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January 19, 2012

FILE NO: 76142.2

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: *Petitions for Order to Exempt Owned Non-Financial Entities from Aggregation for Compliance with Position Limits and Order to Broaden and Clarify Rule 151.7(i)*

Dear Secretary Stawick:

On behalf of the Working Group of Commercial Energy Firms ("the Working Group"), Hunton & Williams LLP hereby submits two petitions to the Commodity Futures Trading Commission pursuant to Section 4a(a)(7) of the Commodity Exchange Act.

The Working Group respectfully requests that the Commission take action on these petitions as soon as possible, but in any event no later than 30 days after the date of this petition.

If you have any questions, please contact the undersigned.

Respectfully submitted,

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Enclosures
cc: Chairman Gary Gensler
Commissioner Jill Sommers
Commissioner Bart Chilton
Commissioner Scott O'Malia
Commissioner Mark Wetjen
Dan Berkowitz, General Counsel
Kenneth Danger, Division of Market Oversight

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

Working Group of Commercial Energy Firms	))	**Docket: Not Assigned**

PETITIONS FOR

ORDER TO EXEMPT OWNED NON-FINANCIAL ENTITIES FROM AGGREGATION FOR COMPLIANCE WITH POSITION LIMITS

AND

ORDER TO BROADEN AND CLARIFY RULE 151.7(i)

I. INTRODUCTION.

The Working Group of Commercial Energy Firms (the "Petitioner") hereby submits two petitions to the Commodity Futures Trading Commission (the "Commission") pursuant to Part 4a(a)(7) of the Commodity Exchange Act (as amended, the "CEA"). Both petitions pertain to Part 151.4[1] of the Commission's regulations (the "Regulations") which implement federal position limits for derivatives (Part 151 of the Regulations is referred to herein as the "Position Limit Rules").[2] *First*, the Petitioner respectfully requests that the Commission issue an order to exempt persons, under certain circumstances, from aggregating positions in Referenced Contracts held by "owned non-financial entities" (as described herein) for purposes of compliance with the Position Limit Rules. *Second*, the Petitioner respectfully requests that the Commission issue an order that broadens and clarifies Rule 151.7(i)[3] to permit a market participant to not aggregate positions in Referenced Contracts if doing so requires the sharing of information that could result in a violation of state, local or foreign law. Petitioner submits these two petitions severally.[4]

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1 17 C.F.R. § 151.4

2 *Position Limit for Futures and Swaps*, 76. Fed. Reg. 71,626 (Nov. 18, 2011).

3 17 C.F.R. § 151.7(i)

4 Petitioner avers that combining the petitions is more efficient given that both requests for relief arise from a set of common facts and the same underlying rules.

The Petitioner respectfully requests that the Commission take action on these petitions as soon as possible, but in any event no later than 30 days after the date of this petition. The Position Limit Rules will require market participants to design, test and implement new processes and systems, among other things, to aggregate positions across many affiliated entities. Market participants must begin compliance with the Position Limit Rules within sixty days of the further definition of "swap" being published in the Federal Register.[5] For such market participants to complete the work necessary to comply with the Position Limit Rules prior to their effective date, sufficient lead-time is necessary. Delayed action by the Commission in granting the relief requested in these petitions will cause commercial firms to expend significant resources, perhaps unnecessarily.

While the Commission considers these petitions, the Petitioner further requests that the Commission provide interim exemptive relief from the Position Limit Rules' aggregation requirements under Part 4a(a)(7) of the CEA substantially in the forms of Exhibit A and Exhibit B. Such interim exemptive relief is necessary to prevent commercial firms and their affiliated owned non-financial entities incurring significant costs to potentially comply with the Position Limit Rules' aggregation requirements on a temporary basis.

The two proposed exemptive orders are effective methods to afford the necessary relief to market participants from the highly burdensome and practically unworkable aggregation rules within the Position Limit Rules. Should the Commission find that another action, such as the issuance of a regulation, is preferable and would afford the same degree of relief as the proposed exemptive orders, the Petitioner supports the Commission taking such other action, *provided* that the Commission issue an interim exemptive order during any necessary notice and comment period. The Petitioner also requests that the Commission take any other actions it deems necessary in furtherance of the relief sought under these petitions.

The Petitioner does not request confidential treatment for these petitions.

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5 *Position Limit Rules* at 71,632.

II. QUALIFICATION OF PETITIONER.

Petitioner is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial and residential consumers. Members of the Petitioner, their affiliates and various joint ventures in which they participate will be subject to the Position Limit Rules. Petitioner has been an active participant in the rulemaking process, submitting several comment letters with regard to the Position Limit Rules[6] and meeting with Commissioners and Commission staff on multiple occasions about such rules. Petitioner is fully qualified to make this petition on behalf of entities with affiliates that are similarly affected by the Position Limit Rules.

III. AUTHORITY OF COMMISSION TO GRANT PETITIONS.

The Commission has the authority necessary to grant these petitions under Part 4a(a)(7) of the CEA. Under Part 4a(a)(7) of the CEA, the Commission "by rule, regulation, or order, may exempt, conditionally or unconditionally, any person, or class of persons . . . from any requirement it may establish . . . with respect to position limits."

In the present case, the Commission would be well within its powers to find that the issuance of the requested exemptive orders is necessary and in the public interest. As discussed below, the Position Limit Rules' aggregation provisions potentially impose substantial burdens on commercial firms, their investors and their affiliated owned non-financial entities. Issuance of the proposed exemptive orders, in contrast, will avoid the imposition of substantial costs on

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6 October 17, 2011 - Position Limits for Derivatives:
http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=49891&SearchText=

October 14, 2011 - Inclusion of Long-Term Contracts in the Definition of Deliverable Supply for Calculating the Spot-Month Position Limits:
http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=49890&SearchText=

August 16, 2011 - Spot-Month Position Limits - Conditional Exemption for Cash-Settled Contracts:
http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=48085&SearchText=

June 5, 2011 - Position Limits for Derivatives:
http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=44705&SearchText=

March 28, 2011 - Position Limits for Derivatives:
http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=33861&SearchText=

commercial firms and the derivatives markets and, at the same time, not increase the risk of excessive speculation in commodity markets.[7] The exemptive orders may even prevent a loss of liquidity or the increase of market concentration that likely will result under the Position Limit Rules. Further, as discussed herein, the Position Limit Rules will force many commercial firms to significantly alter their well-established, robust and effective compliance programs. Given the policy and regulatory rationale that has shaped such compliance programs, it is in the public interest not to partially deconstruct them or for the Commission to force them to address challenges that would not otherwise exist.

