PRIVATE EQUITY GROWTH CAPITAL COUNCIL

SUBMITTED ELECTRONICALLY

July 3, 2014

Ms. Melissa Jurgens
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street N.W.
Washington, D.C. 20581

Re: CFTC, Notice of Proposed Rulemaking on Aggregation, Aggregation of Positions (RIN 3038–AD82); Extended Comment Period

Dear Ms. Jurgens:

This letter is submitted by the Private Equity Growth Capital Council ("***PEGCC***", "***we***" or "***us***", as applicable) in response to the extension of the comment period on the Notice of Proposed Rulemaking on Aggregation Positions (the "***Proposing Release***") issued by the Commodity Futures Trading Commission ("***CFTC***" or "***Commission***").[1] We appreciate the opportunity to submit these supplemental comments in response to the Commission's re-opening of the comment period on the Proposing Release.[2] The PEGCC is an advocacy, communications and research organization established to develop, analyze and distribute information about the private equity and growth capital investment industry and its contributions to the national and global economy.[3]

I. Summary

This letter reiterates and reincorporates by reference our prior comment letters on this topic, dated June 29, 2012, August 20, 2012 and February 10, 2014, respectively (the "***Prior Letters***").[4] As we set forth in detail in our February 10, 2014 submission, and again at the

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1 Aggregation of Positions, 78 Fed. Reg. 68946 (Nov. 15, 2013) *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-11-15/pdf/2013-27339.pdf.

2 Position Limits for Derivatives and Aggregation of Positions, 79 Fed. Reg. 30762 (May 29, 2014) *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-05-29/pdf/2014-12427.pdf.

3 Established in 2007, and formerly known as the Private Equity Council, the PEGCC is based in Washington, D.C. The PEGCC's members are the world's leading private equity and growth capital firms united by their commitment to growing and strengthening the businesses in which they invest.

4 The Prior letters may be accessed on the CFTC's online comment database at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58295 (June 29, 2012 submission),

Commission's recent roundtable addressing these issues,[5] our comments may be summarized as follows:

- We continue to be appreciative of and support the CFTC's decision to provide for and permit, in appropriate circumstances, disaggregation notwithstanding an investment by an "owner entity" that exceeds 50 percent, and up to and including 100 percent, of the ownership interest in an "owned entity" (the "***Greater-than-Fifty Exemption***").
- However, we remain concerned that certain aspects of the proposed Greater-than-Fifty Exemption will, if adopted without revision, unnecessarily limit or even prevent the usability of the exemption by many private equity funds.

II. Greater-than-Fifty Exemption Should be Effective upon Submission of a Notice Filing

The Proposing Release would require an owner entity to submit an application to the Commission and then wait for Commission approval prior to the effectiveness of the Greater-than-Fifty Exemption. As we discussed at length in our February 10, 2014 submission and at the Roundtable, we believe that the Commission should permit an owner entity to claim the Greater-than-Fifty Exemption via a filing to the Commission that is effective upon submission.

An application and approval process will demand significant resources from both CFTC staff and market participants, resulting in an unnecessary and inefficient outcome on both ends.[6] Moreover, because the Proposing Release does not indicate or impose any specific timing obligation or standard of review with respect to the CFTC's review of an application,[7] an owner entity could be exposed to aggregating the accounts of a qualifying owned entity during the CFTC's review period, notwithstanding that the owner and owned entity have no programs or systems in place that could facilitate the type of information sharing that is required to comply with an aggregation requirement. It would be a counter-productive use of resources to develop and implement an interim aggregation compliance program while at the same time awaiting the Commission's approval of disaggregation relief – which, once granted, would require the dismantling of the interim information sharing programs and systems. If the purpose of the exemption is to recognize instances where an owner entity does not coordinate with, control, or otherwise involve itself in the trading activities of an owned entity, a stalled (and unnecessary)

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http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58418 (Aug. 20, 2012 submission) and http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59650 (Feb. 10, 2014 submission).

5 *Public Roundtable to Discuss Position Limits for Physical Commodity Derivatives [and Aggregation]*, CFTC, Washington, DC (June 19, 2014) (the "**Roundtable**") *see* http://www.cftc.gov/PressRoom/Events/opaevent_cftcstaff061914.

6 As noted at the Roundtable, across the private equity industry alone, the application requirement could result in the submission of thousands of applications for disaggregation relief. It is unrealistic to suggest that any application and review process, however conducted, would provide a meaningful and timely review of this volume of submissions.

7 "The Commission reiterates that . . . even if the owned entity is not consolidated and other requirements for relief are satisfied, the Commission could nevertheless, in its discretion, determine that relief is not appropriate." Proposing Release at 68960 (emphasis added).

application process will not only risk undermining the purpose of the exemption, but will also impose unnecessary financial costs and legal uncertainty on both owner and owned entities.

