July 13, 2016

Submitted Electronically

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

Re: Position Limits for Derivatives: Certain Exemptions and Guidance (RIN 3038-AD99)

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to submit these comments with respect to the supplemental notice of proposed rulemaking (the "**2016 Proposal**")[2] published by the Commodity Futures Trading Commission ("**CFTC**" or the "**Commission**") regarding proposed amendments to part 150 under the Commodity Exchange Act (the "**CEA**").

As the trade association for the global derivatives market, ISDA monitors regulatory developments that could affect the ability of market participants to use derivatives to, among other things, execute risk management strategies. ISDA, either on its own or jointly with fellow trade associations, has previously submitted a series of comment letters addressing the CFTC's proposed position limits rules, each of which we also incorporate herein, and this letter will briefly restate certain of the arguments and

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members comprise a broad range of derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

[2] *Position Limits for Derivatives: Certain Exemptions and Guidance,* 81 Fed. Reg. 38458 (May 26, 2016).

International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 **F** 202 756 0271
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

observations raised in those comment letters in summary form in Part I below, which we believe remain applicable to the 2016 Proposal. For example, and consistent with ISDA's prior comments on these rules, ISDA continues to believe that there is no justification, either from a statutory perspective or in terms of market protection, for the imposition of non-spot month limits or limits on financially settled contracts, which could significantly harm market liquidity and reduce the ability of commercial market participants to allocate risk through the derivative markets, without any commensurate market protection benefits. More generally, the cost and benefit discussions provided both in the 2016 Proposal and in the Commission's December 12, 2013 proposed rules on Position Limits for Derivatives[3] (the "**2013 Proposal**") remain inadequate and fail to properly or meaningfully address the cost and benefit requirements applicable to any Commission rulemaking under the CEA. With respect to aggregation, ISDA again notes its support for the Commission's proposed rules, subject to a few comments noted below.

ISDA is supportive of the amendments set forth in the 2016 Proposal, which address a number of important industry concerns. However, and as will be addressed in Part II below, ISDA and its members continue to have a number of residual concerns about several aspects of the proposed position limits rules, both from a practical and logistical perspective and on several substantive issues:

- As noted, we do appreciate and support those aspects of the 2016 Proposal that would delegate to exchanges the authority and ability to grant applications for certain exemptions from the position limits rules – namely, for non-enumerated bona fide hedging positions, certain spread positions, and enumerated anticipatory bona fide hedges. However, we strongly encourage the Commission to consider providing clarifications that will allow a successful delegation of authority to exchanges – that is, if the Commission intends to delegate this function to the experience, expertise, and functional capabilities of the exchanges, it must delegate that authority in a meaningful way, without the use of ambiguous, uncertain definitions and processes and a system of oversight that will make it difficult or impossible for the exchanges to fulfill the purposes of the delegation. Similarly, the Commission must expressly permit exchanges to consider the entire set of relevant facts and circumstances, as appropriate, when reviewing applications for an exemption from position limits, in light of each exchange's experience and expertise. For example, the exchanges must not be constrained by prior, non-finalized Commission attempts to pre-empt the analysis that may be relevant or appropriate for a given request for a non-enumerated bona fide hedging exemption.

- The Commission's proposals continue to fail to explain, explore or even address why it has concluded that accountability levels, rather than hard limits, are not the

[3] *See* 78 Fed. Reg. 75680.

best and most appropriate tool for the surveillance and market monitoring of non-spot month positions and positions in financially settled contracts. The exchanges have successfully used accountability levels for these products for many years, and ISDA suggests that the Commission do the same.

