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January 22, 2015

***Via Electronic Submission***

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

**Re: Re-Opening of Comment Period Regarding Commission Agricultural Advisory Committee Discussion of Position Limits for Derivatives (RIN 3038–AD99) and Aggregation of Positions (RIN 3038–AD82)**

Dear Mr. Kirkpatrick:

The Futures Industry Association ("**FIA**") appreciates the opportunity to provide the Commodity Futures Trading Commission ("**Commission**" or "**CFTC**") with comments and recommendations in response to the Commission's re-opening of the comment period for its proposed rules (1) establishing position limits for derivatives, and (2) amending the rules governing the aggregation of positions.[1] FIA's regular and associate members, their affiliates, and their customers actively participate in the listed and over-the-counter ("**OTC**") derivatives markets as intermediaries, principals, and users.[2] Consequently, FIA and its members have a significant interest in the Proposed Rules. FIA's comments and recommendations, which supplement FIA's prior comment letters, focus on the impact of speculative limits on market

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[1] *See Position Limits for Derivatives and Aggregation of Positions*, 79 Fed. Reg. 71973 (Dec. 4, 2014) (proposed rule, re-opening of comment period); *Position Limits for Derivatives*, 78 Fed. Reg. 75680 (Dec. 12, 2013) (proposed rule) ("**Position Limits Proposal**"); and *Aggregation of Positions*, 78 Fed. Reg. 68946 (Nov. 15, 2013) (proposed rule) ("**Aggregation Proposal**") (collectively "**Proposed Rules**"); *see also Position Limits for Derivatives and Aggregation of Positions*, 80 Fed. Reg. 200 (Jan. 5, 2015).

[2] FIA is the leading trade organization for the futures, options, and cleared swaps markets worldwide. FIA's membership includes clearing firms, exchanges, clearinghouses, and trading firms from more than 25 countries as well as technology vendors, lawyers, and other professionals serving the industry. FIA's mission is to support open, transparent, and competitive markets, to protect and enhance the integrity of the financial system, and to promote high standards of professional conduct. As the principal members of derivative clearinghouses worldwide, FIA's member firms play a critical role in the reduction of systemic risk in the global financial markets. FIA along with its affiliated associations, FIA Europe and FIA Asia, make up the global alliance, FIA Global, which seeks to address the common issues facing its collective memberships.

liquidity and hedging transactions, and the potential unintended consequences of overly proscriptive rules.[3]

The Commission reopened the comment period to focus on two issues pertaining to agricultural commodities: (1) hedges of a physical commodity by a commercial enterprise; and (2) the process for estimating deliverable supplies used in setting spot month speculative position limits. FIA notes, however, that *bona fide* hedging issues apply equally to all Referenced Contracts, and deliverable supply issues apply equally to all physical delivery Referenced Contracts. Indeed, under the Dodd-Frank Wall Street Reform and Accountability Act ("**Dodd-Frank Act**"), Congress harmonized the regulatory treatment of agricultural and other commodity derivatives. Consequently, the Commission's swap regulations do not differentiate between agricultural and other physical commodity swaps.[4] FIA recommends, therefore, that the Commission re-evaluate *bona fide* hedging and deliverable supply issues for all commodities, not just agricultural commodities.

FIA commends the Commission and Staff for making important modifications to the proposed position limits rules. FIA supports the Commission's proposed amendments to the aggregation rules, with the modifications recommended in FIA's Aggregation Letter. Nevertheless, FIA remains concerned that, because of its complexity and imposition of limits for the first time on swap positions, the Position Limits Proposal, if finalized as proposed, may have unintended harmful consequences on the derivatives markets, including reduced liquidity for *bona fide* hedgers. To help minimize any unintended consequences, FIA recommends that the Commission implement position limits in phases and adopt the following changes to the Position Limits Proposal as a supplement to, and in addition to those recommended in, FIA's prior comments to the Commission.

