the vehicle's assets be registered in order to take advantage of the IAC exception. Pension plan beneficiaries should not be deprived of the services of a particular CTA that is exempt from registration in accordance with the CEA and regulations thereunder because of required aggregation under the position limits rules, when such beneficiaries

[9] 78 FR 68965.

have no direct contact with the CTA and no person is required to register as a CPO to operate the plan. Further, even in situations where there is a registered CPO, we also believe that should not restrict who may act as an IAC only to registered CTAs.

2.5 Violation of laws exemption

AIMA welcomes the CFTC's proposed rule 150.4(b)(8) that establishes an exemption from aggregation of positions when the sharing of information between a person and an owned entity would create a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder. It would be helpful if the Commission could confirm that this provision extends to supranational laws, including those promulgated by the European Union. We believe that the "reasonable risk" standard is an appropriate basis for the exemption.

In our July 2012 submission, we set out our view that a person wishing to apply the exemption should supply "supporting legal documentation" rather than an opinion from Counsel, in order to ensure the proportionality of the regime.[10] We therefore support the Commission's amended approach that would require a "written memorandum of law explaining in detail the basis for the conclusion that the sharing of information creates a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder". We also welcome the confirmation from the Commission that the memorandum may be prepared by an employee of the firm or its affiliates.[11]

2.6 Clarification Regarding Employee Benefit Plans

The Commission stated that it was responding to a comment "that a corporate entity that is the sponsor of an employee benefit plan should not be required to aggregate the positions of the plan with the sponsor's proprietary positions."[12] The Commission's proposed response is to treat the manager of the employee benefit plan as an IAC and the plan's positions as client positions. We request that the Commission clarify that this treatment also be applied in the case of a governmental plan or a church plan, *i.e.*, where the sponsor of the employee benefit plan may not be a corporate entity.[13] We further request a slight revision of the text of proposed Regulation 150.1(e)(5)(ii), which is intended to effect the treatment discussed above. That paragraph now refers to a "manager of a commodity pool the operator of which is excluded from registration under §4.5(a)(4)." Because most of the employee benefit plans referred to in Regulation 4.5(a)(4) are construed not to be pools for purposes of that provision, we believe that it would be clearer and more appropriate to use identical language in Regulation 150.1(e)(5)(ii) as appears in the introductory text of Regulation 150.1(d) defining the term "eligible entity." Therefore, we recommend that the phrase "commodity pool the operator of which is excluded from registration" be deleted from Regulation 150.1(e)(5)(ii) and replaced with the phrase "trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term 'pool' or 'commodity pool operator,' respectively," the latter being taken from the text of Regulation 150.1(d).

3. Filing Requirements

Proposed Rule 150.4(c) sets out the notice filing requirements associated with the aggregation framework. We note that filing requirements inevitably create a burden for the firms who are subject to them and believe that it is important to design them in such a way as to minimize this burden. We therefore welcome the Commission's approach, whereby a repeat filing is only required where there is a "material change to the information" provided in an earlier filing; this is preferable to requiring a new notice to be filed on a periodic basis. However, we believe that there is scope to refine further the filing requirements in order to ensure smooth transition to the new framework. For example, it would be helpful to introduce a grace period of 75 days from the initial compliance date in respect of the owned entity exemption, permitting firms to avail themselves of this exemption if they are in the process of making an exemption claim. This would address the difficulty that is otherwise caused by the fact that "the exemption from aggregation would not be effective retroactively because the filing is a pre-requisite to the exemption."[14]

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10 78 FR 68965.
11 78 FR 68950.
12 78 FR 68960-61.
13 *See* CFTC Regulation 4.5(a)(4)(iii) and (v).
14 78 FR 68962.