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Via Electronic Submission: <http://comments.cftc.gov>

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

Re: Aggregation of Positions; RIN 3038-AD82

Dear Mr. Kirkpatrick:

Morgan, Lewis & Bockius LLP (“**Morgan Lewis**”)¹ thanks the U.S. Commodity Futures Trading Commission (the “**Commission**”) for the opportunity to respond to the Commission’s request for comment on the supplementary notice of proposed rulemaking on aggregation of positions (“**Aggregation Supplement**”), published in the *Federal Register* on September 29, 2015.²

Morgan Lewis counsels commercial market participants and financial services clients in futures, swap, and securities transactions, as well as in derivatives regulation, legislation, compliance, and enforcement matters. Areas in which clients often seek our counsel include position limits and aggregation of positions. It is in this connection that we respectfully submit to the Commission our comments on the Aggregation Supplement. We generally support the Commission’s proposed owned entity exemption from aggregation, but recommend an

¹ Founded in 1873, Morgan Lewis offers more than 2,000 lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—in 28 offices across the United States, Europe, Asia, and the Middle East. The firm provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labor and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

² Aggregation of Positions, 80 Fed. Reg. 58,365 (reproposed Sept. 29, 2015).

enhancement to the owned entity relief that would provide the Commission and futures exchanges with greater flexibility in applying its disaggregation relief.

I. We Support the Owned Entity Exemption That the Commission Proposed in the Aggregation Supplement

In 2013, the Commission published two proposed rulemakings related to the Commission's position limits regime,³ including a proposal requiring aggregation of positions.⁴ In the 2013 aggregation proposal, the Commission provided notice-filing relief from the aggregation requirement to owners and separately organized entities in which the owners have an ownership or equity interest of between 10 percent and 50 percent.⁵ The Commission did not provide notice-filing relief for owners with an ownership or equity interest of greater than 50 percent in an owned entity; instead, the Commission proposed an application procedure whereby such owners would request disaggregation relief and the Commission would review requests on a case-by-case basis.⁶

The Commission subsequently proposed, in the Aggregation Supplement, to permit disaggregation to owners with an ownership or equity interest in an owned entity of greater than 10 percent (without limiting the relief to those owners who owned less than 50 percent), to the extent that such owners satisfy the regulatory requirements and file with the Commission a notice of relief as stipulated in the regulation (the "**Owned Entity Exemption**"). Thus, all owners with a greater than 10 percent ownership or equity interest in an owned entity could qualify for the notice-filing relief without separately applying to the Commission to seek relief on a case-by-case basis. The Commission eliminated the application procedure for owners with an ownership or equity interest of greater than 50 percent in an owned entity when it expanded the owned entity relief.⁷

To qualify for the Owned Entity Exemption, the Commission proposes to require a person ("**owner**") with an ownership or equity interest in an entity ("**owned entity**") in an amount greater than 10 percent to satisfy specific conditions to demonstrate that the owner and owned entity are independent from one another. In addition to the requirement that an owner file notice with the Commission, the owner and owned entity would be required to have:

1. No knowledge of the other's trading decisions or positions;

³ Position Limits for Derivatives, 78 Fed. Reg. 75,680 (proposed Dec. 12, 2013).

⁴ Aggregation of Positions, 78 Fed. Reg. 68,946 (proposed Nov. 15, 2013).

⁵ Aggregation of Positions, 78 Fed. Reg. at 68,958-59.

⁶ *Id.* at 68,959-61.

⁷ Aggregation Supplement at 58,379 (proposed Regulation 150.4(b)(3) is now labeled "reserved").

2. Separately developed, independent trading systems;
3. Separate employees that control the trading decisions of each entity;
4. Risk management systems that do not permit the sharing of trades or trading strategy; and
5. Written procedures designed to maintain each entity's independence and preclude information sharing.

