| asset management group

February 10, 2014
Melissa Jurgens
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington DC 20581

Re: Notice of Proposed Rulemaking – Aggregation of Positions (RIN 3038-AD82)

The Asset Management Group ("AMG")[1] of the Securities Industry and Financial Markets Association ("SIFMA") appreciates the opportunity to provide the Commodity Futures Trading Commission (the "Commission") with comments regarding the "Aggregation of Positions" proposed rulemaking ("2013 Aggregation NPRM").[2] We believe that the Commission has made some positive steps in this 2013 Aggregation NPRM, but we have some significant concerns with respect to certain aspects of the proposal, in the following areas in particular:

- ***Owned Entity Aggregation.*** The Commission should not adopt the owned entity aggregation as proposed. Requiring passive investors, which include, without limitation, registered and private commodity pools and other investment vehicles, pension funds and other institutional clients of asset managers, that have no control over, or even knowledge of, the specific commodity derivatives trading activities of owned entities they have invested in to aggregate the positions of such entities would impose significant costs that would unnecessarily diminish their ability to provide valuable capital investment and generate returns for their beneficiaries and participants, exceeds the scope of the Commission's position aggregation authority under the Commodity Exchange Act ("CEA"), and is an unwarranted departure from the Commission's historical aggregation approach. The proposed exemptions from this owned entity aggregation requirement under proposed rules 150.4(b)(2) (10 to 50% ownership) and (b)(3) (above 50% ownership) do not sufficiently address the flaws of the proposed approach to aggregating owned entity positions in the passive investment ownership context.

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[1] The AMG's members represent U.S. asset management firms whose combined assets under management exceed $20 trillion. The clients of AMG member firms include, among others, registered investment companies, ERISA plans, and state and local government pension funds, many of whom invest in commodity futures, options, and swaps as part of their respective investment strategies.

[2] 78 Fed. Reg. 68,946 (Nov. 15, 2013).

- ***Investment in Accounts or Pools with "Substantially Identical Trading Strategies."*** The Commission should not adopt the aggregation requirement in proposed 150.4(a)(2) for investments in funds that follow "substantially identical trading strategies" regardless of common trading control, significant ownership, or even knowledge of the relevant investments. This proposal is vague and lacks sufficient statutory, policy, and cost-benefit rationale.

- ***Passive Investors in Commission Regulation 4.13 Exempt Pool Aggregation Requirement.*** We recommend that the Commission amend 150.4(b)(1)(iii) to only require passive investors to aggregate positions of a Commission regulation 4.13 exempt pool based on a 25% or more ownership interest when "the operator of which is exempt from registration *under §§ 4.13(a)(1) or (a)(2)*" in order for this requirement to apply to its intended targets.

- ***Independent Account Controller Exemption.*** We recommend that the Commission extend "independent account controller" eligibility to registered commodity pool operators ("CPOs"), exempt CPOs, and exempt and excluded commodity trading advisors ("CTAs"). We also question the utility of the burdensome requirement on asset managers to submit notice filings to claim the independent account controller exemption.

1. Owned Entity Aggregation

Consistent with current 17 CFR 150.4(a), under proposed 150.4(a)(1), a person would be required to aggregate "positions in accounts" in which the person "directly or indirectly" has more than a 10% ownership interest. The Commission further proposes to interpret "accounts or positions" to include "accounts or positions" of third party[3] owned entities.[4] The Commission interprets ownership of another entity, standing alone, as providing a separate and distinct basis to require aggregation of the positions owned by the owned entity, regardless of actual control of such trading accounts.[5] That is, the Commission interprets the "ownership prong" of CEA section 4a(a)(1) to apply to accounts owned by owned entities if a person has an ownership interest greater than 10% in that owned entity (and otherwise does not have trading control or have a direct ownership interest in the owned entity accounts themselves).[6]

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[3] We use the term "third party" to refer to any person that is separate from another person. A person can have relationships with many types of third parties, e.g., an owned entity, an entity it does not have an ownership interest in but whose trading it controls, etc.

[4] *See* proposed 150.4(b)(2) (providing for an exemption from aggregation requirements for positions in accounts of an owned entity when the ownership interest in the owned entity is between 10 and 50% of total equity). *See also* 78 Fed. Reg. at 68,959.

[5] *Id.* citing 77 Fed. Reg. at 31,773.

[6] *Id.* ("The Commission continues to believe, as stated in the Part 151 Aggregation Proposal, that an equity or ownership interest above 50% constitutes a majority ownership or equity interest of the owned entity and is so significant as to justify aggregation under the ownership prong of Section 4a(a)(1) of the CEA.")

For the reasons set forth below, we recommend that the Commission reconsider its proposed owned entity aggregation rules. We present our specific recommendations in section 1.3 below.

1.1. Requiring passive investors that have no control over, or even knowledge of, the specific commodity derivatives trading activities of owned entities to aggregate the positions of such entities will be unduly costly.

