



November 12, 2015

Submitted Electronically

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581.

Re: Aggregation of Positions; Supplemental Notice of Proposed Rulemaking (RIN 3038-AD82)

Dear Mr. Kirkpatrick:

The Private Equity Growth Capital Council (“**PEGCC**”, “**we**” or “**us**”, as applicable) appreciates the opportunity to provide comments on the supplemental notice of proposed rulemaking published by the Commodity Futures Trading Commission (“**CFTC**”, or the “**Commission**”) (the “**Supplemental Proposal**”)¹ regarding the proposed revision to the aggregation provisions of part 150 of the Commission’s regulations on position limits.

The PEGCC is an advocacy, communications and research organization and resource center 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. Established in 2007 and formerly known as the Private Equity Council, the PEGCC is based in Washington, D.C. The members of the PEGCC 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.

Please consider these comments as supplemental to (i) our earlier meetings with the Commission on this subject² and (ii) the comments we have previously submitted to the Commission on aggregation and position limits.³

¹ *Aggregation of Positions*, 80 Fed. Reg. 58365 ([September 29, 2015](#)).

² *E.g.*, Meeting with CFTC on July 30, 2012 on Aggregation Policy for Position Limits, details available [here](#); Meeting with CFTC on September 22, 2014 on Aggregation Policy for Position Limits, details available [here](#).

³ *See, e.g.*, [PEGCC Comments to the CFTC on the Disaggregation Proposal](#), June 29, 2012; [PEGCC Comments to the CFTC on Notice of Proposed Rulemaking on Aggregation](#), August 20, 2012; [PEGCC Comments to the CFTC on Notice of Proposed Rulemaking on Aggregation](#),

I. PEGCC Strongly Supports the CFTC’s General Approach in the Supplemental Proposal and Recommends a Few Modifications and Clarifications.

The PEGCC strongly supports the CFTC’s general approach in the Supplemental Proposal, which is directly responsive to the prior comments that we have submitted and would allow for disaggregation as between an owner entity and its owned entities when the owner does not exercise control over the trading activities of an owned entity.

The PEGCC also supports the Commission’s steps to separate, as a procedural matter, the aggregation rulemaking process from the Commission’s position limits proposal.⁴ These aggregation rules will be applicable in the context of existing position limits that currently apply to futures, and so we believe that the Commission should finalize the aggregation rules without regard to its timeline for any subsequent position limits rulemaking.

We also specifically express our support for the Commission’s decision to permit owner entities to claim disaggregation by submitting a notice filing that is effective upon submission to the Commission. As we have consistently noted in our submissions to the Commission, this outcome provides efficiencies for both the Commission and those market participants that will rely on this exemption without limiting in any way the CFTC’s ability to request additional information from market participants, as needed or relevant.

As discussed in more detail herein, while we are generally supportive of the Supplemental Proposal and the conditions proposed therein, we respectfully request that the Commission:

- Remove the requirement that the notice filing contain a description of the relevant circumstances that warrant disaggregation.
- Provide that an owner filing a notice of trading independence in order to claim an exemption from aggregation under this rule should only be required to make subsequent filings in the event of a change in its ability to comply with the conditions of the exemption.
- Defer the aggregation requirement for a three-month time period following an acquisition or investment but prior to the notice filing deadline to permit an owned entity to conduct the necessary internal review to support and approve the notice filing.

February 10, 2014; [PEGCC Supplemental Comments to the CFTC on Proposed Aggregation Relief](#), July 3, 2014; and [PEGCC Supplemental Comments to the CFTC on Proposed Aggregation Relief](#), October 24, 2014.

⁴ With respect to the CFTC’s position limits rulemaking efforts and the multitude of comments received to date, Commissioner Sharon Bowen has said that: “If we need to do a supplemental proposal to improve the rule, let’s do it.” ([Statement of Commissioner Sharon Y. Bowen at the Meeting of the Agricultural Advisory Committee](#), September 22, 2015.) The PEGCC agrees generally with the proposition that both the public and Commission would benefit from the opportunity to review and, as necessary, provide further comment on a modified and updated version of the original 2013 position limits proposal.

- Clarify that the Supplemental Proposal does not prohibit the sharing of information used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that control, direct or participate in the relevant entities' trading decisions.
- Specify that the presumption of control for trading and aggregation purposes is not triggered where there is no actual control over trading, sharing of information, or other control factors present that would require the owner entity to conclude that it could not meet the conditions of the proposed exemption with respect to a given owned entity.
- Remove the restriction that would prohibit certain limited partnership holders from claiming the “greater than 10 percent” exemption.

II. Certain Revisions and Clarifications would Facilitate Compliance with the Supplemental Proposal’s Notice Filing Requirement.

In our prior comments to the Commission, we have consistently supported the proposal to make the notice filing claiming the exemption effective upon submission to the Commission.⁵ We thank the Commission for recognizing these efficiency concerns through the Supplemental Proposal. We respectfully submit, however, that a few clarifications would make the Supplemental Proposal more effective and would facilitate compliance by market participants.