The Commission has, to some degree, already afforded market participants notice and the opportunity to comment on the general subjects of the requested exemptive orders. The requested rules are logical outgrowths of prior rulemakings, and concerns regarding meaningful public notice and opportunity for public comment have largely been abated. As no truly new concepts are advanced by these petitions, the Commission would not run afoul of the Administrative Procedure Act by issuing the two exemptive orders sought by these petitions and, if desired, providing subsequent opportunity for public comment.

IV. COMMON DISCUSSION FOR BOTH PETITIONS.

Departing from its proposed position limit rules, the Commission did not include in the final Position Limit Rules an exemption from the aggregation requirement for persons holding an ownership interest in certain non-financial companies, subject to the satisfaction of certain conditions (the "Owned Non-financial Entity Exemption"). As a practical matter, this unanticipated omission means commercial firms can obtain relief from the strict application of the aggregation requirements of the Position Limit Rules through only one exemption, Rule 151.7(i), which applies when sharing information between affiliates would result in a violation of Federal law or regulation (the "Federal Law Exemption"). The Federal Law Exemption, as discussed herein, provides little to no relief to many commercial entities. Thus, absent further relief from the Commission, commercial firms will be left to contend with Position Limit Rules

[7] The requested amendments to the aggregation provisions of the Position Limit Rules will avoid an increase in coordinated trading among affiliated entities, and therefore will not facilitate a trader engaging in excessive speculation in commodity markets by coordinating trading among several accounts or entities.

that are highly impractical, if not impossible, to implement and require them to depart from existing "best practices" with respect to information sharing and separation of trading control.

The Petitioner respectfully requests that the Commission take swift action to avoid potentially serious unintended and materially adverse consequences and disruption to commercial firms and the broader derivatives and commercial markets. Absent actual relief from the aggregation requirements of the Position Limit Rules, commercial firms likely will have to significantly reorganize their existing commercial operations. These actions may include the restructuring or disposition of investments in joint ventures. Similarly, certain investors in commercial firms will have to reexamine and restructure their investments. As a direct consequence of this commercial restructuring, markets may witness a reduction in market participation and liquidity and, at the same time, a concentration of position control and an increase in information sharing among competitors. Issuance of the requested exemptive orders will prevent this hardship to commercial firms and potential distortions to the derivatives and commodities markets.

A. The Removal of the Proposed Owned Non-financial Entity Exemption was Unanticipated and Not Well Supported.

The Commission published its proposed position limit rules on January 26, 2011 (the "Proposed Position Limit Rules").[8] In the Proposed Position Limit Rules, the Commission set forth the Owned Non-financial Entity Exemption in proposed Rule 151.7(f). The Proposed Position Limit Rules required a trader to "aggregate all positions in accounts in which a trader, directly or indirectly, holds an ownership or equity interest of 10 percent or greater; as well as accounts over which the trader controls trading."[9] The Owned Non-financial Entity Exemption provided an exemption from this aggregation requirement for an entity that owns 10 percent or more of a non-financial entity if that entity could demonstrate that the trading positions of the owned non-financial entity are independently controlled and managed and there was appropriate

8 *Position Limits for Derivatives*, 76. Fed. Reg. 4,712 (Jan. 26, 2011).

9 *Proposed Position Limit Rules* at 4,762.

separation of information related to those trading positions.[10] The proposed exemption provided a non-exclusive list of indicia of independence and separation.[11]

The Owned Non-financial Entity Exemption was removed unexpectedly and did not appear in the final Position Limit Rules. The Commission gave no indication in the Proposed Position Limit Rules or prior to the issuance of the Position Limit Rules that the inclusion of the Owned Non-financial Entity Exemption in the final rule was on tenuous ground. Accordingly, entities to which the exemption would have potentially applied, including the members of the Petitioner, provided comments focused on how to improve the exemption they believed to be forthcoming and did not provide extensive comments on why the exemption was both necessary and justified as a policy matter.

The Commission's rationale for removing the Owned Non-financial Entity Exemption was that, in light of the retention of the independent account controller exemption and its general aggregation policy and the inclusion of an exemption for federal law information sharing restrictions, further disaggregation exemptions would not be appropriate.[12] The Commission did not provide any support as to why another disaggregation exemption would not be appropriate or why a departure is appropriate from the current practice used by trading exchanges regulated by the Commission for granting commercial firms relief from existing aggregation requirements.[13]

B. <u>The Position Limit Rules Will Force Market Participants to Share Information and Coordinate Trading Contrary to Existing "Best Practices</u>."

The Position Limit Rules mandate the sharing of information and the coordination of trading activities in markets and circumstances where participants currently take great care to prevent such sharing and coordination. Thus, the Position Limit Rules force commercial firms to depart from existing "best practice" for legal compliance.

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10 *Proposed Rule* 151.7(f).

11 *Id.*

12 *Position Limit Rules* at 71,654.

13 *Id.*

1. *Competition Considerations.*

Many of the "best practices" that commercial firms and investors in such firms follow are designed to preserve competition – either among the joint venture's participants or between the joint venture and one or more of its participants – by preserving the incentives for competitors or potential competitors involved in joint venture relationships to independently compete in the relevant market. Chief among these "best practices" are (a) the prevention of certain information sharing between two entities that operate in the same market and (b) the establishment of independent control of trading positions.[14] In April 2000, the Federal Trade Commission (the "FTC") and the U.S. Department of Justice ("DOJ", together with the FTC, the "Agencies") issued "Antitrust Guidelines for Collaboration Among Competitors" (the "Collaboration Guidelines").[15] The Agencies identified six factors to evaluate whether joint venture participants and their collaboration have the ability to compete independently of each other.[16] One of these factors is the control by certain personnel of the joint venture participants of the collaboration's competitively significant decision making. Specifically, the Agencies stated:

> . . . the Agencies consider the extent to which the collaboration's governance structure enables the collaboration to act as an independent decision maker. For example, the Agencies ask whether participants are allowed . . . to exercise significant control over the operations of the collaboration. In general, the collaboration is less likely to compete independently as participants gain greater control over the collaboration's price, output, and other competitively significant decisions.[17]

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14 *See*, Edwards, Jr., Robert P., "Mergers, Acquisitions and Joint Ventures", *Energy Law and Transactions*, Vol. 5, Chapter 103.04[2], Lexis Nexis ("Participants in joint ventures can reduce the risk of antitrust challenge by establishing methods of operation which limit the coordination between the erstwhile competitors to that which is necessary to: achieve the joint venture; avoid unnecessary exchanges of price, customer or production cost data; and avoid unnecessary discrimination of such data to persons involved with the participants' operations apart from the joint venture.")

