

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Part 151**

**RIN: 3038-AD82**

**AGGREGATION UNDER PART 151, POSITION LIMITS FOR FUTURES AND SWAPS**

**AGENCY:** Commodity Futures Trading Commission

**ACTION:** Notice of Proposed Rulemaking

**SUMMARY:** On November 18, 2011 the Commodity Futures Trading Commission (“Commission” or “CFTC”) published in the Federal Register a final rule and interim final rule, which establish a position limits regime for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. In response to a petition for exemptive relief under section 4a(a)(7) of the Commodity Exchange Act and certain comments to the Commission’s interim final rule for spot-month limits for cash-settled contracts, this notice proposes certain modifications to the Commission’s policy for aggregation under the position limits regime in part 151.

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN number 3038-AD82, by any of the following methods:

- Agency Web Site: <http://www.cftc.gov>
- Mail: David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21<sup>st</sup> Street, NW, Washington, DC 20581
- Hand Delivery/Courier: Same as mail above

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to [www.cftc.gov](http://www.cftc.gov). You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedure established in CFTC regulation 145.9 (17 CFR 145.9).

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from [www.cftc.gov](http://www.cftc.gov) that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Stephen Sherrod, Senior Economist, Division of Market Oversight, at (202) 418-5452, [ssherrod@cftc.gov](mailto:ssherrod@cftc.gov); Neal Kumar, Counsel, Office of General Counsel, at (202) 418-5353, [nkumar@cftc.gov](mailto:nkumar@cftc.gov), Riva Spear Adriance, Senior Special Counsel, Division of Market Oversight, at (202) 418-5494, [radriance@cftc.gov](mailto:radriance@cftc.gov), Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

## A. Introduction

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).<sup>1</sup> Title VII of the Dodd-Frank Act<sup>2</sup> amended the Commodity Exchange Act (“CEA”)<sup>3</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission’s rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight.

As amended by the Dodd-Frank Act, sections 4a(a)(2) and 4a(a)(5) of the CEA mandate that the Commission establish limits for futures and option contracts traded on a designated contract market (“DCM”), as well as swaps that are economically equivalent to such futures or options contracts traded on a DCM. This mandate directed the Commission to establish position limits on the expedited timeframe of 180 days from the date of enactment for exempt commodities and 270 days from the date of enactment for agricultural commodities. In response to the Congressional mandate, the Commission proposed and ultimately adopted final rules in

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<sup>1</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm>.

<sup>2</sup> Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010.”

<sup>3</sup> 7 U.S.C. 1 et seq.

part 151 regarding position limits for 28 physical commodity futures and option contracts (“Core Referenced Futures Contracts”) and physical commodity swaps that are economically equivalent to such contracts (collectively with Core Referenced Futures Contracts referred to as “Referenced Contracts”).<sup>4</sup>

The regulations in the part 151 position limits regime, consistent with the Commission’s historical approach to position limits,<sup>5</sup> generally includes three components: (1) the level of the limits, which set a threshold that restricts the number of speculative positions that a person may hold in the spot-month, individual month, and all months combined,<sup>6</sup> (2) an exemption for positions that constitute bona fide hedging transactions,<sup>7</sup> and (3) rules to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.<sup>8</sup>

The Commission published Part 151 in the Federal Register in November of 2011, but determined to phase in compliance with the new position limits regime.<sup>9</sup> Specifically, 60 days after the Commission publishes a joint final rulemaking with the Securities and Exchange

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<sup>4</sup> See Position Limits for Futures and Swaps, 76 FR 71626, Nov. 18, 2011.

<sup>5</sup> See 17 CFR 150 (1999). Prior to the Dodd-Frank Act rulemaking, the Commission administered position limits under Commission regulation 150, which established federal position limits on certain enumerated agricultural contracts. The position limits on these agricultural contracts are referred to as “legacy” limits, and the listed commodities are referred to as “enumerated” agricultural commodities.

<sup>6</sup> See 17 CFR 151.4.

<sup>7</sup> See 17 CFR 151.5. See also CEA section 4a(c)(1) & (2).

<sup>8</sup> See 17 CFR 151.7.

<sup>9</sup> See 76 FR at 71632; and 151.4(d).

Commission (“SEC”) further defining the term “swap” in the Federal Register,<sup>10</sup> the rules require market participants to comply with spot-month limits for the 28 physical commodities as well as non-spot month limits for the enumerated agricultural contracts. The Commission also established the spot-month position limit levels for cash-settled contracts on an interim final basis and solicited comments on the appropriateness of such levels.<sup>11</sup> Finally, for the remaining non-spot month limits (i.e., all commodities other than the enumerated agricultural commodities), the rules require compliance on the first calendar day of the third calendar month following a Commission order providing the numerical level of the non-spot month limits based upon a formula provided in part 151.<sup>12</sup>

As noted above, one of the three major components to the Commission’s position limits regime is determining which accounts and positions a person must aggregate.<sup>13</sup> The final rule in regulation 151.7 largely adopted the Commission’s existing aggregation policy under regulation 150.4. The aggregation provisions generally require that unless a particular exemption applies, a person must aggregate all positions for which that person controls the trading decisions with all the positions for which that person has a 10 percent or greater ownership interest in an account or

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<sup>10</sup> Id. See also Further Definition of “Swap,” “Security-Based Swap,” and “Security Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818, May 23, 2011 (notice of proposed rulemaking).

<sup>11</sup> See 76 FR at 71637.

<sup>12</sup> See 151.4(d)(3).

<sup>13</sup> The proposed rules in this release deal solely with the aggregation of accounts.

position, as well as the positions of two or more persons acting pursuant to an express or implied agreement or understanding.<sup>14</sup>

Regulation 151.7 retained the scope of exemptions from aggregation that were contained in regulation 150.4, including the ownership interests of limited partners in pooled accounts,<sup>15</sup> discretionary accounts and customer trading programs of futures commission merchants (“FCM”),<sup>16</sup> and eligible entities with independent account controllers that manage customer positions (“IAC” or “IAC exemption”).<sup>17</sup> Further, the Commission provided two additional exemptions for underwriters of securities,<sup>18</sup> and where the sharing of information between persons would cause either person to violate federal law or regulations adopted thereunder.<sup>19</sup> With the exception of the exemption for underwriters, market participants were required to file a notice with the Commission demonstrating compliance with the conditions applicable to each exemption.<sup>20</sup>

## B. Aggregation Petition and Interim Final Rule Comments

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<sup>14</sup> See 17 CFR 151.7(a) & (b). In addition, the Commission included a new aggregation provision for persons with positions in accounts with identical trading strategies. This provision applies even if a person does not control trading and has a less than 10 percent interest in an account. See 17 CFR 151.7(d).

<sup>15</sup> 17 CFR 151.7(c).

<sup>16</sup> 17 CFR 151.7(e)

<sup>17</sup> 17 CFR 151.7(f)

<sup>18</sup> 17 CFR 151.7(g).

<sup>19</sup> See 17 CFR 151.7(i).

<sup>20</sup> See 17 CFR 151.7(h). The exemption for federal law information sharing restrictions in regulation 151.7(i), also requires that market participants submit an opinion of counsel that the sharing of information would cause a violation of federal law.

On January 19<sup>th</sup>, 2012 the Commission received a petition for interim relief from, among other things, part 151's provision for aggregation of positions across accounts (hereinafter "aggregation petition")<sup>21</sup> under CEA section 4a(a)(7) for purposes of part 151.<sup>22</sup> The Commission has also received letters that generally support the aggregation petition.<sup>23</sup> In addition, several commenters opined on the aggregation rules in connection with the Commission's request for comment on the interim final rule for spot-month position limits on cash-settled contracts.<sup>24</sup> As further discussed below, the aggregation petition and certain interim final rule commenters argue that the Commission should clarify the exemption provided in regulation 151.7(i) where the sharing of information would cause a violation of federal law and expand the exemption to include circumstances in which state or foreign law would prohibit the sharing of information necessary to comply with the aggregation standard. In addition, the aggregation petition and commenters request that the Commission create an aggregation exemption for owned non-

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<sup>21</sup> The aggregation petition was originally filed by the Working Group of Commercial Energy Firms; certain members of the group later reconstituted as the Commercial Energy Working Group. Both groups (hereinafter, collectively, the "Working Groups") wish to present one voice with respect to the petition. A copy of the aggregation petition can be found on the Commission's website at [www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/wgap011912.pdf](http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/wgap011912.pdf).

<sup>22</sup> CEA section 4a(a)(7) specifically provides: "The Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits." 7 U.S.C. 6a(a)(7).

<sup>23</sup> See Commodity Markets Council ("CMC") on March 9, 2012; Edison Electric Institute and the American Gas Association on March 1, 2012; and the Futures Industry Association ("FIA") on March 26, 2012.

<sup>24</sup> See FIA on January 17, 2012 ("CL-FIA"); Atmos Energy Holdings ("ATMOS") on January 17, 2012 ("CL-Atmos"); Edison Electric Institute ("EEI") on January 17, 2012 ("CL-EEI"); and American Gas Association ("AGA") on January 17, 2012 ("CL-AGA").

financial entities.<sup>25</sup> In this connection, some commenters argue that the Commission should only aggregate on the basis of control and not ownership. Finally, one commenter requests that the Commission expand the exemption provided in 151.7(g) for the ownership interests of broker-dealers connected with specific market-making activity.

#### 1. Exemption for Federal Law Restriction

As noted above, section 151.7(i) provides an exemption from aggregation where the sharing of information between persons would cause either person to violate federal law. The aggregation petition seeks to clarify that the exemption would apply to potential violations of federal law,<sup>26</sup> and also seeks to expand the exemption to apply to local, state, foreign and international law.<sup>27</sup> According to the aggregation petition, the standard in the rule could be read as limited to per se violations of the law, but not cover “indicia of improper market activity.”<sup>28</sup> Further, market participants may not be able to rely on the exemption where they take certain action to avoid the “potential” of a violation. Moreover, the Working Groups argue that the filing of an opinion of counsel to claim the exemption may act as a disincentive for market

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<sup>25</sup> The Commission initially proposed but did not adopt an exemption that would have permitted persons with an ownership or equity interest in a non-financial entity not to aggregate the positions or accounts of the non-financial entity provided the person filed an application demonstrating compliance with certain conditions. See Position Limits for Derivatives, 76 FR 4752, 4762-63, Jan. 26, 2011. The Commission determined not to adopt this proposed exemption, but instead generally retained the Commission’s existing aggregation policy. See 76 FR 71626.

<sup>26</sup> Aggregation petition at 18.

<sup>27</sup> Id. at 24.

<sup>28</sup> Id. at 17.

participants to avail themselves of the exemption because an adverse opinion would harm the applicant.