While asset management companies would not generally need to aggregate customer positions managed by independent account controllers under proposed 150.4(b)(5)'s independent account controller ("IAC") exemption, individual IAC or non-IAC asset managers often invest customer assets (either directly or through investment vehicles) in entities that trade in commodity derivatives. Under the Commission's proposed 150.4(a), 10% or more ownership in a trading account may be sufficient to warrant aggregation. In this case, under the Commission's interpretation of the term "account,"[7] a purely passive holder of equity securities would be required to aggregate the positions of all entities of which it has beneficial equity ownership of 10% or more, unless it perfects an exemption to owned entity aggregation (most pertinently under proposed 150.4(b)(2) or (b)(3)). An arbitrary owned entity aggregation threshold at 10% ownership is vastly over-inclusive even if it is used as indicia of corporate control;[8] the Commission itself points out that corporate "control" is imputed at 50% or more ownership for the purpose of pre-merger notifications to federal regulators under the Hart–Scott–Rodino Antitrust Improvements Act.[9]

Passive investors of the type managed by AMG members do not have control over owned entities by virtue of their *passive* ownership interest in a legal entity. As such, they would typically only have minimal knowledge of these owned entities' trading positions and decisions.[10] The 2013 Aggregation NPRM would create a new standard of care for passive investors: they would have to determine whether and to what extent the owned entity (and all of its owned entity affiliates) trade in commodity derivatives and if so, act to perfect an exemption. If no exemption is available, then the passive investor would have to obtain reliable commodity

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[7] We believe this reading would constitute an unexplained change from Commission administrative precedent. *See* section 1.4 below.

[8] As discussed below in section 1.7, the appropriate control standard under Commission position limits rules relates to trading control, not corporate control.

[9] 78 Fed. Reg. at 68,958, *citing* 16 CFR 801.1(b).

[10] Under some circumstances, when a passive investor (for example an Employee Retirement Income Security Act ("ERISA") plan) makes an investment in an entity, the investor's fiduciary duties (for example, as created under ERISA) could very well entail making prudent inquiries into the trading activities and investments of the owned entity. *See Harley v. Minnesota, Mining and Manufacturing Co*., 898 F. Supp. 2d 898, 906 (D. Minn. 1999) ('[A] fiduciary is required to undertake an independent investigation into the merits of an investment and to use appropriate, prudent methods in conducting the investigation."), *aff'd,* 284 F.3d 901 (8th Cir. 2002), *cert. denied,* 537 U.S. 1106 (2003); 29 CFR § 2550.404a-1(b)(2) (providing that an investment fiduciary, when evaluating an investment, must take into consideration the risk of loss associated with the investment).

derivatives position information from the entities in which it invests and is required to aggregate in order to ensure compliance with speculative position limits. In addition, these passive investors would have to develop, often from scratch, costly position monitoring infrastructure and hire or train staff to apply that infrastructure to the derivatives positions of their investments in order to ensure compliance with position limits. These costs to passive investors would deter investment in businesses that own commodity positions and are not offset by any commensurate benefit, especially in terms of reduced likelihood of excessive speculation or manipulation.

1.2. The proposed owned entity aggregation exemptions provide inadequate relief for passive investors and do nothing to further the goals Congress directed the Commission to achieve in promulgating position limits.

The Commission proposes two exemptions to the proposed general rule that requires a person to aggregate accounts owned by a third-party entity where such person has a greater than 10% ownership in the owned entity:

1. Under proposed 150.4(b)(2), the Commission proposes an aggregation exemption for ownership interests of up to 50% of an entity's equity under certain conditions. The owner and the owned entity ("Related Entities") must not have knowledge of one another's trading decisions and have in place protections to ensure independence, including: (1) enforced written procedures to prevent sharing of trading information; (2) physical separations; (3) separately developed and independent trading systems; (4) no sharing of employees that control trading decisions; and (5) no sharing of risk management systems that permit sharing of trading information or strategies before a trade is made. This exemption is effective upon submission of a notice filing under proposed 150.4(c)(1).

2. Under proposed 150.4(b)(3), the Commission proposes an aggregation exemption for ownership interests above 50% ownership under certain conditions. These conditions include all of those described above for ownership interests at and below 50% ownership, plus: (1) certification that the Related Entities' financial results are not consolidated in a financial statement pursuant to relevant accounting rules; (2) each director for the owned entity certifies that (a) all of the owned entity's positions are bona fide hedging positions, or (b) the owned entity's positions do not exceed 20% of any position limit. This exemption must be approved by the Commission or staff operating under delegated authority in order to become effective under proposed 150.4(c)(2).

These two exemptions would provide inadequate relief for passive investors and would do nothing to further the goals Congress directed the Commission to achieve in promulgating position limits.

First, while a move in the right direction, the proposed 150.4(b)(2) exemption from aggregation for ownership interests of up to 50% in the owned entity does not extend to all ownership interests and would require a burdensome notice filing in all investment circumstances, regardless of the absence of common trading control, for no apparent benefit. By

contrast, passive investors in a pool that are not affiliated with the pool operator under proposed 150.4(b)(1) would not be required to submit a notice filing to disaggregate the positions of pools in which they have invested, regardless of their ownership interest in the pool. Again, the 2013 Aggregation NPRM provides no reason why passive investors in owned entities should not have at least the same degree of deference.