## I. If the Commission Determines that Position Limits are Necessary, it Should Set Spot Month Limits and Adopt Position Accountability Levels for Non-Spot Months and All-Months Combined

Consistent with its prior comments, FIA urges the Commission to exercise caution as it seeks to implement a complex position limits regime.[5] Section 4a(a)(1) authorizes the Commission to set position limits if it finds that they are necessary to prevent "excessive" speculation. If the Commission makes such a finding, FIA recommends that the Commission

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[3] For the convenience of the Commission and Staff, FIA has attached as **Attachment A** hereto, a summary of FIA's prior position limits and aggregation comments to the Commission. The summary includes cross-references to the Section of FIA's prior letters that address the particular topic. *See* Letter from FIA to CFTC (RIN Number 3038-AD99), dated Feb. 6, 2014 ("**FIA PL Letter**"); Letter from FIA to CFTC (RIN 3038-AD82), dated Feb. 6, 2014 ("**FIA Aggregation Letter**"); and Letter from FIA to CFTC in response to CFTC public roundtable, dated July 31, 2014 ("**FIA Roundtable Letter**").

[4] *See* 17 C.F.R. Part 35 (2014).

[5] *See* FIA PL Letter at Section III (page 6).

only set spot month position limits and work with designated contract markets ("**DCM**") to adopt and implement accountability levels outside of the spot month in lieu of hard limits.[6]

One problem with hard limits is that they are a blunt instrument -- targeting all speculative positions regardless of whether they are "excessive." In contrast to hard limits, position accountability levels outside the spot month would provide the Commission and DCMs with a flexible tool to prevent only excessive speculative activity. An accountability level regime for non-spot months would provide market participants with the time necessary to adjust their trading activity, and their information technology, reporting, supervisory and compliance systems to implement spot month limits for Referenced Contracts pursuant to what will probably be one of the most complex rules ever issued by the CFTC.

### *A. The DCMs should administer position accountability levels in coordination with the Commission*

As FIA has previously commented, the Commission should rely primarily on the DCMs to administer accountability levels outside of the spot month.[7] DCMs have substantial experience and a demonstrated track record monitoring compliance with accountability levels.[8] The Commission should conserve its resources by delegating to DCMs the authority to implement and monitor compliance with federal accountability levels outside of the spot month.[9] Furthermore, implementation of accountability levels outside of the spot month would provide the Commission and DCMs with the following benefits:

- **Targeting "Excessive" Speculation**. If a position exceeds an accountability level, the DCMs, as overseen by the Commission, have the discretion to order a market participant to reduce its position if it represents "excessive" speculation. This structure matches the aim of Section 4a of the Commodity Exchange Act ("**CEA**"), as amended, which is to address "excessive" speculation as opposed to speculation in general.

- **Understanding Costs and Benefits of Hard Position Limits**. During the administration of position accountability levels, the Commission can conduct a comprehensive cost-benefit analysis of the impact of hard spot month position limits

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[6] FIA reiterates its prior comment that the Commission should not require SEFs to establish speculative position limits, including hard limits or accountability levels. *Id*. at Section XI.E (page 42).

[7] *See* FIA PL Letter at Section IV.D.1 (page 13).

[8] The Commission would continue to oversee the administration of position accountability levels by DCMs through its rule enforcement reviews.

[9] FIA understands that CME intends to recommend to the Commission a process through which the Commission and DCMs would administer position accountability levels. FIA is available to work with the Commission and the DCMs to develop a structure for the efficient administration of a position accountability regime.

on market liquidity for commercial hedgers and price discovery before determining whether to extend hard limits outside of the spot month.

- **Enhanced Data Collection**. The Commission could use the information collected through a position accountability regime to understand the trading activity of market participants with large speculative positions and determine if hard non-spot month speculative position limits are necessary.

### *B. The Commission has the statutory authority to adopt position accountability levels outside of the spot month pursuant to CEA Section 4a(a)(1)-(3)*

FIA understands that the Commission has concerns about whether it has the discretion to adopt accountability levels rather than hard limits outside of the spot month. FIA respectfully submits that several provisions in CEA Section 4a(a) authorize the CFTC to implement accountability levels. First, under Section 4a(a)(1), the Commission should determine that hard limits outside the spot month are not necessary to prevent excessive speculation.[10] Second, Section 4a(a)(3) of the CEA authorizes the Commission to set limits "as appropriate." This provision provides the Commission with discretion to determine whether and, if so, what types of limits are appropriate. Accountability levels, which operate as flexible limits because the Commission can order a market participant who exceeds a particular level to reduce its position, are more appropriate than hard limits outside the spot month because of their more limited impact on market liquidity and price discovery. Third, CEA Section 4a(a)(7) provides the Commission with broad discretion to exempt, "conditionally or unconditionally," any swap or futures contract from any position limits requirement. Thus, in addition to subsections (a)(1) and (a)(3), this Section similarly enables the Commission to adopt accountability levels rather than hard limits outside the spot month.