Similar to the petition, certain commenters to the interim final rule argue that the requirement that the sharing of information “would cause” a violation of federal law sets the bar too high to claim the exemption.<sup>29</sup> In this connection, commenters opine that such a high standard makes it too difficult to obtain an opinion of counsel to reach the necessary conclusion.<sup>30</sup> Therefore, several commenters argue that the Commission should clarify that the standard to claim the exemption is that the sharing of information presents either party with a reasonable risk of violating federal law.<sup>31</sup> Commenters also believe that the Commission should expand this exemption to cover potential violations of state and foreign law.<sup>32</sup> Finally, one commenter suggests that the Commission should remove the requirement to file an opinion of counsel to claim the exemption, which the commenter believes is burdensome.<sup>33</sup>

## 2. The Owned Non-Financial Entity Exemption and Aggregation Based on Ownership Generally

As noted above, the proposed rules for part 151 proposed that a person with a 10 percent or greater ownership or equity interest in a non-financial entity need not aggregate the positions of the non-financial entity with his own positions, if the person filed an application with the Commission demonstrating compliance with certain conditions. This exemption was not part of

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<sup>29</sup> See CL-FIA at 16-17; CL-Atmos at 5-6; and CL-EEI at 17-18.

<sup>30</sup> CL-EEI at 17-18; and CL-Atmos at 5-6.

<sup>31</sup> CL-FIA at 16-17; CL-EEI at 17-18; and CL-Atmos at 5-6.

<sup>32</sup> CL-AGA at 2; CL-FIA at 16-17; CL-EEI at 17-18; and CL-Atmos 5-6.

<sup>33</sup> CL-AGA at 5.

the Commission's previously existing aggregation policy for position limits on the enumerated agricultural contracts in part 150. Ultimately, the Commission determined to largely retain its existing aggregation policy with limited additional exemptions, and did not adopt the proposed owned non-financial entity exemption.

According to the aggregation petition, the Commission's failure to include an exemption for a person's ownership interest in a non-financial entity will result in "serious adverse consequences" to the Working Groups participants, and represents a "drastic departure from current market practices."<sup>34</sup> In light of these consequences, the aggregation petition includes a draft owned non-financial entity exemption for the Commission to incorporate into its aggregation policy. The draft exemption is similar, but not identical to, the owned non-financial entity exemption that the Commission proposed but did not adopt as part of its final rule.<sup>35</sup>

The aggregation petition suggests that without an owned non-financial entity exemption, the rules would force information sharing and the coordination of trading between entities, which would be contrary to existing best practices for antitrust compliance.<sup>36</sup> Given the conflict with such practices, the Working Groups argue that compliance with the position limits rules may create liability under the antitrust laws. The Working Groups also argue that the aggregation rules, as adopted by the Commission, are contrary to certain industry best practices that "go beyond the letter of the law or applicable regulations in order to ensure that activities of

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<sup>34</sup> See Aggregation petition, pg. 5-16.

<sup>35</sup> Id. at Exhibit A.

<sup>36</sup> Id. at 7. The Working Groups cite to best practices issued by the Federal Trade Commission and the U.S. Department of Justice regarding antitrust guidelines ("Antitrust Guidelines for Collaboration Among Competitors"). Available at [www.ftc.gov/os/2000/04/ftcdojguidelines.pdf](http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf)

unregulated entities are kept separate from activities of regulated entities to the greatest extent possible.”<sup>37</sup>

The aggregation petition also opines that the information sharing between persons necessary to comply with the position limits would impose significant costs that would impact the physical and derivatives markets.<sup>38</sup> According to the Working Groups, entities with complex corporate structure arrangements that include established information barriers to ensure compliance with other regulatory requirements will face significant costs to monitor positions on an intra-day basis, notwithstanding the current lack of control over such trading.<sup>39</sup> In this case, the Working Groups claim that aggregation will significantly impact holding companies and firms that invest in commercial firms, particularly in the context of “passive investment.” Such firms will have to monitor the commercial firm for compliance with position limits and “insert itself into the management of the firm.”<sup>40</sup> In addition, according to the Working Groups, the aggregation of futures, cleared swaps and bilateral swaps across entities on a real time basis requires technology that does not yet exist.<sup>41</sup> The aggregation petition also points to concerns

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<sup>37</sup> Id. at pg. 9.

<sup>38</sup> Id. at 10-16.

<sup>39</sup> Similarly, according to the aggregation petition, the aggregation requirements impose significant compliance burdens where ownership interests may involve international companies, or where a corporate structure includes multiple levels of companies between a parent company and a child company with an account or position.

<sup>40</sup> Id. at 11.

<sup>41</sup> Id.

surrounding allocation and reporting of positions, sharing of information on physical inventories, and information sharing for the unwinding of accounts.<sup>42</sup>

The Working Groups assert that the position limit rules represent a “drastic departure from the *status quo*.”<sup>43</sup> According to the aggregation petition, the Commission’s position limits previously only applied to agricultural commodity futures and options on futures, and DCM position limits applied to futures on energy and metals commodities.<sup>44</sup> However, the Commission’s new position limits rules will apply to swaps for the first time. Further, the Working Groups contend that DCMs previously provided “aggregation exemptions that provided the flexibility necessary for commercial enterprises to manage their position limit obligations across entities without undue burden.”<sup>45</sup> In addition, the aggregation of accounts across commercial firms could lead to decreased liquidity and competition in the energy derivatives market.

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<sup>42</sup> Id. at 12-14.

<sup>43</sup> Id. at 14.

<sup>44</sup> The Commission notes that although the aggregation petition describes the final position limit rules, including the aggregation requirements, as a “drastic departure from the status quo,” and seeks to differentiate between Commission and DCM rules regarding treatment of owned positions for purposes of aggregation, many current and past DCM rules require aggregation of the positions a person either owns or controls. See Board of Trade of the City of Chicago, Inc. (“CBOT”) Rule 559.D; Chicago Mercantile Exchange, Inc. (“CME”) Rule 559.D; New York Mercantile Exchange, Inc. (“NYMEX”) Rule 559.D; ICE Futures U.S., Inc. (“ICE US”) Rule 6.12; Board of Trade of Kansas City, Missouri, Inc. (“KCBT”) Rule 2008.00; and Minneapolis Grain Exchange, Inc. (“MGE”) Rule 7310. See also NYMEX Rule 9.35, MGEX Rule 7310 and CBOT Rule 425.05 as examples of older rules requiring aggregation of the positions a person either owns or controls, which were in effect over the last 10 years. Furthermore, acceptable practices adopted by the Commission in August, 2001, provided DCMs with a safe harbor for position limit rules that aggregated positions a person owns or controls. See 66 FR 42256, 42280, August 10, 2001, Appendix B to Part 38, Core Principle 5. See also <http://www.cftc.gov/files/foia/fedreg01/foi010810a.pdf>.

<sup>45</sup> Id. at 15.

In light of these changes, the Working Groups believe that the Commission should provide relief in the form of an owned non-financial entity exemption. The aggregation petition includes a draft owned non-financial entity exemption that follows the Commission's prior proposed exemption with some modifications.<sup>46</sup>

Similar to the aggregation petition, commenters to the interim final rule request that the Commission adopt an owned non-financial entity exemption.<sup>47</sup> FIA and EEI argue that without such an exemption, market participants would have to aggregate all positions held by any entity in which it has a ten percent ownership interest, even if such interest is passive without control over trading. According to FIA, such a consequence would "have an unnecessary and profoundly negative impact on users of Referenced Contracts, and their affiliates with no corresponding benefit to the stability or integrity of the market."<sup>48</sup> EEI also argues that the owned non-financial entity exemption would provide commercial firms the same aggregation relief as eligible entities that rely on the independent account controller exemption.<sup>49</sup>

Several commenters also address the requirement that persons aggregate based upon ownership of positions generally. These commenters recommend that the Commission only aggregate based on control, and not aggregate positions based upon an ownership interest in a position or account.<sup>50</sup> According to these commenters, aggregation through an ownership interest, absent control of trading decisions, will impose significant burdens for entities to

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<sup>46</sup> Id. at Exhibit A.

<sup>47</sup> CL-FIA at 17-18; and CL-EEI at 16-17.

<sup>48</sup> CL-FIA at 18. See also CL-EEI at 16-17.

<sup>49</sup> CL-EEI at 16.

<sup>50</sup> See e.g., CL-FIA at 15; CL-EEI at 1-2, 14-15; CL-Atmos at 3-5; and CL-AGA at 1-3.

aggregate on an intra-day basis, may harm liquidity, and does not address the potential concerns about coordinated trading. Similar to the comments regarding the owned non-financial entity exemption, commenters submit that aggregating positions based solely on ownership creates substantial compliance burdens within the context of a complex corporate structure. In this connection, EEI suggests that the Commission not require an entity to aggregate owned positions if an entity could show the independence of trading decisions of the owned entity.<sup>51</sup>

### 3. Exemption for Underwriters

As noted above, Commission rule 151.7(g) includes an exemption from the ownership criteria for aggregation if the ownership interest:

is based on the ownership of securities constituting the whole or a part of an unsold allotment to or subscription by such person as a participant in the distribution of such securities by the issuer or by or through an underwriter.

FIA submits that the Commission should clarify and expand this exemption to include an ownership interest based on the acquisition or disposition of securities acquired in connection with the trading or market-making activities of a broker-dealer registered with the SEC, or a comparable broker-dealer.<sup>52</sup> FIA believes that aggregation based upon a 10 percent ownership interest should not be required if the broker-dealer acquires the interest – (1) in anticipation of demand, (2) as part of its normal market-making activity, or (3) as a result of a routine life cycle event, such as a stock distribution. Such ownership interests, according to FIA, do not present

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<sup>51</sup> See e.g., CL-EEI at 14-15.

<sup>52</sup> CL-FIA at 6, 16.

the same concerns about sharing transaction or position information that may facilitate coordinated trading.<sup>53</sup>

In response to the issues raised in the aggregation petition and comments to the interim final rule, the Commission has determined to propose modifications to certain position limits aggregation provisions.

## **II. Proposed Rules**

### **A. Proposed Rules for Information Sharing Restriction**

The Commission is proposing to clarify that the scope of the exemption in regulation 151.7(i) includes a reasonable risk of a violation of federal law. The Commission intended to cover such risks in the final rule and is therefore proposing to amend regulation 151.7(i) to make clear that the exemption includes circumstances in which the sharing of information would create a reasonable risk of a violation of federal law or regulations adopted thereunder.

The proposed rules retain the requirement that market participants file an opinion of counsel to rely on the exemption in regulation 151.7(i). The opinion allows Commission staff to review the legal basis for the asserted regulatory impediment to the sharing of information, and is particularly helpful where the asserted impediment arises from laws and/or regulations that the Commission does not directly administer. Further, Commission staff will have the ability to consult with other federal regulators as to the accuracy of the opinion, and to coordinate the development of rules surrounding information sharing and aggregation across accounts in the future. The Commission also notes that the proposed clarification should address the concerns of

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<sup>53</sup> CL-FIA at 16.

commenters that obtaining an opinion of counsel could be difficult if the Commission read the existing standard to include only per se violations.

With regard to comments that the exemption should permit persons to rely upon “best practices” or other “guidelines,” the Commission notes that the proposed exemption applies to situations where the sharing of information creates a reasonable risk of violating federal law or regulations adopted thereunder. Whether a reasonable risk exists will depend on the interconnection of the applicable statute and regulatory guidance, as well as the particular facts and circumstances as applied to the statute and guidance. Notwithstanding the Commission’s facts and circumstances review of potentially conflicting federal law or regulations, the exemption in regulation 151.7(i) is effective upon filing of the notice in 151.7(h) and opinion of counsel. These provisions authorize the Commission to request additional information beyond that contained in the notice filing, and the Commission may amend, suspend, terminate or otherwise modify a person’s aggregation exemption upon further review. As the Commission gains further experience with the exemption for federal law information sharing restriction in regulation 151.7(i), the Commission anticipates providing further guidance to market participants.