Second, the proposed application-based exemption from aggregation in 150.4(b)(3) for ownership interests in excess of 50% is, as a practical matter, unworkable. Passive investors cannot plan their investment and compliance programs around a disaggregation application filing that depends on Commission approval which, even if granted, may take weeks or months to issue, while their managers may need to make immediate investment decisions.

Moreover, the conditions imposed on the proposed 150.4(b)(3) exemption seriously constrain its utility. This is particularly true of the condition prohibiting consolidation of financial results. The fact that an investor consolidates the financial results of the firms in which it invests is not indicative of trading control; earning returns on an investment is the main reason an investor invests. In addition, the requirement that the owned entity's positions not exceed 20% of any position limit effectively subjects owned entities to lower position limits.[11] The 2013 Aggregation NPRM makes no findings that this restriction furthers any of the goals Congress directed the Commission to achieve in promulgating position limits rules under CEA sections 4a(a)(2)(C) and 4a(a)(3)(B).

1.3. The Commission should reconsider its owned entity aggregation requirements.

For reasons stated in more detail in section 1.4 below, we believe the Commission's proposed owned entity aggregation requirements are legally flawed and based on an erroneous interpretation of the CEA and applicable administrative precedent. We recommend, therefore, that the Commission re-examine the 2013 Aggregation NPRM and substantially amend the proposed 150.4(b)(2) and (3) exemptions to achieve a more appropriate balance among the six statutory factors that the CEA requires the Commission to address when promulgating any position limit rules,[12] by:

[11] The alternative requirement that all of the owned entity's positions be bona fide hedging positions is not an independent condition. CEA section 4a(c)(1) prohibits the Commission from restricting the bona fide hedging positions of any trader: "No rule, regulation, or order issued under subsection (a) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions[.]" CEA section 4a(c)(1). Therefore, the limitation that an owned entity's positions be limited entirely to bona fide hedging positions is simply a sub-set of the requirement that would restrict speculative positions up to 20% of any limit.

[12] These factors include the "goals" stated in CEA section 4a(a)(2)(C), i.e., "striv[ing] to ensure" that (Factor 1) "trading on foreign boards of trade in the same commodity will be subject to comparable limits" and (Factor 2) "that any limits to be imposed by the Commission will not cause price discovery in the commodity to shift to trading [to FBOTs]." They also include the four additional factors that CEA section 4a(a)(3)(B) directs the Commission to balance when exercising its CEA section 4a(a)(2) authority: (1) (Factor 3) to diminish, eliminate, or prevent excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in price; (2) (Factor 4) to deter and prevent market manipulation, squeezes, and corners; (3) (Factor 5) to ensure sufficient market liquidity for bona fide hedgers; and (4) (Factor 6) to ensure that the price discovery function of the underlying market is not disrupted.

1. Extending the relief provided to passive investors in commodity pools under current 150.4(c) and proposed 150.4(b)(1) to passive investors in owned entities that do not have actual trading control of the owned entity's derivatives trading; and

2. Extending the owned entity exemption at proposed 150.4(b)(2) to include all third party ownership interests (greater than 50%) that do not involve actual common trading control.

In addition, we recommend three additional, non-exclusive changes that would reduce the cost to comply without forgoing meaningful regulatory benefit under the six statutory factors referenced above:

Filing requirements: The Commission should only require a 150.4(c)(1) notice filing when there is majority ownership in addition to indicia of trading control, e.g., a common business purpose relating to derivatives trading or the commercial use of commodities. The Commission's proposed 150.4(c)(2) application procedure should be omitted altogether or reserved for instances where there is majority ownership in addition to a trading control. In any event, a passive investor that holds an equity investment of any amount in an operating company that it has no trading control over should not be required to make any type of filing. If the Commission insists on a filing requirement for passive investors, then it should allow for a simplified, generic omnibus filing that would provide the Commission with notice that a passive investor intends to use the exemption on a going-forward basis consistent with the terms of the exemption for its passive equity investments.

Pro rata attribution of positions: The Commission should allow for the *pro rata* attribution of positions based on ownership interest. *Pro rata* allocation of positions would be less costly for passive investors because it would provide them some proportionate degree of protection if their owned entity exceeds a position limit. For example, for a passive investor with a 15% ownership interest in an owned entity that exceeds a position limit, an allocation of 15% or even 25% of that owned entity's positions would reduce the risk of an inadvertent position limits overage. Accordingly, we recommend *pro rata* allocation of ownership interests within set bands of ownership percentages.

Quarterly measurement: The costs of complying with the Commission's proposed aggregation rules would also be reduced if the Commission provided a safe harbor to passive investors to measure ownership interests on a predetermined basis, such as on quarterly dates. Permitting passive investors to measure ownership interests on a fixed and workable schedule will not undermine the Commission's position limits regime. This approach would mitigate our members' concerns about disruptions to their clients' investments that could otherwise result from frequent changes in ownership interests.

