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VIA ELECTRONIC SUBMISSION

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

Re: Supplemental Notice of Proposed Rulemaking, *Aggregation of Positions*, RIN 3038-AD82

Dear Mr. Kirkpatrick:

I. INTRODUCTION.

On behalf of The Commercial Energy Working Group (the "**Working Group**"), Sutherland Asbill & Brennan LLP hereby submits this letter in response to the request for public comment set forth in the Commodity Futures Trading Commission's (the "**CFTC**" or "**Commission**") Supplemental Notice of Proposed Rulemaking, *Aggregation of Positions* (the "**Supplemental Aggregation NOPR**").[1] The comments contained herein should be considered in conjunction with the Working Group's prior submissions on the CFTC's Notice of Proposed Rulemaking, *Aggregation of Positions* (the "**2013 Aggregation NOPR**")[2] and the CFTC's Notice of Proposed Rulemaking, *Position Limits for Derivatives* (the "**Position Limits NOPR**"),[3] as there are numerous instances where the proposals under the speculative position limits regime are interdependent.[4]

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[1] *See* Supplemental Notice of Proposed Rulemaking, *Aggregation of Positions*, 80 Fed. Reg. 58,365 (Sept. 29, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2015-24596a.pdf.

[2] *See* Notice of Proposed Rulemaking, *Aggregation of Positions*, 78 Fed. Reg. 68,946 (Nov. 15, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-27339a.pdf.

[3] *See* Notice of Proposed Rulemaking, *Position Limits for Derivatives*, 78 Fed. Reg. 75,680 (Dec. 12, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-27200a.pdf.

[4] For example, under the Position Limits NOPR, proposed CFTC Regulation 150.3(i) states "[e]ntities required to aggregate accounts or positions under § 150.4 shall be considered the same person for the purpose of determining whether they are eligible for a *bona fide* hedging position exemption…with respect to such aggregated

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. Among the members of the Working Group are some of the largest users of energy derivatives in the United States and globally. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

The Working Group supports the CFTC's proposal in the Supplemental Aggregation NOPR to modify the 2013 Aggregation NOPR by providing aggregation relief to entities with more than 50% common ownership on the same terms that such relief is available to entities with between 10% and 50% common ownership. The Working Group recognizes that the Supplemental Aggregation NOPR reflects the Commission's willingness to carefully consider the input of market participants. By issuing the Supplemental Aggregation NOPR, the CFTC has moved closer to establishing an aggregation regime that is largely workable. However, additional clarity and flexibility with respect to certain of the criteria that must be satisfied to be eligible for relief is necessary. With a few key modifications, as discussed herein, the proposed aggregation regime will better account for market realities and preserve flexibility for market participants while still providing an effective speculative position limits regime.

II. COMMENTS OF THE WORKING GROUP.

A. The CFTC Should Clarify in the Text of Its Final Regulations on Aggregation That Owners and Their Affiliates May Share Such Trading Information as Is Necessary to Manage Risk and Meet Compliance Obligations.

The Working Group shares Commissioner Giancarlo's concerns that the CFTC's proposed aggregation regime might stifle critical risk mitigation efforts and compromise compliance objectives.[5] Specifically, due to the proposed restrictions on information sharing, some corporate groups may not be permitted to utilize their established risk management procedures or compliance monitoring systems if they want to benefit from the proposed aggregation relief. As Commissioner Giancarlo noted, "[o]wners and their affiliates may need to share information regarding trades or trading strategy to verify compliance with applicable credit limits as well as restrictions and collateral requirements for inter-affiliate transactions, among other risk-management and compliance-related objectives."[6] For these reasons, the Working

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account or position." Position Limits NOPR at 75,828. In addition, the interaction between (i) the inclusion of trade options in the universe of referenced contracts and (ii) the proposed aggregation requirements could prevent entities from utilizing the proposed conditional spot month limit exemption solely because they have affiliates, which are not subject to common trading-level control, that solely engage in commercial physical commodity transactions, some of which may contain embedded volumetric optionality.