#### 1. Proposed Rules for Information Sharing Restriction - Foreign Law

For the same reasons the Commission adopted the exemption for federal information sharing restrictions, the Commission proposes extending the exemption to the law of a foreign jurisdiction. In addition, similar to the clarification for the exemption for federal law information sharing restriction, the Commission is also proposing an exemption where the sharing of information creates a reasonable risk of violating the law of a foreign jurisdiction. However, the Commission remains concerned that certain market participants could potentially use the existing

and proposed expansion of the exemption in regulation 151.7(i) to evade the requirements for the aggregation of accounts. In this regard, this proposed rule, consistent with the exemption for federal law information sharing restriction, includes the requirement to file an opinion of counsel specifically identifying the restriction of law and facts particular to the market participant claiming the exemption.<sup>54</sup>

The Commission notes that the aggregation petition references information sharing restrictions that arise from “international” law. The proposed rules include relief from aggregation for information sharing that could create a reasonable risk of violating the law of a foreign jurisdiction. The Commission seeks comment as to whether this proposal adequately addresses the concerns of market participants outlined in the interim final rule comments and the aggregation petition, and as to whether those concerns are valid. The Commission specifically requests comment on the types of “international” law, if any, which could create information sharing restrictions other than the law of a foreign jurisdiction. Should the regulation 151.7(i) exemption include “international” law or is it sufficient to refer to the “law of a foreign jurisdiction”? Alternatively, the Commission is considering a case-by-case approach through petitions submitted pursuant to CEA section 4a(a)(7). Should the Commission adopt such a case-by-case approach?

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<sup>54</sup> The Commission notes that the proposed expansion of this exemption includes a proposed technical change to regulation 151.7(i). The proposed technical change specifies that the “notice” filing referenced in current regulation 151.7(i) is a reference to the notice filing requirements set forth in regulation 151.7(h). In addition, the Commission has proposed a technical change to the FCM exemption in current regulation 151.7(e). Proposed regulation 151.7(e)(4) is designed for ease of reference for market participants to follow the filing requirements in regulation 151.7(h), which requires persons claiming the FCM exemption in regulation 151.7(e) to file pursuant to regulation 151.7(h). Finally, the Commission is also proposing a technical change to the form and manner of filing for an aggregation exemption in regulation 151.10(b)(4). Specifically, this proposed change makes clear that a notice filing for an aggregation exemption is effective upon filing.

## 2. Proposed Rules for Information Sharing Restriction – State Law

After consideration of the aggregation petition and the interim final rule comments the Commission is also proposing to establish an exemption for situations where information sharing restrictions could trigger state law violations. In addition, similar to the clarification for the exemption for federal law information sharing restriction, the Commission is also proposing that the state law information sharing restriction apply to situations where the sharing of information creates a reasonable risk of violating the state law. However, as noted above, the Commission remains concerned about the potential for evasion within the context of this exemption. In this regard, this proposed rule, consistent with the federal law information sharing restriction, includes the requirement to file an opinion of counsel specifically identifying the restriction of law and facts particular to the market participant claiming the exemption.

The Commission solicits comments as to the appropriateness of extending the information sharing exemption to state law. Should the Commission provide for such an exemption? Alternatively, the Commission is considering a case-by-case approach through petitions submitted pursuant to CEA section 4a(a)(7). Should the Commission adopt such a case-by-case approach and otherwise rely upon the preemption of state law in administering its aggregation policy?

The Commission notes that the aggregation petition cites to Texas Public Utility Code Substantive Rule 25.503, which provides that “a market participant shall not collude with other market participants to manipulate the price or supply of power.”<sup>55</sup> That provision applies to intra-state transactions and resembles regulations of the Federal Energy Regulatory

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<sup>55</sup> Aggregation petition at 24.

Commission.<sup>56</sup> In this regard, should the Commission limit application of the proposed exemption for state law information sharing restrictions to laws that have a comparable provision at the federal level? What criteria should the Commission use in identifying state laws that a person may rely upon for an exemption from aggregation?

The Commission also solicits additional comment as to the types of state laws, including specific laws, which could create an information sharing restriction in conflict with the Commission's aggregation policy.

The Commission further notes that the aggregation petition seeks to extend the exemption to information sharing restrictions that arise from "local" law.<sup>57</sup> However, neither the aggregation petition nor interim final rule commenters have provided examples, and the Commission is concerned that an exemption for local law would be difficult to implement due to the number of laws and/or regulations that would need to be considered and the vast numbers of localities that might issue such laws and/or regulations.

The Commission solicits comment as to the appropriateness of extending the information sharing exemption to "local" law. Commenters are asked to provide the scope of local law and identify any specific laws that create information sharing restrictions that would conflict with the Commission's aggregation policy. What criteria could the Commission use in identifying local laws that a person may rely upon for an exemption from aggregation? Should the Commission adopt a case-by-case approach through petitions submitted pursuant to CEA section 4a(a)(7) and otherwise rely upon the preemption of local law in administering its aggregation policy?

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<sup>56</sup> See e.g. 18 C.F.R. 1c.1 & 1c.2.

<sup>57</sup> Aggregation petition at 24.

## B. Proposed Rules - Ownership of Positions Generally

The Commission continues to consider ownership an appropriate measure for aggregation. Section 4a(a)(1) of the CEA provides for the general aggregation standard with regard to position limits, and specifically provides:

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; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person.<sup>58</sup>

Congress incorporated this provision into Section 4a as part of the CEA Amendments of 1968 ("1968 Act").<sup>59</sup> The legislative history to the 1968 Act indicates that Congress added this language to expressly incorporate prior administrative determinations of the Commodity Exchange Authority (predecessor to the Commission).<sup>60</sup> Prior to the 1968 Act, administrative

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<sup>58</sup> 7 U.S.C. 6a.

<sup>59</sup> Public Law 90-258, 82 Stat. 26 (1968).

<sup>60</sup> See S. Rep No. 947, 90<sup>th</sup> Cong., 2 Sess. 5 (1968). This senate report provides:

Certain longstanding administrative interpretations would be incorporated in the act. As an example, the present act authorizes the Commodity Exchange Commission to fix limits on the amount of speculative "trading" that may be done. The Commission has construed this to mean that it has the authority to set limits on the amount of buying or selling that may be done and on the size of positions that may be held. All of the Commission's speculative limit orders, dating back to 1938, have been based upon this interpretation. The bill would clarify the act in this regard....

determinations as well as regulations of the Commodity Exchange Authority announced standards that included control of trading and the ownership of positions.<sup>61</sup>

In light of the language in section 4a, the legislative history and regulatory developments, the Commission has historically viewed, and continues to view, section 4a as requiring aggregation on the basis of either ownership or control.<sup>62</sup> The Commission also believes that

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Section 2 of the bill amends section 4a(1) of the act to show clearly the authority to impose limits on "positions which may be held." It further provides that trading done and positions held by a person controlled by another shall be considered as done or held by such other; and that trading done or positions held by two or more persons acting pursuant to an express or implied understanding shall be treated as if done or held by a single person.

<sup>61</sup> See Administrative Determination ("A.D.") 163 (Aug. 7, 1957) ("[I]n the application of speculative limits, accounts in which the firm has a financial interest must be combined with any trading of the firm itself or any other accounts in which it in fact exercises control."). In addition, the Commission's predecessor, and later the Commission, provided the aggregation standards for purposes of position limits in the large trader reporting rules. See Superseding of Certain Regulations, 26 FR 2968, Apr. 7, 1961. In 1961, then regulation 18.01 read:

"(a) *Multiple Accounts*. If any trader holds or has a financial interest in or controls more than one account, whether carried with the same or with different futures commission merchants or foreign brokers, all such accounts shall be considered as a single account for the purpose of determining whether such trader has a reportable position and for the purpose of reporting." 17 CFR 18.01 (1961).

The provisions concerning aggregation for position limits generally remained part of the Commission's large trader reporting regime until 1999 when the Commission incorporated the aggregation provisions into part 150.4 with the existing position limit provisions in part 150. See 64 FR 24038, May 5, 1999. The Commission's part 151 rulemaking also incorporates the aggregation provisions in part 151.7 along with the remaining position limit provisions in part 151. See 76 FR 71626, Nov. 18, 2011.

<sup>62</sup> See e.g., Exemptions from Speculative Position Limits for Positions which have a Common Owner but which are Independently Controlled and for Certain Spread Positions, 53 FR 41563, 41564, Oct. 24, 1988); and Exemption from Speculative Position Limits for Positions

aggregation of positions across accounts based upon ownership is a necessary part of the Commission's position limit regime.<sup>63</sup> An ownership standard establishes a bright-line test that provides certainty to market participants and the Commission.<sup>64</sup>

Absent aggregation on the basis of ownership, the Commission would have to apply a control test in all cases, which poses significant administrative challenges to individually assess control across all market participants. Further, if the statute only required aggregation based on control, market participants may be able to use an ownership interest to circumvent aggregation in circumstances where an ownership interest is used to directly or indirectly influence control over the account or position. The Commission also notes that the ownership prong attributes a position to the beneficial owner of multiple accounts that amount to an unduly large position, which position limits are intended to prevent. Therefore, the proposed rules would continue to require aggregation based upon either ownership or control.

Regarding a threshold level to aggregate on the basis of ownership, the Commission has generally found that an ownership or equity interest of less than 10 percent in an account or position that is controlled by another person who makes discretionary trading decisions does not present a concern that such ownership interest results in control over trading or can be used

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which have a Common Owner but which are Independently Controlled and for Certain Spread Positions, 55 FR 30926, July 30, 1990.

<sup>63</sup> See also, Exemptions from Speculative Position Limits for Positions which have a Common Owner but which are Independently Controlled and for Certain Spread Positions, 53 FR 13290, 13292, Apr. 22, 1988. In response to two separate petitions, the Commission proposed the independent account controller exemption from speculative position limits, but declined to remove the ownership standard from its aggregation policy.

<sup>64</sup> See also Revision of Federal Speculative Position Limits and Associated Rules, 64 FR 24038, 24044, May 5, 1999 (“[T]he Commission...interprets the ‘held or controlled’ criteria as applying separately to ownership of positions or to control of trading decisions.”); and 53 FR 13290, 13293 (1988).

indirectly to create a large speculative position through ownership interests in multiple accounts. As such, the Commission has traditionally viewed an ownership interest below 10 percent as not warranting aggregation.<sup>65</sup> Commenters suggest that a similar analysis should prevail for an ownership interest of 10 percent or more where such ownership represents a passive investment that does not involve control of the trading decisions of the owned entity. Commenters argue that under these conditions, such passive investments would present a reduced concern for trading pursuant to direct or indirect control, as well as a reduced risk for persons with positions in multiple accounts to hold an unduly large overall position.

