# CSC SUGAR, LLC

February 10, 2014

**Via Electronic Submission:** http://comments.cftc.gov

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

**Re: RIN 3038-AD99 Position Limits for Derivatives;**
**RIN 3038-AD82 Aggregation of Positions**

Dear Ms. Jurgens:

CSC Sugar, LLC[1] ("**CSC Sugar**") appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "**Commission**" or "**CFTC**") on its notices of proposed rulemaking on position limits[2] (the "**Position Limits Proposal**") and aggregation of positions[3] (the "**Aggregation Proposal**" and, together, the "**Proposals**"). CSC Sugar, a privately owned and operated company that specializes in sugar, is a leading logistics expert in the sugar industry that manages its risk by using futures contracts. The Proposals, if adopted as proposed, would have an adverse effect on CSC Sugar's operations and risk management. CSC Sugar has reviewed the Proposals and is offering its recommendations to minimize the unintended consequences of the Proposals on the trading and risk management operations of commercial enterprises.

## I. The Owned Entity Aggregation Relief Does Not Reflect Market Realities and Is Too Restrictive

The Commission's Aggregation Proposal requires aggregation for any person with a 10 percent or greater ownership or equity interest in an owned entity.[4] However, under proposed rule 150.4(b)(2), persons with an ownership or equity interest of 10 percent or greater but not

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[1] CSC Sugar, LLC is a privately owned and operated international agri-products trading, processing, and marketing company specializing in raw, refined and liquid sugar. CSC Sugar is the number one importer of raw sugar into the U.S. with a market share of approximately 40%. CSC Sugar employs approximately 50 people and is headquartered in New Canaan, Connecticut.

[2] Position Limits for Derivatives, 78 Fed. Reg. 75,680 (proposed Dec. 12, 2013).

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

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



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more than 50 percent[5] are not required to aggregate their positions if they satisfy the conditions for the exemptive relief. To qualify for this exemptive relief, the owner and the owned entity must satisfy the following conditions: (1) possess no knowledge of the trading decisions of the other; (2) trade pursuant to separately developed and independent trading systems; (3) have and enforce information barrier procedures, which include document routing and security arrangements, such as separate physical locations, to maintain the independence of their activities; (4) do not share employees that control the trading decisions of the other; (5) do not have risk management systems that permit the sharing of trades or trading strategy; and (6) compliance with the requisite notice filing procedures.

The Commission's presumption that control exists at the 10 percent ownership threshold is not correct with respect to owned operating entities. While the presumption may create a logical bright-line test for financial entities such as investment funds, where control may actually exist at the 10 percent threshold, it is not appropriate to apply this threshold to operating companies. Ownership of a privately held operating company is typically held amongst a few persons and, as a result, a 10 percent ownership interest in a privately held operating company *does not* automatically mean that the person with the 10 percent ownership interest has the power to control or direct the operating company. A more appropriate indication of control is whether a person has a majority interest of the operating company's board of directors or a majority voting interest. A person with a majority of the board or majority voting interest possesses the power to control the decisions of the operating company and, thus, has the ability to control or direct the owned entity's trading decisions. A mere 10 percent owner does not.

Accordingly, CSC Sugar respectfully requests that the Commission determine whether a person controls the board or possesses a majority voting interest of an owned entity before requiring aggregation between the owner and owned entity. The Commission should eliminate the 10 percent ownership aggregation threshold to more accurately reflect the way ownership and control is commonly structured in operating entities. The 10 percent threshold is too low to allow for relief where it should otherwise be available, and is too low to garner the attention of the owned entity such that the owner could easily obtain the information necessary to aggregate positions. The Commission should not require aggregation where trading control does not exist.

## II. The Commission's *Bona Fide* Hedging Exemption is Too Narrow and Should Permit Unpriced Purchase or Sale Contracts to Qualify as *Bona Fide* Hedge Positions

The Position Limits Proposal would narrow the *bona fide* hedging exemption to the detriment of commercial enterprises such as CSC Sugar. One important aspect of the *bona fide* hedging exemption relates to unpriced physical purchase or sale contracts. The Commission briefly addressed this issue in passing in its discussion of the exemptive request made by the Working Group of Commercial Energy Firms.[6] When a commercial enterprise enters into a contract with another party to purchase or sell a commodity, the commercial enterprise often

[5] Under proposed rule 150.4(b)(3), persons with a greater than 50 percent ownership or equity interest may qualify for exemptive relief if they meet a different, more onerous set of conditions. Aggregation of Positions, 78 Fed. Reg. at 68,976.