- Similarly, the position limits rules themselves, if adopted without meaningful clarification or revision, continue to contain a series of ambiguities and practically unworkable conditions or requirements. For example:
    - The definition of or process for determining "estimated deliverable supply," which is to be used in developing spot month limits, remains entirely opaque.
    - The various reporting conditions applicable to both market participants and exchanges in connection with seeking, obtaining and maintaining a valid exemption from position limits are overly broad and burdensome and, in several instances, practically impossible. In addition, the proposed prohibitions against obtaining certain exemptions (*i.e.*, spread and cross-commodity exemptions) during the spot month or the last five trading days of a contract will unnecessarily impair the ability of commercial market participants to hedge.
    - Procedurally, to the extent that the Commission does move forward to finalize any aspect of the position limits rules, we again request that the Commission avoid an expedited implementation process that ignores the multiple lessons learned via the Dodd-Frank rulemaking process. Specifically, for market participants that transact in multiple jurisdictions, the Commission must provide clear rules and guidance addressing its plans to harmonize its position limits efforts with those of its fellow global regulators.
    - The Commission still needs to address numerous operational issues and questions before the 2016 Proposal is adopted, if it is to be both effective and efficient, several of which are detailed below.

Finally, in addition to these comments, to the extent the Commission ultimately determines to proceed with a final rulemaking, we urge the Commission to roll out the final rules through a flexible, phased approach, as implementation of any compliance program will cause significant operational difficulties, and costs, for both markets and market participants. We specifically suggest that the Commission include a detailed, phased implementation program at least nine months long to accompany any final position limits rule or rules. We discuss this recommendation further in Part III below.

I. A number of concerns raised in previous ISDA comments on position limits and aggregation proposals remain unaddressed.

As noted above, ISDA, either on its own or jointly with other trade associations, has previously submitted a series of comment letters evidencing its concerns with the CFTC's proposed position limits rules. In submitting this letter, we reference and re-incorporate our prior submissions and briefly review the key components of those comments.

A. The Commission must find that position limits are both necessary and appropriate for a specific commodity before imposing such limits, and the Commission must consider the costs and benefits of its proposals.

On February 10, 2014, ISDA (in collaboration with the Securities Industry and Financial Markets Association or "SIFMA")[4] submitted a comment letter (the "**2014 Letter**") to the Commission regarding the Commission's 2013 Proposal.

As noted in the 2014 Letter, to support the legal sufficiency of the 2013 Proposal, the CFTC continues to rely on its incorrect conclusion that the Dodd-Frank amendments to CEA section 4a(a) amounted to an unqualified mandate that the Commission impose position limits. On the contrary, the statute unambiguously identifies standards that the CFTC must follow when it purports to exercise its position limits authority. Yet in every instance, whether with respect to the requirement of a necessity finding, a determination of appropriateness, or even in defining the core term "excessive speculation," the Commission ignores Congress's instruction and instead defaults to its incorrect interpretation of the statute. No plausible interpretation of CEA section 4a(a) permits the CFTC to disregard the instruction of Congress in this way.[5]

The 2014 Letter also stressed that the CFTC must adequately consider the costs and benefits of the proposed position limits rules. Significantly, the United States District Court for the District of Columbia vacated the original rules before reaching the cost benefit challenges presented in that lawsuit. An appropriate assessment of the costs and benefits of the proposed position limits rules must involve a realistic analysis of the impact position limits will have on commodities markets, market participants, and the economy generally.[6] The various proposals published by the CFTC have failed to

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4 *See* Comment Letter, *available at* https://www2.isda.org/attachment/NjI5OA==/FINAL%20ISDA-SIFMA%20Position%20Limits%20NPRM%20Comment%20Letter%20(Feb%20%2010%20with%20Annexes).pdf.

5 For further analysis, *see generally* 2014 Letter at page 4.

6 As recently reinforced by the D.C. Circuit Court of Appeals, the CFTC's cost-benefit discussion should identify marginal benefits of the rule in the existing regulatory regime, identify benefits of the rule that do not depend on later rulemaking, evaluate the costs and benefits appropriately (given limitations on available data), *see Inv. Co. Inst*. v. *CFTC*, 720 F.3d 370, 378–79 (D.C. Cir. 2013), consider adequately incremental efficiency costs to market participants, and adequately

provide such an analysis.[7] Incidentally, and for example, the cost-benefit analysis in the 2016 Proposal features highly unrealistic estimates of the time and cost that will be required to implement and maintain compliance programs.