While prior Commission rulemakings have generally restricted exemptions to the ownership criteria to limited partners of commodity pools and independent account controllers managing customer funds for an eligible entity, the Commission has considered a broader passive investment exemption.<sup>66</sup> Further, the Commission indicated in the part 151 final rule

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<sup>65</sup> The Commission codified this aggregation threshold in its 1979 statement of policy on aggregation, which was derived from the administrative experience of the Commission's predecessor. See Statement of Policy on Aggregation of Accounts and Adoption of Related Reporting Rules, 44 FR 33839, 33843, Jun. 13, 1979. Note, however, rule 151.7(d) will separately require aggregation of investments in accounts with identical trading strategies.

<sup>66</sup> See e.g., 53 FR 13290, 13292 (1988) (proposal). The 1988 proposal for the independent account controller rule requested comment on the possibility of a broader passive investment exemption, and specifically noted:

“[Q]uestions also have been raised regarding the continued appropriateness of the Commission's aggregation standard which provides that a beneficial interest in an account or positions of ten percent or more constitutes a financial interest tantamount to ownership. This threshold financial interest serves to establish ownership under both the ownership criterion of the aggregation standard and as one of the indicia of control under the 1979 Aggregation Policy.

In particular, certain instances have come to the Commission's attention where beneficial ownership in several otherwise unrelated accounts may be greater than ten percent, but the circumstances surrounding the financial interest clearly exclude the owner from control over the positions. The Commission is requesting comment on whether further revisions to the current Commission

that the development of aggregation exemptions could occur over time.<sup>67</sup> This incremental approach to account aggregation standards reflects the Commission's historical practice.<sup>68</sup> Consistent with that practice, the Commission has considered the additional information provided and the concerns raised by the aggregation petition and interim final rule commenters, and believes it appropriate to propose certain relief from the ownership criteria of aggregation.<sup>69</sup>

#### 1. Disaggregation Relief for Owned Entities

Proposed rule 151.7(b) continues the Commission's longstanding rule that persons with an ownership or equity interest in an account or position of less than 10 percent need not aggregate such positions solely on the basis of the ownership criteria. Persons with a 10 percent or greater ownership interest would still generally be required to aggregate the account or positions. However, proposed rule 151.7(b)(1) establishes a notice filing procedure to permit a

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rules and policies regarding ownership are advisable in light of the exemption hereby being proposed. If such financial interests raise issues not addressed by the proposed exemption for independent account controllers, what approach best resolves those issues while maintaining a bright-line aggregation test?"

<sup>67</sup> See 76 FR 71626, 71654.

<sup>68</sup> See e.g., 53 FR 41563, 41567, Oct. 24, 1988 (the definition of eligible entity for purposes of the IAC exemption originally only included CPOs, or exempt CPOs or pools, but the Commission indicated a willingness to expand the exemption after a "reasonable opportunity" to review the exemption.); 56 FR 14308, 14312, Apr. 9, 1991 (The Commission expanded eligible entities to include commodity trading advisors, but did not include additional entities requested by commenters until the Commission had the opportunity to assess the current expansion and further evaluate the additional entities); and 64 FR 24038, May 5, 1999 (The Commission expanded the list of eligible entities to include many of the entities commenters requested in the 1991 rulemaking).

<sup>69</sup> The Commission notes that ownership and control are considered separately for the aggregation of accounts. As such, if the Commission were to adopt the proposed exemption outlined below, and a market participant qualified for the exemption, such person would nonetheless have to aggregate those same accounts or positions identified in the exemption if such person otherwise controlled trading, acted pursuant to an express or implied agreement or held positions in accounts with identical trading strategies.

person in specified circumstances to disaggregate the positions of a separately organized entity (“owned entity”), even if such person has a 10 percent or greater interest in the owned entity. The notice filing would need to demonstrate compliance with certain conditions set forth in 151.7(b)(1)(i), and such relief would not be available to persons with a greater than 50 percent ownership or equity interest in the owned entity. Similar to other exemptions from aggregation, the notice filing would be effective upon submission to the Commission, but the Commission may subsequently call for additional information as well as reject, modify or otherwise condition such relief. Further, such person is obligated to amend the notice filing in the event of a material change to the circumstances described in the filing.

The proposed criteria to claim relief under 151.7(b)(1) address the Commission’s concerns that an ownership or equity interest of 10 percent and above may facilitate or enable control over trading of the owned entity or allow a person to accumulate a large position through multiple accounts that could overall amount to an unduly large position. Essentially, the proposed rules amending the ownership criteria for aggregation across accounts establish a rebuttable presumption that persons with an ownership or equity interest of 10 percent or greater must aggregate, but such persons may file for disaggregation relief if their ownership interest does not exceed 50 percent and they can demonstrate independence by meeting the criteria described below.<sup>70</sup>

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<sup>70</sup> The Commission notes that the conditions for independence apply to the person filing the notice as well as the owned entity. In addition, for purposes of complying with the proposed conditions, such “person” shall include any entity that such person must aggregate pursuant to regulation 151.7. For example, if company A files a notice under proposed regulation 151.7(b)(1) for company A’s equity interest of 30 percent in company B, then company A must comply with the conditions for the exemption, including any entity with which company A aggregates positions under 151.7. In this connection, if company A controls the trading of

Proposed rule 151.7(b)(1)(i)(A) conditions aggregation relief for the ownership interest in another entity on a demonstration that a person filing for disaggregation relief and the owned entity do not have knowledge of the trading decisions of the other. The Commission believes that where an entity has an ownership interest in another entity and neither entity share trading information, such entities demonstrate independence. In contrast, persons with knowledge of trading decisions of another in which they have an ownership interest are likely to take such decisions into account in making their own trading decisions, which implicates the Commission's concern about independence and enhances the risk for coordinated trading. For purposes of this provision, the Commission does not consider knowledge of overall end-of-day position information to necessarily constitute knowledge of trading decisions, so long as the position information cannot be used to dictate or infer trading strategies. As such, the knowledge of end-of-day positions for the purpose of monitoring credit limits for corporate guarantees would not necessarily constitute knowledge of trading information. However, the ability to monitor the development of positions on a real time basis could constitute knowledge of trading decisions because of the substantial likelihood that such knowledge might affect trading strategies or influence trading decisions of the other.

Proposed rule 151.7(b)(1)(i)(B) conditions aggregation relief on a demonstration that such person seeking disaggregation relief and the owned entity trade pursuant to separately developed and independent trading systems. Further, proposed rule 151.7(b)(1)(i)(C) conditions relief on a demonstration that such person and the owned entity have, and enforce, written procedures to preclude the one entity from having knowledge of, gaining access to, or receiving

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company C, then there must be independence between company B and company C for purposes of company A's 151.7(b)(1) notice filing.

data about, trades of the other. Such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities. The Commission has applied these same conditions in connection with the IAC exemption to ensure independence of trading between an eligible entity and an affiliated independent account controller.<sup>71</sup> Such conditions have been useful in ensuring that trading is not coordinated through the development of similar trading systems, and that procedures are in place to prevent the sharing of trading decisions between entities. Similar to the IAC exemption, the proposed owned entity exemption in proposed rule 151.1(b)(1) would permit disaggregation if there is independence of trading between two entities. Thus the Commission proposes to include the above conditions, which are already applicable in the IAC context, and which should also strengthen the independence between the two entities for the owned entity exemption.

Proposed rule 151.7(b)(1)(i)(D) conditions aggregation relief on a demonstration that such person does not share employees that control the owned entity's trading decisions, and the employees of the owned entity do not share trading control with such persons. The Commission is concerned that shared employees with knowledge of trading decisions undermine the independence of trading between entities. Similar to the restriction on information sharing, the sharing of employees with knowledge of trading decisions presents a strong risk to the independence of trading between entities. In the aggregation petition, the Working Groups submit that entities should be permitted to share "attorneys, accountants, risk managers,

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<sup>71</sup> See 17 CFR 151.7(f).

compliance and other mid- and back-office personnel.”<sup>72</sup> At this time, the Commission questions, and seeks comment regarding, whether the sharing of such persons compromises independence because it would provide each entity with knowledge of the other’s trading decisions.<sup>73</sup>

Proposed rule 151.7(b)(1)(i)(E) conditions aggregation relief on a demonstration that the person and the owned entity do not have risk management systems that permit the sharing of trades or trading strategies with the other. This condition addresses concerns that risk management systems that permit the sharing of trades or trading strategies with each other present a significant risk of coordinated trading through the sharing of information.<sup>74</sup> The Commission has not proposed a condition that the risk management system be separately developed from the risk management system of the owned entity, and the Commission seeks comment as to whether risk management systems that do not communicate trade information can maintain independence of trading between entities.<sup>75</sup>

Proposed rule 151.7(b)(1)(ii) conditions aggregation relief on a demonstration that such person does not have greater than a 50 percent ownership or equity interest in the owned entity.

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<sup>72</sup> Aggregation petition at Exhibit A.

<sup>73</sup> The Commission notes that the proposed condition barring the sharing of employees that control the owned entity’s trading decisions would include a prohibition on sharing of employees described in the aggregation petition (attorneys, accountants, risk managers, compliance and other mid-and back-office personnel), to the extent such employees are aware of the trading decisions of the person or the owned entity.

<sup>74</sup> This condition is similar to a condition proposed in the aggregation petition.

<sup>75</sup> The Commission remains concerned that a trading system, as opposed to a risk management system, that is not separately developed from another system can subvert independence because such a system could apply the same or similar trading strategies even without the sharing of trading information.

An equity or ownership interest above 50 percent constitutes a majority ownership or equity interest of the owned entity and is so significant as to require aggregation under the ownership prong of Section 4a(a)(1) of the CEA. This proposal would provide administrative certainty and would address concerns about circumvention of position limits by coordinated trading or direct or indirect influence between entities. To the extent that the majority owner may have the ability and incentive to direct, control or influence the management of the owned entity, the proposed bright-line test would be a reasonable approach to the aggregation of owned accounts pursuant to Section 4a(a)(1). A person with a greater than 50 percent ownership interest in multiple accounts would have the ability to hold and control a significantly large and potentially unduly large overall position in a particular commodity, which position limits are intended to prevent.<sup>76</sup>

The proposed owned entity exemption and the clarification and expansion of the violation of law exemption address concerns raised in the aggregation petition and interim final rule comments. First, the clarification and extension of the violation of law exemption responds to concerns that market participants could face increased liability under state, federal and foreign law. While the aggregation petition and other commenters argue that an owned non-financial entity exemption would reduce the risk of liability under antitrust and other laws, the proposed

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<sup>76</sup> The Commission notes that aggregation based on ownership looks to a person's equity interest regardless of voting control. By way of comparison, with a greater than 50 percent interest in voting shares, such person generally is required to consolidate the owned entity for purposes of the Generally Accepted Accounting Principles ("GAAP"). See Financial Accounting Standards Board Accounting Standards Codification Topic 810, at paragraphs 810-10-15-8 and 10, available at <https://asc.fasb.org/>. See also Accounting Research Bulletin 51 at paragraph 3 and Statement of Financial Accounting Standard No. 94 at paragraph 2. The Commission believes that aggregation based upon an ownership or equity interest of greater than 50 percent, regardless of voting interest, is appropriate to address the heightened risk of direct or indirect influence over the owned entity. Further, unless a particular exemption applies, a person with a 50 percent or greater voting interest in an owned entity would likely be required to aggregate the positions of the owned entity on the basis of control.

clarification and expansion would allow market participants to avail themselves of the violation of law exemption in those circumstances where the sharing of information creates a reasonable risk of violating the above mentioned bodies of law.