These recommendations would present substantially reduced costs for AMG members and their clients yet would still ensure at least the same degree of efficacy of the Commission's position limits regime under the goals provided by Congress in CEA sections 4a(a)(2)(C) and 4a(a)(3)(B) by providing passive investors with legal certainty that would promote liquidity in

commodity derivatives. In fact, the Commission's proposal would increase the potential for coordinated manipulative trading activity because it mandates common trading control where none currently exists.

1.4. Requiring passive investors that have no control over, or knowledge of, the specific commodity derivatives trading activities of owned entities they have invested in to aggregate the positions of such entities has not been justified.

1.4.1. Requiring passive investors that have no control over, or knowledge of, the specific commodity derivatives trading activities of owned entities they have invested in to aggregate the positions of such entities exceeds the scope of the Commission's position aggregation authority under the CEA.

The 2013 Aggregation NPRM states its basis for requiring the aggregation of owned entity positions regardless of the existence of common trading control as follows (emphasis added):

> In light of the language in section 4a, its legislative history, subsequent regulatory developments, and the Commission's historical practices in this regard, the Commission continues to believe that section 4a requires aggregation on the basis of *either ownership or control of an entity*.[13]

The relevant portion of CEA section 4a(a)(1) provides (emphasis added):

> [T]he 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.

CEA section 4a(a)(1), by its terms, requires aggregation of positions held and trading done by third parties only when the other person is "*directly or indirectly controlled*."[14] This is not a situation where the CEA is silent about aggregating the positions of third parties (including owned entities) so that the Commission might fill the gap by inferring that the "ownership prong" applies to positions held by an owned third party; rather, the statute specifically addresses the conditions under which a third party's positions are to be aggregated, i.e., when the positions

[13] 78 Fed. Reg. at 68,956.

[14] In the first critical clause quoted above, the phrase "any person" refers to a third party, whereas the phrase "such person" refers to the principal person subject to this statutory aggregation provision. Thus, re-phrasing the clause slightly for purposes of clarification, the positions held and trading done by a third party (e.g., the company in which an investor invests) directly or indirectly controlled by a person (e.g., the investor) shall be included with the positions held and trading done by that person (e.g., the investor). By contrast, the "ownership prong" that appears immediately after this first clause applies only to directly held positions ("positions held and trading done by such person," e.g., the investor).

held and trading done by the third party are "directly or indirectly controlled." With respect to positions held and trading done by third parties, CEA section 4a(a)(1) imposes a constraint on the Commission's authority to require aggregation. CEA section 4a(a)(1) provides that the aggregation of positions held and trading done by third parties is to occur only when the positions held and trading done by the third party are "directly or indirectly controlled" ("Third Party Aggregation Constraint").

The statutory Third Party Aggregation Constraint is consistent with the legislative history of CEA section 4a. As cited in the Commission's 2012 "Aggregation, Position Limits for Futures and Swaps" proposed rulemaking,[15] a 1968 Senate Report provides that "Section 2 of the bill amends section 4a(1) of the [CEA] to show clearly the authority to impose limits on [...] trading done and positions held by *a person controlled by another* shall be considered as done or held by" a person (e.g., the investor).[16]

1.4.2. Requiring passive investors that have no control over, or knowledge of, the specific commodity derivatives trading activities of owned entities they have invested in to aggregate the positions of such entities is an unwarranted departure from the Commission's historical aggregation approach.

The Commission interprets 17 CFR 150.4(b) and proposed Commission regulation 150.4(a) as requiring the aggregation of owned entity positions.[17] The Commission, however, has never promulgated rules (that were not vacated) in which it has interpreted "accounts" to encompass accounts owned by third parties that are commonly owned but not commonly controlled. All of the Commission's pre-2011 position aggregation rulemakings required aggregation on the basis of direct ownership in accounts, not ownership interests in third parties who, in turn, own positions in derivatives trading accounts.

For example, the Commission's 1979 Statement of Aggregation Policy is squarely focused on ownership of accounts, not ownership in entities that own accounts.[18] Its first point stated that "[e]xcept for a limited partner or shareholder in a commodity pool, any person who has a 10% or more financial interest *in an account* will be considered as an account controller" (emphasis added).[19] The 1979 Statement of Aggregation Policy defines "discretionary account" as "a commodity futures trading account for which buying and/or selling orders can be placed or originated, or for which transactions can be effected..."[20]

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[15] 77 Fed. Reg. 31,767 (May 30, 2012).

[16] *Id.* at 31,772 at fn. 80, citing S. Rep No. 947, 90th Cong., 2 Sess. 5 (1968) (emphasis added).

[17] Proposed 150.4(a) ("For the purpose of applying the position limits set forth in § 150.2, unless an exemption set forth in paragraph (b) of this section applies, all positions in accounts for which any person, by power of attorney or otherwise, directly or indirectly controls trading or holds a 10% or greater ownership or equity interest, must be aggregated with the positions held and trading done by such person.").

