November 13, 2015

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

Re: Aggregation of Positions (RIN 3038-AD82)

Dear Mr. Kirkpatrick:

Better Markets, Inc.[1] appreciates the opportunity to comment on the above-captioned Supplemental Notice of Proposed Rulemaking ("Proposed Rule") to the November 15, 2013 proposed rule on Aggregation ("2013 Proposed Rule") of the Commodity Futures Trading Commission ("CFTC, Commission"). The Proposed Rule purports to clarify and amend the aggregation regime ("Aggregation") of the rules related to speculative position limits ("Position Limits"), in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

INTRODUCTION

Imposing strong, meaningful limits on excessive speculation lies at the heart of Title VII of the Dodd-Frank Act. Many decades of successful implementation across a variety of commodity derivatives has proved the essential role of Position Limits in ensuring orderly and fair markets that accurately reflect and reconcile supply and demand fundamentals. Central to the effective imposition of Position Limits is an accurate and comprehensive methodology for determining the total holdings of every market participant, namely by aggregating all of the trading across all of the entities it controls. Ultimately, in the Dodd-Frank Act, Congress intended Position Limits to be applied broadly to all positions that, in the aggregate, may compromise the integrity of the marketplace. Congress also intended

[1] Better Markets, Inc. is a nonprofit organization that promotes the public interest in the domestic and global capital and commodity markets. It advocates for transparency, oversight, and accountability in the financial markets.

that Position Limits be applied in the aggregate according to the principle of "direct or indirect control." [2]

The previously proposed rules on Aggregation laid out a tiered structure, whereby the concept of control, and thus the obligation to aggregate positions, was determined by percentage ownership in an entity. Better Markets has consistently and categorically rejected any proposed procedure by which firms with greater than 50% ownership of another may seek to disaggregate their positions. Such an allowance runs flatly against the statutory mandate, historical Commission precedent,[3] and logic. Unfortunately, however, the Commission has progressively weakened its formulation of control based on ownership, ending up with precisely this flawed approach.

The Proposed Rule represents the most recent and most egregious undermining of Congress's language and intent. In a series of proposals, the Commission has added qualifications and exemptions that greatly diminish the effectiveness of its approach. Specifically, the Proposed Rule impermissibly weakens the Aggregation regime by allowing entities with majority ownership not only to qualify for disaggregation, but also to do so through a simple, immediately effective filing. This is inexcusable and fundamentally at odds with the statutory mandate of limiting speculation.

Further, the Commission is amending the proposal without addressing its most important and damaging flaw: its failure to mandate aggregation of groups or classes of traders such as Commodity Index Traders. This is irresponsible and counterproductive. Despite the deliberate and unambiguous mandate by Congress,[4] the Commission continues to craft its Aggregation rules without attention to groups or classes of traders that present an enormous potential source of excessive speculation. In the Proposed Rule, the Commission also continues to ignore the statutory mandate to "diminish, eliminate or prevent" excessive *speculation*, and instead focuses exclusively on affecting excessive *concentration* and potential market manipulation.

As has been exhaustively demonstrated by numerous academic studies and compelling data set forth in previous letters to the CFTC,[5] excessive speculation is a serious

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2 "The positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person." 7 U.S.C. § 6a.

3 "The Commission acknowledged that to provide such relief in order to address issues raised by commenters would represent a break by the Commission from past practice" NOPR 80 FR 58368.

4 "The Commission shall, by rule or regulation, establish limits (including related hedge exemption provisions) on the aggregate number or amount of positions in contracts based upon the same underlying commodity (as defined by the Commission) that may be held by any person, including any group or class of traders" 7 U.S.C. § 6a (emphasis added).