The proposed owned entity exemption applies to both financial and non-financial entities that have passive ownership interests. Market participants that qualify for the exemption can file a notice with the Commission demonstrating independence between entities and, thereafter, forgo the development of monitoring and tracking systems for the aggregation of accounts. The Commission seeks comment as to whether such passive interests present a significantly reduced risk of coordinated trading compared to owned entities that fail the criteria for the proposed exemption. In addition, the Commission specifically requests comment as to whether the proposed relief should be limited to ownership interests in non-financial entities.

While the owned non-financial entity exemption mentioned in the aggregation petition would permit disaggregation even if the owned entity is a wholly owned company, the Commission is concerned that an ownership interest greater than 50 percent presents heightened concerns for coordinated trading or direct or indirect influence over an account or position, and that permitting disaggregation at that level of ownership would be inconsistent with the statutory requirement to aggregate on the basis of ownership. Small ownership interests of less than 10 percent do not warrant aggregation. A 10 percent or greater ownership interest has served as a useful measure for aggregation, but the Commission has determined relief may be warranted for passive investments. However, for the reasons discussed above, an ownership interest greater than 50 percent requires aggregation because ownership at that level serves as a useful benchmark for the increased risk of direct or indirect influence over the trading of an owned entity. Because the circumstances facilitating control can be difficult to monitor, a facts and

circumstances review would be difficult to administer by both market participants and the Commission. In addition, a person with a greater than 50 percent ownership interest in multiple accounts may have the ability to hold a significantly large and potentially unduly large overall position in a particular commodity, which position limits are intended to prevent. Therefore, the Commission proposes limiting the availability of the exemption to those having an ownership interest no greater than 50 percent because such a bright-line rule would provide clarity to market participants and a useful tool for the Commission to simplify aggregation where there is an increased and substantial risk of coordinated trading.<sup>77</sup>

With regard to filing requirements for the exemption in regulation 151.7(b) (1), the Commission notes that market participants would be required to file in accordance with regulation 151.7(h).<sup>78</sup> As such, market participants must file a notice with the Commission with a description of how they adhere to the criteria in regulation 151.7(b) (1) and a certification that the conditions are met. This certification, as well as any other certification made under regulation 151.7(h), must come from a senior officer of the market participant with knowledge as to the contents of the notice.<sup>79</sup> Therefore, the Commission is proposing to clarify in regulation 151.7(h)(1)(ii) that such certification come from a senior officer. Further, regulation 151.7(h)(3)

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<sup>77</sup> The Commission reminds market participants that proposed regulation 151.7(b)(1) does not affect the applicability of a separate exemption from aggregation (e.g., the independent account controller exemption).

<sup>78</sup> Where the provisions of regulation 151.7 require a person to file a notice, entities cannot rely upon an exemption unless such entity has properly filed a notice in accordance with regulation 151.7(h).

<sup>79</sup> See 17 CFR 151.7(h)(1)(ii). Market participants should update the certification if the individual certifying compliance no longer works for the company.

requires market participants to promptly update a notice filing in the event of a material change of the information contained in the notice filing.<sup>80</sup>

With regard to the type of material necessary to file a notice to claim an exemption under 151.7(b)(1), the Commission notes that each submission must be specific to the facts of the particular entity. The person claiming the exemption must provide specific facts that demonstrate compliance with each condition of relief. Such a demonstration should likely include an organizational chart including the ownership and control structure of the involved entities, a description of the risk management system, a description of the information-sharing systems (including bulletin boards, and common email addresses of the entities identified), an explanation of how and to whom the trade data and position information is distributed (including the responsibilities of the individual receiving such information), and the officers that receive reports of the trade data and position information.<sup>81</sup>

The Commission specifically requests comments as to the appropriateness of the owned entity exemption as well as the conditions applicable to the exemption. Should the Commission add additional criteria? If so, what criteria and why? Should the Commission require market participants to submit additional information to claim the exemption? If so, what information and why? With regard to the owned entity exemption, should the Commission alter the scope of the exemption? If so, how should it be altered and why? Further, at what percent of ownership

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<sup>80</sup> In this regard, the Commission clarifies that a material change would include, among other events, if the person making the original certification is no longer employed by the company. See also CEA § § 6(c)(2) and 9(a)(3).

<sup>81</sup> The Commission notes that this list is not meant to be exhaustive of the factors that would indicate an exemption is warranted and should not be interpreted as being solely sufficient to claim the exemption because each filing is fact specific. As noted earlier, the Commission may demand additional information regarding the exemption within its discretion.

interest should a market participant no longer be able to claim the exemption proposed in regulation 151.7(b)(1), if any? Are there specific circumstances in which a higher percentage of ownership than 50 percent would be appropriate to claim the exemption in regulation 151.7(b)(1) notwithstanding the concerns described above regarding coordinated trading, direct or indirect influence, and significantly large and potentially unduly large overall positions in a particular commodity? In addition, the Commission welcomes comment on the owned non-financial entity exemption set forth in appendix A of the aggregation petition as an alternative to the owned entity exemption proposed herein.

## 2. Higher Tier Entities

In connection with the Working Groups' request for the Commission to include an owned non-financial entity exemption, the Working Groups also request that the Commission provide relief from the filing requirements for claiming the exemption. Specifically, the aggregation petition argues that if an entity files a notice and claims the owned non-financial entity exemption, then "every higher-tier company (a company that holds an interest in the company that submitted the notice) need not aggregate the referenced contracts of the owned non-financial entities identified in the notice."<sup>82</sup> Thus, the Commission is proposing rules that provide relief to such "higher-tier entities" within the context of a corporate structure.<sup>83</sup>

Proposed rule 151.7(j) provides that higher-tier entities may rely upon a notice for exemption filed by the owned entity, and such reliance would only go to the accounts or

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<sup>82</sup> Aggregation petition at 23.

<sup>83</sup> For purposes of the discussion below, "higher-tier" entities include entities with a 10 percent or greater ownership interest in an owned entity.

positions specifically identified in the notice. For example, if company A has a 30 percent interest in company B, and company B has filed an exemption notice for the accounts and positions of company C, then company A may rely upon company B's exemption notice for the accounts and positions of company C. Should company A wish to disaggregate the accounts or positions of company B, company A would have to file a separate notice for an exemption.

The proposed rules also provide that a higher-tier entity that wishes to rely upon an owned entity's exemption notice must comply with conditions of the applicable aggregation exemption other than the notice filing requirements. Although higher-tier entities need not submit a separate notice to rely upon the notice filed by an owned entity, the Commission notes that it may, upon call, request that a higher-tier entity submit information to the Commission, including the possibility of an on-site visit, demonstrating compliance with the applicable conditions.

The Commission believes that these proposed rules, if adopted, should significantly reduce the filing requirements for aggregation exemptions. Further, the Commission does not anticipate that the reduction in filing will impact the Commission's ability to effectively survey the proper application of exemptions from aggregation. The initial filing of an owned entity exemption notice should provide the Commission with sufficient information regarding the appropriateness of the exemption, while repetitive filings of higher-tier entities would not be expected to provide additional substantive information. However, the Commission again notes that higher-tier entities would still be required to comply with the substantive conditions of the exemption specified in the owned entity's notice filing.

### C. Underwriting

As noted above, Commission regulation 151.7(g) includes an exemption from aggregation where an ownership interest is in an unsold allotment of securities. FIA requests that the Commission expand the exemption to include situations where securities are owned in anticipation of demand as part of normal market-making activity, or as a result of a routine life cycle event, such as a stock distribution.

The Commission believes that the ownership interest of a broker-dealer registered with the SEC, or similarly registered with a foreign regulatory authority,<sup>84</sup> in an entity based on the ownership of securities acquired as part of reasonable activity in the normal course of business as a dealer is largely consistent with the ownership of an unsold allotment of securities covered by the underwriting exemption currently found in regulation 151.7(g). In both circumstances, the ownership interest is likely transitory and not to hold for investment purposes. Accordingly, the Commission is proposing an aggregation exemption in regulation 151.7(g) for such activity.<sup>85</sup>

However, the Commission notes that this exemption would not apply where a broker-dealer acquires more than a 50 percent ownership interest in another entity because this would not be consistent with holding such a transitory interest for the purpose of market making and runs a higher risk of coordinated trading.<sup>86</sup> Therefore, a broker-dealer that acquires more than 50

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<sup>84</sup> See 15 U.S.C. 78o.

<sup>85</sup> The Commission specifically notes that this proposed exemption would not apply to registered broker-dealers that acquire an ownership interest in securities with the intent to hold for investment purposes.

<sup>86</sup> With regard to FIA's request that the exemption include a broker-dealer's ownership of securities in anticipation of demand or as part of routine life cycle events, the proposed rules would cover such activity if the activity was in the normal course of the person's business as a dealer.

percent ownership interest in another entity must aggregate that entity, in the absence of another aggregation exemption.

The Commission requests comment on whether ownership of stock, by a broker-dealer registered with the SEC or similarly registered with a foreign regulatory authority, that is acquired as part of reasonable activity in the normal course of business as a dealer, without other ownership interests or indicia of control or concerted action, warrants aggregation.

#### D. Independent Account Controller for Eligible Entities

As noted above in section I.A of this release, section 151.7(f) provides an eligible entity with an exemption for the eligible entity's customer accounts that are managed and controlled by independent account controllers. In the part 151 rulemaking, the Commission adopted the same definitions of eligible entity and independent account controller found in the Commission's prior position limit regulations in regulation 150.1. The definition of eligible entity includes "the limited partner or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter \* \* \*." However, with regard to a CPO that is exempt under regulation 4.13, the definition of an independent account controller only extends to "a general partner of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter." At the time the Commission expanded the IAC exemption to include regulation 4.13 commodity pools, market participants generally structured such pools as limited partnerships.<sup>87</sup>

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<sup>87</sup> See 63 FR 38532.

The Commission understands that today, not all regulation 4.13 commodity pools are formed as partnerships. For example, regulation 4.13 pools may be formed as limited liability companies and have managing members, not general partners.

The Commission is proposing to expand the definition of independent account controller to include the managing member of a limited liability company. As such, regulation 4.13 commodity pools established as limited liability companies would be accorded the same treatment as such pools formed as limited partnerships. The limitation of the exemption to general partners was based upon a market structure that, historically, did not generally include regulation 4.13 commodity pools established as limited liability companies. In light of market developments since the Commission expanded IACs to include regulation 4.13 pools as eligible entities, it may not be appropriate for there to be a distinction between limited partnerships and limited liability companies in this regard. As such, the Commission is proposing to amend the definitions of eligible entity and independent account controller in part 151.1 to specifically provide for regulation 4.13 commodity pools established as limited liability companies.