[18] Statement of Policy on Aggregation of Accounts and Adoption of Related Reporting Rules, 44 Fed. Reg. 33,839 (Jun. 13, 1979).

[19] *Id.* at 33,845.

[20] *Id.*

The 2013 Aggregation NPRM presents the following quote from a position limits rulemaking from 1999 in an attempt to support its interpretation that CEA section 4a(a)(1)'s "ownership prong" includes ownership of third parties' accounts: "the Commission . . . interprets the 'held or controlled' criteria [of CEA section 4a] as applying separately to ownership of positions or to control of trading decisions."[21] However, this quote does not refer to accounts of owned entities. This is not surprising as, again, this 1999 rulemaking was squarely focused on the aggregation of directly owned accounts – and not of accounts owned by an owned third party. For example, the 1999 rulemaking provided that when a person "holds or has a financial interest in or controls more than one account, all such accounts shall be considered by the futures commission merchant, clearing member or foreign broker as a single account…"[22] Thus, neither the quote nor the rulemaking from 1999 support the interpretation in the 2013 Aggregation NPRM.

Contrary to the assertion of the 2013 Aggregation NPRM, the Commission has in fact clearly distinguished between ownership of accounts, on the one hand, and ownership in third party entities that themselves own accounts, on the other. In the context of its CFTC Form 40 rules at 17 CFR 18.04(a)(8), the Commission requires the reporting of information relating to "persons… who have a financial interest of 10% or more in the [Form 40] reporting trader *or* the accounts of the reporting trader" (emphasis added). If financial interests in "accounts" encompassed financial interests in accounts of other persons, then the Commission would have had no need to separately articulate the requirement to report financial interests in the accounts of a reporting trader and the requirement to report financial interests in the reporting trader itself.

The Commission's historical definition of "account" in the position aggregation context is consistent with other Commission regulations that also similarly define the term "account." For example, 17 CFR 39.2 defines "customer account" as meaning "a clearing member account held on behalf of customers, as that term is defined in this section, and which is subject to section 4d(a) or section 4d(f) of the [CEA]" and "house account" as meaning "a clearing member account which is not subject to section 4d(a) or 4d(f) of the [CEA]." 17 CFR 1.3(vv) defines "futures account" to mean an "account that is maintained in accordance with the segregation requirements of sections 4d(a) and 4d(b) of the [CEA] and the rules thereunder." None of these regulations define an "account" as encompassing accounts of owned entities.

The one exception is the Commission's definition of "proprietary account" in 17 CFR 1.3(y),[23] which is defined explicitly to include accounts held by "business affiliates."[24] This term

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[21] 78 Fed. Reg. at 68,956, *quoting* Revision of Federal Speculative Position Limits and Associated Rules, 64 Fed. Reg. 24,038, 24,044 (May 5, 1999).

[22] *Id.* at 24,046.

[23] 17 CFR 1.3(y) "*Proprietary account*. This term means a commodity futures, commodity option, or swap trading account carried on the books and records of an individual, a partnership, corporation or other type of association: (1) for one of the following persons, or (2) of which ten percent or more is owned by one of the following persons, or an aggregate of ten percent or more of which is owned by more than one of the following persons:

[...]

is cited as support for the Commission's new interpretation of the term "account" in the position limits context.[25] The term "proprietary account," however, is irrelevant to the position limits context. The term "proprietary account" is used in 17 CFR 155.3, which requires that a futures commission merchant ("FCM") give priority to executing customer orders over orders from any "proprietary account." Moreover, the fact that the term "proprietary account" is explicitly defined to include accounts held by "business affiliates" suggests that in the Commission's regulations, the term "account," standing alone, does not include accounts of owned entities but rather refers only to directly held or controlled trading accounts.

Even the Commission's enforcement history reflects that it has traditionally viewed aggregation of owned entity positions as only being required where there is common derivatives trading control. The import of the Commission's Order settling an administrative enforcement action in September 2010 against Vitol Inc. and one of its affiliates for false statements in connection with NYMEX position aggregation rules (which parallel Commission rules),[26] is that control was a pre-requisite in considering whether Vitol Inc. was required to aggregate the positions of its commonly-owned affiliate.[27] The recitation of facts in the Commission's Order

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> (viii) A business affiliate that, directly or indirectly is controlled by or is under common control with, such individual, partnership, corporation or association: P*rovided, however*, That an account owned by any shareholder or member of a cooperative association of producers, within the meaning of section 6a of the [CEA], which association is registered as a futures commission merchant and carries such account on its records, shall be deemed to be an account of a customer and not a proprietary account of such association, unless the shareholder or member is an officer, director or manager of the association."

[24] 17 CFR 1.3(y)(1)(viii).

[25] 78 Fed. Reg. 68,956 citing 17 CFR 1.3(y).