B. Residual concerns with 2014 aggregation proposal.

On November 12, 2015, ISDA submitted a comment letter[8] to the Commission regarding the Commission's September 29, 2015 supplement to its proposed rules on aggregation limits for derivatives[9] (the "**2015 Proposal**"). That comment letter, which generally supported the Commission's proposed approach to aggregation, as amended, also included a few specific requests which we continue to believe are fundamental to a successful aggregation program.

First, ISDA requested that the Commission clarify that the 2015 Proposal does not prohibit the sharing of information when used only for risk management and surveillance and other non-trading purposes, such as, for example, information used to assess collateral requirements or verify compliance with applicable credit limits or information maintained by a custodian or other service provider that does not control trading. ISDA also requested that the Commission clarify that there is no presumption of control for trading and aggregation purposes where an owner entity has an ownership interest in an owned entity that is less than 25 percent and does not actually exercise control over trading decisions and strategy of the owned entity, and thus that the relevant exemption and disaggregation notice filing are only required for entities in which an owner maintains an ownership interest of 25 percent or greater in an owned entity (as opposed to requiring the submission of a notice at 10 percent ownership, which is the threshold set forth in the Commission's amended aggregation proposal). Lastly, ISDA requested that the Commission provide that an owner entity filing a notice of trading independence in order to claim an exemption from aggregation under the aggregation rules should be required to make subsequent filings only in the event of a change in its compliance with the conditions of the exemption.

To the extent the Commission moves to finalize its aggregation rules, we again encourage the Commission to consider and incorporate these clarifications.

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address the probability that the rule will be of no net benefit because of the expected circumstances of its application, *see Bus. Roundtable* v. *SEC*, 647 F.3d 1144, 1155–56 (D.C. Cir. 2011).

[7] For further analysis, *see generally* 2014 Letter at page 22.

[8] *See* Comment Letter, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60529.

[9] *See* 80 Fed. Reg. 58635.

II. ISDA and its members continue to have concerns about the proposed position limits rules, both from a practical and logistical perspective and on several substantive issues.

A. The delegation of exemptive authority to the exchanges must be done in a way that allows the exchanges to perform this function in a meaningful way and with appropriate deference by the Commission to the experience and expertise that the exchanges offer.

The 2016 Proposal would delegate to exchanges the authority to grant applications for certain exemptions from the position limits rules – namely, for non-enumerated bona fide hedging positions ("**NEBFHs**"), certain spread positions, and enumerated anticipatory bona fide hedges. ISDA very much supports this recognition by the Commission of both (i) the experience and expertise that the exchanges are able to offer to this aspect of the position limits rules and (ii) the practical, cost and logistical limitations that the Commission would face if attempting to administer the exemption process on its own. However, in order to ensure realization of these objectives, ISDA strongly encourages the Commission to clarify, to the maximum extent possible, its intention to actually delegate these functions to the exchanges, and to not micromanage or otherwise interfere with or second-guess the exchange process in a way that itself becomes disruptive to the markets and market participants.

In particular, the 2016 Proposal should clarify and confirm that the exchanges have broad authority to determine the standards and requirements for exemptions from position limits, and to grant such exemptions, and the Commission's authority to review such actions should be limited to enumerated circumstances. The 2016 Proposal should confirm the broad authority of the exchanges and provide specific standards for Commission review and override of exchange actions. Although the 2016 Proposal sets forth certain rulemaking, recordkeeping and other mechanical requirements for exchanges granting exemptions, it does not provide guidance on the nature of the delegation, the scope of the authority granted to exchanges or the situations in which the Commission might review and override the exchanges' action. This potentially places the exchanges in an untenable position. For example, the exchanges must not be limited by prior, non-finalized Commission attempts to pre-empt the analysis that may be appropriate for a given request for a NEBFH exemption. In light of each exchange's experience and expertise, the Commission should expressly permit exchanges to consider the entire facts and circumstances, as appropriate, when reviewing applications for an exemption from position limits. ISDA supports the Commission's determination that, by delegating to exchanges the ability to review and grant applications for exemptions, markets and market participants will benefit by permitting exchanges to bring their own experience and expertise to the review and analysis of a given set of facts and circumstances.