The Commission intends to coordinate the disposition of the petition with the implementation of position limits under part 151. To do so, among other things, the Commission has directed staff to promptly review comment letters as soon as practicable following close of the comment period. Further, in order to provide an orderly transition to the compliance dates specified in part 151.4, the Commission intends to finalize consideration of the petition prior to the first compliance date of part 151.

### **III. Related Matters**

#### **A. Considerations of Costs and Benefits**

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing an order.<sup>88</sup> Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The proposed rules provide the public with an opportunity to comment on concerns raised in the aggregation petition and in comments on the interim final rule. The petitioner and the commenters seek clarification of certain provisions of the Commission's aggregation policy, and seek to alter or expand exemptions from aggregation to include circumstances where there may be a low risk of coordinated trading. The Commission requests comment on all aspects of its consideration of costs and benefits, including identification and assessment of any costs and benefits not discussed herein. In addition, the Commission requests that commenters provide data and any other information or statistics that they believe supports their positions with respect to the Commission's consideration of costs and benefits.

#### 1. Aggregation Petition and Other Comments

As discussed in section I.B. of this release, the Commission received a petition seeking relief from certain aggregation provisions in the final rules, as well as several comments regarding aggregation in response to the interim final rule on cash-settled contract limits.

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<sup>88</sup> 7 U.S.C. 19(a).

Among other things, the aggregation petition requests that the Commission provide an aggregation exemption for owned non-financial entities similar to an exemption that the Commission proposed but did not adopt in its final rules.<sup>89</sup>

The aggregation petition states that compliance with the final rules' aggregation requirements would require information sharing and coordination of trading that is contrary to current best practices.<sup>90</sup> The aggregation petition contends that the aggregation rules may impede investment in commercial firms, impair liquidity and competition in energy derivatives markets, or cause firms to exit the market altogether.<sup>91</sup> Further, the aggregation petition states that the aggregation rules necessitate the development and implementation of extensive and expensive information technology systems that can track positions across numerous affiliates, even if those affiliates currently trade independently of each other.<sup>92</sup> The aggregation petition also submits that companies with an ownership position in a joint venture would have to divest their interest to avoid operational difficulties associated with aggregating positions.<sup>93</sup> The petitioner contends that these asserted costs could be mitigated if the Commission were to adopt

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<sup>89</sup> As part of the proposed rules for part 151, the Commission proposed that persons with an ownership or equity interest in a non-financial entity need not aggregate the positions or accounts of the non-financial entity provided the person filed an application demonstrating compliance with certain conditions. See Position Limits for Derivatives, 76 FR 4752, 4762-63, Jan. 26, 2011.

<sup>90</sup> See Aggregation Petition at 19.

<sup>91</sup> Id. at 10-16.

<sup>92</sup> Id. at 11.

<sup>93</sup> Id. at 15.

a variant of the owned non-financial entity exemption,<sup>94</sup> clarify that the violation of law exemption applies to situations in which there is a “reasonable risk” of violating the applicable law, expand the violation of law exemption to include possible violations of local, state, foreign, and international law,<sup>95</sup> and adopt provisions relieving “higher-tier” entities of the filing requirement, as discussed above.<sup>96</sup>

Several commenters to the Commission’s interim final rule also suggest that the Commission adopt a version of the “owned non-financial entity” exemption; these commenters argue that even above 10 percent ownership, where there is no common control, there is no risk of coordinated trading and, therefore, no need for aggregation of positions.<sup>97</sup> These commenters recommend that the Commission aggregate based on control, and not based on an ownership interest in a position or account.<sup>98</sup> Commenters contend that aggregation of accounts in passive investments, where the owned entity is independently managed and controlled, will be costly and have a negative impact on markets and market participants.<sup>99</sup> Commenters also claim that many businesses establish information barriers between affiliates, and that the final rules would require the destruction of those barriers in order to ensure compliance.<sup>100</sup>

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<sup>94</sup> Id. at Exhibit A.

<sup>95</sup> Id. at 16-18.

<sup>96</sup> Id. at 23.

<sup>97</sup> See CL-FIA at 15; CL-Atmos at 4-5; and CL-EEI at 14-15.

<sup>98</sup> See e.g. CL-FIA at 15; CL-EEI at 1-2, 14-15; CL-Atmos at 3-5; and CL-AGA at 1-3.

<sup>99</sup> See CL-FIA at 18 and CL-EEI at 16-17.

<sup>100</sup> See CL-FIA at 15; CL-EEI at 14-15; and CL-Atmos at 3.

As with the petitioners, commenters to the interim final rule also assert that the aggregation provisions impose significant operational challenges for entities and end-users in particular, requiring them to develop and maintain costly internal infrastructure mechanisms to ensure compliance.<sup>101</sup> FIA estimates that for a large conglomerate, costs to comply with the final rule's aggregation procedures could be high. In particular, FIA estimates that each entity could spend as much as \$500,000 to \$1,000,000 to identify all entities subject to aggregation and to establish protocols for reporting all commonly owned and controlled positions in Referenced Contracts; as much as \$1,000,000 to \$1,500,000 to establish new information technology systems for consolidating and tracking aggregated position information; and approximately \$100,000 for each entity subject to aggregation to report position information to its affiliates and/or controlling entities.<sup>102</sup>

With regard to the exemption for federal law information sharing restriction in regulation 151.7(i), several commenters also suggest that the Commission extend the exemption to include state and foreign jurisdictions.<sup>103</sup> One commenter wrote that the provision in regulation 151.7(i) that requires an opinion of counsel to obtain such an exemption was too burdensome and should be revised.<sup>104</sup>

One commenter also suggests that the Commission extend the underwriting exemption in regulation 151.7(g) to include situations where a broker-dealer acquires positions for legitimate

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<sup>101</sup> See CL-EEI at 14-15; and CL-Atmos at 1-2.

<sup>102</sup> See CL-FIA at 19-20.

<sup>103</sup> See CL-EEI at 17-18; CL-AGA at 1-2; CL-FIA at 6; and CL-Atmos at 5.

<sup>104</sup> See CL-AGA at 5.

dealing reasons, such as in anticipation of increased demand, as part of its normal market-making activity, or as a result of a routine life-cycle event.<sup>105</sup>

## 2. Summary of the Commission's Proposal

*Exemption for Violation of Laws.* In the final part 151 rules, the Commission included an exemption from aggregation for those entities for whom sharing the requisite information would violate federal law. The Commission seeks to clarify that it always intended the exemption to apply in those circumstances in which the sharing of information presents a "reasonable risk" of violating the applicable law(s).

As explained above, one commenter urged the Commission to drop the requirement that, to obtain the violation-of-laws exemption an entity must submit an opinion of counsel (as discussed in section II.C). Such an opinion allows the Commission to review the facts and circumstances supporting the claimed exemption, and thus the proposed rules would retain the requirement to submit an opinion of counsel.

In light of the aggregation petition and comments on the interim final rule, the Commission is including in this proposal an expansion of the violation-of-law exemption to include state law and the law of foreign jurisdictions. The existing rule allows entities who believe that the aggregation provisions would require them to violate state or foreign laws to seek an exemption on a case-by-case basis. The Commission seeks comment as to the scope of the proposed exemption.

*Proposed Owned Entity Exemption.* Proposed rule 151.7(b)(1) provides that any person with an ownership or equity interest in an entity (financial or non-financial) of 10 percent or

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<sup>105</sup> See CL-FIA at 16.

greater may disaggregate the owned entity's positions upon demonstrating compliance with each of several specified indicia of independence.<sup>106</sup> The proposed indicia are that such person and the owned entity: (1) do not have knowledge of the trading decisions of the other; (2) trade pursuant to separately developed and independent trading systems; (3) have in place policies and procedures to preclude sharing knowledge of, gaining access to, or receiving data about, trades of the other; (4) do not share employees that control the trading decisions of the other; and (5) maintain a risk management system that does not allow the sharing of trade information or trading strategies between entities. In addition, such person's ownership or equity interest in the owned entity cannot exceed 50 percent.

The aggregation petition and several of the other commenters urge that the Commission should permit market participants to disaggregate accounts in situations where ownership of an account is passive, as they contend there is a less of a concern regarding coordinated trading.<sup>107</sup> The aggregation petition and other commenters suggest that the Commission add an owned non-financial entity exemption, which they contend would incorporate such situations as well as

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<sup>106</sup> As discussed in section II.D.1, at over 50 percent ownership, the proposed ownership standard would mandate aggregation in order to give effect to the statutory requirement that positions "held" by a person must be aggregated, and because of a person's ability to influence management and the concomitant heightened concerns about coordinated trading. The owned entity exemption does not impact the availability of the IAC, FCM, and federal, state, or foreign law information sharing restriction exemptions as found in regulation 151.7(h). However, as proposed, this exemption from the ownership criteria would not apply to investments in accounts with identical trading strategies.

<sup>107</sup> They further contend that a lack of an owned non-financial entity exemption could increase liability for antitrust and other federal law and regulations. This concern is addressed by the proposed clarification discussed above, which provides that market participants may avail themselves of the violation of law exemption if the sharing of information creates a reasonable risk of a violation.

alleviate potential negative impacts to liquidity and competition in both physical and derivatives markets.

The Commission is proposing to permit disaggregation of entities where a person has no greater than a 50 percent interest in the entity and meets certain other conditions. The proposed owned-entity exemption would apply to a person's passive investments in either financial or non-financial entities. Those who qualify under this proposal would have to demonstrate that they meet all of its conditions. The Commission seeks comment as to whether the concerns suggested by the aggregation petition and other commenters are valid, whether this proposal meets those concerns, and whether the 50 percent limit and other conditions are appropriate.

*Expansion of the Underwriter Exemption.* The Commission is also proposing to expand the exemption for the underwriting of securities that was adopted as regulation 151.7(g) to include ownership interests acquired through the market-making activities of an affiliated broker dealer. This proposal would exempt from aggregation ownership interests acquired as part of a person's reasonable market-making activity in the normal course of business as a broker-dealer registered with the SEC or comparable registration in a foreign jurisdiction,<sup>108</sup> so long as there is no other ownership interests or indicia of control or concerted action. The Commission intends for this proposal to apply to ownership interests that are likely transitory and not for investment purposes, and seeks comment as to whether such interests are at a low risk for the coordination of trading or whether this exemption could lead to evasion of applicable position limits.<sup>109</sup>

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<sup>108</sup> See 15 U.S.C. 78o.

<sup>109</sup> The Commission specifically notes that this proposed exemption would not apply to registered broker-dealers that acquire an ownership interest in securities with the intent to hold for investment purposes.

*Proposed “Higher-Tier” Entity Filing Relief.* The Commission also is proposing to extend filing relief to “higher-tier” entities. As such, proposed regulation 151.7(j) provides that higher-tier entities may rely on exemption notices filed by owned entities. Commenters claim that such an exemption would reduce the burden of filing exemption notices by eliminating redundancies. The Commission seeks comment as to whether this proposal will in fact reduce the filing burden for claiming an exemption, and whether the proposal would affect the Commission’s ability to oversee how exemptions are applied in the market.