## II. The Commission Should Establish an Extended Compliance Period for Any Final Speculative Position Limits and Aggregation Rules

FIA recommends, consistent with its prior comments, that the Commission provide market participants with a transition period of not less than nine months to comply with any final speculative position limits and aggregation rules.[11] FIA members expended considerable time and resources, and experienced substantial technological problems, preparing to comply with the Commission's prior Part 151 rule. Based upon FIA members' experience with the prior implementation process, a transition period of nine months would help market participants to develop, test and implement the information technology, reporting, supervisory and compliance systems necessary to comply with the position limits and aggregation rules.

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[10] *See* FIA PL Letter at Sections III (page 6) and IV.D (page 12).

[11] *See* FIA PL Letter at Section XIII (page 44).

An extended compliance period also would more closely align the compliance date for any CFTC-issued position limits rule with the implementation of position limits in the European markets through the new Markets in Financial Instruments Directive and Regulation (known as "**MiFID 2**").[12] Many FIA members and other market participants operate in multiple jurisdictions, including the United States and Europe. As a result, the U.S. and European position limits regimes will affect the trading activities of many market participants and their aggregated affiliates. In certain instances, the two position limits regimes will apply to the same transaction or position, but may do so in different or inconsistent ways, which will further complicate the efforts of market participants to implement systems reasonably designed to comply with both sets of rules. In order to provide market participants with the time needed to evaluate, understand and implement the U.S. and European position limits regimes, FIA recommends that the Commission coordinate implementation of the Proposed Rules with implementation of the European position limits regime.

The chart below compares and summarizes FIA's recommended implementation schedule for CFTC-set position limits, accountability levels and aggregation rules, and the current implementation schedule for position limits under MiFID 2.

| | **FIA Recommendation: CFTC Position Limits Timeline** | **MiFID 2: Position Limits Timeline** |
|---|---|---|
| **Compliance Date** | Approximately January 3, 2017 | January 3, 2017 |
| **Rule Finalized** | No later than April 3, 2016 | No later than July 3, 2015[13] |

FIA believes that coordination of the implementation schedules of U.S. and European position limit regimes would help to reduce the time and expense necessary to design and implement systems to comply with the rules.

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[12] *See* Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments (May 15, 2014) (amending Directive 2002/92/EC and Directive 2001/61/EU).

[13] July 3, 2015 is the date by which the European Securities and Markets Authority ("**ESMA**") must submit draft regulatory technical standards ("**RTS**") to the European Commission, setting out the MiFID 2 position limits regime. There will then follow a separate process by which the European Commission, European Parliament and European Council must agree to a final version of the RTS. This second stage could take between two and ten and a half months, depending upon whether any changes are requested to the draft RTS. Following agreement of the final RTS, the European national regulators are then responsible for setting position limits in accordance with the methodology set-out in the RTS, and then notifying ESMA of the level at which the position limits have been set. January 3, 2017, is the date on which MiFID 2 will come into force throughout the European Union. The July 3, 2015, and January 3, 2017, dates each are hard wired into the primary "level 1" legislative text under MiFID 2. As such, neither date can be amended.

## III. The Definition of *Bona Fide* Hedging Positions Should Include Common Risk Management Practices Utilized by Agricultural and Other Commodity Commercial Enterprises

FIA, like many other commenters, is concerned that the Commission's definition of *bona fide* hedging positions is overly narrow and does not recognize long-standing commercial risk-management practices authorized by the statutory definition of *bona fide* hedging positions in Section 4a(c)(2) of the CEA. As FIA previously has commented, CEA Section 4a(c)(1) prohibits the Commission from establishing limits on *bona fide* hedging transactions or positions.[14] The Commission should exercise great care to ensure that the Proposed Rules do not unduly restrict commercial risk management transactions and positions in Referenced Contracts.