5 *See* Supplemental Aggregation NOPR at 58,381.

6 *Id*.

Group respectfully requests that the CFTC clarify in the text of its final regulations on aggregation that owners and their affiliates may share such trading information as is necessary to manage risk and meet compliance obligations without forfeiting eligibility for aggregation relief.[7]

To achieve this outcome, the Working Group respectfully suggests the CFTC include in the text of its final regulations on aggregation the following as new subparagraph (iii) to CFTC Regulation 150.4(b)(2):

> **Nothing in paragraph (b) of this section 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 an affiliate, or from establishing and monitoring compliance or risk policies and procedures, including position limits, for an affiliate or on an enterprise wide basis, or from sharing employees so long as such employees do not control, direct or participate in the entities' trading decisions.**

1. The Working Group's Proposed Language Is Consistent with Prior CFTC Commentary.

The Working Group's proposed language for new subparagraph (iii) to CFTC Regulation 150.4(b)(2) is consistent with prior CFTC commentary. Notably, the CFTC's commentary in the 2013 Aggregation NOPR discussing factors in proposed CFTC Regulation 150.4(b)(2)(i) demonstrates that the Commission recognizes the need to permit such information sharing as is necessary to manage risk and ensure compliance without forfeiting eligibility for aggregation relief. That commentary from the CFTC in the 2013 Aggregation NOPR is provided in the table below.

CFTC'S COMMENTARY FROM THE 2013 AGGREGATION NOPR ON PROPOSED CFTC REGULATION 150.4(b)(2)(i) DEMONSTRATING THE NEED FOR INFORMATION SHARING

PROPOSED FACTOR	CFTC'S PROPOSED TEXT	CFTC'S COMMENTARY
Proposed CFTC Regulation 150.4(b)(2)(i)(A)	"Do not have knowledge of the trading decisions of the other"	"…this proposed criterion…would not prohibit information sharing solely for risk management, accounting, compliance, or similar purposes and information sharing among mid- and back-office personnel that do not control, direct or participate in trading decisions…."[8]

[7] The Working Group also requests for the CFTC to confirm that entities that do not satisfy the particular conditions necessary to qualify for any of the exemptions from the Commission's speculative position limits aggregation requirements are still permitted to petition for aggregation relief under Section 4a(a)(7) of the Commodity Exchange Act.

[8] 2013 Aggregation NOPR at 68,961.

CFTC'S COMMENTARY FROM THE 2013 AGGREGATION NOPR ON PROPOSED CFTC REGULATION 150.4(b)(2)(i) DEMONSTRATING THE NEED FOR INFORMATION SHARING		
PROPOSED FACTOR	**CFTC'S PROPOSED TEXT**	**CFTC'S COMMENTARY**
Proposed CFTC Regulation 150.4(b)(2)(i)(C)	"Have and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include…separate physical locations..."	"The requirement of 'separate physical locations'…would not necessarily require that the relevant personnel be located in separate buildings…. [T]he important factor is that there be a physical barrier between the personnel that prevents access between the personnel that would impinge on their independence."[9]
Proposed CFTC Regulation 150.4(b)(2)(i)(D)	"Do not share employees that control the trading decisions of either"	"[S]haring of [attorneys, accountants, risk managers, compliance and other mid- and back-office personnel] between entities would generally not compromise independence so long as the employees do not control, direct or participate in the entities' trading decisions…."[10]
Proposed CFTC Regulation 150.4(b)(2)(i)(E)	"Do not have risk management systems that permit the sharing of trades or trading strategy"	"…this criterion generally would not prohibit sharing of information to be used only for risk management and surveillance purposes….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."[11]

As demonstrated above, the CFTC recognizes the need to share information in certain circumstances, such as to manage risk and monitor compliance, so long as that information is not used to direct trading decisions. However, the actual language of proposed CFTC Regulation 150.4(b)(2) does not clearly permit such activity without losing eligibility for proposed aggregation relief. To better express the sentiment expressed in the CFTC's prior commentary, the Working Group respectfully suggests that the CFTC adopt the Working Group's recommendation above to add new subparagraph (iii) to proposed CFTC Regulation 150.4(b)(2).