If the Commission determines to review an exchange-granted exemption, there should be a defined process for conducting such review. More importantly, there should be

recognition by the Commission that this review authority, if used on an unpredictable and unnecessarily frequent (or even ad-hoc) basis, will impair the utility of both exemptions and the exemption process for market participants. Similarly, if the Commission does intend to reverse an exemption, the proposal to permit a market participant a single day to exit the position that is in excess of a limit[10] (in the absence of a previously granted exemption) is entirely inadequate. In all instances, the time period required will be dependent on the underlying commodity involved, the size of the position, the type of market participant, and a range of other factors, and should in no event be less than one business day. On this point, ISDA encourages the Commission to remain mindful of its statutory mandate to ensure fair, efficient and well-functioning markets and the express absence of any statutory mandate to set arbitrary firm position limit levels to the detriment of efficient and well-functioning markets.

Finally, ISDA continues to be concerned about the lack of clarity on coordination among different exchanges with respect to limits and exemptions across markets. Each exchange should have the authority to determine the appropriate exemptions for its markets. However, the exchanges should not be subject to different review determinations by the CFTC with respect to exemptions granted from the limits on contracts for the same or related commodities. This also argues for the establishment of standards applicable to all exchanges, so that actions by different exchanges are dealt with in a consistent manner. In addition, it is unclear from the 2016 Proposal whether or how exchanges will need to coordinate the granting of exemptions with respect to contracts on the same underlying commodities that trade on more than one exchange. Guidance on this issue might be helpful as well.

B. In the absence of any support for their necessity or usefulness and considering the likelihood of significant, negative market impact should they be implemented, the Commission should not apply position limits outside the spot month.

ISDA continues to urge the Commission to withdraw in its entirety any aspect of the 2016 Proposal that would impose position limits outside of the spot month (*i.e.*, non-spot month limits). There continues to be no justification for non-spot-month limits, and such limits are not supported by any data that has been presented by the Commission. As a result, the proposed position limits, to the extent they would apply in the non-spot month, are arbitrary and capricious and thus cannot be lawfully adopted as final.[11]

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[10] *See* 78 Fed. Reg. 75680 at 75713.

[11] *See Motor Vehicle Mfrs. Ass'n of the U.S.* v. *State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 41 (1983) (permitting an agency's action in promulgating rules under informal procedures to "be set aside if found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'" (quoting 5 U.S.C. § 706(2)(A)).

Non-spot month limits could have significant impact, and could result in a shift in market structure. Out-the-curve liquidity could disappear, along with the ability to hedge for market participants, as a direct result of the imposition of inappropriate non-spot month position limits. Similarly, markets could become further fragmented, as they have in response to other of the CFTC's Dodd-Frank rulemakings, including the swap execution facility rules, creating a U.S. versus rest-of-the-world divide. Moreover, and more importantly, nothing in the 2016 Proposal, like the prior proposals, provides any support for the proposition that these negative effects will be offset by greater protections to the market and market participants from these limits. They are therefore very likely to harm market participants without any corresponding benefits.

The Proposal's methodology for setting non-spot-month limits is not only an arbitrary formula borrowed from decades-old precedent (and not reviewed for appropriateness in the context of today's markets or the twenty-eight different commodity markets to which the Commission seeks to apply it), but is pegged to data that the Commission itself acknowledges as unreliable in the 2013 Proposal -- imprecise calculations of open interest.[12]

The CFTC has failed to explain why it did not select accountability levels, rather than fixed position limits, to manage and monitor traders with large positions outside of the spot month. On this point, ISDA again observes that the CEA does not prohibit accountability levels, and that the CEA authorizes the Commission to set limits on positions in contracts on physical, non-excluded commodities only as necessary and appropriate to prevent "excessive speculation." Accountability levels will permit the Commission to achieve the same purpose as position limits, but without imposing undue costs on market participants that will accompany fixed limits, and ISDA continues to encourage the Commission to consider where and how accountability limits may be used to mitigate the cost and burden impact of its positions limits proposals. Exchanges have used accountability limits as a successful surveillance and market monitoring tool for many years, and the Commission should embrace rather than reject that experience and learning.