### *A. The Commission should expand the list of enumerated bona fide hedging positions*

Consistent with its prior comments, FIA recommends that the Commission expand the list of enumerated *bona fide* hedging positions to encompass all transactions that reduce risks in the conduct and management of a commercial enterprise.[15] FIA continues to support the Working Group of Commercial Energy Firm's Petition requesting that the Commission expand the list of enumerated hedging transactions, which should apply equally across all physical commodities.[16] FIA also supports the concerns expressed by various agricultural market participants at the December 9, 2014 Agricultural Advisory Committee meeting that the proposed definition of *bona fide* hedging positions does not sufficiently address anticipatory hedging.

### *B. The Commission should authorize DCMs to grant non-enumerated hedge exemptions from Federal and DCM-set speculative position limits*

As FIA has previously commented, the Commission should not limit *bona fide* hedging positions only to specifically enumerated positions. In order to avoid the unintended consequences of overly restrictive exemptions and to provide the flexibility that commercial enterprises need to manage the risks associated with their businesses, the Commission should permit DCMs to grant non-enumerated hedge exemptions.[17] FIA recommends that the Commission develop a process that would provide market participants with a timely response to non-enumerated hedge applications, implement procedures for DCMs to recognize non-

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[14] "No rule [establishing position limits under Section 4a(a)(1)] shall apply to . . . *bona fide* hedging transactions or positions." CEA Section 4a(c)(1).

[15] *See* CEA Section 4a(c)(2)(A)(ii); and FIA PL Letter Section IX.E (page 30).

[16] *See* Petition from the Working Group of Commercial Energy Firms to the Commission (Jan. 20, 2012) ("**Working Group Petition**"). In particular, and as previously discussed in the FIA PL Letter, FIA supports request numbers 3, 4, 7, 8, and 9 of the Working Group Petition. *See* FIA PL Letter Section IX.E (page 30).

[17] *See* FIA Roundtable Letter Section III.A (page 8).

enumerated hedge exemptions granted by other platforms, and adopt a transparent process for Commission review of DCM determinations. Specifically, the Commission should establish a process pursuant to which:

- A market participant can apply to a DCM for a non-enumerated hedge exemption in the spot month.[18] The DCM then would review the application to determine whether it complies with the DCM's rules.

- A market participant should be permitted to apply for a non-enumerated hedge exemption to any DCM that lists the applicable Referenced Contract. Furthermore, if a market participant holds positions or intends to establish non-enumerated *bona fide* hedge positions on more than one DCM, the market participant should be permitted to file an application with more than one DCM at the same time.

- If the Commission reviews a DCM-granted non-enumerated hedge exemption and agrees that such positions constitute *bona fide* hedging positions, the Commission should update the list of enumerated *bona fide* hedging positions to incorporate the non-enumerated hedging positions granted by the DCM.

- If the Commission disagrees with the DCM's non-enumerated hedge exemption determination, any remedy should be prospective. In other words, if a market participant entered into non-enumerated hedging positions in reliance on the DCM determination, but the Commission disagrees, the Commission should provide the market participant with a reasonable period of time to unwind the positions to prevent a speculative position limit violation.

### *C. The Commission should address concerns that a market participant could abuse the bona fide hedging exemption through anti-evasion rules, rather than an overly restrictive definition of bona fide hedging positions*

FIA understands that the Commission is concerned that a market participant could abuse the scope of the *bona fide* hedging exemption by claiming to be a marketer of a physical commodity. The Commission should not address this concern with an overly narrow definition of *bona fide* hedging that will limit the ability of commercial market participants to hedge the risks that they incur in their commercial operations. Rather, the Commission should rely on its anti-evasion rules and its authority to issue a special call to review a market participant's hedging practices to determine if they are *bona fide*. For example, if a market participant relied on a *bona fide* hedging exemption and filed a Form 204 with the Commission, CFTC Staff could issue a special call to review the market participant's historical commercial market activity to determine

[18] As noted above, FIA requests that the Commission, in conjunction with the DCMs, adopt position accountability levels outside of the spot month.

if the hedges are *bona fide*. This process would target abuse without limiting the ability of market participants to hedge their commercial risk.

## IV. The Commission Should Rely on the DCMs to Estimate Deliverable Supply

As FIA has commented previously, the CFTC should continue to rely on the DCMs to estimate deliverable supply for purposes of adopting spot month speculative position limits.[19] The DCMs have substantial expertise in this area, and the Commission should rely on their expertise and resources.