*Independent Account Controller Exemption.* As discussed above, the IAC exemption in regulation 151.7(f) previously included commodity pools exempt from registration under § 4.13 that are structured as limited partnerships. The Commission is proposing to allow commodity pools structured as limited liability companies to rely on the IAC exemption. The Commission seeks comment as to whether there is any relevant distinction between limited partnerships and limited liability companies for purposes of this exemption.

### 3. Consideration of Costs and Benefits

It is the Commission’s goal that this proposal uphold part 151’s regulatory aims without diminishing its effectiveness. In so doing, the Commission adheres to its belief that aggregation represents a key element to prevent evasion of prescribed position limits and that its historical approach towards aggregation—one that appropriately blends consideration of ownership and control indicia—remains sound.<sup>110</sup>

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<sup>110</sup> The Commission’s general policy on aggregation is derived from CEA Section 4a(a)(1), which directs the Commission to aggregate based on separate considerations of ownership, control, or persons acting pursuant to an express or implied agreement.

The Commission seeks comment as to whether compliance with this proposal will reduce the costs market participants will incur to comply with the aggregation requirements of the final rules. In particular, how would the cost of filing a notice for disaggregation relief compare with the cost of developing systems necessary to aggregate the positions of owned entities under the current version of part 151? Note that, in the preamble to part 151, the Commission estimated that the filing of a Notice of Disaggregation would create certain costs for market participants.<sup>111</sup> In particular, the Commission approximated that the aggregation-related reporting requirements would affect “ninety entities, resulting in a total burden, across all these entities, of 225,000 annual labor hours and \$5.9 million in annualized capital, start-up, total operating, and maintenance costs.”<sup>112</sup> The Commission has estimated the additional burden that may result from the proposed rules as part of its Paperwork Reduction Act calculations, and requests comment on those estimations.<sup>113</sup> The Commission also seeks comment as to how many entities would be able to take advantage of the proposed exemption. Alternatively, how many entities would be able to take advantage of the owned non-financial entity exemption described in the aggregation petition?

Because costs associated with the aggregation of positions are highly variable and entity-specific, the Commission requests that commenters submit data from which the Commission can consider and quantify the costs of the proposed rules.

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<sup>111</sup> The costs of filing the Notice included costs of filing an opinion of counsel as well as the other necessary information under § 151.7(h).

<sup>112</sup> 76 FR 71626 at 71683.

<sup>113</sup> See section III.C.2 of this release.

In assessing benefits, it is important for the Commission to determine whether the proposed rules will enhance the Commission's ability to monitor compliance with position limits by focusing the Commission's resources on those entities most at risk of coordinated trading through multiple accounts. The Commission seeks comment as to whether the proposed amendments to the Commission's aggregation policy will result in lower costs for market participants without compromising the core purposes of the position limits regime.

#### 4. Section 15(a) Considerations

As the Commission has long held, position limits are an important regulatory tool that is designed to prevent concentrated positions of sufficient size to manipulate or disrupt markets. The aggregation of accounts for purposes of applying position limits represents an integral component that impacts the effectiveness of those limits. In the final rule, the Commission implemented a policy for the aggregation of accounts that largely tracked its longstanding standards of aggregation, which were designed to prevent evasion of those position limits. The proposed rules would amend this policy to introduce and expand certain exemptions. The Commission intends for the proposed rules to preserve the important protections of the existing aggregation policy, but at a lower cost for market participants. The Commission requests comment on its consideration of the costs and benefits of the proposed rules in relation to each of the Section 15(a) factors discussed herein.

##### a. Protection of Market Participants and the Public

The Commission wants to ensure that the exemptions proposed in these rules will not lessen the protection of market participants and the public that the aggregation policy in the Final

Rule provides. Given that the account aggregation standards are necessary to implement an effective position limit regime, it is important that the clarified and expanded exemptions of the proposed rules be sufficiently tailored to exempt from aggregation only those accounts that do pose a low risk of coordinated trading. The Commission believes that clarifying the scope of the violation of law exemption to include the risk of violating the applicable law more accurately informs market participants as to the standard for claiming the exemption. The proposed owned-entity exemption maintains the Commission's historical presumption threshold of 10 percent ownership or equity interest and makes that presumption rebuttable only where several conditions indicative of independence are met. This exemption focuses on the conditions that impact trading independence. The Commission intends that any exemption it adopts would allow the Commission to direct its resources to monitoring those entities with a higher risk of coordinated trading and thus at a higher risk of circumventing position limits, without reducing the protection of market participants and the public that the Commission's aggregation policy affords.

Similarly, the Commission intends for the "higher-tier" entity exemption, and the expansion of the underwriting and IAC exemptions, to reduce costs for market participants without a compromise to the integrity or effectiveness of the Commission's aggregation policy.

The Commission welcomes comment regarding whether the proposed rules would impact protection of market participants and the public.

#### b. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission wants to ensure that the exemptions proposed in these rules would fully preserve account aggregation as a tool to uphold the integrity of the part 151 position limit regime, which helps maintain the overall competitiveness and integrity of derivatives markets.

The Commission seeks comment regarding whether the proposed rules would impact the efficiency, competitiveness, and/or financial integrity of futures markets.

c. Price Discovery

Similarly, the Commission wants to ensure that the exemptions proposed in these rules do not adversely impact the price discovery process, which the part 151 position limit regime (including the account aggregation provisions in § 151.7) is designed to protect. The Commission welcomes comment as to whether the proposed rules would impact price discovery.

d. Sound Risk Management

The Commission wants to ensure that the exemptions proposed in these rules will not lessen the effectiveness of the sound risk management practices that the Final Rule promotes. The Commission welcomes comment as to whether the proposed rules would impact sound risk management practices.

e. Other Public Interest Considerations

The Commission has not identified any other public interest considerations related to the costs and benefits of the proposed rules. The Commission welcomes comment as to whether there are additional public interest considerations the Commissions should consider.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires that agencies consider the impact of their regulations on small businesses.<sup>114</sup> The requirements related to the proposed amendments fall mainly on DCMs, swap execution facilities (“SEF”) that are trading facilities, FCMs, foreign brokers, and large traders. The Commission has previously determined that DCMs, FCMs, foreign brokers and large traders are not “small entities” for the purposes of the RFA.<sup>115</sup> Further, in the Commission’s position limits rule,<sup>116</sup> the Commission determined that SEFs, which includes SEFs that are trading facilities, are not “small entities” for purposes of the RFA.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies, on behalf of the Commission, pursuant to 5 U.S.C. 605(b), that the actions proposed to be taken herein would not have a significant economic impact on a substantial number of small entities.

## C. Paperwork Reduction Act

### 1. Overview

The Paperwork Reduction Act (“PRA”) imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.<sup>117</sup> An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Certain provisions of the proposed regulations would result in new collection of information

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<sup>114</sup> 44 U.S.C. 601 et seq.

<sup>115</sup> See Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act, 47 FR 18618, Apr. 30 1982. See also Special Calls, 72 FR 34417, Jun. 22, 2007 (foreign broker determination).

<sup>116</sup> 76 FR 71626, Nov. 18, 2011.

<sup>117</sup> 44 U.S.C. 3501 et seq.

requirements within the meaning of the PRA. The Commission seeks to supplement the control number assigned by the Office of Management and Budget (“OMB”) for part 151 – Position Limits for Futures and Swaps (OMB control number 3038-0077). Therefore the Commission is submitting this proposal to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.

In January of 2012, the Commission received a petition requesting relief under section 4a(a)(7) of the CEA and clarification of certain aggregation requirements in regulation 151.7. In response to that petition, the Commission is proposing to clarify certain aspects of the aggregation standards, and to expand the scope of certain exemptions from aggregation. If adopted, responses to this collection of information would be mandatory to the extent persons wish to rely upon the exemptions contained within the proposed amendments to Commission regulation 151.7. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, headed “Commission Records and Information.” In addition, the Commission emphasizes that section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.”<sup>118</sup> The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974.<sup>119</sup>

Proposed rule 151.7(b)(1) establishes an exemption for a person to disaggregate the positions of a separately organized entity (“owned entity”). To claim the exemption, a person

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<sup>118</sup> 7 U.S.C. 12(a)(1).

<sup>119</sup> 5 U.S.C. 552a.

would need to meet certain criteria and file a notice with the Commission in accordance with regulation 151.7(h). The notice filing would need to demonstrate compliance with certain conditions set forth in regulations 151.7(b)(1)(i)-(vii). Similar to other exemptions from aggregation, the notice filing would be effective upon submission to the Commission, but the Commission may call for additional information as well as reject, modify or otherwise condition such relief. Further, such person is obligated to amend the notice filing in the event of a material change to the filing.

The proposed rules also amend regulation 151.7(i), which provides an exemption from aggregation where the sharing of information between persons would cause either person to violate federal law. The proposed amendments clarify that the exemption would apply to a situation where the sharing of information creates a reasonable risk of a violation of federal law or regulations adopted thereunder, and not solely a per se violation. For the same reasons the Commission adopted the exemption for information sharing restrictions for federal law, the Commission expanded the exemption in regulation 151.7(i) to generally extend to the state law and the law of a foreign jurisdiction. The proposed rules also retain the requirement that market participants file a notice demonstrating compliance with the condition and an opinion of counsel that the sharing of information could create a reasonable risk of a violation of state or federal law or the law of a foreign jurisdiction. The opinion allows Commission staff to review the legal basis for the asserted regulatory impediment to the sharing of information, and is particularly helpful where the asserted impediment arises from laws and/or regulations that the Commission does not directly administer. Further, Commission staff will have the ability to consult with other federal regulators as to the accuracy of the opinion, and to coordinate the development of rules surrounding information sharing and aggregation across accounts in the future.

The Commission is also proposing to amend the definitions of eligible entity and independent account controller in part 151.1 to specifically provide for regulation 4.13 commodity pools established as limited liability companies. These proposed amendments will likely expand the number of entities that can file for the independent account controller aggregation exemption.

Finally, the proposed rules include relief from notice filings for “higher-tier” entities, which, under proposed regulation 151.7(j), may rely on the filings submitted by owned entities. A “higher-tier” entity need not submit a separate notice pursuant to the notice filing requirements to rely upon the notice filed by an owned entity as long as it complies with conditions of the applicable aggregation exemption.

## 2. Reporting Burdens

Proposed regulation 151.7(b)(1) specifies that qualified persons may file a notice claiming exemptive relief from aggregation. Proposed regulation 151.7(b)(1)(vii) states that the notice is to be filed in accordance with regulation 151.7(h), which requires a description of the relevant circumstances that warrant disaggregation and a statement that certifies that the conditions set forth in the exemptive provision have been met. Persons claiming the exemption would be required to submit to the Commission, as requested, such information as relates to the claim for exemption. An updated or amended notice must be filed with the Commission upon any material change.

