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March 26, 2012

Via Electronic Submission

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Center  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

**Re: Petitions for Exemptive Relief from Certain Requirements of  
Part 151 of the Commission's Regulations**

Dear Mr. Stawick:

The Futures Industry Association (“**FIA**”) appreciates the opportunity to provide the Commodity Futures Trading Commission (the “**Commission**”) with comments in support of the Petitions of the Working Group of Commercial Energy Firms (“**Working Group**”) requesting certain exemptive relief from the Commission’s regulations establishing speculative position limits (“**Position Limits Rule**”).<sup>1</sup> The FIA supports the Working Group’s Petitions requesting exemptive relief from the aggregation requirements of the Position Limits Rule (the “**Aggregation Petitions**”) as well as its Petition requesting relief for certain *bona fide* hedging transactions (the “**Bona Fide Hedging Petition**”).<sup>2</sup>

Under Section 4a(a)(7) of the Commodity Exchange Act (“**CEA**”), the Commission has the authority to “exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps . . . or any transaction or class of transactions from any requirement it may establish with respects to position limits.” The FIA respectfully requests that the Commission, pursuant to its authority under CEA Section 4a(a)(7), grant the Working Group’s

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<sup>1</sup> *Position Limits for Futures and Swaps*, 76 Fed. Reg. 71626 (Nov. 18, 2011).

<sup>2</sup> On January 19, 2012, the Working Group filed with the Commission three petitions for exemptive relief from various aspects of the Position Limits Rule. Two of these petitions pertain to the aggregation provisions in CFTC Rule 151.7: *first*, a petition for a Commission order exempting owned non-financial entities from the aggregation requirement in CFTC Rule 151.7 (“**ONFE Petition**”); and *second*, a petition for a Commission order broadening and clarifying the exemption for certain federal law information sharing restrictions in CFTC Rule 151.7(i) (“**Information Sharing Petition**”). Because these two petitions pertain to the aggregation provisions in CFTC Rule 151.7, FIA refers to the ONFE Petition and Information Sharing Petition collectively as the “**Aggregation Petitions**.” The *third* petition filed by the Working Group is a petition for a Commission order granting exemptive relief for certain non-enumerated *bona fide* hedging transactions under CFTC Rule 151.5 (“**Bona Fide Hedging Petition**”). FIA refers to the Aggregation Petitions and the *Bona Fide Hedging Petition* collectively as the “**Petitions**.”

Petitions for exemptive relief as expeditiously as possible and make explicit that such relief applies to all market participants who satisfy the specified conditions.

## **I. FIA's Interest in the Petition and the Position Limits Rule**

The FIA's members, their affiliates, and their customers actively participate in the exchange-traded and over-the-counter derivatives markets as intermediaries, principals, and users. The Commission's aggregation requirements for Referenced Contract positions will adversely affect the FIA's members, affiliates of the FIA's members, their customers, and the efficiency and competitiveness of the U.S. derivatives markets. In addition to their concerns about the aggregation requirement, the FIA's members are concerned that the Commission's unnecessarily narrow definition of *bona fide* hedging under CEA section 4a(c)(2) and CFTC Rules 151(a)(2) and (a)(5) will impede the ability of hedgers to manage the risks they incur in their businesses at a reasonable cost.

## **II. The FIA Supports the Working Group's Aggregation Petitions and Urges the Commission to Grant the Relief Requested Therein as Expeditiously as Possible**

The FIA supports the requests in the Aggregation Petitions for exemptions that would reinstate a modified version of the proposed owned, non-financial entity exemption ("**ONFE Exemption**") and expand the exemption for "federal law information sharing restriction" ("**Federal Law Exemption**") to include situations where such information sharing could lead to a *reasonable risk* of violating federal law, state law, or the law of a foreign jurisdiction. As the FIA has explained previously, in the absence of the requested relief, the Position Limits Rule's aggregation requirements may disrupt the efficient operation of numerous businesses and harm the liquidity and competitiveness of the derivatives markets.<sup>3</sup>

### **A. The Commission Should Provide Relief that Allows All Market Participants to Disaggregate Positions in Referenced Contracts Held by Independently Managed and Controlled Owned Non-Financial Entities**

The FIA agrees with the Working Group that the Commission should adopt an appropriately tailored ONFE Exemption that allows market participants to disaggregate the positions of owned, but independently managed and controlled, non-financial entities.<sup>4</sup> As the

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<sup>3</sup> See Futures Industry Association, Comment Letter on Position Limits for Futures and Swaps at 15 (dated Jan. 17, 2012). In addition to position limits established by the Commission, the FIA's members would also be required to comply with the same problematic aggregation requirement for any exchange-set position limits. 17 C.F.R. § 151.11(e).