C. The Commission should not apply limits for financially or cash-settled contracts which would provide no benefit and which will contradict the policy objectives of the CEA by making it more difficult for commercial firms to manage and hedge against commercial risk.

Like non-spot month limits, if limits generally are too low and apply to financially settled contracts, the traders that provide the liquidity against which hedgers and commercial

[12] *See* the CFTC's description in the 2013 Proposal of the swap data repository data that may serve as a primary input source for determining open interest, which is the fundamental variable of the proposed formula for non-spot month limits: "[s]everal reporting entities hav[e] submitted data that contained stark errors." 78 Fed. Reg. at 75734 & n.428.

market participants trade may be forced to exit the market or to curtail their trading. A structural market shift could result wherein the futures and swaps markets fail to serve as a venue for price discovery and managing and hedging commercial risk.

The Commission has not demonstrated that financially or cash-settled contracts are either disruptive to the markets or relevant in any way for the purpose of the concerns the Commission attempts to address with position limits. Because a cash-settled contract does not, by definition, result in any activity in the underlying physical commodity (these contracts are, instead, dependent upon and generally price based on a reference to the physical market), the potential for a position in a cash-settled contract to disrupt or distort the price of a physical commodity is essentially non-existent. There is no evidence, nor does the Commission offer any evidence, that trading in cash-settled contracts influences the prices of either physically settled contracts or of physical commodities, generally.

Rather, these markets are used by both commercial and financial hedgers alike in the process of managing risks resulting from activity in the physical markets. The benefit or purpose of limits on positions in cash-settled contracts is unidentified, yet the costs due to reduced liquidity for hedgers that use the cash-settled contacts will be tangible and inevitable. As noted above, accountability levels are a practical and viable tool frequently used by exchanges to address surveillance and market monitoring concerns with respect to cash or financially settled contracts, and we encourage the Commission to consider how to incorporate accountability levels, rather than hard limits, into its own regulatory toolbox for these products.

D. The current "estimated deliverable supply" calculation is ambiguous and should be subject to a more formal notice and comment process.

The "estimated deliverable supply" methodology that is proposed remains ambiguous and unreliable (*i.e.*, it is a single unarticulated methodology for all 28 commodities subject to the proposed rules). In the future, ISDA's concern is that this definition could become a tool the CFTC uses effectively to lower position limits without going through a formal notice and comment process.

Under the 2013 Proposal, the CFTC may "rely" on its own estimates of deliverable supply, but the Proposal does not indicate how the CFTC would arrive at its own deliverable-supply estimates.[13] The Commission notes that, as an alternative to relying on its own estimate, it could rely on the estimates provided by designated contract markets—

[13] Even if the Commission were to determine to rely on its own estimates of deliverable supply, we believe that the CFTC should always seek input on the methodology and data sources used to make its estimates. Specifically, the CFTC should include a requirement that it consult with both exchanges and commercial market participants regarding the scope of deliverable supply of each commodity. If the CFTC fails to include input from these constituents, in determining deliverable supply, the spot month position limits may fail to reflect accurate or reliable levels of estimated deliverable supply.

which are required, under the proposed rules, to submit such estimates to the CFTC. If the CFTC were to specify how it intends to develop its own estimates of deliverable supply, the definition would be less susceptible to arbitrary interpretation. For that reason, the Commission should always publish its estimates of deliverable supply for public review and comment – and the CFTC should always identify the data that it uses (even if that data is not publically available) to reach its estimates. Moreover, the CFTC should permit challenges to the CFTC's estimated levels by demonstrating that they do not accurately reflect actual market supplies.

E. The proposed reporting conditions applicable to exemptions are excessively burdensome, impractical and unworkable, and exemptions should remain available for positions held during the spot month where appropriate.