5 *See* Better Markets letter to CFTC dated March 28, 2011 ("Position Limits Comment Letter 2011"), at pages 80-85, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=34010&SearchText=better%20markets (incorporated herein as though fully set forth); *see also* Better Markets letter on Position Limits to CFTC dated February 10, 2014 ("Position Limits Comment Letter 2014") *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59716 and Better Markets letter on Position Limits to CFTC dated February 10, 2014 ("Aggregation Comment Letter 2014") *available at*

threat to the core function of our commodity markets. The CFTC should be looking to fulfill the statutory mandate to *strengthen* regulation of speculation, not weaken it, as this Proposed Rule dramatically does. The Commission must take concrete steps to remediate these weaknesses to provide strong, comprehensive, and effective Position Limits Rules, as Congress has explicitly directed it to do.

DISCUSSION

The Definition of Control Has Been Impermissibly Narrowed

Consistent with statutory language and goal (as well as logic, common sense and reason), the longstanding policy to determine which positions are subject to speculative Position Limits required entities to aggregate positions for which they control the trading together with those held by entities they own.[6] This makes perfect sense, of course, since failing to aggregate all positions at the control entity level would allow traders to easily evade Position Limits by simply spreading its positions among enough subsidiaries, so that no one entity exceeded the limits. This would be a clear violation of clear Congressional intent and defeat the plain language and purpose of the statute.

Congress expanded the Commission's authority to implement position limits in Section 737 of the Dodd-Frank Act, and, while doing so, it explicitly preserved the following provision of the Commodity Exchange Act:

> "In determining whether any person has exceeded such limits, the positions held and trading done by any persons *directly or indirectly* controlled by such person shall be included with the positions held and trading done by such person."[7]

The paradigm example of control, of course, is ownership. Thus, determining a person's aggregatable positions using the concepts of control and ownership[8] is a faithful and obvious implementation of the statutory mandate. Indeed, this was reflected in the longstanding aggregation regime for futures and options in part 150 ("Current Part 150"), as well as the aggregation provisions proposed in the original part 151 Position Limits proposed rule ("Proposed Part 151").[9]

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http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59715; *see also* David Frenk & Wallace Turbeville, *Commodity Index Traders and the Boom/Bust Cycle in Commodities Prices*, (Oct. 14, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945570. For a list of further studies, *see* http://www2.weed-online.org/uploads/evidence_on_impact_of_commodity_speculation.pdf.

6 *See* Commodity Exchange Act § 4a.

7 7 U.S.C. § 6a(a)(1) (emphasis added).

8 Above a de minimis 10%.

9 Position Limits for Derivatives, 76 Fed. Reg. 4,752 (Jan. 26, 2011).

However, on May 30, 2012,[10] the Commission proposed an interim Part 151 ("Interim Part 151"), which significantly weakened this clear aggregation regime by adding and expanding opportunities for disaggregation.[11] Chief among these was the expansion of the exempted ownership threshold from a reasonable 10% to an unreasonable 50% under certain conditions (while still disallowing the exemption for majority owners).[12] In the 2013 reproposal, the Proposed Rule went much further by allowing disaggregation in certain circumstances where an entity has *greater than 50%* ownership of another, subject to the Commission's approval and compliance with a list of requirements[13]. If "indirect control" of a subsidiary's positions is not signified by, at a minimum, majority ownership of the entity, then "indirect control" becomes a meaningless concept or at least one inconsistent with it's plain, longstanding and ordinary meaning, which would be a violation of the express terms of the statute.

Beginning with exemptions available only to de minimis ownership, the foundational Aggregation regime had been eroded significantly over those 3 years. Now, the supplemental proposed rule seeks to remove any remaining distinction between minority and majority ownership, effectively enshrining the presumption that ownership does not signify control over trading activity.[14] This turns law, logic and language upside down. That is unacceptable and must be reversed to comply with the law.

The Commission's approach may ultimately be even worse. Commissioner Giancarlo has solicited comment on potentially removing any presumption of control for all minority owners, and, unbelievably, "whether the Commission should consider modifying the current proposal to clarify that owners and their affiliates may share such trading information as is necessary for effective risk safeguards without forfeiting eligibility for disaggregation."[15] If this suggestion, albeit by only one Commissioner, were to be adopted, it would demonstrate that the Commission is no longer taking the issue of Aggregation seriously in any regard and intends to not enforce the law as directed to do so by Congress.