The Commission posed several questions to its Agricultural Advisory Committee regarding estimating deliverable supply and the size of spot month position limits. Below are FIA's responses to certain Commission questions:

### *A. The Commission should not reduce too substantially the size of the spot month limits as part of the spot month reset process*

The Commission asked the following questions in Section I of its questions to the Agricultural Advisory Committee: Should there be a restriction on how much the Commission could reduce a spot month speculative position limit for a particular commodity in one biennial cycle? For example, in circumstances where the most recent three years of data show reduced deliverable supplies that may not be reflective of longer term product data, should the Commission leave the spot month limits at existing levels, and rely on the exchanges to set a lower level for their spot month limits? What support can you provide for your position?

FIA encourages the Commission not to reduce too substantially the size of the spot month limits as part of the spot month reset process. Many commodity market participants develop and implement long-term plans to manage and grow their businesses. As is true in other commodity markets, agribusiness planning is informed by expected global market fundamentals. The growth projections of commodity market participants assume that the derivatives markets will be available to help them manage the risks associated with their future business plans. In order to enhance the predictability and reduce uncertainty in business planning, the Commission should adjust limits gradually and by no more than a minimum percentage in one biennial cycle.

### *B. The Commission should establish higher limits for cash-settled contracts*

The Commission asked the following question in Section II of its questions to the Agricultural Advisory Committee: What consideration, if any, should the Commission give to the settlement method (physical delivery or cash-settled) for a particular contract in assessing whether the deliverable supply estimate and proposed spot month speculative position limit levels are reasonable?

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[19] *See* FIA PL Letter Section IV.A (page 8).

As FIA previously has recommended, the Commission should establish higher limits for cash-settled contracts because cash-settled contracts are less susceptible to manipulation and excessive speculation.[20] For this same reason, higher limits for cash-settled contracts should be available to all market participants, even those who hold a position in the physical delivery contract. Holding a single position, or even multiple positions up to the speculative limit, in a physical-delivery Referenced Contract cannot constitute excessive speculation or enable a market participant to manipulate the price of a Core Referenced Futures Contract.

## V. Conclusion

FIA is concerned that certain aspects of the Position Limits Proposal may create unintended consequences, such as the reduction of liquidity for *bona fide* hedgers. The recommendations discussed above and in FIA's prior comments are designed to permit market participants to continue to utilize the derivatives markets as a means to hedge and mitigate commercial risk.

Please contact Allison Lurton, Senior Vice President and General Counsel, at 202-466-5460, if you have any questions about FIA's comments or recommendations.

Respectfully submitted,

Walt L. Lukken
President and Chief Executive Officer

Attachment

cc: Honorable Timothy G. Massad, Chairman
Honorable Mark P. Wetjen, Commissioner
Honorable Sharon Bowen, Commissioner
Honorable J. Christopher Giancarlo, Commissioner
Vincent A. McGonagle, Director
Stephen Sherrod, Senior Economist
Riva Spear Adriance, Senior Special Counsel

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[20] *See* FIA PL Letter Section IV.C (page 11) *citing* Former CFTC Rule pt. 38, App. B, core prin. 5, para. (b)(2) (2010). The Commission previously stated that the potential for distortion of prices is "negligible" for cash-settled contracts.

**SUMMARY OF FIA'S PRIOR COMMENTS ON PROPOSED POSITION LIMITS AND AGGREGATION RULES**

## I. Summary of FIA Comments on Position Limits Proposed Rule[1]

### *A. Spot Month Limits*

- The Commission should adopt the CME Group's estimated levels of deliverable supply for the commodities that underlie Core Referenced Futures Contracts ("**CRFC**") so that any spot month speculative position limits set by the Commission reflect current, rather than outdated and inaccurate, deliverable supply.

- When considering whether to adjust spot month limits in the future, the Commission should include supply that is subject to long-term supply contracts within the scope of deliverable supply. In addition, the Commission should consult with the exchanges and commercial market participants regarding the scope of deliverable supply of each commodity to ensure that spot month position limits reflect current levels of estimated deliverable supply.

- The definition of the spot month for federal limits should be the same as the definition of spot month for purposes of any exchange limits. In addition, the Commission, like the exchanges, should publish a calendar that identifies the spot month for each CRFC.

### *B. Conditional Spot Month Limit*

- The proposed prohibition against holding a single physical-delivery Referenced Contract in order to be eligible for the higher spot month limits for cash-settled contracts should be eliminated because it is not necessary to prevent excessive speculation or manipulation.