[6] Position Limits for Derivatives, 78 Fed. Reg. at 75,719.

enters into an offsetting futures contract on an exchange. For example, if CSC Sugar enters into an OTC forward contract with a sugar refinery and manufacturer to deliver 50,000 tons of raw sugar to a specific refinery in April or May, and the contract is priced against a May Exchange for Physical contract, CSC Sugar might, for example, enter into a long March futures contract on an exchange and take delivery. However, the forward contract is not priced at a fixed price and, as a result, would not qualify for exemptive relief under the *bona fide* hedging position definition. Entering into these types of transactions, where the forward contract is unpriced until near the time of performance, is common for commercial enterprises because it reduces counterparty exposure. For example, in this scenario, CSC Sugar would be exposed to counterparty credit risk if the forward contract has a set price. If the sugar refinery defaults and does not take delivery, CSC Sugar would have to find a new buyer for the sugar. Assuming that the price of sugar has decreased, CSC Sugar would suffer a financial loss, whereas it would not incur this loss if the forward had been unpriced. Importantly, the performance obligation of an unpriced contract is identical to the performance obligation of a priced contract, yet the Commission automatically would recognize a *bona fide* hedge position only for a transaction involving a priced contract.

We note the Commission's concerns that evaluations of price risk are on a case-by-case basis.[7] However, the Commission should permit the *bona fide* hedger to calculate its price risks on a case-by-case basis instead of submitting the particulars of each transaction to the Commission under an open-ended review pursuant to either CFTC Rule 140.99 or Section 4a(a)(7) of the Act. The specific price risk should not be determinative of whether a transaction may properly be classified as a *bona fide* hedge position. The transaction described above occurs regularly in commercial markets and is a common strategy used to reduce risk. Therefore, this type of transaction should not be subject to the speculative position limits regime and should be a component of the *bona fide* hedge exemption in the Commission's final rules.

## III. The Commission's Exemptive Authority Under Section 4a(a)(7) of the Act Should (A) Not Replace CFTC Rule 1.47 and (B) Stipulate a Timely Review Period and Provide a Waiver of the Position Limits Regime During the Commission's Review Period

### A. The Commission Should Not Replace CFTC Rule 1.47 With Section 4a(a)(7) of the Act or CFTC Rule 140.99

The Commission's Position Limits Proposal eliminates the current method of seeking exemptive relief under CFTC Rule 1.47 and replaces it with Section 4a(a)(7) relief or interpretative guidance under CFTC Rule 140.99. CFTC Rule 1.47 contains explicit deadlines by which the Commission must review a request for exemptive relief (30 days) or a request for an amendment to existing exemptive relief (10 days). The Commission would instead replace the current procedures with exemptive relief that does not have formal procedures or a specific timeframe for Commission review. The Commission's Position Limits Proposal would institute uncertainty where certainty had existed before. CSC Sugar respectfully requests that the Commission continue to use CFTC Rule 1.47 as a method for market participants to seek exemptive relief from the position limits regime.

[7] Position Limits for Derivatives, 78 Fed. Reg. at 75,719-20.

B. Requests for Disaggregation Relief Made Pursuant to Section 4a(a)(7) of the Act Should Stipulate an Explicit Timeframe for Commission Review and Provide a Waiver Program During the Pendency of an Application

The Aggregation Proposal would permit persons who do not qualify for disaggregation relief under proposed rule 150.4(b)(3) to separately apply to the Commission for exemptive relief pursuant to Section 4a(a)(7) of the Act.[8] The Commission states that applications for relief should include "the particular facts and circumstances that justify the relief,"[9] but the Commission does not describe the relevant factors that it would consider when determining whether to grant relief. In fact, the Commission acknowledges that Section 4a(a)(7) does not provide these factors or impose a specific time period for the Commission's review.[10]