2. The Working Group's Proposed Language Is Consistent with Other U.S. Statutes.

The Working Group's proposed language for new subparagraph (iii) to CFTC Regulation 150.4(b)(2) is consistent with other U.S. statutes. For example, the U.S. securities laws require

9 *Id*. at 68,962.

10 *Id*.

11 *Id*.

barriers to the sharing of material, non-public information among registered persons and related entities.[12] In the *Staff Summary Report on Examinations of Information Barriers: Broker-Dealer Practices under Section 15(g) of the Securities Exchange Act of 1934* (the "**SEC Staff Report**"),[13] the Securities and Exchange Commission's Office of Compliance Inspections and Examinations discusses mechanisms used by broker-dealers to ensure that senior executives are able to receive information necessary to fulfill their duties, while at the same time ensuring such information is not used to circumvent the insider trading prohibitions of the securities laws. In short, the SEC Staff Report provides a blueprint for how sensitive information can be shared inside a corporate group without running afoul of restrictions on the use of that information.

The Working Group's proposed language for new subparagraph (iii) to CFTC Regulation 150.4(b)(2) is also consistent with other exemptions contained in the CFTC's current and proposed aggregation regime. For example, proposed CFTC Regulation 150.4(b)(1), which is similar to current CFTC Regulation 150.4(c), provides an exemption from aggregation for a principal or affiliate of the operator of a pooled account, subject to certain conditions. In this respect, proposed CFTC Regulation 150.4(b)(1) and current CFTC Regulation 150.4(c) demonstrate the CFTC's recognition of the need for information sharing, in certain circumstances.

B. Entities Should Be Permitted to Rely Upon the Aggregation Relief Filings of Affiliates Regardless of Location in the Organization Structure.

Proposed CFTC Regulation 150.4(b)(9) permits higher-tier entities[14] to rely upon requests for aggregation relief filed by owned entities.[15] This approach is practical and would limit the regulatory burden associated with multiple requests for relief on both market participants and the Commission. However, it is unclear whether an owned entity can rely on the filing of a higher-tier entity other than its direct owner. A greater reduction in the regulatory burden associated with aggregation relief filings could be achieved if, in addition to the reliance contemplated in proposed CFTC Regulation 150.4(b)(9), owned entities were permitted to rely upon filings made by higher-tier entities under the same conditions required in proposed CFTC Regulation 150.4(b)(9). Further, joint ventures should be permitted to file for aggregation relief for participants in joint ventures.

By way of example, as long as the entities covered by the filing are able to provide the necessary information to the CFTC, any of the entities in the diagram below should be able to

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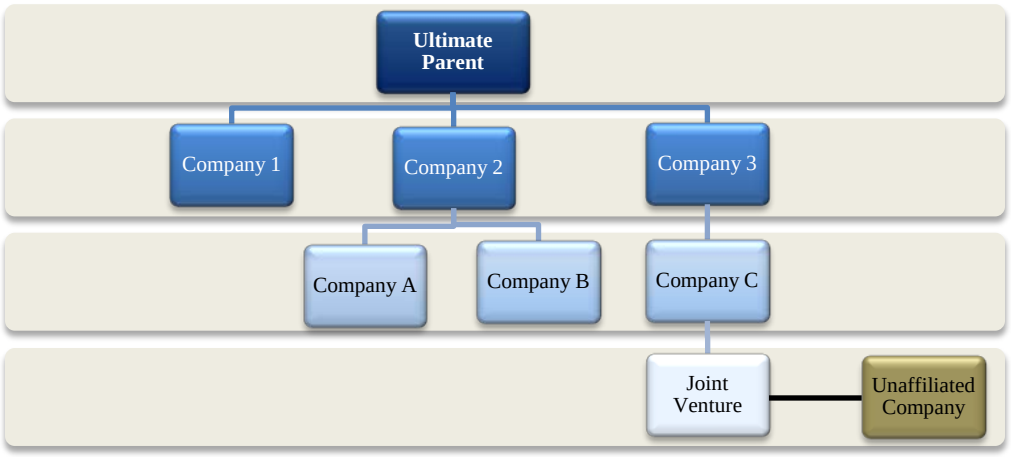
[12] *See* Securities and Exchange Act of 1934 at Section 15(g), 15 U.S.C. § 78o(g); *see also* Investment Advisers Act of 1940 at Section 204A, 15 U.S.C. § 80b-4a.