### *C. Non-Spot Month Limits*

- The Commission should not impose non-spot month speculative position limits. Rather, it should establish position accountability levels on single month and all-months-combined positions in Referenced Contracts because hard limits on these positions are neither necessary nor appropriate and will unnecessarily restrict legitimate commercial activity.

- Should the Commission decide to set hard single month and all-months-combined speculative position limits, it should use the open interest data that

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[1] Letter from FIA to CFTC (RIN Number 3038-AD99), dated February 6, 2014 ("**FIA PL Letter**").

it has collected for all Referenced Contracts to calculate appropriate levels for such limits. If the Commission's open interest data for Referenced Contracts are incomplete, the Commission should delay the imposition of hard non-spot month limits until the Commission has collected and evaluated complete data.

### *D. Contracts Subject to Limits: The Definition of Referenced Contracts*

- In order to reduce uncertainty and unnecessary compliance costs, the Commission should publish a comprehensive list of Referenced Contracts, or at a minimum, a comprehensive list of Referenced Contracts traded on designated contract markets ("DCMs") and swap execution facilities ("SEFs"), as part of the final rule and Staff's Referenced Contract Workbook.

- Because commodity index contracts serve as an important risk-management tool for pension funds and other vehicles to hedge the risk of inflation, the Commission's netting rules should not restrict the ability of market participants to make commodity index contracts available to the market. Accordingly, the Commission should allow a market participant that makes these products available to net the positions of the commodity index contract against Referenced Contracts used to hedge the exposure of the commodity index contract. Alternatively, the Commission should establish an exemption for Referenced Contracts that hedge exposure to commodity index contracts.

- For purposes of the definition of basis contracts, which are excluded from position limits, the Commission should expand the list of commodities in Appendix B that are substantially the same as a CRFC. The scope of commodities that are substantially the same in Appendix B should reflect the commercial practices of market participants.

- Trade options should be excluded from the definition of Referenced Contract so they will not be subject to position limits.

### *E. Definition of Bona Fide Hedging Positions*

- Market participants should have the ability to make commercially reasonable decisions about whether to hedge all or some components of portfolios of risk.

- The Commission should continue to permit legal entities within an aggregated group to rely on separate *bona fide* hedging exemptions, rather than requiring them to manage *bona fide* hedging exemptions on an aggregated basis.

- The Commission should retain its long-standing substantially related qualitative factor for determining whether a cross-commodity hedge qualifies as a *bona fide* hedging position, but eliminate the proposed quantitative factor because the quantitative factor: (a) is not adequately supported, (b) does not take into account long-term price correlation between substantially related commodities, (c) is inconsistent with long-standing commercial practices, and (d) would preclude market participants from entering into *bona fide* hedging transactions and positions permitted by the CEA.

- The Commission should: (a) expand the list of enumerated hedging positions to permit common risk reducing practices, (b) not restrict *bona fide* hedging positions in the spot month, and (c) re-institute a Division of Market Oversight ("DMO") Staff-administered process with objective standards and time limits for market participants to seek non-enumerated hedging exemptions.

- The Commission should not apply a negligence standard for purposes of determining whether hedging positions have been established and liquidated in an orderly manner. Instead, it should interpret the orderly trading requirement for *bona fide* hedge positions consistently with the Commission's disruptive trading practices interpretation.

- The Commission should continue to grant risk-management exemptions because non-speculative positions should not be subject to speculative position limits.

- The position limits reporting requirements should be modified so that they are commercially practicable and provide the Commission with information that it can review and analyze with the resources available to it.

### *F. Exchange-Set Limits*

- The Commission should authorize DCMs to establish position accountability levels in lieu of hard limits outside of the spot month. In addition, the Commission should not require market participants to apply for an exemption to net offsetting positions on another exchange or in the OTC market. Such a requirement creates the risk that decisions about whether to grant, and the scope of, an exemption may be affected by competitive considerations between and among DCMs and SEFs, and may inappropriately restrict or eliminate the benefits of netting for purposes of the federal limits.

- The Commission should exempt SEFs from any requirement to enforce compliance with federal speculative position limits or establish SEF speculative position limits for contracts subject to federal limits. Alternatively, SEFs should only be required to provide data to the Commission to assist it in monitoring compliance with federal speculative position limits.