15 Available at www.ftc.gov/os/2000/04/ftcdojguidelines.pdf

16 *Collaboration Guidelines* § 3.34.

17 *Id*. § 3.34(d).

Another factor identified by the Agencies is the likelihood of anticompetitive information sharing:

> The Agencies evaluate the extent to which competitively sensitive information concerning markets affected by the collaboration likely would be disclosed. This likelihood depends on, among other things, the nature of the collaboration, its organization and governance and safeguards implemented to prevent or minimize such disclosure. For example, participants might refrain from assigning marketing personnel to an R&D collaboration, or, in a marketing collaboration, participants might limit access to competitively sensitive information regarding their respective operations to only certain individuals or to an independent third party. . . . In general, it is less likely that the collaboration will facilitate collusion on competitively sensitive variables if appropriate safeguards governing information sharing are in place.[18]

Given these government identified factors for evaluating collaborations among competitors for potential anticompetitive behavior, commercial firms that are current or potential competitors either with each other or with a joint venture often take great care, frequently at the advice of counsel, to assure that neither a joint venture nor its participants receive competitively-sensitive information[19] or have the ability to exercise control over trading decisions[20] if doing so could give one company a competitive advantage.

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18 *Id.* § 3.34(c).

19 Current "best practices" do not prohibit information sharing between management bodies or persons, even if overlap exists between the management of two affiliated entities. It is well understood that such information might be needed for compliance purposes, as well as strategic planning, and may be of the type of information that a reasonable investor might be expected to want to receive. Furthermore, the establishment of general trading policy is not inconsistent with such "best practices." This is distinct from the ability to direct trading into and out of specific positions on a day-to-day basis. Most commercial firms have significant measures in place to prevent inappropriate control of trading by management, particularly if such management may be privy to trading information of an affiliate that the firm wishes not to integrate for trading purposes. The departure from established "best practices" that will result from the aggregation requirements of the Position Limit Rules weakens the rigor of compliance programs established to serve the public interest with the goal of preventing potential violations of the law.

20 The FTC has often required joint venture participants to cede decision making control and erect information barriers as conditions to consent decrees. *See, e.g.*, Decision and Order, In the matter of TC Group, L.L.C. et al., No. 061-0197, Mar. 14, 2007 at http://www.ftc.gov/os/caselist/061097/index.shtm. *See, also,* Wait, Amanda L., "Competitor Information Exchanges: Practical Considerations from FTC Consent Decrees," *American Bar Association, Section of Antitrust Law's Competition and Consumer Protection Issue in the Energy Industry Conference*, May 6, 2011, at http://www.hunton.com/files/Publication/37824b3f-67a0-48d5-9211-712846a587e0/Presentation/PublicationAttachment/1740fa96-1c76-40bb-909f-74c0f7ee0687/Competitor_Information_Exchanges.pdf.

Yet, the Position Limit Rules, absent further relief from the aggregation requirements, will force commercial firms and associated investors to abandon such "best practices" or engage in material corporate restructurings, including the disposition of investments, to avoid information sharing or coordinated trading. Market participants cannot cite compliance with the Position Limit Rules as an affirmative defense to violations of other laws. As seen in the Department of Justice action against KeySpan Corporation,[21] compliance with a separate regulatory requirement does not shield conduct from the antitrust laws.[22]

Investors and joint venturers will struggle to balance antitrust concerns with the requirements of the Position Limit Rules without the legal certainty of a clear exemption. Future direct investments and joint ventures, as a result will likely be limited and conducted in a materially different manner. Accordingly, the impact of the Position Limit Rules extends well beyond the derivatives markets and, quite importantly, the physical markets they were intended to protect.

2. *Other Regulatory Considerations.*

Commercial firms, particularly those in the energy business, are frequently part of a larger corporate family with many affiliates. Certain of these affiliates may be subject to state, federal or foreign regulation beyond antitrust law that requires such affiliates to operate independently and restricts sharing of certain information with other affiliates. Regulators expect that regulated entities will promote a "culture of compliance" in order to minimize the potential for violations of applicable requirements and not just the actual occurrence of violations. As discussed herein, commercial firms have, as a matter of "best practices," implemented policies and procedures that go beyond the letter of the law or applicable regulations in order to ensure that activities of unregulated entities are kept separate from activities of regulated entities to the greatest extent possible.

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21 *United States v. KeySpan Corporation*, Civ. Action No. 10-cu-1415(WHP) (Feb. 22, 2010).

22 Mason, Mary Ann, Monts, William L. and Edwards-ford, Meghan, "Certain Financial Hedge Arrangements Can Violate Sherman Act Section 1," *Antitrust, Competition and Economic Regulation Alert*, 25 June 2010.

For example, the Federal Energy Regulatory Commission (the "FERC") "believes it is in the public interest to encourage companies subject to our regulatory requirements to develop rigorous compliance programs that will help minimize the potential for violations of applicable requirements, and to give significant weight to those programs when we determine whether to assess a civil penalty or other remedy for a violation."[23] These expectations create a strong incentive to establish rigorous barriers providing for (a) the separation of information and (b) the independent control of trading. Such barriers necessarily constrain activity at a level well before such activity would result in a violation of federal, state or local regulatory requirements.

C. <u>Compliance with the Position Limit Rules is Highly Impractical and Impossible to Implement without Market Distortions</u>.

The Position Limit Rules require coordination of information sharing and trading among affiliates and joint ventures that is highly impractical to achieve and cannot be done without tremendous disruption to commercial businesses. This disruption, as it would be experienced by a multitude of commercial firms, will cause adverse changes in both the derivatives and physical markets.

Under the Position Limit Rules, commercial energy firms must monitor positions across an entire enterprise on an intra-day basis,[24] regardless of whether the trading by individual entities is coordinated or controlled by the same trader. Monitoring and coordination will be extremely challenging given not only the structural complexity of many commercial firms, many of which have operations around the globe that independently trade in futures and swaps as part of distinct business lines, but also the rigorous barriers established to ensure compliance with other applicable regulatory requirements. For example, the Position Limit Rules would require two U.S.-based competitors that co-own a joint venture in Singapore, which is a competitor of its owners, to not only share their position information with the joint venture, but also would likely require the three entities to coordinate their trading in order to avoid violating the Position Limit Rules.