A. Content of Certification

As proposed, the Supplemental Proposal requires the notice filing to contain a *description of the relevant circumstances that warrant disaggregation*.⁶ We believe that it is unlikely that the provision of this information would make the Supplemental Proposal more effective. There are a wide range of ownership structures and relationships that support disaggregation and a thorough, meaningful and active review of such information in real-time would unduly strain the Commission’s resources. Moreover, if the Commission wishes to determine whether disaggregation is warranted in a particular case, the Commission retains the authority to request information regarding the specific circumstances warranting disaggregation from any entity claiming the exemption. Accordingly, we instead respectfully suggest that the notice filing contain only the certification that the entity, as of the date of the filing, meets the conditions of the exemption with respect to each owned entity specified in the filing.

B. Subsequent Filings

Responding to Commissioner Giancarlo’s request for “public comment on whether the Commission should consider modifying the proposed rule to clarify that an owner filing a notice of trading independence in order to claim an exemption from aggregation under this rule need

⁵ [PEGCC Comments to the CFTC on Notice of Proposed Rulemaking on Aggregation](#), February 10, 2014 at 4; [PEGCC Supplemental Comments to the CFTC on Proposed Aggregation Relief](#), July 3, 2014 at 2.

⁶ Proposed rule § 150.4(b)(2)(ii).

only make subsequent filings in the event of a material change in the owner’s degree of control over its subsidiary’s positions[.]”⁷ we believe Commissioner Giancarlo raises an important point and we agree with his suggestion.

We respectfully submit that an owner filing a notice of trading independence in order to claim an exemption from aggregation under this rule should only be required to make subsequent filings in the event of a change in its ability to comply with the conditions of the exemption. Accordingly, we request that the Commission clarify that a subsequent notice filing is only required in the following circumstances:

- when an owner entity is withdrawing the notice filing because it no longer maintains a requisite ownership interest in the owned entity, or
- in the event that the owner entity is no longer in compliance with the exemption criteria with respect to an owned entity.

C. Responsible Senior Officer

We agree with the Supplemental Proposal that the notice filing should be submitted by a senior officer of the owner entity, on behalf of the owner entity.⁸ We note, however, that governance structures and forms of organization may widely differ across entities. Consistent with our prior submissions to the Commission, we continue to believe that owner entities are usually in the best position to fully understand the nature of the responsibilities given to their representatives.⁹ Therefore, for the avoidance of doubt, we ask that the Commission clarify that the specific senior officer submitting the notice filing may be the “appropriate person” as identified within the context of a particular owner entity’s internal governance structure.

D. Timing of Notice Filing

As we have noted in our prior comments to the Commission, once an investment is made into a new owned entity, an owner entity requires time to undertake post-closing diligence and operational measures to confirm whether seeking or claiming the aggregation exemption is necessary for a given investment.¹⁰ Accordingly, we suggest that an owner entity be provided a reasonable amount of time (for example, three months), following the acquisition of an ownership interest in an owned entity that is above the control presumption threshold, in which to conduct the necessary internal review to support and approve the notice filing. We therefore respectfully request that the Commission defer the aggregation requirement for a three-month time period following an acquisition or investment but prior to the notice filing deadline.

⁷ 80 Fed. Reg. at 58381.

⁸ Proposed rule § 150.4(c)(1)(ii).

⁹ [PEGCC Supplemental Comments to the CFTC on Proposed Aggregation Relief](#), July 3, 2014 at 2.

¹⁰ [PEGCC Supplemental Comments to the CFTC on Proposed Aggregation Relief](#), October 24, 2014 at 3.

Creating this three-month window would ensure that owner entities are not compelled to pre-emptively claim an aggregation exemption only to subsequently withdraw it.

We submit that this three-month period would promote the ability of market participants to make investment decisions, would prevent delays in the deployment of capital to operating companies and would ultimately reduce the administrative burden on the Commission. Where an owner entity takes active steps to control and direct the trading strategy of a newly acquired owned entity, however, aggregation would of course still be required.

On a related note, we also request the Commission to provide for at least a six-month compliance period, following the effective date of any final aggregation rule, during which entities will be able to undertake the initial diligence and governance processes necessary to support filing for and claiming the owned entity aggregation exemption with respect to existing owned entities.

III. Consistent with its 2013 Proposal, the Commission Should Clarify that the Supplemental Proposal Permits the Sharing of Information Used for Risk Management and Surveillance Purposes with Non-Trading Employees.

