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VIA ELECTRONIC SUBMISSION

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

Re: ***Response to Staff Questions Regarding Aggregation of Positions, RIN 3038-AD82***

Dear Ms. Jurgens:

INTRODUCTION.

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Sutherland Asbill & Brennan LLP hereby submits these comments in response to the Commodity Futures Trading Commission's (the "**CFTC**" or "**Commission**") request for further public comment on its Notice of Proposed Rulemaking, *Aggregation of Positions*.[1] The Working Group appreciates the Commission's effort in continuing to solicit feedback on its position limits aggregation framework. With a few key changes, the current proposal will be reasonable for many market participants to implement.

Specifically, this comment letter responds to questions from staff in the Commission's Division of Market Oversight issued in connection with the CFTC's June 19th Position Limits Roundtable ("**Roundtable**").[2] The Working Group requests that the Commission consider these comments in conjunction with the Working Group's prior comments on this proceeding.[3]

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[1] *See* Notice of Proposed Rulemaking, *Aggregation of Positions,* 78 Fed. Reg. 68,946 (Nov. 15, 2013) ("**Proposed Aggregation Rule**").

[2] *See* Position Limits Roundtable: Staff Questions (June 2014), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/staffquestions061214.pdf.

[3] *See* The Commercial Energy Working Group, Comment Letter on the Notice of Proposed Rulemaking, *Aggregation of Positions*, RIN 3038-AD82 (Feb. 10, 2014) ("**Working Group Comment Letter**"), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59647&SearchText= .

QUESTION ONE.

For ownership interests over 50 percent, what organizational structures do you have in place that would indicate that there is an appropriately high degree of separation between the owner and the owned entity, in light of the statutory purposes of position limits, such that the two should not be aggregated? For example, in this situation, what organizational structures would prevent the owner and owned entity from using the limits that would apply to them separately (if they are not aggregated), in order to engage in excessive speculation or market manipulation?

Working Group Response:

As discussed in the Working Group Comment Letter and discussed in detail during the Aggregation Panel of the Roundtable, the determination of whether affiliated entities' positions should be aggregated for the purposes of position limits should turn on the presence or absence of coordinated or commonly controlled trading. Stated another way, the positions of two affiliates should be aggregated if their day-to-day trading decisions are coordinated or are effectively controlled by the same person or persons.[4] Therefore, in the absence of that coordination or control, entities should be permitted to avoid aggregation of their positions, regardless of the level of common ownership between the entities.

To achieve an "appropriately high degree of separation between the owner and the owned entity" such that trading coordination or common trading control is absent, two primary issues should be addressed.

First, the day-to-day trading decisions of the entities in question must be made independently. This can be accomplished by ensuring that each entity has independent traders and that those traders are not overseen by the same direct supervisors.

Second, each entity must not have access to data that would allow it to reproduce or determine the trading strategy of the other entity. As such, employees with the authority to direct the trading of one entity must not have access to the other entity's trade or position-level information. That data must be appropriately segregated.

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[4] The Working Group also requests that the CFTC clarify that two independent counterparties entering into an arm's length transaction which requires a degree of coordination are not coordinating their trading for the purposes of the CFTC's proposed position limits aggregation rules. Specifically, example seven in the CFTC's Proposed Rule on *Position Limits for Derivatives*, 78 Fed. Reg. 75,680 (Dec. 12, 2013) ("**Proposed Position Limits Rule**"), contemplates that one party to a transaction may need to aggregate its derivatives for position limit purposes with those of its counterparty because they may be deemed to be trading pursuant to an express or implied agreement by entering into a commonplace commercial transaction. The Working Group, in its comment letter on the Proposed Position Limits Rule makes clear that such an approach to aggregation is not only incorrect, but would have serious commercial consequences. *See* The Commercial Energy Working Group, Comment Letter on the Notice of Proposed Rulemaking, *Position Limits for Derivatives*, RIN 3038-AD99, at 63-64 (Feb. 10, 2014), *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59693&SearchText=sutherland.