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23 *See* Federal Energy Regulatory Commission Policy Statement on Compliance, 125 FERC ¶ 61,058 (Oct. 16, 2008).

24 *Position Limit Rules* at 71,643 and 71,662.

To assure intra-day compliance with the Position Limit Rules, commercial firms will have to design, test and implement systems, including “real-time” systems, that work across multiple entities for futures, cleared swaps, bilateral swaps and physical positions. This will require technology that does not currently exist sufficient to meet the requirements of the Position Limit Rules. Integrated trading systems will also require the deconstruction of certain information barriers specifically designed to prevent improper sharing of information. Such systems will be necessary to make prospective trading decisions, and they will be very challenging and exorbitantly expensive to construct.

The final Position Limit Rules will also impose impractical compliance obligations on holding companies and firms that invest in commercial firms. These institutions invest in commercial firms as going concerns and are not involved in the day-to-day trading of futures and swaps by such commercial firms or their affiliates. Currently such firms do not need to engage in any information sharing or coordinated trading among their portfolio of investments. However, due to mere ownership (which may be an entirely passive investment), a holding company or an investor (if the independent account controller exemption is not available to it) must build complex and expensive monitoring systems to comply with the Position Limit Rules. Moreover, it must insert itself into the management of firms in which it has invested to assure such compliance, changing its role from that of merely an investor.

Commercial firms, holding companies and investors with many affiliates face other pragmatic and legal questions when aggregating trading positions to comply with the Position Limit Rules. For example, even within one corporate family, there may be multiple entities between an account holding Referenced Contracts and the ultimate corporate parent. The situation becomes even more difficult if there are investors holding interests of 10% or more in the corporate parent. The Position Limit Rules are silent as to whether each entity in the corporate family must aggregate the positions of the first-level account (and possibly submit separate reports to the Commission if, on an aggregated basis, any position limit is exceeded at the first-level account). Also unanswered by the Position Limit Rules is whether a corporate parent that aggregates trading positions across multiple subsidiaries relieves such subsidiaries of their reporting obligations under the Position Limit Rules. A related question is which entity files a petition for a *bona fide* hedge exemption if compliance and reporting is ultimately handled by a corporate parent or mezzanine-level company for multiple affiliates. These problems become harder to solve when two or more unaffiliated firms hold interests in an owned non-financial entity. Moreover, the aggregation requirements raise tough legal issues when applied to international companies. At the extreme, the Commission might assert that a French firm must disclose all of its trading positions throughout the world because it must aggregate the trading positions of a U.S. affiliate that holds Referenced Contracts in excess of a position limit. The Commission might eliminate these pragmatic and legal issues if it were to issue an Owned Non-financial Entity Exemption in the form of proposed exemptive orders.

The Petitioner identifies a few other practical considerations below:

- Trading Allocation. - To coordinate trading for purposes of compliance with the Position Limit Rules, affiliated entities will be forced to make allocations of trading authority among several now aggregated accounts. In short, affiliated entities will be forced to assign a portion of permitted speculative or other trades[25] to each entity. In the context of joint ventures, this may require correspondence and negotiation between unaffiliated market participants that are competitors of each other. The Position Limit Rules will create the potential for disagreements with respect to trading allocation that corporate structuring previously prevented. At the same time, the Position Limit Rules will change the roles of investors and joint venturers, in some cases changing passive investors into active ones. Moreover, it is not clear how firms will resolve allocation disagreements, while at the same time ensuring intra-day compliance with the Position Limit Rules.

- Misleading Position Reports. – The aggregation of financial and physical positions across multiple entities might result in reporting to the Commission that is potentially misleading and gives the Commission a picture of one or more commercial firms' trading portfolio(s) that is not well correlated to the actual trading activities. The reporting will provide data on an aggregated basis, but will not convey an accurate view

[25] By "speculative or other trades" we mean trades that are not *bona fide* hedging transactions. The Petitioner maintains that not all transaction are limited to the categories of "speculative" or "hedging." Moreover, certain trades may be hedging transactions for commercial and accounting purposes, but may not meet the enumerated criteria for *bona fide* hedging transaction set out in the Position Limit Rules.

of which traders control certain positions. That is to say nothing of the complications of multiple entities reporting the same position, suggesting a greater open interest in such position than exists. For example, as currently styled, Rule 151.5(b) states that determinations of whether a position is eligible for a *bona fide* hedge exemption from the Position Limit Rules is done by the person aggregating trading positions. However, the trader immediately responsible for a trading position will characterize such position as a *bona fide* hedge (or not) and that characterization is then shared across affiliates and with any joint venture participants. It is foreseeable that an aggregating person may assert a *bona fide* hedge for that position, while at the same time identifying a different position in the same commodity contract held in a separate account as a speculative position. Yet, it may not be apparent in the aggregated position report which risk exposures relate to those positions deemed to be *bona fide* hedges.

- <u>Aggregation of Physical Positions</u>. - Aggregation across affiliated entities will, for firms that exceed position limits, require the sharing of information regarding physical inventories and fixed-price purchase or sale commitments (Form 404), counterparty information (Form 404S) and, in advance of exceeding limits in certain cases, anticipated production, requirements or merchandising activities (Form 404A). The sharing of such information about physical positions raises both proprietary and competitiveness concerns.

- <u>Forced Unwinds</u>. - Among accounts, an aggregate position in Referenced Contracts could be held in excess of the position limits under the Position Limit Rules. The Commission, a self-regulatory body or the aggregating entity, might instruct that the position be reduced among such accounts so they collectively come into compliance with the Position Limit Rules. This reduction, however, will require information sharing and trading coordination across accounts, potentially among unaffiliated market participants. A legitimate disagreement about which positions should be liquidated likely will be difficult to resolve in short order. Again, this is an example of the Position Limit Rules creating practical challenges that did not exist prior to the issuance of such rules.

Given that commercial firms of all kinds will find it impractical - perhaps impossible - to implement adequate compliance measures with respect to the Position Limit Rules, an additional exemption is necessary to avoid imposing a substantial burden on commercial energy firms that may force some to not only completely restructure their domestic and, if applicable, global trading operations, but also to divest themselves of investments in certain joint ventures.

D. Without the Owned Non-financial Entity Exemption, the Position Limit Rules Represent a Drastic Departure from Current Market Practices with Serious Adverse Consequences.

The Position Limit Rules will mandate the sharing of information and the coordination of activity in markets where participants took great care to prevent such sharing and coordination. The Commission's independent account controller exemption and the historic practices of designated contract markets ("DCMs") to grant relief from aggregation requirements in the absence of control have worked well to date, but that fact has little to no bearing on the application of such exemptions in the context of commodities and instruments previously not covered by Federal position limits. The Position Limit Rules represent a drastic departure from the *status quo*.