Making a notice filing for the Greater-than-Fifty Exemption effective immediately upon submission to the Commission would be consistent with the approach that the Commission has proposed in connection with filing for other aggregation exemptions.[8] The notice filing would permit the Commission to identify those owner entities relying on the relief and, in the event of an actual concern of abuse or misapplication, provide the Commission with the appropriate points of contact for further inquiry. We remain of the view that once the notice filing is properly submitted, there is no need for any further review or evaluation by any organization, other than in an instance where the Commission has reason to explore whether the conditions of the exemption are in fact being observed by a particular entity or group of entities. Therefore, we respectfully request that the Commission revise the proposed Greater-than-Fifty Exemption to remove the application and approval process and to provide that the exemption is effective upon the submission of a notice filing and the required certifications to the CFTC.

III. Other Clarifications and Revisions

Board Member Certification

We reiterate our view that, instead of requiring a certification from each representative of the owner entity that is on the board of directors of an owned entity, the final rule should permit the owner entity to make this certification directly to the Commission, on its own behalf and on behalf of its representative(s) on the owned entity's board of directors. The owner entity is in the best position to fully understand the nature of the responsibilities given to its representative(s) and will have a more complete understanding of the controls it implements across multiple owned entities. Moreover, the representative(s) may not have full knowledge of the separations maintained at the owner entity level with respect to other owned entities.

Three-Month Penalty Period

We continue to believe that rather than imposing an arbitrary three-month penalty period in the event that the conditions of the exemption cease to be met by an owner entity, the Commission should instead require (i) that the conditions of the exemption must be met at all times, and (ii) that if such conditions are not met, the exemption would cease to be available until such time as the owner entity recertified that it meets the conditions of the exemption. There is no identified purpose for the three-month penalty period, and there are no similar penalty periods in the context of other aggregation exemptions.

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[8] *E.g.*, the principal or affiliate of a commodity pool operator in connection with an interest in a commodity pool (proposed rule 150.4(b)(1)(ii)); an owner entity in respect of an ownership interest of ten to fifty percent in an owned entity (proposed rule 150.4(b)(2)); certain positions of a futures commission merchant ("**FCM**") where the FCM does not control the trading of such account (proposed rule 150.4(b)(5)); and an eligible entity's client positions or accounts carried by an authorized independent account controller (proposed rule 150.4(b)(5)).

Owned Entity Permitted Activity

We support the permitted scope of the owned entity's derivatives activities, which provide that either (i) all of the owned entity's positions qualify as *bona fide* hedging transactions or (ii) the owned entity's positions that do not so qualify do not exceed 20 percent of any position limit currently in effect. This condition, importantly, does not restrict an owned entity from engaging in activity in derivatives not subject to position limits (*e.g.*, foreign exchange and interest rate trades). However, we understand that for certain corporate structures, the 20 percent restriction may inappropriately restrict the usability of the exemption, even in an instance where there are in fact separations of control in place that would otherwise support claiming disaggregation relief. Therefore, and while the 20 percent restriction is not necessarily problematic for PEGCC and its member firms, we do not believe that it is an essential condition of claiming the Greater-than-Fifty Exemption.

GAAP Accounting/Consolidated Financials

The proposed Greater-than-Fifty Exemption would require an owner entity to certify to the Commission 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 the owner entity. As with the scope of owned entity permitted activity (discussed above), PEGCC and its member firms do not expect this condition to be restrictive of their ability to claim the exemption based on the current owner entity / owned entity structures that are in place in the private equity industry. However, and in any event, we do not believe that including this condition in the final rule is necessary in light of the other conditions and certifications that must be met or provided in order for an owner entity to demonstrate adequate separations of control prior to relying on the exemption. While consolidated financials may be an appropriate factor in the context of observing shared "corporate control", the concept of *common control* for the purposes of the CFTC's aggregation requirements is more appropriately focused on operational control of trading accounts – that is, the actual exercise of control over day-to-day trading decisions.

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The PEGCC thanks the CFTC for its decision to include the Greater-than-Fifty Exemption in the Proposing Release and for this opportunity to provide further comment on the Proposing Release. In order to make the exemption practical and effective for market participants, we urge the Commission to include the few modifications identified in this letter in its final aggregation rules. We stand ready to discuss any of these issues further or to assist the Commission in any way that may be helpful.

Respectfully submitted,

Steve Judge
President and CEO
Private Equity Growth Capital Council

cc: Honorable Timothy G. Massad, Chairman
Honorable Scott D. O'Malia, Commissioner
Honorable Mark P. Wetjen, Commissioner
Honorable Sharon Y. Bowen, Commissioner
Honorable J. Christopher Giancarlo, Commissioner

Stephen Sherrod, Senior Economist
Riva Spear Adriance, Senior Special Counsel