Occupy the SEC

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November 13, 2015

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

Re: Aggregation of Positions (RIN 3038-AD82)

Dear Sir:

Occupy the SEC ("OSEC")[1] submits this comment letter in response to the Commodity Futures Trading Commission's ("CFTC"; "Agency") supplemental notice of proposed rulemaking regarding aggregation of positions under the Agency's position limits regime.[2] In short, we are chagrined by the Agency's proposal, which threatens to undermine the efficacy of longstanding position limit regulations.

Section 4a(a)(1) of the Commodity Exchange Act ("CEA") requires aggregation of position limits across related entities. The linchpin of this statutory mandate is control, **whether direct or indirect:** "[i]n 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."[3]

Naturally, "indirect control" is difficult to assess, and the Agency does not have the capacity to make a case-by-case determination as to whether the positions of any two entities in the entire marketplace should be aggregated. The Agency's existing regulations establish a common-sense, bright-line test whereby aggregation of enumerated agricultural derivatives is required whenever one entity has at least 10 percent ownership in an account or position of another.[4] This

[1] Occupy the SEC (http://occupythesec.org) is a group of concerned citizens, activists, and financial professionals that works to ensure that financial regulators protect the interests of the public, not Wall Street.
[2] Aggregation of Positions, 80 F.R. 58365 (Sep. 29, 2015) (hereinafter "Proposed Rule").
[3] 7 U.S.C. § 6a(a)(1) (emphasis added).
[4] *See* 17 C.F.R. § 150.4(a), (b).

approach follows the obvious logic that owners of an entity (especially at higher percentages of ownership) exercise indirect control over the entity's operations, through directorship votes.

The Proposed Rule Abandons the Bright-Line Ownership Standard

The Agency seemingly vindicates the ownership-based approach, taking great pains to rebut contrary assertions by various industry groups and reiterating that ownership is a relevant factor when it comes to assessing control within the meaning of 7 U.S.C. 6a(a)(1). For instance, the Proposed Rule cites the Congressional history relating to the Agency's 1986 reauthorization.[5] At the time, certain witnesses argued that aggregation should not be based on ownership, but Congress rejected that view, as it had done in issuing prior iterations of the CEA.[6] The Proposed Rule also cites an earlier statement by the Agency, from 1988, to the effect that an ownership test creates a reliable, bright-line test for aggregation:

> Both ownership and control have long been included as the appropriate aggregation criteria in the Act and Commission regulations. Generally, inclusion of both criteria has resulted in a bright-line test for aggregating positions.[7]

Remarkably, the Proposal Rule contradicts that very citation – *its own words* – and adopts a proposal that eschews a bright-line test in favor for a case-by-case, discretionary assessment of compliance based on a slew of factors enumerated at proposed 17 C.F.R. Sec. 150.4(b)(2)(i).

While the new exemption ostensibly retains some ownership component – applying to cases involving ownership about 10 percent – the degree of ownership is no longer a material consideration under the new aggregation rubric. This is evident from the fact that, under the Proposed Rule, the owners of *100 percent* of an owned entity could be permitted to disaggregate the positions of the owned entity under certain circumstances.[8] It is difficult to imagine a realistic scenario where a parent company actually exercises **zero** "indirect control" over the trading decisions of a wholly owned subsidiary, but the Agency apparently considers such a scenario plausible enough to eviscerate a long-standing and reliable regulatory standard – one tying ownership and control – and replace it with loopholes, clauses and contingencies.

While OSEC recognizes the Agency's sensitivity to industry concerns, which have evidently produced this further dilution of the position limits regime, we would have preferred if the Agency exhibited equal solicitude for commodity producers, end-users, and consumers affected by commodity price manipulation and inefficiencies borne of market domination. In recent years, commodity speculation has produced widespread poverty around the world,[9] as well as

[5] Proposed Rule at 58372.
[6] *Id.*
[7] *Id.*, citing Exemption From Speculative Position Limits for Positions Which Have a Common Owner but Which Are Independently Controlled; Proposed Rule, 53 F.R. 13290, 13291–92 (Apr. 22, 1988).
[8] *Id.* at 58369.
[9] Logan Cochrane, Mogamat Adams & Sherin Kunhibava, *The Impact of Speculation on Global Food Accessibility and Food Security*, 29 Arab L. Q. 76 (2015) ("The global food price spikes of 2008 and 2011 resulted in tens of millions of people being pushed into poverty.").

political instability in volatile regions.[10] It is incumbent upon the Agency to finalize this Rule with such broader consequences in mind.