Prior to the Position Limit Rules, Federal position limits only existed for certain agricultural commodities, and only applied to contracts for future delivery and options on contracts for future delivery on such commodities. Because of this scope, most of the Petitioner's members' activities largely fell outside the scope of Federal position limits. The new Position Limit Rules drastically change the universe of commodities and instruments subject to Federal position limits. In addition to contracts for future delivery on agricultural commodities, the Position Limit Rules will apply Federal position limits to (a) certain energy-related contracts for future delivery and certain contracts for future delivery on metals and (b) swaps referencing certain agricultural, energy-related and metals commodities.

DCMs, prior to the Position Limit Rules, applied position limits to contracts for future delivery for energy-related commodities and metals. Those limits, however, (a) did not apply to swaps and (b) were subject to aggregation exemptions that provided the flexibility necessary for commercial enterprises to manage their position limit obligations across entities without undue burden.[26] DCMs, in granting exemptions from the aggregation requirements, generally required a market participant to demonstrate both the absence of information sharing among affiliated entities and a lack of trading control for day-to-day positions among such entities. These are the fundamental criteria that underpin the Owned Non-financial Entity Exemption that the Petitioner requests.

Many participants in energy derivatives markets created entities and entered into joint ventures without the need to address Federal position limits aggregation requirements. If these entities are now required to aggregate derivatives positions, then they may be forced to unwind or divest their interests in a number of joint ventures due to the operational difficulties discussed above or because of contractual terms. Many joint ventures were formed with current market practices in mind and, thus, have operating or shareholder agreements that require a strict separation of trading operations and prohibit information sharing among the joint venture and its owners. If such entities are required to comply with the Position Limit Rules' aggregation provisions, then they might violate the contractual underpinnings of the joint ventures.

The release for the Position Limit Rules does not contain a discussion of the costs and benefits associated with the Position Limit Rules altering current and future investments in commercial firms or joint ventures. There is no discussion of the effects on commercial firms or the broader derivatives and physical markets as investments in commercial firms and joint ventures are unwound or restructured. Joint ventures, in particular, are key tools for commercial firms. They facilitate investment in business ventures that might not otherwise occur if the entire risk was borne by a single firm. The Position Limit Rules now place an impediment to entering into joint ventures if hedging through futures or swaps is a necessary component. The Commission did not evaluate the broader economic implications of discouraging such joint

[26] Part 150.5(g) of the Commission's regulations only requires DCMs to aggregate positions across affiliated entities for the purposes of exchange-level position limits in the event that such entities' trading is under the control of the same person. However, the DCMs affiliated with the CME Group and ICE OTC have elected to adopt aggregation requirements that mirror the Commission's requirements for Federal position limits. Though it is not stated explicitly, the Position Limit Rules effectively supersede this rule with respect to positions in Referenced Contracts and associated swaps as affiliated entities are required to aggregate positions regardless of trading control for the purposes of the Position Limit Rules.

ventures. The Petitioner believes that such an analysis should include not only the loss of investment and productivity, but factors such as loss of jobs and higher commodity prices to U.S. consumers.

The Position Limit Rules will adversely affect investment in commercial firms. Such investments are necessary for the on-going business of commercial firms as a source of capital for developing new projects, installing new "green-technology," operating assets that deliver energy commodities to millions of Americans and employing thousands of people. The aggregation requirements under the Position Limit Rules effectively discourage direct investment in commercial firms. Again, the Petitioner believes costs for the loss of available capital should be accounted for in understanding and evaluating the economic impact of the final Position Limit Rules, absent the relief sought in these petitions.

Another consequence of the Position Limit Rules aggregation requirement could be a decrease of liquidity and competition in energy derivatives markets. *First*, the rules will limit the degree to which affiliated entities, regardless of whether their trading is conducted independently, can engage in speculative and hedging transactions. This on its face will reduce liquidity and could have significant consequences for price transparency in less liquid products or at less liquid delivery points. *Second*, as noted above, the aggregation requirements may lead certain entities to exit the market, and requiring coordination and concerted activity among remaining affiliated market participants who were *de facto* competitors in the marketplace could cause unwanted concentration of market share.

E. Rule 151.7(i) Does Not Adequately Protect Commercial Market Participants from the Unnecessary Burdens Associated with Aggregation of Accounts for Compliance with the Positions Limit Rules.

In explaining why it removed the proposed Owned Non-financial Entity Exemption, the Commission concluded that, because the Commission included the independent account controller exemption and the Federal Law Exemption, it would be inappropriate to further extend the disaggregation exemption to owned non-financial or financial entities.[27] As the independent account controller exemption is available only to "eligible entities," which excludes most commercial firms by definition, commercial firms are left with only the Federal Law Exemption as relief from the aggregation of accounts required by the Position Limit Rules.

The Federal Law Exemption, as currently constructed, will likely be of limited usefulness and may not cover the full range of circumstances that the Commission may have thought it would, as there are only a few applicable circumstances where the sharing of information is *per se* illegal under Federal law.[28] There are other instances where information sharing is not the prohibited activity, but rather indicia of improper market activity. For example, the sharing of information between entities, who at times might be competitors, such as in the case of a joint venture, may be viewed as evidence of a violation of law or could form the basis for an inference of an anticompetitive agreement even when no direct evidence exists.[29] In these cases, the determination of whether a violation of law has occurred is a facts and circumstances inquiry, and it is only after some form of adjudication that an answer to the question of whether information sharing violated Federal law can be reached.[30] Without the legal certainty that is only available from a judicial determination, market participants will not be able to avail themselves of Rule 151.7(i) and will comply with the aggregation provisions of the Position

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[27] *Position Limit Rules* at 71,654.

[28] For example, the act of a public utility with captive customers sharing non-public market information that could be used to the detriment of the public utilities' captive customers violates Section 35.39 of the FERG's regulations.

[29] *See, e.g.*, United States v. Container Corp., 393 U.S. 333, 337 (1969) (asserting that exchange of price information in a highly concentrated industry involving a fungible product with inelastic demand would "chill the vigor of price competition"); *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 368-69 (3d Cir. 2004) (permitting inference of *per se* illegal agreement when: (1) exchange of pricing information was between upper hierarchy of glass producers; (2) several of defendants' documents emphasized that price increases were not economically justified or supportable but encouraged competitors to hold the line; (3) documents suggested "not just foreknowledge of a single competitor's pricing plans, but of the plans of multiple competitors"; and (4) predictions of price behavior were followed by actual price changes).