The proposed requirements for entities with between 10 percent and 50 percent common ownership to qualify for aggregation relief (the "**50 Percent Requirements**") have the proper focus and concentrate on these two issues.[5] The requirements impose limitations on (i) the ability to coordinate or direct trading decisions of the disaggregated entities and (ii) the ability to access information on the trading behavior of other disaggregated affiliates, while preserving the ability of disaggregated entities to engage in coordinated risk management and be subject to common strategic oversight by management. The Commission should follow these principles when setting parameters for aggregation relief for entities with more than 50 percent common ownership, with the understanding that these principles should be flexible enough to accommodate a variety of ownership structures. To the extent the Commission would like to adopt additional requirements for entities with more than 50 percent common ownership to qualify for aggregation relief, the Commission could adopt the approach suggested in the Working Group's response to Question 3 set forth below.[6]

As for specific organizational structures that can be used to ensure there is an "appropriately high degree of separation," a commercial energy firm could use any or all of the following:

- physical separation between the traders and their direct supervisors of one entity from the traders and their direct supervisors of the other;
- policies limiting the sharing of information across disaggregated affiliates, including policies limiting the type and granularity of data that management can share with trading supervisors and traders of disaggregated entities;
- firewalls preventing access to trade or position-level data by personnel with trading authority in disaggregated affiliates;
- separate clearing accounts or sub-accounts;
- separate trading and credit support documentation with counterparties; and
- board of directors' resolutions requiring disaggregated affiliates to trade independently.

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[5] *See* Working Group Comment Letter at 5.

[6] As discussed more fully in response to Question 3, a company should be able to avail itself of an exemption from aggregation with the positions of commonly owned entities where that company meets an exemption based on a modified version of the Independent Account Controller exemption.

QUESTION TWO.

What organizational difficulties do you face in complying with the proposal to require aggregation when there are ownership interests over 50 percent?

Working Group Response:

Aggregating the positions of affiliates with more than 50 percent common ownership that currently trade independently from one another will raise a number of significant issues. For any number of reasons, in many cases in the energy sector, a deliberate decision was made to avoid trading coordination between the affiliates in question. As discussed during the Aggregation Panel at the Roundtable, subjecting such energy market participants to mandatory aggregation where there are ownership interests above 50 percent will effectively force the creation of new information flows where none previously existed. Such a situation will enhance compliance burdens imposed on market participants and create the potential for compromising the existing independent trading activity of affiliates with 50 percent common ownership.

In this respect, requiring affiliates in a large global company to aggregate positions will require that company to have in place a system to monitor continuous compliance with position limits. Putting in place such a system will be difficult and costly. From an information technology perspective, the system effectively needs to be able to monitor a global enterprise's financial and physical positions on a 24-hour, real-time basis. Further, a number of different operational issues would have to be managed. For instance, which entities would have the right to space under a position limit, and how would hedge exemptions be allocated and managed? These issues are complex and may be difficult to monitor and implement.

In addition, there may be competitive reasons for avoiding aggregation. For example, a company may own 50.1 percent of a joint venture with a competitor rather than 50 percent for a number of reasons. Requiring aggregation of positions in this circumstance may provide valuable trading-level information to the joint venture or the minority owner, to the detriment of the majority owner.[7]

[7] Under certain circumstances, aggregation may be avoided in this scenario if there is reasonable risk of a violation of law. However, that reasonable risk may not be present in all circumstances.

QUESTION THREE.

Should the Commission consider granting an aggregation exemption to the separately organized operating units of a commercial enterprise, regardless of ownership interests? Should such exemption be conditioned on independence of control of trading decisions, similar to the exemption for an eligible entity with an independent account controller?

