Electric Power Supply Association

Via Electronic Submission to http://comments.cftc.gov

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

Re: Aggregation of Positions, RIN 3038-AD82 (Sept. 29, 2015)

Dear Mr. Kirkpatrick,

The Electric Power Supply Association ("EPSA") is pleased to provide comments supporting the Commodity Futures Trading Commission's ("CFTC" or "Commission") Supplemental Notice of Proposed Rulemaking to Amend the Aggregation Requirements under 17 C.F.R. Part 150 ("NOPR" or "Proposal").[1] EPSA believes that the proposed modifications will provide for a more workable aggregation standard, and urges the CFTC to expeditiously finalize the instant proposal to Rule 150.4. Further, EPSA requests that the Commission include in the position limits rule, clear guidance explaining how the new compliance requirements would be implemented in conjunction with preexisting Commission policies such as Rule 150.4. Finally, EPSA supports the Commission's preliminary views in the NOPR that aggregation policy should focus on instances where affiliated market participants demonstrate actual control over each other's trading activities. Therefore, EPSA supports a revised aggregation policy that permits a market participant to immediately avail of disaggregation relief upon making a notice filing in good faith, even if the CFTC believes a further inquiry is necessary to verify that the market participant's ownership interests do not facilitate direct or indirect trading control.

Statement of Interest

EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers that are active participants in physical commodity markets with related commercial hedging activities. These suppliers account for nearly 40 percent of the installed generating capacity in the United States and provide reliable and competitively priced

[1] Supplemental Notice of Proposed Rulemaking, Aggregation of Positions, 80 Fed. Reg. 58365 (Sept. 29, 2015), available via CFTC website.

electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

This NOPR affects EPSA members because it impacts future compliance obligations for commercial energy firms under a Part 151 position limits rule applicable to Referenced Contracts and economically equivalent swaps ("Covered Transactions"). The aggregation rule sets up a default obligation that would require a commercial energy firm to obtain, track and aggregate all positions and accounts as to Covered Transactions in which it holds a direct or indirect ownership or equity interest of 10 percent or greater, regardless of whether the owned entities or affiliates engaging in those transactions are within its common control. Without a workable disaggregation policy, a commercial firm may face cost-prohibitive compliance requirements under the aggregation rule to collect, coordinate and analyze trading and position information as to each of its independently controlled, owned entities' Covered Transactions. Therefore, EPSA has a strong interest in a CFTC disaggregation policy which permits commercial energy companies to efficiently request and quickly obtain disaggregation relief.

Comments

EPSA supports a position limits framework that will not unduly delay or restrict our members' commercial risk management and hedging activities or hamper future opportunities to seek hedging counterparties in a liquid marketplace. EPSA believes this NOPR is a very helpful improvement upon the prior CFTC aggregation proposal.[2] However, we note that it is only a first step of many that the CFTC must take to achieve a workable framework that protects commercial market participants against undue costs and burdens of a speculative position limits rule. EPSA offers the following comments supporting finalization of the NOPR and encourages the Commission to make complementary changes in other aspects of the position limits framework that will minimize unnecessary burdens on commercial entities.

First, EPSA believes that the CFTC's decision to eliminate a "prior approval" process, *i.e.* a case-by-case approval process for disaggregation requests from over-50% owners for their owned entities, is particularly helpful to alleviate costly and cumbersome compliance burdens on commercial energy companies. A "prior approval" process could lead to the illogical result that commercial firms which have no effective control over affiliates or owned entities, would still be

[2] Notice, Aggregation of Positions, RIN 3038-AD82, 78 Fed. Reg. 68946 (Nov. 15, 2013). [2013 Aggregation Proposal].

required to invest significant efforts in aggregation compliance pending a final CFTC decision that grants disaggregation relief. The shift in this NOPR to a notice filing[3] that provides immediate disaggregation relief, is the appropriate solution to avoid these unjustifiable burdens on commercial market participants.[4] EPSA also agrees that an exclusive notice filing requirement enhances the Commission's regulatory goals, focusing its limited resources on only those disaggregation filings which might reasonably warrant additional discretionary review.