[30] *Collaboration Guidelines* at 3. "Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. Once identified, such agreements are challenged as per se unlawful. All other agreements are evaluated under the rule of reason, which involves factual inquiry into an agreement's overall competitive effect. As the Supreme Court has explained, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances … Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce."

Limit Rules. Ironically, the very act of filing the notice required under Rule 151.7(i) exposes them to scrutiny for (or the possible commission of) a violation of Federal law.

There are many times when commercial entities take action to avoid violating Federal law, not because they know such actions *would* violate the law, but because the actions have the *potential* to result in a violation. For example, in the case of the FERC affiliate rules, the default action is to not share market information that might harm the captive customers, even if after analysis, such sharing could be deemed permissible (although only usually in hindsight). The legality of any action or inaction requires an analysis of the particular facts and circumstances, and often the conclusion is not definitive. Because of the fact specific nature of this regulatory analysis, compliance programs generally, and information sharing prohibitions specifically, are designed with the intent and spirit of the law in mind.

The opinion requirement for the Federal Law Exemption itself may be a disincentive for market participants to avail themselves of the exemption. Should counsel reach the requisite conclusion for use of the Federal Law Exemption, and should information sharing actually occur as described in the opinion, the market participant is then at a disadvantage in establishing that the information sharing was not anticompetitive. Accordingly, market participants would be rational in not using the Federal Law Exemption to avoid any jeopardy if the facts and circumstances of an incident of information sharing align with those counsel identifies in its opinion.

F. Market Participants Were Not Given an Adequate Opportunity to Advocate for the Retention of the Owned Non-financial Entity Exemption.

The Commission did not provide market participants with adequate notice and opportunity to comment that it was removing the proposed Owned Non-financial Entity Exemption from the Position Limit Rules. As mentioned above, the Petitioner supported the proposed Owned Non-financial Entity Exemption, and made several recommendations to make the proposed exemption more practical to implement for both the Commission and market participants. Given the massive paradigm shift that flows from the Position Limit Rules, market participants saw the Owned Non-financial Entity Exemption as necessary to prevent the Position Limit Rules from being as disruptive and burdensome on commercial markets as they now will be. Had market participants believed the proposed Owned Non-financial Entity Exemption would potentially not be part of the final Position Limit Rules, they would have submitted substantially different comments, and would have engaged Commissioners and staff directly on this issue. Thus, the Commission cannot say it was truly informed of the interests of commercial firms regarding the removal of the proposed Owned Non-financial Entity Exemption.

V. PETITION FOR ORDER TO EXEMPT OWNED NON-FINANCIAL ENTITIES FROM AGGREGATION FOR COMPLIANCE WITH POSITION LIMITS.

The Petitioner hereby petitions the Commission to issue a new exemptive order in the form of Exhibit A to establish an exemption for "owned non-financial entities"[31] from aggregation requirements of the Position Limit Rules upon the satisfaction of certain criteria set forth in the proposed exemptive order text.

A. The Owned Non-financial Entity Exemption is Consistent with the Commission's Policy Goals.

The Commission's fundamental rationale for the aggregation of positions among affiliated entities 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."[32] The Commission goes on to acknowledge that such concerns are mitigated if accounts are "managed under the discretion and control of an independent trader and subject to effective information barriers."[33]

The Petitioner believes the Commission's rationale for proposing the Owned Non-Financial Entity Exemption was and continues to be valid. The Commission stated:

> This limited exemption aims to allow disaggregation primarily in the case of a conglomerate or holding company that merely has passive ownership interest in

[31] The Working Group notes the proposed Owned Non-financial Exemption, by its terms, would apply to non-financial entities. However, the Working Group does not believe the limitation to non-financial entities is a *sine qua non* of the proposed exemption. As argued herein, as long as affiliates can demonstrate that (a) separation of information and (b) separation of trade control exists between them, then neither affiliate should be required to aggregate positions for purposes of complying with the Position Limit Rules.

[32] *Position Limit Rules* at 71,652.

[33] *Id.*

> one or more non-financial operating companies. In such cases the operating companies may have complete trading and management independence and operate at such a distance from the holding company that it would not be appropriate to aggregate positions.[34]

The Owned Non-financial Entity Exemption as proposed herein is entirely consistent with the Commission's stated fundamental rationale for aggregating positions.[35] Under the proposal, a trader would have to certify not only that the trading of an owned non-financial entity was independently directed, but it would also have to show that sufficient safeguards were in place to prevent the sharing of information across entities. Like in the case of the independent account controller exemption, the absence of control or coordination would substantially mitigate any potential concerns regarding the potential for excessive speculation or market disruption. In short, granting these petitions would not increase the risk of excessive speculation in physical commodity derivatives markets and would allow commercial energy firms, such as the Petitioner's members, to avoid a significant and unnecessary burden.

As mentioned above, the policy rationale underlying the Owned Non-financial Entity Exemption is consistent with the body of well-developed precedent and guidance established by the FERC recognizing the fundamental corporate separation embedded in passive ownership structures and the inability of passive owners to manage, direct or otherwise control the day-to-day business operations of an energy company. In addition, the Securities and Exchange Commission (the "SEC") gives similar treatment to the fundamental corporate separation embedded in passive ownership under certain circumstances.[36] [37]

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34 *Proposed Position Limit Rules* at 4,762-3.

35 *See Statement of Policy on Aggregation of Accounts and Adoption of Related Reporting Rules* 44 Fed. Reg. 33,839 (Jun. 13, 1979) (the "Aggregation Statement") at 33,845-46. The Commission provided an exemption for certain futures commissions merchants if, among other things, (i) a trader, other than the FCM seeking the exemption, directs the trading of applicable accounts, and (ii) each trading decision in the accounts is made independently of all trading decisions in other account at the FCM seeking the exemption.

36 *See* SEC Rule 13d-1. Certain entities that attest that their investment in an issuer is in the ordinary course of their business and not for the purpose of changing or influencing control of the issuer are permitted to file disclosure of their investment on Form 13G rather than Form 13D. Form 13G is significantly less onerous and extensive than Form 13D. *See also*, Final Rule: "*Amendments to Beneficial Ownership Reporting Requirements*," 63 Fed. Reg. 2854 (Jan. 15, 1998).