Working Group Response:

As noted above, the correct analytical lens to use in determining if aggregation relief is appropriate is whether common trading-level control or trading coordination exists. If control or coordination is absent, then aggregation relief should be available. The level of common ownership between the entities at issue should not be relevant.

To reflect this concept in its regulations, the Working Group suggests that the Commission adopt regulatory language similar to the language set forth below. The Working Group modeled the language after the existing Independent Account Controller exemption.

> Accounts of entities under common ownership need not be aggregated where the entities are excluded affiliates. An excluded affiliate is a separately organized legal entity—
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> (1) That is specifically authorized by a parent entity to control trading decisions on its own behalf, without the day-to-day direction of the parent entity or any other affiliate;
>
> (2) Over whose trading the parent entity maintains only such minimum control as is consistent with its fiduciary responsibilities to fulfill its duty to supervise diligently the trading of the excluded affiliate or as is consistent with such other legal rights or obligations which may be incumbent upon the parent entity to fulfill (including policies and procedures to manage enterprise-wide risk);
>
> (3) That trades independently of the parent entity and of any other affiliate; and
>
> (4) That has no knowledge of trading decisions of the parent or any other affiliate.

This language is also similar to the Federal Energy Regulatory Commission's ("**FERC**") regulatory barriers on the sharing of information between franchised affiliates and affiliated market-regulated entities.[8] Specifically, under those requirements, to the maximum extent practical, the employees of a market-regulated affiliate must operate separately from the

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[8] *See* 18 C.F.R. § 35.39 (2014).

employees of any affiliated franchised public utility. However, the entities are permitted to share support employees and senior officers and boards of directors as long as the shared officers and boards of directors do not participate in directing, organizing, or executing generation or market functions. In addition, permissibly shared support employees and senior officers and board of directors may have access to information covered by the information sharing prohibition. The Working Group requests that the Commission follow its approach with respect to the 50 Percent Requirements[9] and FERC's approach with respect to shared support employees and allow majority-owned affiliates to share risk management and other personnel who do not have trading-level control and enjoy aggregation relief.

Finally, any aggregation exemption filing, whether for entities with between 10 percent and 50 percent common ownership or entities with more than 50 percent common ownership, should be a notice filing that does not require affirmative Commission action to become valid. In addition, such a filing should be permitted to be made by one entity within a corporate group on behalf of any other affiliates for which aggregation relief is being requested. The combination of a notice filing and the ability to make one filing on behalf of a corporate enterprise will significantly reduce the Commission's burden when administering an aggregation relief regime. The ability to make a single notice filing to receive aggregation relief will also reduce the compliance burden for market participants and, more importantly, will provide market participants a quick and efficient route to relief. In particular, a notice filing procedure that allows aggregation relief when the filing is made will eliminate regulatory and business concerns that would arise if Commission affirmation was required for market participants to receive that relief.

QUESTION FOUR.

What concerns do you have regarding the facts and circumstances determination concerning whether trading strategies are "substantially identical"?

Working Group Response:

The Working Group has one concern with respect to a facts and circumstances determination regarding whether trading strategies are "substantially identical." It is common for affiliated entities that trade independently from one another to have similar trading profiles if they are hedging similar risks. For example, a commercial energy firm may have an entity that hedges the risk of its refineries and an entity that hedges the risks associated with merchandising physical crude. At any given point, the trading of the two entities could look "substantially identical" given the similar risks that they face. The Working Group would like to confirm that such trading does not constitute "substantially identical" trading strategies for the purposes of the Commission's proposed position limits aggregation requirements.

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[9] *See* Proposed Aggregation Rule at 68,962.

CONCLUSION.

The Working Group appreciates this opportunity to provide comments on the proposed aggregation standards under the speculative position limits regime and respectfully requests that the Commission consider the comments set forth herein as it develops any final rulemaking in this proceeding.

If you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ R. Michael Sweeney, Jr.
R. Michael Sweeney, Jr.
Alex S. Holtan

Counsel for The Commercial Energy Working Group