### *G. Eligible Affiliates*

- If an entity qualifies as an "eligible affiliate" of another person, then the eligible affiliate is not required to comply separately with speculative position limits. To ensure that the proposed exemption for an "eligible affiliate" covers sister affiliates, the Commission should define it consistently with the definition of "eligible affiliate counterparty" under CFTC Rule 50.52.

### *H. Phased Compliance Date*

- Because of the complexities and costs involved in implementing federal and exchange-set speculative position limits, the Commission should provide market participants with an extended transition period of not less than nine months from the date on which the final rule is issued to comply with any final speculative position limits rule.

## II. Summary of FIA Comments on Aggregation Proposed Rule[2]

### *A. FIA Supports Certain Aspects of the Proposal*

- FIA supports the exemption from the aggregation requirement for independently controlled owned entities where the ownership or equity interest is not greater than 50 percent.

- FIA supports the exemption from the aggregation requirement for information-sharing restrictions, including the provision that permits market participants to prepare a memorandum of law, rather than a formal opinion of counsel, describing the basis for their conclusion that the sharing of information could create a reasonable risk of violating federal, state, or foreign laws or regulations adopted thereunder. FIA also supports the proposal to permit the memorandum of law to be prepared by either internal or external counsel, and "in a general manner" by a group of similarly situated market participants, rather than individually by every market participant for which the exemption would be available.

- FIA supports the Commission's clarification that a contingent ownership interest, such as a call option for an equity stake in another market participant, does not constitute an ownership or equity interest for purposes of the Aggregation Proposal.

### *B. Definition of Control of Trading*

- FIA requests that the Commission affirm, consistent with prior precedent, that the aggregation requirement applicable to "positions held by, and trading done

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[2] Letter from FIA to CFTC (RIN 3038-AD82), dated Feb. 6, 2014 ("**FIA Aggregation Letter**").

by, two or more persons acting pursuant to an express or implied agreement or understanding" only applies when the parties agree to trade Referenced Contracts pursuant to such an agreement or understanding.

  - In particular, FIA requests that the Commission revise the discussion of the aggregation requirement in Example No. 7 of *bona fide* hedging positions for physical commodities in Appendix C to the 2013 Position Limits Proposal to eliminate any implication that two persons who enter into a bilateral Referenced Contract, which at least one party hedges with another Referenced Contract, are required under proposed CFTC Rule 150.4 to aggregate their positions solely as a result of either the bilateral agreement or any hedge that either party may enter into to manage the price risk associated with the bilateral agreement.

- The Commission should clarify that an exemption from aggregation is available to entities that share trading and position information only for risk management purposes even if such information is shared on a real-time basis.

### *C. Exemptions from Aggregation*

- The Commission should permit the disaggregation of majority-owned affiliates which demonstrate that their trading decisions and positions are subject to independent control and management regardless of whether the entities seeking the exemption are required to consolidate their financial statements under U.S. generally accepted accounting principles ("GAAP").

- The Commission should permit registered broker-dealers to disaggregate any ownership or equity interest predicated on the ownership of securities acquired in the normal course of business as a dealer, provided that the broker-dealer does not have actual knowledge of the trading decisions and positions of the owned entity.

- The Commission should adopt a new exemption from the aggregation requirement for banks and other financial institutions holding a transitory ownership or equity interest in an independently controlled entity that was acquired through foreclosure or any similar credit event.

- The Commission should allow entities relying on the information-sharing exemption to protect their privileged attorney-client communications and confidential work-product by giving them the option to submit a summary explanation of the legal restrictions against sharing information *in lieu* of a full memorandum, provided that they make the full memorandum available for inspection by the Commission or CFTC Staff, upon request.

### *D. Notice Filing to Rely on an Exemption from Aggregation*

- The Commission should provide a safe harbor period for notice filings that are received within a reasonable period of time – up to 90 days – after aggregation is required for entities that otherwise would qualify for an exemption.[3] In addition, the Commission should clarify that, provided that a person is otherwise in compliance with the CFTC's position limits rules, an inadvertent failure timely to submit a disaggregation notice would constitute a single violation of the notice requirement in proposed CFTC Rule 150.4(c) and not a daily violation of the underlying position limits in proposed CFTC Rule 150.2.