Permitting disaggregation of majority-owned subsidiaries ignores the statute's clear language regarding indirect control, and therefore violates the language and intent of the statute. The Commission must therefore reinstate the longstanding and appropriate 10% ownership criterion.

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10 "On May 30, 2012, the Commission proposed, partially in response to a petition for interim relief from part 151's provision for aggregation of positions across accounts, certain modifications to its policy for aggregation under the part 151 Position Limits regime (the "Part 151 Aggregation Proposal'')." Proposed Rule, 78 Fed. Reg. 68,946.

11 Aggregation, Position Limits for Futures and Swaps, 77 Fed. Reg. 31,767 (May 30, 2012).

12 *Id.* at Proposed §151.7(b)(1).

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

14 Aggregation of Positions, 80 Fed. Reg. 58,365 (Sep. 29, 2015).

15 *Id.*

Excessive Speculation and Groups or Classes

Congress enumerated four objectives that the CFTC must seek to achieve as it sets Position Limits.[16] First and foremost, "to the maximum extent practicable" the agency must "diminish, eliminate, or prevent excessive speculation."[17] Other objectives include ensuring "sufficient market liquidity for *bona fide* hedgers," and ensuring that "the price discovery function of the underlying market is not disrupted."[18] These goals clearly place orderly market function, and the needs of commercial hedgers, at the forefront.[19]

Thus, should the level of market-wide speculation in a given contract become large enough to threaten the contract's ability to appropriately **serve the needs of commercial hedgers**, it must be limited. The Proposed Rule must therefore provide for an aggregation regime that accounts for this. Given that financial speculation across a class of traders (as opposed to simply an individual trader) can create excessive speculation and otherwise interfere with the orderly functioning of the markets, the statute **requires** that such classes also be subject to limits to achieve the goals of the statute. To do otherwise would impermissibly promote and facilitate the activity of financial speculators over bona fide hedgers, price discovery, and the elimination of excessive speculation.

Importantly, Congress explicitly clarified and strengthened the aggregation requirements previously contained in the Commodities Exchange Act by applying them to contracts in the same underlying commodity and to economically related contracts, across all venues.[20] **Moreover, Congress explicitly inserted language expanding the CFTC's aggregation powers to cover "any group or class of traders."[21]** Yet, the Proposed Rule disregards this statutory mandate entirely and continues to show no indication that the Commission has sought to – or intends to -- identify groups or classes of traders that might be suitable candidates for aggregation. This is despite the fact that many commenters have requested that the Commission investigate classes such as Commodity Index Traders, an identifiable group or class of traders that, falls within the express statutory definition and, according to overwhelming evidence, causes excessive speculation.[22]

To fulfill its statutory mandate, **the Commission must**

(1) determine whether the class of Commodity Index Traders or any other group or class of traders is a significant cause of excessive speculation, and

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16 7 U.S.C. § 6a(a)(3)(B).
17 *Id.*
18 *Id.*
19 For an exhaustive discussion of the importance of regulating excessive speculation, in addition to excessive concentration, and the clear mandate to do so, please see Better Markets Position Limits Comment Letter 2011, Better Markets Position Limits Comment Letter 2014, and Better Markets Aggregation Comment Letter 2014. Supra Note 5.
20 7 U.S.C. § 6A(c)(a)(2)
21 7 U.S.C. § 6A(c) (a)(3)(A)
22 *Id.* At 5

(2) if it concludes that they are, amend its aggregation rule accordingly.

Failure to do so would not only ignore the clear language of the statute, it would leave the American public at the mercy of unwarranted price fluctuations and higher costs that result from excessive speculation.

CONCLUSION

By giving firms the widest possible berth to avoid the aggregation limits, the Commission's proposed rule subverts the integrity of the markets that it is charged with protecting. To protect bona fide end-users and the overall integrity of the commodity markets, the Commission must eliminate excessive speculation, and to achieve this goal, it must strengthen its Proposed Rule as detailed above.

Sincerely,

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