The Agency Must Be Vigorous in Applying the "Implied Agreement" Standard

Furthermore, we urge the Agency to be vigilant in enforcing current regulation § 150.4(a) and proposed rule § 150.4(a)(1), under which unaffiliated individuals acting pursuant to an implied agreement will have their qualifying positions aggregated. We remind the Agency that utilized that financial conglomerates commonly establish unaffiliated Special Purpose Vehicles (SPVs) to serve as the conduit for their trading strategies. Often the sponsor or parent will have no equity interest in the SPV, and the trading decisions will be nominally outsourced to a third party investment advisor. Despite the SPV's apparent independence, the entity is merely a conduit for the sponsor's trading strategies. Aggregation must be applied in such scenario, despite the apparent absence of an ownership relationship between the parties. We urge the Agency to increase the focus of its special calls on SPVs and other derivative vehicles.

The Proposed Rule Creates a Rebuttable Presumption of Compliance

The Proposed Rule's notice filing procedure may run afoul of the CEA. The aggregation statute mandates that the Agency take an active role in establishing position limits:

> "For the purpose of diminishing, eliminating, or preventing such burden, **the Commission shall**, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits. . . . **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."[11]

The statute mandates that the Agency make the determination of whether aggregation is required or not. However, the Proposed Rule upends that mandate by allowing entities to decide for themselves, at least initially, whether they must aggregate. Under proposed rule § 150.4(b)(2), the mere filing of a compliance notice with the Agency automatically permits an entity to evade its aggregation responsibilities. After reviewing the notice and any call reports, the Agency may retroactively inform the filer that it was not eligible for disaggregation. This passive approach is at odds with the plain text of the CEA, which mandates that the Agency do the determining. Agency action that fails to observe procedure required by law is subject to invalidation by a reviewing court.[12]

We recognize that the Agency's administrative burden has blossomed in recent years, especially in light of the additional responsibilities created by the Dodd-Frank Act.[13] History has shown

[10] Brian Merchant, *Commodity Traders Helped Spark the War in Syria, Complex Systems Theorists Say*, Vice (Oct. 26, 2015), *at* http://motherboard.vice.com/read/commodities-traders-helped-spark-the-war-in-syria-complex-systems-theorists-say.
[11] 7 U.S.C. § 6a(a)(1) (emphasis added).
[12] 5 U.S.C. § 706(2)(D).
[13] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

that the Agency is not able to address the volume of data that it is entrusted with.[14] Under the current system, as proposed, the likely outcome is that many companies that should have their positions aggregated will evade that restriction, *under color of law*, simply because the Agency's staff will not get around to actually reviewing the case in a timely manner. Instead of adopting a clear, bright-line rule and permitting exemptions on a case-by-case basis, the Proposed Rule opens the regulatory floodgates, overconfident in its ability to plug any holes retroactively.

The Proposed Rule Creates an Uncertain Standard that is Susceptible to Challenge

The Proposed Rule eschews the certainty of a bright-line, ownership-based test in favor of a more amorphous standard under which the final determination is highly discretionary. In 1988 the Agency previously counseled against an uncertain aggregation standard:

> "In the absence of an ownership criterion in the aggregation standard, each potential speculative position limit violation would have to be analyzed with regard to the individual circumstances surrounding the degree of trading control of the positions in question. This would greatly increase uncertainty."

The Proposed Rule's multi-factorial framework produces such uncertainty. Under proposed rule § 150.4, a reviewing Agency official must ask difficult questions like:

- does one party have "knowledge" of the other's trading decisions? and
- are written procedures are being "enforced?"

This subjective approach will necessary lead to inconsistent results. Under this approach, a pairing deemed worthy of aggregation by one examiner may well have been found exempt by another examiner. A bright-line test premised on ownership percentage would have been easy to understand, enforce, and justify in court. However, under the proposed standard, an aggrieved litigant could attack the Agency's determinations of "knowledge" and "enforcement" under proposed rule § 150.4 as arbitrary and capricious. Such challenges would have been more difficult to raise under a simpler, more objective standard. One might expect the CFTC, once bitten,[15] to take a shy stance towards opening itself to further litigation on position limits.

[14] Matthew Philips, *The CFTC Is Drowning in Market Data*, Oct. 31, 2013, *available at* http://www.bloomberg.com/bw/articles/2013-10-31/the-cftc-is-drowning-in-swaps-futures-trading-data.
[15] *See Int'l Swaps & Derivatives Ass'n v. CFTC*, 887 F. Supp. 2d 259 (D.D.C. 2012).

Conclusion

As the Agency asserts in the Proposed Rules, it is required to act in light of a clear Congressional mandate and evidence of serious market distortion. We urge it to act in a decisive and aggressive manner in furtherance of this mandate, and place little credence on self-interested industry exhortations for looser regulation.

Thank you.

Sincerely,
/s/
Occupy the SEC

Akshat Tewary
Neil Taylor
et al.