### *E. Pro Rata Aggregation*

- The Commission should permit entities to aggregate the positions of an owned entity on a *pro rata* basis, in proportion to their ownership or equity interest. If the Commission does not permit *pro rata* aggregation of an entity's positions in Referenced Contracts, it should *not* require *pro rata* aggregation of cash market positions while simultaneously requiring *full* aggregation of an entity's Referenced Contract positions, as is suggested in the 2013 Position Limits Proposal.

## III. Summary of FIA Supplemental Comments on CFTC Staff June 19, 2014 Roundtable[4]

### *A. FIA's Recommendations for the Proposed Aggregation Rule*

- The Commission should expand the owned entity exemption in proposed CFTC Rule 150.4(b)(2) to apply equally to both minority and majority owned entities. The criteria in the Proposed Aggregation Rule that must be met to rely on the owned entity exemption for minority ownership interests provides a sufficient and appropriate basis to demonstrate independence of trading decisions between the owner and the owned entity, regardless of ownership percentage.

- Under the Proposed Aggregation Rule, one of the conditions to demonstrate independence of trading decisions for purposes of the owned entity exemption is proposed CFTC Rule 150.4(b)(2)(i)(C), which requires that the owner and the owned entity have written procedures to preclude access to trading

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[3] In the FIA Aggregation Letter, FIA requested that the Commission provide for a 180-day period to make a filing for an exemption from aggregation. However, after additional consultation, FIA subsequently amended the request from a 180-day period to a 90-day period. FIA believes that the 90-day period represents sufficient time to come into compliance with the Proposed Aggregation Rule without imposing unworkable administrative burdens.

[4] Letter from FIA to CFTC in response to CFTC public roundtable, dated July 31, 2014 ("**FIA Roundtable Letter**").

information. FIA requests that the Commission clarify that the exemption only requires the owner claiming the exemption to have written procedures restricting access to trading information.

- In the preamble to the Proposed Aggregation Rule, the Commission clarified that the owned entity exemption would not restrict the owner and the owned entity from sharing information and employees related to risk management, accounting, compliance or similar mid- and back-office functions. The Commission should incorporate this guidance in the rule-text for the owned entity exemption.

- The Commission should permit broker-dealers to rely upon the exemption from aggregation regardless of whether the broker-dealer's ownership or equity interest in an owned entity exceeds fifty percent, provided that the broker-dealer does not have actual knowledge of or control over the trading decisions and positions of the owned entity.

- The Commission should adopt an exemption from aggregation for transitory ownership or equity interests in an owned entity, such as those acquired through foreclosure or a similar credit event.

- FIA recommends that the Commission provide a 90-day period during which a market participant can rely upon an exemption for which it is otherwise eligible, prior to submitting the requisite notice to the Commission.

- If a person is eligible to claim an exemption from aggregation, but fails to make a timely notice filing within the 90-day period, such failure constitutes a single violation for failure to make the filing, not a separate violation of speculative position limits.

- Under the Proposed Aggregation Rule, one of the conditions to demonstrate independence of trading for purposes of the owned entity exemption is proposed CFTC Rule 150.4(b)(2)(i)(B), which requires that the owner and the owned entity trade pursuant to separately developed and independent trading "systems." FIA recommends that the Commission change references to independent trading "systems" to independent trading "strategies," to conform CFTC Rule 150.4(b)(2)(i)(B) to the CEA and other provisions in Part 150.

### *B. Non-Enumerated Hedge Exemptions*

- Given the Commission's proposal to expand the products subject to position limits to cover swaps, the Commission should retain the flexibility to recognize non-enumerated hedge exemptions in CFTC Rule 1.47. FIA recommends that the Commission rely on the exchanges to review applications for non-enumerated hedge exemptions in the first instance and provide a public comment process should exchanges receive multiple requests for the same non-enumerated hedge exemption.

- For example, if a market participant held positions in a CRFC or Referenced Contract on a DCM, the participant could apply to the DCM for the non-enumerated hedge exemption. To the extent that a market participant held positions exclusively in over-the-counter swaps that are directly or indirectly linked to a CRFC, the market participant could apply to any DCM that lists the Referenced Contract for a non-enumerated hedge exemption.

- FIA recommends that to the extent the exchanges receive multiple applications for the same type of non-enumerated hedge exemption, the CFTC should initiate a process to expand the list of enumerated hedging positions through a public request for comment or a proposed amendment to the regulations with a public comment period.