<sup>4</sup> As indicated in its March 25, 2011 comment letter, the FIA respectfully requests that the Commission modify the ONFE Exemption by: (1) making the exemption conditionally effective upon filing; and (2) allowing applicants to use any commercially reasonable criteria to demonstrate that two entities are subject to independent control. See Futures Industry Association Comment Letter on Position Limits for Derivatives at 23-27 (dated Mar. 25, 2011).

FIA pointed out in its January 17, 2012 comment letter, the Commission removed the ONFE Exemption from the proposed rule based on the factually incorrect conclusion that preserving the exemption for Independent Account Controllers (“IAC”), along with two other exemptions, was sufficient to address concerns expressed during the comment period regarding the potential impact of the aggregation requirement on commonly-owned entities or accounts and, therefore, further expansion of the scope of exemptions was not appropriate.<sup>5</sup> Contrary to the Commission’s conclusion, the IAC exemption cannot be used to disaggregate independently managed and controlled, but commonly owned, proprietary trading accounts of non-financial entities, a practice that the Commission’s regulations previously expressly permitted with respect to exchange limits and accountability levels.<sup>6</sup> Similarly, in most cases, the other exemptions included in the Position Limits Rule provide no meaningful relief for separately managed owned, non-financial entities. As a result, absent a violation of Federal law, these market participants will be forced to aggregate all positions of all owned, non-financial entities in which they have a 10 percent or greater ownership interest even though the entities trade and manage their positions independently and, as a practical matter, may not be able to access each other’s position information.

Requiring aggregation of separately managed owned, non-financial entities does not further the policy rationale behind the Commission’s aggregation requirement and imposes significant new compliance costs on many market participants with little, if any, discernible public benefit. The Commission stated in the preamble to the Position Limits Rule that, “[t]he fundamental rationale for the aggregation of positions or accounts is the concern that a single trader, through common ownership or control of multiple accounts, may establish positions in excess of the position limits and thereby increase the risk of market manipulation or disruption.”<sup>7</sup> In situations where there is no common control, there is no risk of coordinated trading and, therefore, no need for aggregation.<sup>8</sup> Consequently, firms with a 10 percent or greater ownership interest in an owned, non-financial entity that can demonstrate that the owned, non-financial entity is independently controlled and managed should be permitted to disaggregate their

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<sup>5</sup> The Commission stated that due to the Position Limits Rule’s inclusion of the IAC exemption, the Federal Law Exemption, and the exemption for underwriting, it “would not be appropriate, at this time, to expand further the scope of disaggregation exceptions to owned non-financial or financial entities.” 76 Fed. Reg. at 71654.

<sup>6</sup> See 17 C.F.R. § 150.5(g) (“In determining whether any person has exceeded the limits established under this section, all positions in accounts for which such person by power of attorney or otherwise directly or indirectly *controls* trading shall be included with the positions held by such person; such limits upon positions shall apply to positions held by two or more person acting pursuant to an express or implied agreement or understanding, the same as if the positions were held by a single person.”) (Emphasis added).

<sup>7</sup> 76 Fed. Reg. at 71652.

<sup>8</sup> See Futures Industry Association, Comment Letter on Position Limits for Futures and Swaps at 18 (dated Jan. 17, 2012).

positions.<sup>9</sup> Further, the FIA respectfully requests that companies be permitted to demonstrate independent management and control of the owned, non-financial entity through any commercially reasonable criteria. The indicia of independent management and control enumerated in the proposed version of the Position Limits Rule are too restrictive and do not reflect the many ways in which commercial entities, including affiliates of FIA's members, are organized and operate.<sup>10</sup>

**1. The Exemptive Order Providing Relief from the Position Limits Rule's Aggregation Requirement Should Remove the Reference to Eligible Entities from the Definition of Owned Non-Financial Entities**

The Commission should provide exemptive relief from the Position Limits Rule's aggregation requirement to any entity that is not a "financial entity". The Working Group's proposed order to reinstate the ONFE Exemption defined an "owned non-financial entity" as any entity that is "not a financial entity *or eligible entity* and in which another entity directly or indirectly has a 10 percent or greater ownership or equity interest."<sup>11</sup> The FIA recommends that the Commission amend the proposed order that accompanies the Aggregation Petitions to eliminate the reference to "eligible entities" in the definition of "owned non-financial entity".