CSC Sugar believes that the ownership threshold for owned entity relief should be eliminated altogether and instead the Commission should require aggregation where actual trading control exists but, in the event that the Commission retains a threshold percentage at which aggregation is required, CSC Sugar recommends that the Commission provide more details about Section 4a(a)(7) relief. The critical factor that the Commission should consider when it reviews applications for exemptive relief is trading control; *i.e.*, whether the entity with the ownership interest actually directs or controls the trading decisions of the owned entity. For example, an explicit statement that the owner does not control or direct the trading decisions in the application should suffice. Evidence of the lack of control could be demonstrated by an owner that does not have a majority interest of the owned entity's the board or a majority voting interest. Moreover, the Commission only addresses its exemptive authority in relation to situations where an entity with a greater than 50 percent ownership or equity interest does not qualify for owned entity relief. The Commission should clarify that its exemptive authority can and will be used in other situations where disaggregation relief is requested.

Another aspect of the Commission's Aggregation Proposal that the Commission should resolve before it adopts final rules is the lack of a specific timeframe by which the Commission must complete its review of a request for exemptive relief made pursuant to Section 4a(a)(7) of the Act. Without a specific timeframe, the Aggregation Proposal will cause great uncertainty about aggregation during the pendency of an applicant's request for relief. An open-ended review period will stifle commercial enterprises. Accordingly, the Commission should consider the impact of an open-ended review period and modify its proposal to prevent any adverse unintended consequences. CSC Sugar recommends that the Commission provide a defined review period, clear review procedures to which Commission staff must adhere (including a written justification for the denial of an application), and a waiver program that would provide to an applicant temporary relief during the pendency of its application.

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[8] Section 4a(a)(7) of the Commodity Exchange Act reads: "The Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits." 7 U.S.C. § 6a(a)(7).

[9] Aggregation of Positions at 68,960.

[10] *Id.*

An applicant for exemptive relief will be subject to uncertainty during the Commission's review of its application for exemptive relief, even with a definite review period. Therefore, the Commission should implement a waiver program during the pendency of an application for exemptive relief. A waiver program would not prevent the Commission from achieving the goals of the position limits regime. The Commission itself has described the burdens for commercial enterprises that must file applications for relief. For example, in the vacated position limits rules,[11] the Commission adopted a notice filing procedure for disaggregation relief instead of the proposed application procedure because it represented "a less burdensome, yet effective, alternative to the proposed application and pre-approval process."[12] The Commission described the benefits of the notice filing procedures as allowing "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."[13]

Further, a waiver program would allow an applicant to continue to use its current trading strategies while the Commission reviews its application and until the Commission issues a formal response to the request. By implementing a waiver program, the Commission will provide greater certainty to commercial enterprises that rely on their trading strategies to effectively manage their risks. A waiver program would prevent an applicant from incurring the costs associated with changing trading strategies while its request for relief is under review and costs associated with compliance with the aggregation rules for those entities that are ultimately granted disaggregation relief.

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CSC Sugar appreciates the opportunity to comment and provide its recommendations on the Commission's Proposals. Aggregation should only be required where de facto common control may be shown to exist. Disaggregation relief is a critical component of an effective position limits regime, but it should be meaningful relief that is not overly burdensome. Accordingly, the Commission should eliminate the 10 percent ownership aggregation threshold for owned-operating entities and provide owned entity relief where the owner does not control or direct the owned entity's trading decisions. Additionally, in the event that a person does not qualify for an enumerated exemption from aggregation and applies for relief pursuant to Section 4a(a)(7) of the Act, the Commission should review the application within a specific time period and provide a waiver to the applicant during the pendency of the Commission's review. The Commission should modify the Position Limits Proposal and allow unpriced contracts to qualify as *bona fide* hedge positions. Should you have any questions about CSC Sugar's recommendations on the Proposal, please do not hesitate to contact the undersigned at 203 846 5610 or areul@cscsugar.com.

Sincerely,

Andrew Reul, CFO

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[11] Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626, 71,654 (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)).

[12] *Id.*

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