As previewed above, the various reporting conditions applicable to both market participants and exchanges in connection with seeking, obtaining and maintaining a valid exemption from position limits are overly broad and burdensome and, in several instances, practically impossible. For example, proposed rule 150.9(a)(6) (for non-enumerated bona fide hedges) and proposed rule 150.10(a)(6) (for spreads) requires a report of the position for which the exemption is obtained, and the report must be "updated and maintained." In our view, market participants should not be required to update a report every time they change/modify their position, which would not add value to either the exchange's or the Commission's oversight. More importantly, neither exchanges nor the Commission are likely to have resources available to meaningfully review such reports. ISDA observes that the CFTC always retains the ability to obtain this information, as needed, for example via a special call, and ISDA encourages the Commission not to finalize rules that would impose impractical and unnecessary reporting requirements.

Similarly, proposed rule 150.10(a)(3)(iii) requires an applicant for a spread exemption to identify "the maximum size of all gross positions in derivative contracts to be acquired by the applicant during the year after the application is submitted." For reasons similar to those noted above, this is far too broad and practically impossible, as no market participant can predict trading activity over the next year.

In addition, the proposed prohibitions against obtaining certain exemptions (*i.e.*, spread and cross-commodity exemptions) during the spot month or the last five trading days of a contract will unnecessarily impair the ability of commercial market participants to hedge. For both spread exemptions and cross-commodity exemptions, if appropriate in the context of the facts and circumstances (as determined by the exchanges in the context of their experience and expertise), the exchanges should be empowered to permit these exemptions to be maintained into the spot month. The five-day limit establishes an arbitrary threshold that should not be required to be applied across-the-board. The exchanges are in a better position to determine whether a time limit on exemptions is appropriate for certain markets and, if so, what that limit should be.

F. The Commission should address cross-border harmonization of position limit calculations, as the current proposal would leave members in a state of uncertainty in handling cross-border issues.

As noted above, from a procedural perspective, to the extent that the Commission does move forward to finalize any aspect of the position limits rules, we continue to request that the Commission avoid an expedited implementation process that ignores the multiple lessons learned via the Dodd-Frank rulemaking process. Specifically, for market participants that transact in multiple jurisdictions, the Commission must provide clear rules and guidance addressing its plans to harmonize its position limits efforts with those of its fellow global regulators. This was and remains a major area of uncertainty and ambiguity for market participants as they seek to comply with the broader set of the Commission's Dodd-Frank swaps rulemakings. ISDA and its members also hope to avoid a position limits implementation process that could independently disrupt domestic and global markets if done without careful cooperation among and between global regulators.

G. The Commission should correct the text of proposed Rule 150.5, which by its terms would cover contracts on excluded commodities and is clearly in error.

We note that the 2016 Proposal, in Rule 150.5(b), would extend the requirements for exchange hedge exemption rules that are imposed under the 2016 Proposal, as well as the procedures for NEBFH exemptions (including Commission review), to contracts on excluded commodities.[14] This is clearly an error and should be rectified. First, there is no basis in the Dodd-Frank amendments to the CEA for this extension of the Commission's authority over exchange position limits on excluded commodities. To the contrary, that authority is clearly limited to position limits on contracts on physical commodities.[15] Moreover, the Proposal in this regard is inconsistent with longstanding regulation and practice, pursuant to which the exchanges have exercised authority over position limits on excluded commodities. That system has worked well and no problems or issues have been identified, by Congress, the CFTC or others that would support the proposed rule. Further, the Commission has not advanced any reasons for this radical change in position limit regulation, or any need for the amendments to Rule 150.5. Indeed, there is no discussion of this issue at all in the entire release; it appears only in the text of the rule itself. Under these circumstances, the Commission should rectify what is clearly an error in the 2016 Proposal.

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[14] *See* proposed Rule 150.5(b).

[15] CEA Section 4a(a)(2).

H. The Commission still needs to address numerous operational issues and questions before the 2016 Proposal is adopted if it is to be both effective and efficient.