With regard to the existing filing procedure for claiming exemptions from aggregation, in the part 151 final rule the Commission estimated that ninety entities would incur a burden of 225,000 annual labor hours as well as \$5.9 million in annualized capital, start-up, total operating, and maintenance costs. This estimate was based on each entity submitting one notice of

disaggregation per year at a burden of 2,500 labor hours. Given the expansion of the exemptions that market participants may claim, the Commission anticipates an increase in the number of notice filings; however, because of the relief for “higher-tier” entities under proposed regulation 151.7(j), the Commission expects that increase to be offset by a reduction in the number of filings by “higher-tier” entities. Thus, the Commission anticipates a small net increase in the number of filings under regulation 151.7 as a result of the proposed rules. The Commission believes that this small increase will create a small increase in the annual labor burden. However, because entities will have already incurred the capital, start-up, operating, and maintenance costs to file other exemptive notices, the Commission does not anticipate an increase in those costs.

In light of the Commission providing for these additional exemptions, the Commission estimates that 90 entities will each file two notices annually under proposed regulation 151.7(b)(1), at an average of 20 hours per filing. Thus, the Commission approximates a total per-entity burden of 40 labor hours annually. Using the same labor cost estimates as in the existing collection (OMB# 3038-0077),<sup>120</sup> such a burden would cost approximately \$3,100 per entity for filings under proposed regulation 151.7(b)(1). Under proposed regulation 151.7(f), the Commission anticipates that 10 entities will annually file one notice each, at an average of 20 hours per filing, for a per-entity burden of 20 labor hours annually. Such a burden would cost approximately \$1,600 per entity. Finally, the Commission anticipates that 45 entities will

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<sup>120</sup> The Commission staff's estimates concerning the wage rates are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (“SIFMA”). The \$78.61 per hour is derived from figures from a weighted average of salaries and bonuses across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2010, modified to account for an 1800-hour work-year and multiplied by 1.3 to account for overhead and other benefits. The wage rate is a weighted national average of salary and bonuses for professionals with the following titles (and their relative weight); “programmer (senior)” (60% weight), “compliance advisor (intermediate)” (20%), “systems analyst” (10%), and “assistant/associate general counsel” (10%).

annually file one notice each under proposed regulation 151.7(i), at an average of 80 hours per filing, for a per-entity burden of 80 hours each. Such a burden would cost approximately \$6,300 per entity. Monetary estimates have been rounded to the nearest hundred.

In sum, the Commission estimates that 145 entities would submit a total of 235 responses per year and incur a total burden of 7,400 labor hours at a cost of approximately \$582,000 annually in addition to the existing burden under § 151.7.

### 3. Comments on Information Collection

The Commission invites the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility, (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information, (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected, and (4) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by email at [OIRA-submissions@omb.eop.gov](mailto:OIRA-submissions@omb.eop.gov). Please provide the Commission with a copy of comments submitted so that all comments can be summarized and addressed in the final regulation preamble. Refer to the Addresses section of this notice for comment submission instructions to the Commission. A copy of the supporting statements for the collection of information discussed above may be obtained by visiting

RegInfo.gov. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully considered if received by OMB (and the Commission) within 30 days after the publication of this notice of proposed rulemaking.

**List of Subjects**

17 CFR Part 151

Position limits, Bona fide hedging, Referenced Contracts.

In consideration of the foregoing, pursuant to the authority contained in the Commodity Exchange Act, the Commission hereby proposes to amend chapter I of title 17 of the Code of Federal Regulations as follows:

**PART 151 – POSITION LIMITS FOR FUTURES AND SWAPS**

1. The authority citation for part 151 is revised to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 5, 6, 6a, 6c, 6f, 6g, 6t, 12a, 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

2. Revise § 151.1 to read as follows:

**§ 151.1 Definitions**

\* \* \* \* \*

*Eligible Entity* means a commodity pool operator; the operator of a trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term “pool” or “commodity pool operator,” respectively, under § 4.5 of this chapter; the limited partner, limited member or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings

association; an insurance company; or the separately organized affiliates of any of the above entities:

\* \* \* \* \*

*Independent Account Controller* means a person:

(1) \* \* \*

(5) Who is registered as a futures commission merchant, an introducing broker, a commodity trading advisor, or an associated person of any such registrant, or is a general partner or manager of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter.

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3. Revise § 151.7 to read as follows:

**§ 151.7 Aggregation of positions.**

\* \* \* \* \*

(b) Ownership of accounts generally. For the purpose of applying the position limits set forth in § 151.4, except for the ownership interest of limited partners, shareholders, members of a limited liability company, beneficiaries of a trust or similar type of pool participant in a commodity pool subject to the provisos set forth in paragraph (c) of this section or in accounts or positions in multiple pools as set forth in paragraph (d) of this section, any person holding positions in more than one account, or holding accounts or positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest, must aggregate all such accounts or positions. However -

(1) Any person with a 10 percent or greater ownership or equity interest in an owned entity, need not aggregate the accounts or positions of the owned entity with any other accounts or positions such person is required to aggregate, provided that:

(i) Such person, including any entity that such person must aggregate, and the owned entity:

(A) Do not have knowledge of the trading decisions of the other;

(B) Trade pursuant to separately developed and independent trading systems;

(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 document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities;

(D) Do not share employees that control the trading decisions of either; and

(E) Do not have risk management systems that permit the sharing of trades or trading strategy;

(ii) Such person does not have greater than a 50 percent ownership or equity interest in the owned entity; and

(iii) Such person complies with the requirements of paragraph (h) of this section.

\* \* \* \* \*

(e) \* \* \*

(4) The futures commission merchant or the affiliate has complied with the requirements of paragraph (h) of this section.

(g) Exemption for underwriting. Notwithstanding any of the provisions of this section, a person need not aggregate the positions or accounts of an owned entity if the ownership interest

is based on the ownership of securities constituting the whole or a part of an unsold allotment to or subscription by such person as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(1) *Further*, a broker-dealer registered with the Securities and Exchange Commission, or similarly registered with a foreign regulatory authority, need not aggregate the positions or accounts of an owned entity if the ownership interest is based on the ownership of securities acquired as part of reasonable activity in the normal course of business as a dealer, *provided that*, such person does not have actual knowledge of the trading decisions of the owned entity.

(h) Notice filing for exemption.

(1) Persons seeking an aggregation exemption under paragraph (b)(1), (c), (e), (f), or (i) of this section shall file a notice with the Commission, which shall be effective upon submission of the notice, and shall include:

(i) a description of the relevant circumstances that warrant disaggregation; and

(ii) a statement of a senior officer of the entity certifying that the conditions set forth in the applicable aggregation exemption provision have been met.

(2) Upon call by the Commission, any person claiming an aggregation exemption under this section shall provide such information concerning the person's claim for exemption as is requested by the Commission. Upon notice and opportunity for the affected person to respond, the Commission may amend, suspend, terminate, or otherwise modify a person's aggregation exemption for failure to comply with the provisions of this section.

(3) In the event of a material change to the information provided in the notice filed under this paragraph, an updated or amended notice shall promptly be filed detailing the material change.

(4) A notice shall be submitted in the form and manner provided for in § 151.10.

(i) Exemption for law information sharing restriction. Notwithstanding any other provision of this section, a person is not subject to the aggregation requirements of this section if the sharing of information associated with such aggregation creates a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder, and provided that such a person does not have actual knowledge of information associated with such aggregation. Provided further, that such person file a prior notice pursuant to paragraph (h) of this section and an opinion of counsel that the sharing of information creates a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder. *Provided however*, the exemption in this paragraph shall not apply where the law or regulation serves as a means to evade the aggregation of accounts or positions. All documents submitted pursuant to this paragraph shall be in English, or if not, accompanied by an official English translation.

(j) *Higher-Tier Entities.* If an owned entity has filed a notice under paragraph (h) or (i) of this section, any person with an ownership or equity interest of 10 percent or greater in the owned entity need not file a separate notice identifying the same positions and accounts previously identified in the notice filing of the owned entity, provided that:

(1) Such person complies with the conditions applicable to the exemption specified in the owned entity's notice filing, other than the filing requirements; and

(2) Such person does not otherwise control trading of the accounts or positions identified in the owned entity's notice.

(3) Upon call by the Commission, any person relying on the exemption in paragraph (j)(1) of this section shall provide to the Commission such information concerning the person's

claim for exemption. Upon notice and opportunity for the affected person to respond, the Commission may amend, suspend, terminate, or otherwise modify a person's aggregation exemption for failure to comply with the provisions of this section.

\* \* \* \* \*

4. Revise § 151.10 to read as follows:

**§ 151.10 Form and manner of reporting.**

\* \* \* \* \*

(b) \* \* \*

(4) A notice of disaggregation is filed pursuant to § 151.7(h), in which case the notice shall be effective upon filing.

\* \* \* \* \*

5. Revise § 151.12 to read as follows:

**§ 151.12 Delegation of authority to the Director of the Division of Market**

**Oversight.**

(a) \* \* \*

(5) In § 151.7(j)(1)(iii) to call for additional information from a trader claiming the exemption in § 151.7(j)(1).

(6) In § 150.10 for providing instructions or determining the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

\* \* \* \* \*

Issued in Washington DC on May 17, 2012 by the Commission,



David A. Stawick  
Secretary of the Commission

Appendix 1- Statement of Commissioner Jill E. Sommers

I support the Commission's proposed rules that, among other things, expand the exemptions relating to information sharing restrictions, expand the circumstances under which market participants will not be required to aggregate positions, and reduce the reporting burdens on higher tier entities. I am pleased that we recognize that the final position limits rules issued on November 18, 2011 set forth an unworkable and overly restrictive approach to these issues.

Essentially, as they relate to "owned entities," the proposed rules contain three "tiers" for purposes of aggregation. First, if the ownership interest is less than 10 percent, one need not aggregate positions with those of the owned entity. Second, if the ownership interest is between 10 percent and 50 percent, one must aggregate positions with those of the owned entity unless it can be shown that there is a lack of knowledge of, and control over, the trading of the owned entity. Third, if the ownership interest exceeds 50 percent, one must always aggregate positions with those of the owned entity, even if there is a lack of knowledge of, and control over, the trading of the owned entity.

I question whether a bright-line approach is the correct approach, and if it is, whether the line should be drawn at 50 percent. In the absence of knowledge of, and control over, trading of an owned entity, is there a real difference between owning 49 percent and owning 50 percent? I

don't think there is. In justifying 50 percent as the correct place to draw the line, the preamble to the proposed rules states, "such a bright-line rule would provide clarity to market participants and a useful tool for the Commission to simplify aggregation." Providing clarity and certainty to market participants is important. However, if providing clarity and certainty results in a one-size-fits-all answer that fails to take into account the varying needs of a very diverse group of market participants, the clarity and certainty are of little use. Moreover, while it is important to establish an aggregation approach that the Commission can effectively administer, I hesitate to put too much weight on "simplifying" the approach if the simplified approach is needlessly restrictive.

In my dissent to the final position limits rules, I expressed concern that with regard to the 19 new reference contracts, the Commission was taking on "front-line oversight of the granting and monitoring of bona-fide hedging exemptions for the transactions of massive, global corporate conglomerates that on a daily basis produce, process, handle, store, transport, and use physical commodities in their extremely complex logistical operations." My concerns apply equally to the issue of aggregation. We have limited experience as it relates to these new reference contracts, and no experience aggregating swaps into the overall calculations. In the face of such limited experience, our apparent certainty on where to draw lines is troubling.