[13] Securities and Exchange Commission, Office of Compliance Inspections and Examinations, *Staff Summary Report on Examinations of Information Barriers: Broker-Dealer Practices under Section 15(g) of the Securities Exchange Act of 1934* (Sept. 27, 2012), *available at* https://www.sec.gov/about/offices/ocie/informationbarriers.pdf.

[14] The CFTC uses the term "higher-tier entity" "to include entities with a 10 percent or greater ownership interest in an owned entity." *See* 2013 Aggregation NOPR at 68,953 n.47.

[15] The CFTC uses the term "owned entity" to refer to a "separately organized entity." *See* Supplemental Aggregation NOPR at 58,366.

rely upon the aggregation relief filings of affiliates regardless of location in the organizational structure. In short, one entity should be able to file for aggregation relief on behalf of any or all of its affiliates as long as the criteria for relief are satisfied.



Conceptually, there is little difference in the value, nature, and effect of the filings made with the Commission under these scenarios. Many commercial energy firms have ultimate and intermediate holding companies that own large numbers of independently run operating companies. If those holding companies were permitted to file requests for relief, whether such requests were for majority- or minority-owned entities, upon which the owned entities could rely, the number of requests submitted to the Commission would likely reduce significantly, saving valuable resources for both the Commission and market participants.

C. The CFTC Should Clarify in the Text of Its Final Regulations on Aggregation That Subsequent Notice Filings Are Required Only in the Event of a Material Change to the Facts Set Forth in the Relevant Notice Filing.

When discussing the subsequent filings of the notice for the exemption from aggregation, Commissioner Giancarlo points out that "[t]he text of the proposed rule does not appear to require periodic filings following the initial notice of trading independence, but the Commission's calculation of the proposal's costs seems to assume that such filings will be made on an annual basis."[16] The Working Group agrees with Commissioner Giancarlo that the standard is unclear as proposed. Accordingly, the Working Group respectfully requests that the CFTC clarify in the text of its final regulations on aggregation that subsequent filings of the notice for the exemption from aggregation are required only in the event of a material change to the facts set forth in the relevant notice filing with the CFTC.

[16] *Id*. at 58,382 (comparing proposed CFTC Regulation 150.4(c) with the discussion in the Paperwork Reduction Act section of the Supplemental Aggregation NOPR at 58,378).

D. The Commission Should Exclude Pension Plans from the Aggregation Requirement Outright.

As the Working Group noted in its comment letter on the 2013 Aggregation NOPR, the Working Group appreciates the Commission's attempt to address the treatment of pension plans under the 2013 Aggregation NOPR.

However, if the proposed exemption for pension plans contained in the Independent Account Controller ("**IAC**") aggregation exemption were to be included in the final rule on aggregation, many plans would be unable to utilize the exemption and both retirement plan and plan sponsor investments would be disrupted.

By providing an exemption for pension plans within the IAC aggregation exemption, the proposed speculative position limits regime creates an unnecessarily complicated and potentially unavailable route to relief to entities that are, by law, required to operate only in the best interests of plan beneficiaries and are thus legally incapable of being used to further the interests of the pension plan's sponsor. As such, the Working Group requests that the Commission provide an explicit aggregation exemption for pension plans.