[26] "Ownership of Accounts – Except as set forth in Section E. below, 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% or greater ownership or equity interest, must aggregate all such accounts or positions unless such person is a limited partner, shareholder, member of a limited liability company, beneficiary of a trust or similar type of pool participant in a commodity pool. […]." CME Rule 559.D.2, available at http://www.cmegroup.com/rulebook/CME/I/5/5.pdf. Certain commodities are currently subject only to position limit rules set by designated contract markets ("DCMs"). Aggregation for purposes of DCM-set position limits today is governed by Core Principle 5 "Position Limitations or Accountability" in CEA section 5(d)(5) and subpart F of 17 CFR part 28. CEA section 5(d)(1)(B) provides that DCMs have "reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection" unless "otherwise determined by the Commission by rule or regulation." Under 17 CFR 38.301, DCMs "must meet the requirements of parts 150 and 151 of this chapter, as applicable." The only Commission regulation that relates to the aggregation of positions for exchange-set position limits (and that was not vacated) is 17 CFR 150.5(g). 17 CFR 150.5(g) provides that DCMs must aggregate on the basis of control and does not prescribe any other standard:

> 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[.]

[27] In the Matter of Vitol Inc. et al., Docket No. 10-17 (CFTC Sept. 14, 2010), available at http:// www.cftc.gov/ucm/ groups/public/@lrenforcementactions/documents/legalpleading/enfvitolorder09142010.pdf. In this matter, the Commission found that Vitol Inc. and its affiliate willfully failed to correct NYMEX's misperception of the "true nature of the relationship between" Vitol Inc. and its affiliate and imposed a civil monetary penalty of $6 million.

focused on Vitol Inc.'s failure to disclose information relating to the "flow of trading information between" the affiliated entities and the "limited nature of the barriers to trading information flow between" these presumably commonly owned Vitol affiliates.[28] These facts would have been relevant only if common control were a pre-condition to the application of the position aggregation rules (as it is due to the statutory Third Party Aggregation Constraint). Tellingly, no facts relating to common ownership were included in the Order.[29]

1.4.3. The 2013 Aggregation NPRM uses an inappropriate baseline in considering the costs and benefits of its proposed owned entity aggregation rules.

In its discussion of "Cost-Benefit Considerations," the 2013 Aggregation NPRM states that its proposed owned entity aggregation policy is "more permissive than the 10% [owned entity position aggregation] threshold currently provided."[30] It therefore assumes a cost-benefit baseline that requires aggregation of positions for position limit compliance purposes based solely on ownership, regardless of the existence of common control.

This is an inappropriate baseline for two important reasons. First, as described above, neither the Commission nor DCMs (which currently are the sole administrators of position limits for all but nine agricultural commodities, including 19 of the 28 "referenced contracts"), currently require the aggregation of owned entity positions regardless of the existence of common control. Therefore, the Commission's proposal is more restrictive, not "more permissive" than (and, indeed, a dramatic departure from) the existing position aggregation regime. Second, speculative positions outside of the spot month have not been subject to position limits in 19 of the 28 "referenced contract" markets the Commission proposes to subject to position limits under an accompanying release.[31] Aggregating non-spot-month positions of entities in which passive investors make investments presents considerable new challenges, which have not been adequately considered by the 2013 Aggregation NPRM.

1.4.4. "Control" in the context of position aggregation requirements means actual control of derivatives trading, not of anything else, and therefore the owned entity aggregation requirements cannot be based on a theory of corporate control.

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[28] *Id.*

[29] *See also* Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as Amended, Making Findings and Imposing Remedial Sanctions, at 4, http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcitigroupcgmlorder092112.pdf (Sept. 21, 2012) (finding that Citigroup was liable for the position limits violation of its subsidiary Citigroup Global Markets not on the basis of owned entity aggregation requirements under 17 CFR 150.4(b), but rather on the basis of an agency theory (CEA section 2(a)(1)(B) and 17 CFR 1.2).

[30] 78 Fed. Reg. at 68,968.

[31] 78 Fed. Reg. at 75,826. AMG is commenting separately on this proposal, including proposed 150.5(a)(5) providing that aggregation requirements of exchanges must "conform to" those of the Commission under proposed 150.4.

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As noted above, the 2013 Aggregation NPRM bases its proposed owned entity aggregation rules solely on CEA section 4a(a)(1)'s "ownership prong." The 2013 Aggregation NPRM suggests in defense of the 50% ownership aggregation exemption threshold in proposed 150.4(b)(2) that an ownership interest of greater than 50% "is indicative of control" and therefore warrants aggregation of an owned entity's positions even in the absence of any actual trading control. This conclusion appears to be based on conflated notions of corporate control in other contexts with trading control in the position limits context. The Commission cites a 50% equity ownership threshold used by the Federal Trade Commission and Department of Justice as "reflect[ing] a general understanding that ownership at this level poses substantial potential for direct or indirect control over an owned entity."[32] This threshold is used by these other government agencies to identify potential instances of common corporate control for the purpose of anti-trust filing requirements, not of common derivatives trading control.[33] Speculative position limits aggregation requirements are based on whether ownership is indicative of derivatives *trading control*, not corporate control.

