CMC
COMMODITY MARKETS COUNCIL

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Via Electronic Submission

Chris Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: **Comment Period Regarding the Supplemental Notice of Proposed Rulemaking for the Aggregation of Positions (RIN 3038-AD82)**

Dear Mr. Kirkpatrick:

The Commodity Markets Council ("CMC") appreciates the opportunity to submit the following comments to the Commodity Futures Trading Commission (the "CFTC" or "Commission") as part of its comment period for its supplemental notice of proposed rulemaking ("Supplemental Notice") on the aggregation of positions.[1]

I. Introduction

CMC is a trade association that brings together exchanges and their industry counterparts. Its members include commercial end-users which utilize the futures and swaps markets for agriculture, energy, metal and soft commodities. Its industry member firms also include regular users of such designated contract markets (each, a "DCM") as the Chicago Board of Trade, Chicago Mercantile Exchange, ICE Futures US. Minneapolis Grain Exchange and the New York Mercantile Exchange. They also include users of swap execution facilities (each, a "SEF). The businesses of all CMC members depend upon the efficient and competitive functioning of the risk management products traded on DCMs, SEFs or over-the-counter ("OTC") markets. As a result, CMC is well positioned to provide a consensus view of commercial end-users on the impact of the Commission's proposed aggregation regulations on derivatives markets. Its comments, however, represent the collective view of CMC's members, including end-users, intermediaries and exchanges.

[1] See Aggregation of Positions, 80 Fed. Reg. 58365 (Sept. 29, 2015) (supplemental notice of proposed rulemaking).

II. Aggregation of Positions

CMC applauds the CFTC's recent efforts to revise its policy on aggregation under the Commission's position limits regime. While CMC supports the Commission's recent changes, our members have outlined below certain challenges that still remain with regard to the Supplemental Notice. In addition, CMC has incorporated key issues from previous CMC comment letters that have not yet been addressed by the Commission.

A. Information Sharing

CMC understands the information sharing restrictions that are conditions to not aggregating the positions of two affiliates. However, not all information sharing should be prohibited. In particular, CMC believes that information sharing for risk management purposes should be exempt from these restrictions. In general, the Commission should provide explicit safe harbors for certain information sharing within any final rule for the aggregation of positions. Therefore, CMC recommends the following language to be added as clause (iii) to Section 150.4(b)(2) as set out in the supplemental notice:

(2) <u>Exemption for certain ownership of greater than 10 percent in an owned entity</u>. Any person with an ownership or equity interest in an owned entity of 10 percent or greater (other than an interest in a pooled account subject to paragraph (b)(1) of this section), need not aggregate the accounts or positions of the owned entity with any other accounts or positions such person is required to aggregate, provided that:

…

> **(iii) Nothing in this subparagraph shall prevent a person from obtaining such information as is necessary to fulfill its fiduciary duties or fulfill its duty to supervise the trading activities of the owned entity; or from establishing and monitoring compliance or risk policies and procedures, including risk limits, for an owned entity or on an enterprise wide basis, or from sharing employees so long as the employees do not control, direct or participate in the entities' trading decisions.**

B. Inadequacy of the Proposed Exemption for Pension Plans

As noted in a previous CMC comment letter, our members are still concerned that the positions of a retirement plan would need to be aggregated with the commodity interests of the plan sponsor. Under the previous aggregation proposal and the current Supplemental Notice, pension plans would be able to exclude the positions of the plan sponsor, and the plan sponsor would be able to exclude the positions of the plan, to the extent the retirement plan is able to avail itself of the independent account controller exemption. Unfortunately, this proposed approach is not an option for many retirement plans. For this reason the Commission should exclude retirement plans subject to the Employee Retirement Income Security Act ("ERISA") outright from the aggregation requirements. ERISA generally requires that retirement plan fiduciaries act solely in the interest of plan beneficiaries. Thus they are by law prevented from considering the positions of the plan sponsor when making commodity investments. To the extent the Commission views this existing legal requirement as insufficient, the Commission could further condition relief on the requirement that plans and sponsors not make trading decisions in order to benefit from the trading decisions of the other. If the Commission fails to exempt ERISA plans and their sponsors from the requirement that their commodity positions be aggregated together it will be disruptive to these plans, their beneficiaries, and the markets generally.

III. Conclusion

Thank you for the opportunity to provide comments on the commercial impacts of this rulemaking. If you have any questions or concerns, please do not hesitate to contact Kevin Batteh at Kevin.Batteh@Commoditymkts.org

Sincerely,

Kevin K. Batteh
General Counsel
Commodity Markets Council