B. **The Petitioner's Proposed Owned Non-financial Entity Exemption has Modifications Largely Consistent with Final Position Limit Rules.**

The Petitioner recommends the Commission issue an Owned Non-financial Entity Exemption in the form of an exemptive order with the terms set forth in Exhibit A to these petitions. The Petitioner drafted Exhibit A based upon Rule 151.7 (f) and (g), as proposed in the Proposed Position Limit Rules. The substantive changes to subsections (f) and (g) of the Commission's Proposed Position Limit Rules in Exhibit A are as follows:

- Definition. - Incorporated definition of "Owned Non-Financial Entity" wholesale from the Proposed Position Limit Rules.

- Notice in Lieu of Application. - Following the procedural format for the independent account controller exemption, Exhibit A provides that the Owned Non-financial Entity Exemption will be effective upon the provision of notice to the Commission.

- Separateness Measured at Trading Controller Level. - Effective implementation of compliance measures to prohibit (a) the sharing of information and (b) the coordination of trading at the level of persons with the responsibility for making or overseeing day-to-day trading decisions with respect to specific positions. To measure at the entity level is to ignore the fact that legal and compliance personnel acting in a shared resource capacity for multiple accounts, affiliates or joint ventures without being a conduit for commercial information must, at times, know information to run effective compliance regimes, even though such persons have no control over the day-to-day trading of any desk.

- Analysis Between Entity and Owned Non-Financial Entity. - Exhibit A requires that the entity seeking to disaggregate trading positions of an owned non-financial entity establish

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[37] The Petitioner believes that an investor's filing of Form 13G to establish a passive investment in a company should be definitive evidence that no control exists between the investor and the company in which it has invested. We note that the FERC has considered the impact of a Form 13G filing as indicia of the absence of control. *See*, Notice of Proposed Rulemaking: "*Control and Affiliation for Purposes of Market-Build Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*," 75 FR 4498 (Jan. 28, 2010). If an investor files Form 13D in lieu of Form 13G, however, that action cannot be said to be an indicia of trading control or information sharing such that aggregation of trading positions is appropriate. Rather, it only suggests that the investor does not hold interests in a company that are "passive investments" as defined by the SEC.

that separate control and a lack of information sharing exist between the entity and the owned non-financial entity. The Commission's proposed Owned Non-financial Entity Exemption had criteria that apply among all of the entity's affiliates. In commercial firms with many affiliates, there may be groups that operate together and where aggregation might be appropriate. Yet, such commercial firms may have entirely separate entities that are intentionally separate from such coordinated group and which should not aggregate trading positions. For example, a trading company in Europe may be effectively independent from an affiliated trading entity based in the United States. Moreover, with global operations, it may not be possible to verify all of the intricate policies and systems maintained across every affiliate as needed to make representations for all affiliates of the entity seeking disaggregation relief.

- <u>Systems May be Shared by Independent Trading Desks</u>. - So long as any system does not facilitate the sharing of information or coordination of trading between two traders that otherwise should be walled off from each other, that system should be sufficient for purposes of the proposed Owned Non-financial Entity Exemption. Any requirement that separate systems be maintained forces commercial enterprises to unnecessarily bear the costs of largely redundant systems. Moreover, it may impede the compliance oversight function as compliance personnel must manually reconcile data from multiple systems, which is likely an impossibility in real time.

- <u>Elimination of Personnel Roster Requirement</u>. - <u>Exhibit A</u> retains the requirement that the commercial firm notify the Commission of the officer responsible for assuring compliance with the Position Limit Rules as well as provide an organization chart. The Petitioner eliminated the proposed requirement that an entity provide a nearly comprehensive employee roster. The Commission receives no material benefit from receiving a full roster of employees, particularly if that roster may quickly go out of date, resulting in an unnecessary compliance burden for a firm to continually update the roster. The Petitioner, however, believes that the Commission may properly request such a roster for a specific date or time period in connection with a special call.

- Higher Tier Affiliate Relief. – As discussed in Part IV, the Position Limit Rules may require every corporate entity (possibly even investors) directly or indirectly holding a 10% or greater interest in an owned non-financial entity to aggregate Referenced Contract and other trading and physical positions held by such owned non-financial entity. Exhibit A provides that, if an entity has filed notice in accordance with the proposed exemptive order, 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.

VI. PETITION FOR ORDER TO BROADEN AND CLARIFY RULE 151.7(i).

The Petitioner hereby petitions the Commission to issue an exemptive order to broaden and clarify Rule 151.7(i), among other things, to avoid such exemption being so narrow as to be available only in the most unique of circumstances.

A. General.

Rule 151.7(i) sets forth the Federal Law Exemption from the aggregation provisions of the Position Limit Rules. That exemption applies in the event that "the sharing of information associated with such aggregation *would* cause either person to violate Federal law or regulations adopted thereunder" (emphasis added). To avail itself of the exemption, a market participant must file a prior notice with the Commission detailing the circumstances that merit an exemption and an opinion of counsel that the sharing of information at issue would cause a violation of Federal law or regulations adopted thereunder.[38] The Commission seems to have, in part, provided this exemption in lieu of the Owned Non-financial Entity Exemption because the existing independent account controller exemption and the underwriting exemption cover circumstances that "do not present the same concerns as those underlying the aggregation policy, namely, the sharing of transaction or position information that may facilitate coordinated trading."[39]

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38 17 C.F.R. § 151.7(i).

39 *Position Limit Rules* at 71,654.

B. Rule 151.7(i) Should be Available if Sharing of Information Violates Local, State or International Law.

The Federal Law Exemption is also of limited usefulness because it does not take into account local, state, foreign or international law. For example, Texas Public Utility Code Substantive Rule 25.503 provides that "a market participant shall not collude with other market participants to manipulate the price or supply of power." Under that rule, any sharing of competitively sensitive information among affiliated competitors could open up each entity to a claim of collusion to the extent that they did not share that information with other market participants. Many commercial energy firms operate in Texas and are subject to this rule. However, the Position Limit Rules might force such firms to engage in information sharing that potentially violates the rule given the limited scope of exemptive relief from Rule 151.7(i) as currently styled. The resulting conflict between state law and Federal law can and should be avoided by modifying Rule 151.7(i) to afford exemptive relief for potential violations of state law. In a similar manner, the commission should afford exemptive relief should a firm possibly violate local, foreign or international law by sharing information to comply with the Final Position Limit Rules.[40]

C. Proposed Exemptive Order to Modify Federal Law Exemption.

In order to provide market participants with real relief from potential violations of law caused by the Position Limit Rules' aggregation provisions, the Petitioner requests that the Commission issue an exemptive order, in the form of Exhibit B, that clarifies that the Federal Law Exemption (a) applies in circumstances where the sharing of information between affiliates "could" or "would likely" violate the law and (b) encompasses not only Federal law, but also local, state, foreign and international law. Such interpretation will expand the scope of the Federal Law Exemption to the degree where it provides real relief from the risk of violating the law by sharing position and trading information between affiliates.