The Commission has traditionally interpreted "control" in CEA section 4a(a)(1) and its predecessors as control of trading, not of corporate control or any other concept of control. For example, the Commission's current IAC exemption to position aggregation requirements focuses on the controller's independent control of trading decisions and lack of knowledge of the trading decisions of any other IAC.[34] Indeed, the 2013 Aggregation NPRM appropriately models the conditions for the owned entity aggregation exemption in proposed 150.4(b)(2) on the conditions for the IAC exemption, i.e. factors that demonstrate independent trading control. Similarly, the Commission's definition of "controlled account" at 17 CFR 1.3(j) means an account for which a person "actually directs trading."[35] Perhaps most important of all, the terms of the Commission's proposal appear to focus on trading control, not corporate control. The Commission's proposed general aggregation rule (150.4) requires aggregation when a person "directly or indirectly controls *trading*."

Thus, even if the Commission were to abandon the ownership theory relied upon in the 2013 Aggregation NPRM for a control theory instead, the result is the same: the proposal provides no basis for the Commission to depart from its historical view that position aggregation is required only where actual common trading control exists, e.g., when an investor controls the derivatives trading that occurs in a an owned entity's accounts.[36]

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[32] 78 Fed. Reg. at 68,958, *citing* 16 CFR 801.1(b).

[33] *See* 16 CFR 802.2.

[34] 17 CFR 150.1(e).

[35] *See also* CFTC Form 102, available at http:// www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform102.pdf (prompting FCMs and others to identify "controlled accounts" of the same advisor exceeding "special account" activity thresholds).

[36] 78 Fed. Reg. at 68,958.

2. Passive Investment in Commission Regulation 4.13 Exempt Commodity Pools

2.1. The passive 17 CFR 4.13 exempt pool investor aggregation requirement should be omitted.

The 2013 NPRM proposes to require aggregation of positions in a 17 CFR 4.13 pool when a person holds a greater than 25% ownership interest in the pool under proposed 150.4(b)(1)(iii). This proposed rule is identical to current Commission rule 150.4(c)(2)(iii). The rationale for the current rule was that when there are "10 or fewer limited partners or when a limited partner has an ownership interest of 25% or greater, the limited partner" should be required to aggregate the positions of the pool.[37] The Commission was particularly concerned about single-investor pools when it adopted this requirement.[38] The only sub-paragraphs of current 17 CFR 4.13 that encompass the intended targets of this provision are sub-paragraphs (a)(1) and (a)(2). We therefore recommend that the Commission amend 150.4(b)(1)(iii) to apply to pools "the operator of which is exempt from registration *under §§ 4.13(a)(1) or (a)(2)*" in order for this requirement to apply to its intended targets.

3. Investment in Accounts or Pools with "Substantially Identical Trading Strategies"

Proposed 150.4(a)(2) provides that holding or controlling trading in more than one account or pool (collectively "funds") with "substantially identical trading strategies" requires aggregation ("SITS Rule"). This requirement would apply notwithstanding any other applicable aggregation exemption. In other words, the proposed SITS Rule would apply regardless of common control, significant ownership, or even knowledge of the relevant investments in funds with "substantially identical trading strategies."

The proposed SITS Rule should be omitted from any final rulemaking because it lacks sufficient rationale and is unworkable in practice, as discussed below. In the alternative, proposed 150.4(a)(2) should be amended to apply to "any person that, by power of attorney or otherwise, ~~holds or~~ directly controls the trading of positions" in a SITS account or pool.

3.1. The proposed SITS Rule lacks rationale.

The Commission does not provide a statutory or policy rationale for the proposed SITS Rule in the 2013 Aggregation NPRM or its 2012 predecessor.[39] The Commission's 2011 "Position Limits for Futures and Swaps" final rulemaking did contain a short rationale for a similar requirement for investments in funds with "identical trading strategies."[40] This provision, the Commission stated, was "intended to prevent circumvention of the aggregation requirements.

[37] 64 Fed. Reg. at 24,044.

[38] *Id.*

[39] There are, however, four mentions of the "identical trading strategies" rule in footnotes to the 2012 proposal. *See* e.g., 77 Fed. Reg. at 31,769 at fn. 14.

[40] *See* vacated 151.4(d).

In [the] absence of such [an] aggregation requirement, a trader can, for example, acquire a large long-only position in a given commodity through positions in multiple pools, without exceeding the applicable position limits."[41] However, the 2011 rulemaking provided no historical example of any such circumvention.[42]

Finally, the 2013 Aggregation NPRM fails altogether to consider the costs and benefits of the aggregation requirement for investments in funds that follow "substantially identical trading strategies," despite the very real costs that such a requirement would have on investors.

3.2. The proposed SITS Rule is unworkable in practice.

As a consequence of the proposed SITS Rule, a $10,000 investor in two $1 billion commodity index mutual funds using the same index may have to aggregate the positions in those two $1 billion mutual funds because they follow "substantially identical trading strategies." To provide another example, under the proposed SITS Rule, a $10,000 investor in a fund-of-funds that, in turn, invests $10,000 in two $1 billion commodity index funds that follow "substantially identical trading strategies" would have to aggregate the positions in those two $1 billion funds – even if the investor did not know how the fund-of-funds manager allocated the investor's money. (In contrast, under proposed 150.4(b)(1)'s exemption for investors in commodity pools, it appears that if an investor made a $500 million investment in a single $1 billion commodity index pool, it would be exempt from speculative position limits altogether).