The Owned Entity Exemption is an important aspect of the Commission's position limit regime because it allows commercial entities to fulfill trading and risk management needs without impairing existing corporate structures or operations. The Owned Entity Exemption provides a balance between the Commission's regulatory concern regarding concentration of positions and the ability of multi-entity corporate organizations to effectively trade and manage risk.

II. We Suggest That Commission and Exchange Staff Have Discretion to Grant Exemptive Relief to Owners and Owned Entities Whose Operations May Not Satisfy Every Condition of the Owned Entity Exemption

We support the Commission's Owned Entity Exemption because it provides legal and regulatory certainty by establishing a clear test for disaggregation relief. However, the test is inflexible in many ways. Commercial firms operate under various types of arrangements, some of which do not fit neatly within the confines of the Owned Entity Exemption. For these firms, it may be difficult to satisfy every element of the Owned Entity Exemption. The Commission should not preclude such firms from availing themselves of relief from the Commission's aggregation rules when such disaggregation will not result in excessive speculation or otherwise act contrary to the Commission's goals.

Instead, the Owned Entity Exemption should be framed as a non-exclusive safe harbor that affords relief to firms that satisfy the conditions of the relief, without excluding the possibility of relief for owners and owned entities that may not satisfy every condition. We recommend that the Commission clarify that Commission staff, and designated contract market and swap execution facility (collectively, "**Exchange**") staff,⁸ as applicable, are authorized to provide owned entity disaggregation relief to firms that do not satisfy every condition of the proposed rule, on a case-by-case basis, provided that, in each case, the Commission or Exchange

⁸ The Commission requires Exchanges to apply the Commission's aggregation rules to Exchange-set limits in the same way the Commission applies the aggregation rules to federal position limits. *See* Commission Regulation 150.5(g) and proposed Regulation 150.5(b)(8), Position Limits for Derivatives, 78 Fed. Reg. 75,680, 75,831 (proposed Dec. 12, 2013).

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staff determine that the arrangements are not inconsistent with the policy goals of the disaggregation relief. Pursuant to section 4a(a)(7) of the Commodity Exchange Act,⁹ the Commission possesses the authority to exempt persons from the position limits regulations. Consistent with the application procedure formerly proposed in Regulation 150.4(b)(3), the Commission should delegate to Commission staff its authority to exempt persons from the aggregation requirement for federal position limits and, in parallel, allow Exchange staff to exempt persons from the aggregation requirement from exchange position limits, thereby providing a means by which entities that do not satisfy all of the Owned Entity Exemption requirements may still qualify for relief under circumstances deemed appropriate by Commission or Exchange Staff, as applicable.

For example, we are aware that it is not uncommon for affiliates to share risk-management systems or personnel. There are also situations where affiliates may provide data or administrative support functions that may implicate some of the restrictions in the Owned Entity Exemption, but should not necessarily preclude disaggregation relief. It is not possible to anticipate every corporate relationship between affiliates and thus a regulatory approach that provides for flexibility would be desirable.

The Commission's Owned Entity Exemption is suitable for many situations, but not all. Authorizing Commission and Exchange staff to grant case-by-case exemptive relief from the aggregation requirement in particular situations will be consistent with the Commission's goal of diminishing the burden of excessive speculation without unnecessarily limiting flexibility in inter-affiliate operations.

* * *

Morgan Lewis appreciates the opportunity to offer comments on the Aggregation Supplement. We would be happy to discuss our comments or any of the issues raised by the

⁹ Section 4a(a)(7) of the Commodity Exchange Act; 7 U.S.C. § 6a(a)(7) (“The Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits.”).

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Commission's position limits proposed rulemakings at greater length with the Commission or its staff. If the staff has any questions, please do not hesitate to contact the undersigned at (312) 324-1905.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Mike Philipp".

Michael M. Philipp
Partner, Morgan, Lewis & Bockius LLP

cc:

The Honorable Chairman Timothy Massad
The Honorable Commissioner Sharon Bowen
The Honorable Commissioner J. Christopher Giancarlo