[40] For example, under European and UK law, information sharing among joint venture participants and their collaboration gives rise to concerns under anticompetition laws. *See* Pinsent Masons LLP, "*Competition Law and Sharing Information Among Companies*" (Apr. 2008) available at http://www.out-law.com/page-9149.

As an example of where the lower standard would render the Federal Law Exemption meaningful to commercial firms, the FERC Affiliate Restrictions state that a franchised public utility with captive customers may not share "market information" with a market regulated power sales affiliate if the sharing **could** be used to the detriment of captive customers, unless simultaneously disclosed to the public.[41] Note that the test is a subjective one, and not an affirmative prohibition on information sharing. Thus, to show a violation of the FERC Affiliate Restrictions, one would need to show that positions are "market information" and then show that sharing this market information could harm captive customers. Arguably, positions are market information and this sharing could result in harm to captive customers, but this is a subjective determination. However, the Federal Law Exemption requires that the sharing of this information **would** cause a violation of federal law or regulations adopted thereunder. This conclusion is likely too high of a bar to satisfy. This problem is rectified by adopting the Petitioner's reasonable request to replace "would" with "could" or modify "would" as "would likely."

VII. REQUEST OF INTERIM EXEMPTIVE RELIEF.

The Petitioner asks the Commission to issue exemptive orders in the forms of Exhibit A and Exhibit B on or before 30 days after the date of this petition. Petitioner also requests that the Commission provide market participants with interim, temporary relief from the Position Limit Rules while it considers these petitions or if it adopts a different approach to implementing an Owned Non-financial Entity Exemption or modifying the Federal Law Exemption. If the Commission elects to not issue the proposed exemptive orders to effect such amendments or to not pursue some other regulatory action, market participants would be forced to aggregate positions unnecessarily. Aggregation would be highly costly and highly impractical to commercial firms, with potentially devastating consequences to the commercial markets.

VIII. CONCLUSION.

The Petitioner respectfully requests that the Commission grant these petitions as set forth herein. If the Commission will not grant these petitions based on the inclusion of one or more

[41] 18 C.F.R. § 35.39(d)(1) (2010)(emphasis added).

requested terms, but would otherwise grant one or both of these petitions if such terms were removed or modified, the Petitioner hereby requests the Commission grant such petitions on such terms as if the unacceptable terms were removed or modified.

The Petitioner respectfully requests that the Commission take action on these petitions on or before 30 days after the date of this petition.

Respectfully submitted,

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Order for Disaggregation of positions by Owned Non-financial Entities.

(a) *Accounts of owned non-financial entities*. An entity need not aggregate its positions with the positions of one of its owned non-financial entities, as defined in paragraph (b), if it can sufficiently demonstrate, in a notice submitted under paragraph (h) of Part 151.7, that the owned non-financial entity's trading is independently controlled and managed, indicia of which include:

(1) Personnel with primary responsibility for trading of specific contracts for future delivery, options on contracts for future delivery or swaps of the entity have no knowledge of trading decisions by the owned non-financial entity, and the personnel with primary responsibility for trading of specific contracts for future delivery, options on contracts for future delivery or swaps of the owned non-financial entity have no knowledge of trading decisions by the entity;

(2) The owned non-financial entity's specific trading decisions are controlled by personnel who do not share trading control for specific trading positions with personnel that make specific trading decisions for the entity; *provided* that attorneys, accountants, risk managers, compliance and other mid- and back-office personnel may be shared between affiliated entities;

(3) The owned non-financial entity maintains and enforces written policies and procedures to preclude personnel with the primary responsibility for trading specific contracts for future delivery, options on contracts for future delivery or swaps of the entity from having knowledge of, gaining access to, or receiving information or data about its positions, trades or trading strategies, including document routing and other procedures or security arrangements; *provided* that attorneys, accountants, risk managers, compliance and other mid- and back-office personnel may be shared between affiliated entities and information regarding the entities' respective positions, trades or trading strategies may be known to such personnel so long as such information for the entity or the owned-nonfinancial entity, as applicable, is not shared with personnel that have primary responsibility for trading of specific contracts for future delivery, options on contracts for future delivery or swaps for the other entity; and

(4) The owned non-financial entity maintains a risk management system that is (a) separate from the risk management system of the entity and any of its other affiliates or (b) does not permit the sharing of information regarding positions, trades or trading strategy between the personnel of the owned non-financial entity and the entity, which personnel have primary responsibility for trading specific contracts for future delivery, options on contracts for future delivery or swaps of their respective entity, if the positions of such entities are not voluntarily aggregated for purposes of Part 151.4.

(b) *Owned non-financial entities*. Owned non-financial entity means 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.

(c) *Applications for exemption*. Entities notifying the Commission of an exemption from aggregating its positions with the positions of one or more owned non-financial entities under this order, shall file a notice in accordance with Part 151.7(h) and include information:

(1) Designating an officer of the entity whose salary and compensation is independent of trading profits and losses, who shall be responsible for the coordination of aggregation rules and position limits compliance;

(2) Providing an organizational chart that includes the name, main business address, main business telephone number, main facsimile number and main e-mail address of the entity and each of its affiliates that trade Referenced Contracts;

(3) Providing a description of all information-sharing systems, bulletin boards, and common e-mail addresses for entities identified in subclause (ii);

(4) Providing an explanation of the entity's risk management system; and

(5) Providing an explanation of how and to whom the trade data and position information is distributed, including which officers receive reports and their respective titles for entities identified in subclause (ii).

(d) *Relief for Higher-Tier Entities.* Any entity having ownership or equity interests of 10 percent or greater in an entity that has filed a notice under this order need not aggregate the positions of the one or more owned non-financial entities identified in such notice.

Order for Disaggregation of Positions for Statutory or Regulatory Sharing Restrictions.

A person is not subject to the aggregation requirements of Part 151.7 if the sharing of information associated with such aggregation would cause either person to violate international, Federal, state or local law, the law of a foreign country, or regulations adopted thereunder and provided that such a person does not have actual knowledge of information associated with such aggregation; *provided*, *however*, that such person file a prior notice with the Commission detailing the circumstances of the exemption and an opinion of counsel that the sharing of information could cause a violation of applicable law or regulations adopted thereunder.