To comply with the aggregation requirement of the proposed SITS Rule, the investor in the foregoing scenarios would not only have to determine how his or her funds are being invested, but also the trading strategies of all of the relevant funds and whether they meet the undefined test of being "substantially identical." Then, he or she would need a data feed to determine the size of the commodity derivatives positions in each fund determined to be using a "substantially identical trading strategy." Such a requirement would simply be unworkable in most cases (depending on, among other things, the size of the investment, the size of the funds with "substantially identical trading strategies" that the investor's money has been invested in, and the investor's other countable commodity derivatives positions). Even if it could be done (the practical impediments described above aside, there would also be significant and costly legal and operational obstacles to overcome), to implement such a compliance program to prevent inadvertent violations of speculative position limits due to the aggregation requirement of the proposed SITS Rule, would cost many times the investor's $10,000 investments.

[41] 76 Fed. Reg. at 71,654.

[42] The 2011 rulemaking was not very clear when it adopted an aggregation requirement for investments in accounts or pools with "identical trading strategies." Now, the 2013 Aggregation NPRM provides no guidance as to the meaning of "substantially identical trading strategies," nor does it explain how the concern about circumvention has changed from 2011 to 2013 that would explain the difference between "identical" and "substantially identical."

4. Independent Account Controller Exemption

We commend the Commission's inclusion of an IAC exemption that allows asset management companies to disaggregate the positions of customer accounts controlled by an IAC. We also commend the Commission for proposing to allow managers of employee benefit plans in proposed 150.4(b)(5) to qualify as IACs. We do have concerns, however, with two aspects of the proposed IAC exemption, described below.

4.1. The definition of IAC[43] should not be limited based upon CPO or CTA status.

The status of entities as registered, exempt or excluded CPOs or CTAs has nothing to do with the purpose behind the IAC: to provide for a safe harbor from aggregation requirements where there is no shared ownership or control between a parent advisor and sub-advisors. The Commission has not articulated a reason why IAC status should be limited to certain registrants on the one hand and certain exempt or excluded entities on the other. All pool operators and trading advisors should be able to avail themselves of the IAC exemption, irrespective of their status as registered, exempt or excluded.

4.2. The proposed IAC notice filing should not be required.

We question the utility of requiring asset managers to submit notice filings complying with proposed 150.4(c)(1) to claim the proposed 150.4(b)(5) IAC exemption. Under the Commission's current IAC exemption (17 CFR 150.3(e)), no such filing is required. The new proposed filing is unduly burdensome, particularly given the fact that we are aware of no abuses of the existing IAC exemption. In lieu of a notice filing, the Commission should consider a requirement to keep records on the eligible entity's and IAC's compliance with the conditions of the IAC exemption. If, however, the Commission requires a filing, it should allow for a simplified generic, omnibus filing that would provide the Commission notice that an eligible entity intends to use the exemption on a going-forward basis consistent with the terms of the exemption.

5. Summary

For the reasons stated above, we recommend that the Commission make the following changes in any final rulemaking adopting the 2013 Aggregation NPRM:

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[43] Proposed 150.1 defines "independent account controller" to mean a person (1) who specifically is authorized by an eligible entity, independently to control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity; (2) over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities for managed positions and accounts to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations that may be incumbent upon the eligible entry to fulfill; (3) who trades independently of the eligible entity and of any other IAC trading for the eligible entity; (4) who has no knowledge of trading decisions by any other IAC; and (5) who is (i) registered as an FCM, an introducing broker, a CTA, or an associated person of any such registrant, or (ii) a general partner, managing member or manager of a commodity pool the operator of which is excluded from registration under Rule 4.5 or 4.13.

- The Commission should not adopt the proposed owned entity aggregation as proposed. Instead, the rules should be amended as discussed above in order to address the impact on passive investors that have no control over, or even knowledge of, the specific commodity derivatives trading activities of owned entities in which they have invested.

- The Commission should amend 150.4(b)(1)(iii) to only require passive investors to aggregate positions of a Commission regulation 4.13 exempt pool based on a 25% or more ownership interest when "the operator of which is exempt from registration *under §§ 4.13(a)(1) or (a)(2)*."

- The Commission should omit the requirement to aggregate investments in funds that follow "substantially identical trading strategies" from any final rulemaking.

- The Commission should expand the scope of entities eligible to become IACs, so no distinction is made based upon CPO or CTA registration, exemption or exclusion status. In addition, the IAC notice filing requirements should be eliminated.

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We appreciate your consideration of our comments. We stand ready to provide any additional information or assistance that the Commission might find useful. Should you have any questions, please do not hesitate to contact Matt Nevins at 212-313-1176 or Michael Loesch at 202-662-4552.

Sincerely,

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