The proposed IAC aggregation exemption may be unavailable to pension plans for two main reasons. *First*, the exemption does not extend relief to several common plan structures, such as those structured under a master trust, or foreign retirement plans, which are not governed by the Employee Retirement Income Security Act of 1974 ("**ERISA**").[17] *Second*, a common structure for U.S. pension plans is to have employees of the sponsor serve as members of the investment committee of the plan, which is a separate legal entity from and is unaffiliated with the sponsor. This is done for a variety of reasons, including to minimize costs and to ensure that plan assets are appropriately invested. These employees typically have an investment background and may serve in trading-related roles for the plan sponsor. Thus, these employees may have knowledge of both the plan and the sponsor's trading activity. This knowledge may prevent the plan and the sponsor from utilizing the proposed aggregation exemption for pension plans.[18]

In the absence of a specific exemption for pension plans that does not rely on the proposed IAC aggregation exemption, certain plans and their sponsor will have to aggregate their

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[17] If the Commission chooses to adopt the exemption for pension plans contained herein, it would be appropriate to extend the availability of the relief to plans that are structured under a master trust as well as to foreign plans. The availability of the proposed IAC aggregation exemption for pension plans is contingent on the sponsor being excluded from registration as a commodity pool operator under CFTC Regulation 4.5(a)(4). However, plans that are structured under a master trust and foreign plans are not specifically listed under CFTC Regulation 4.5(a)(4) (which defines exclusions from the definition of "commodity pool operator"), which has led to CFTC staff issuing no-action letters granting such plans the same treatment as those otherwise listed in the section. If the Commission provides relief for pension plans, it should extend this relief to both those identified in CFTC Regulation 4.5 as well as these other types of commonly excluded plans.

[18] *See* CFTC Regulation 150.1(e)(3). In order to qualify as an IAC, a person must trade independently of the eligible entity, which in this case would be the plan sponsor.

commodity positions. This will put the fiduciaries of these plans in the untenable position of having to account for the trading strategies of the sponsor, which may not be in the best interests of plan participants. Making a trade based on anything other than the best interests of the plan is inconsistent with the investment committee members' fiduciary duties. Specifically, under ERISA Section 406(b), fiduciaries shall not represent a party "whose interests are adverse to the interest of the plan…." When both the plan sponsor and the plan are aggregated and subject to the same limits, it is possible that at some point either the plan or the plan sponsor would have to reduce exposure in order to stay within the limits. This result is unsatisfactory under ERISA.[19] In short, requiring a plan sponsor and the plan to aggregate positions establishes a conflict of interest which did not previously exist.

Creating an exemption from the aggregation requirement specifically for pension plans will not interfere with the goal of the Commission's speculative position limits – preventing excessive speculation. By exempting a pension plan from aggregation with the plan sponsor, the Commission would simply be acknowledging that such plans are separate and distinct entities and are required by law to operate in the interests of the plan without regard to the interests of the sponsor. The plan and sponsor would, of course, still be subject to speculative position limits, but such limits would be applicable to the positions of the plan or sponsor and not those of the other entity, over which it exercises no control.

III. CONCLUSION.

The Working Group appreciates this opportunity to provide comments on the proposed aggregation 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/ David T. McIndoe
David T. McIndoe
Alexander S. Holtan
Blair Paige Scott

Counsel to The Commercial Energy Working Group

[19] The Working Group notes that the aggregation exemption where information sharing would raise a reasonable risk of the violation of law in proposed CFTC Regulation 150.4(b)(8) would also be unavailable in this circumstance, as the sharing of information between the plan and the sponsor would not violate the law. The trading to avoid exceeding speculative position limits in the aggregate, however, would raise a reasonable risk of violating Section 406 of ERISA.