We note that the Supplemental Proposal requires that to avail of the aggregation exemption, the owner entity and owned entity “not have risk management systems that permit the sharing of trades or trading strategy.”¹¹ We respectfully submit that this condition requires further clarification from the Commission. In its 2013 proposal, the Commission clarified that:

“[T]his criterion generally would not prohibit sharing of information to be used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that, as noted above, control, direct or participate in the entities’ trading decisions. Thus, sharing with employees who use the information solely for risk management or compliance purposes would generally be permitted, even though those employees’ risk management or compliance activities could be considered to have an ‘influence’ on the entity’s trading.”¹²

We request that the Commission expressly include this guidance in any final aggregation rulemaking the follows the Supplemental Proposal. This clarification will ensure that risk management functions are not unduly restricted for entities relying on the aggregation exemption.

IV. The Threshold Presumption of Control for Trading and Aggregation Purposes Should be Reconsidered in the Context of the Private Equity Industry.

The Supplemental Proposal presumes an owner entity with an ownership interest of 10 percent or more to have “control” of an owned entity. Although we reiterate our strong support

¹¹ 80 Fed. Reg. at 58379.

¹² *Aggregation of Positions*, 78 Fed. Reg. 68945 at 68962 ([November 15, 2013](#)).

for the general approach of the Supplemental Proposal, we believe that the Commission's threshold for the presumption of control is restrictive and unnecessarily low. We note in this regard, Commissioner Giancarlo's statement inviting "public comment on whether there should be a removal of the presumption of control of an entity for all minority ownership interests[, which] would allow the exclusion now available to minority owners with a stake below 10 percent, while retaining the presumption for interests exceeding 50 percent."¹³ In light of the reality of private equity and growth capital investment industry ownership structures, we suggest that the Commission reconsider its policies with respect to the threshold for the presumption of control.

In our prior submissions to the Commission,¹⁴ we have consistently noted that, in the experience of the private equity industry, the level of an owner entity's ownership interest does not necessarily correspond to its control of an owned entity. For example, private equity funds commonly make investments in a range of portfolio companies while maintaining the independence of each company, from an operational perspective, as compared to each other portfolio company owned by a single fund. More generally, private equity funds typically do not become involved in the day-to-day operational management of their portfolio companies, and in particular, generally do not control day-to-day trading activities of their portfolio companies.¹⁵

In our experience, and consistent with our prior comments, private equity fund ownership interests of any level of equity interest (including 100 percent ownership interests) in portfolio companies are not typically structured such that the owner entity would (or would seek to) exercise any active level of control over or participation in the owned entities' trading activity.

We therefore strongly support Commissioner Giancarlo's position that 10 percent is too low of a threshold for presuming control for the purposes of the CFTC's position limits aggregation rules. In the absence of actual control over trading, sharing of information, or other significant control factors, one entity's minority ownership interest in another should not lead to the presumptive aggregation of their trading positions.

V. The Commission Should Permit Eligible Limited Partnership Holders to Avail of the "Greater than 10 Percent" Exemption.

Under the Supplemental Proposal, the "greater than 10 percent" exemption is unavailable for interests in pooled accounts. Therefore, limited partnership holders (each, an "LP") in investment vehicles that may meet the Commission's definition of a "commodity pool" are not eligible to rely on the greater than 10 percent proposal for disaggregation from the pools in which they invest. LPs are instead directed to the Commission's "*Exemption for ownership by limited partners, shareholders or other pool participants*" (the "**LP Exemption**").¹⁶ The LP

¹³ 80 Fed. Reg. at 58381.

¹⁴ [PEGCC Comments to the CFTC on the Disaggregation Proposal](#), June 29, 2012 at 2; [PEGCC Comments to the CFTC on Notice of Proposed Rulemaking on Aggregation](#), August 20, 2012 at 2.

¹⁵ [PEGCC Comments to the CFTC on the Disaggregation Proposal](#), June 29, 2012 at 2.

¹⁶ Proposed rule § 150.4(b)(1).

exemption continues to subject LPs to a 25 percent ownership cap or limit when the commodity pool operator of the fund or pool in which the LP has invested relies on certain exemptions from CFTC registration.¹⁷

We suggest that if the same separations of control are present that would allow the LP to rely on the greater than 10 percent exemption (but for the exclusion of LP interests), then LPs should similarly not be subject to a 25 percent cap on their ownership interests in commodity pools, for disaggregation purposes, regardless of the registration status of the operator of the pool.

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¹⁷ Proposed rule § 150.4(b)(1)(iii).

The PEGCC would like to reiterate our deep appreciation of the Commission's sustained engagement with us, market participants and other stakeholders in the continued formulation of the aggregation rules. We commend the Commission for the manner in which the Supplemental Proposal has accommodated a number of the concerns expressed by the private equity and growth capital investment industry and many other commenters.

We appreciate this opportunity to comment on the Supplemental Proposal and would be pleased to answer any questions that you might have regarding our comments, or regarding the private equity and growth capital investment industry more generally.

In order to make the Supplemental Proposal more 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,



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General Counsel
Private Equity Growth Capital Council

cc: Commodity Futures Trading Commission
Timothy G. Massad, Chairman
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