Second, irrespective of the timing of a future Part 151 position limits rule, the CFTC should expeditiously finalize changes to CFTC Rule 150.4. EPSA notes that the ultimate treatment of certain issues in a Part 151 rule, such as the bona fide hedging exemptions, inter-affiliate swaps, and "real-time" compliance requirements, may have a bearing on the functional or practical aspects of aggregation policy. Therefore, EPSA also requests that the Commission include in the position limits rule, clear guidance explaining how the new compliance requirements would be implemented in conjunction with preexisting Commission policies such as Rule 150.4. In general, EPSA encourages the Commission to continue exploring ways in which the various pieces of the position limits framework will fit together to minimize disruptions to commercial entities' hedging and risk management activities.

Third, EPSA believes that discussions in the NOPR[5] support a practical approach to implementing aggregation policy that is much more nuanced than the simple assumption that an owner entity's financial interest in an owned entity, standing alone, is a sufficient basis for aggregation. EPSA therefore requests that the CFTC clarify and confirm in a revised policy that while ownership at 10% or greater may be an *appropriate* factor toward requiring aggregation, ownership at 10% or more is *also* a rebuttable presumption that can be overcome by making the required notice filing in good faith. Such a statement will provide certainty to market participants

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[3] In the 2013 Aggregation Proposal, the Commission included proposed regulation 150.4(b)(2) to establish a notice filing procedure that permits a person in specific circumstances ("owner entity") to disaggregate the positions of a separately organized entity ("owned entity") even if such owner entity has a 10 percent or greater interest in the owned entity. However, above a 50 percent interest in the owned entity, the 2013 Aggregation Proposal would also have required a separate application and approval from the CFTC before the applicant could obtain disaggregation relief. *See id.*, at 68946 et seq.

[4] *See* Supplemental Notice of Proposed Rulemaking, *supra* note 1, at 58367.

[5] Proposed rule, *supra* note 1, at 58369 ("However, the Commission is also mindful that aggregation of positions held by owned entities may in some cases be impractical, burdensome, or not in keeping with modern corporate structures. Therefore, the Commission is proposing a limited revision to the 2013 Aggregation Proposal that would permit all owners of 10 percent or more of an owned entity (*i.e.*, the owners of up to and including 100 percent of an owned entity) to disaggregate the positions of the owned entity..."). *See also* Supplemental Notice of Proposed Rulemaking, Appendix 3, Statement of J. Christopher Giancarlo, *supra* note 1, at 58381.

that even if their notice filing triggers further inquiry as to any of the factors or entities covered therein, disaggregation will still remain the default rule until and unless the Commission specifically orders otherwise. Relatedly, the CFTC should also confirm in its final policy that Commission staff will apply the same standard of review to all notice filings, whether or not the entity requesting disaggregation holds a majority interest or even a 100% interest in its owned entities.

In conclusion, EPSA supports prompt finalization of the NOPR, as it is a significant improvement upon both the Commission's current aggregation policy and the 2013 aggregation proposal. EPSA appreciates that the NOPR rejects the over-simplistic assumption that common ownership alone is the most accurate or reliable proxy for common control in a modern, globally interconnected marketplace. We are hopeful that the aggregation policy revisions are just the first step in a series of actions the Commission may take to simplify and narrow the focus of a speculative position limits regime – especially changes that can conserve the agency's and market participants' resources, protect the CFTC's articulated regulatory objectives, and prevent unnecessary disruptions to commercial energy firms' hedging and risk management activities. EPSA thanks the Commission for issuing the instant proposal and appreciates the opportunity comment. Please do not hesitate to contact the undersigned for more information.

Respectfully Submitted,

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