In addition to the comments above, there are a series of other specific concerns that ISDA believes must be addressed in order for any final rule on position limits to prove effective and workable:

- Under the 2016 Proposal's guidance on spread exemptions, the exchange must certify that granting a spread exemption increases liquidity; in contrast, the CEA requires the CFTC to adopt any position limits that it concludes are necessary in a way that does not impair liquidity.[16] As a result, the CFTC's proposal not only fails to comply with the statutory mandate, but actually reverses the CEA liquidity requirement and instead places the liquidity burden on the exchanges or market participants seeking an exemption. The Commission should remove this from the conditions applicable to approving a spread exemption. The purpose of a spread exemption is not to increase liquidity, but rather to recognize the more limited speculative opportunity created by such positions.

- With respect to natural gas, the proposed spot month limits (up to 5,000 contracts if all financially settled) are much smaller than the existing ability to trade – 5,000 per exchange across three exchanges and unlimited positions in over-the-counter contracts.[17] The proposed spot month limits will materially alter the functioning of the natural gas markets and the Commission has to be mindful of this outcome. The spot month limit for natural gas must be raised to reflect the reality of market conditions. In addition, unlike other commodities, natural gas options expire on the penultimate day of the futures contract, and so a market participant may receive a large position in futures contracts, if the option is in the money, during the spot month. Instruments that expire on the penultimate day of the futures contract should not be included in the position limits calculation – consistent with existing exchange rules. Finally, for these reasons and others, of the three alternatives proposed by the Commission in its 2013 Proposal regarding the conditional spot month limit,[18] to the extent the Commission declines to eliminate position limits for financially settled contracts, we support the second alternative (*i.e.*, setting an expanded spot-month limit for cash settled contracts at five times the level of the limit for the physical-delivery core referenced futures contract, regardless of positions held in the underlying physical-delivery contract).

[16] *See* CEA Section 4a(a)(3).

[17] *See* 78 Fed. Reg. at 75757.

[18] *See* 78 Fed. Reg. at 75738.

- As ISDA has previously commented, to ensure that the proposed exemption for an "eligible affiliate" covers sister affiliates, the Commission should define that term consistently with the definition of "eligible affiliate counterparty" under CFTC Rule 50.52. The exemption should not only apply to subsidiaries but should also apply to sister affiliates. That is, the Commission's speculative position limits rules should treat aggregated entities, including sister affiliates, as a single person.

- Under the proposed rules, the ability of a market participant to apply for an exemption retroactively, after exceeding a position limit, is not included. This is a fundamental component of the position limits programs currently implemented by exchanges, and failing to include this functionality in the Commission's position limits rules would create an inefficient system that forces market participants to either (i) seek exemptions even if ultimately not needed or (ii) curtail necessary trading and hedging activity while they wait for the completion of the administrative exemption approval process.

III. To the extent the Proposal is adopted, the Commission should enact a flexible and phased rollout of the position limit rules to allow for the building and implementation of compliance programs.

Building and implementing a compliance program to respond to the 2016 Proposal will present significant operational difficulty for market participants, exchanges, and the Commission. As a result, we urge the Commission to adopt a flexible and phased rollout of the position limits rules. We specifically suggest that the Commission include a detailed, phased implementation program at least nine months long to accompany any final position limits rule or rules. This phasing period should begin after the deadline for the completion of the exchanges' rulemaking process. Given how costly and complex it will be for market participants to modify their systems to comply with the extensive reporting requirements in the Proposal, it is important that these market participants be able to understand the exchanges' information requirements before making such changes.

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ISDA appreciates the opportunity to provide these comments. If we may provide further information, please do not hesitate to contact the undersigned or ISDA staff.

Sincerely,

Steve Kennedy
Global Head of Public Policy

cc: Timothy G. Massad, Chairman

Sharon Y. Bowen, Commissioner

J. Christopher Giancarlo, Commissioner

Stephen Sherrod, Senior Economist, Division of Market Oversight

Riva Spear Adriance, Senior Special Counsel

Lee Ann Duffy, Assistant General Counsel, Office of General Counsel

Steven Benton, Industry Economist, Division of Market Oversight

Kenneth M. Raisler, Sullivan & Cromwell LLP