The definition of "eligible entity" includes, among other things, "a bank or trust company; a savings association; an insurance company; *or the separately organized affiliates of any of the above entities.*"<sup>12</sup> If adopted as proposed, the aggregation exemption would inadvertently and inappropriately exclude all owned, non-financial entities that are owned by, or affiliated with, an eligible entity. Defining a "non-financial entity" in terms of the CEA definition of a "financial entity" in CEA Section 2(h)(7) is a simpler and more effective way to mitigate the unnecessary burden that aggregation will impose on independently managed

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<sup>9</sup> In the preamble to the Position Limits Rule, the Commission explained that it was setting position limits, pursuant to CEA Section 4a, as amended by the Dodd-Frank Act, "in order to protect against excessive speculation and manipulation while ensuring that the markets retain sufficient liquidity for bona fide hedgers and [ensuring] that their price discovery functions are not disrupted." 76 Fed. Reg. at 71627. As described above, in situations where there is no common control, there is no risk that market participants will coordinate to evade position limits in order to engage in excessive speculation or market manipulation. Accordingly, the ONFE Exemption is consistent with the underlying policy rationale of position limits.

<sup>10</sup> *Position Limits for Derivatives*, Proposed Rule, 76 Fed. Reg. 4752, 4774 (Jan. 26, 2010). See Futures Industry Association, Common Letter on Position Limits for Derivatives at 23-27 (dated Mar. 25, 2011).

<sup>11</sup> See Aggregation Petitions, Exhibit A – 1 (emphasis added).

<sup>12</sup> 17 C.F.R. § 151.1.

commercial affiliates.<sup>13</sup> Furthermore, adopting the statutory definition of “non-financial entity” ensures that the ONFE Exemption’s full relief is available to all owned, non-financial entities that meet the exemption’s criteria.

**B. The Commission Should Expand the Federal Law Exemption to Include Situations Where Information Sharing Could Cause a Violation of Any Law**

The FIA agrees with the Working Group that the Commission should expand the Federal Law Exemption to include circumstances that *could cause* a person to violate international, federal, state, or local law, the law of a foreign jurisdiction, or regulations adopted thereunder, provided that such person does not have actual knowledge of the positions of the other entity. In its January 17, 2012 letter, the FIA pointed out that absent the inclusion of a “reasonable risk” qualification to the Federal Law Exemption and an expansion of the exemption to include violations of state, local, and foreign law, market participants may be required to: (1) share information with another entity under circumstances that increase their potential legal risk; or (2) refrain from otherwise legitimate market activity that reduces risk and increases market liquidity.

For example, the communication of proprietary information between two competitors who are parties to a joint venture may not fall within a literal interpretation of the Federal Law Exemption. However, there are many circumstances where the information sharing required by the Position Limits Rule between joint ventures partners *could* constitute a violation of federal, state, or other laws, but only after application of “rule of reason” or some other similar test. In such situations, the two entities would be placed in the untenable position of either potentially violating the position limits aggregation requirement or, in the alternative, violating state antitrust or the laws of other jurisdictions.

Accordingly, the Commission should eliminate this unnecessary risk and uncertainty by granting the exemptive relief requested in the Working Group’s Aggregation Petitions.

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<sup>13</sup> Subject to certain exclusions and limitations, CEA Section 2(h)(7) defines a “financial entity” as “(I) a swap dealer; (II) a security-based swap dealer; (III) a major swap participant; (IV) a major security-based swap participant; (V) a commodity pool; (VI) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80-b-2(a)); (VII) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); (VIII) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.”

**III. The FIA Supports the Working Group's *Bona Fide* Hedging Petition and Urges the Commission to Grant the Relief Requested Therein as Expeditiously as Possible**

The FIA respectfully requests that the Commission, pursuant to its authority under CEA Section 4a(a)(7), clarify that the types of risk-reducing transactions described in the *Bona Fide* Hedging Petition qualify as *bona fide* hedging transactions under the Position Limits Rule. The FIA agrees with the Working Group that these commonplace risk-mitigating practices meet the statutory definition of *bona fide* hedging under CEA Section 4a(b) and CFTC Rule 151.5(a) and, therefore, should be included among the Position Limits Rule's enumerated hedging transactions. In the absence of such relief, the FIA and its members are concerned that the cost of hedging will increase for all market participants during an uncertain time for the commodity markets and the U.S. economy.

**IV. Conclusion**

For the foregoing reasons, the FIA respectfully requests that the Commission grant the Working Group's Petitions for exemptive relief as expeditiously as possible.

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Please direct any questions about FIA's comments and recommendations to Barbara Wierzynski, Executive Vice President and General Counsel, at 202-466-5460.

Respectfully yours,



John Damgard  
President

cc: Honorable Gary Gensler, Chairman  
Honorable Jill E. Sommers, Commissioner  
Honorable Bart Chilton, Commissioner  
Honorable Scott O'Malia, Commissioner  
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