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<AGENCY TYPE='S'>COMMODITY FUTURES TRADING COMMISSION

<CFR>17 CFR Part 150

<RIN>RIN 3038-AD82

<SUBJECT>Aggregation of Positions

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: On May 30, 2012, the Commodity Futures Trading Commission ("Commission" or "CFTC") published in the Federal Register a notice of proposed modifications to part 151 of the Commission's regulations. The modifications addressed the policy for aggregation under the Commission's position limits regime for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. In an Order dated September 28, 2012, the District Court for the District of Columbia vacated part 151 of the Commission's regulations. The Commission is now proposing modifications to the aggregation provisions of part 150 of the Commission's regulations that are substantially similar to the aggregation modifications proposed to part 151, except that the modifications address the policy for aggregation under the Commission's position limits regime for futures and option contracts on nine agricultural commodities set forth in part 150. Separately, the Commission is also proposing today to establish speculative position limits for the 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts that

previously had been covered by part 151 of its regulations. If both proposals are finalized, the modifications proposed here to the aggregation provisions of part 150 would apply to the position limits regimes for both the futures and option contracts on nine agricultural commodities and the 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. However, the Commission may determine to adopt the modifications proposed here separately from any other amendment to the position limits regime.

DATES: Comments must be received on or before January 14, 2014.

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

- Agency website: http://comments.cftc.gov;
- Mail: Melissa D. Jurgens, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581;
- Hand delivery/courier: Same as mail, above.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow instructions for submitting comments.

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

information may be submitted according to the procedures established in CFTC regulations at 17 CFR part 145.

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

FOR FURTHER INFORMATION CONTACT: Stephen Sherrod, Senior Economist, Division of Market Oversight, (202) 418-5452, ssherrod@cftc.gov; Riva Spear Adriance, Senior Special Counsel, Division of Market Oversight, (202) 418-5494, radriance@cftc.gov; or Mark Fajfar, Assistant General Counsel, Office of General Counsel, (202) 418-6636, mfajfar@cftc.gov; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

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I. Background

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A. Introduction

The Commission has long established and enforced speculative position limits for futures and options contracts on various agricultural commodities as authorized by the

Commodity Exchange Act ("CEA").[1] The part 150 position limits regime,[2] generally includes three components: (1) The level of the limits, which set a threshold that restricts the number of speculative positions that a person may hold in the spot-month, individual month, and all months combined,[3] (2) exemptions for positions that constitute bona fide hedging transactions and certain other types of transactions,[4] and (3) rules to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.[5]

The Commission's existing aggregation policy under regulation 150.4 generally requires that unless a particular exemption applies, a person must aggregate all positions for which that person controls the trading decisions with all positions for which that person has a 10 percent or greater ownership interest in an account or position, as well as the positions of two or more persons acting pursuant to an express or implied agreement or understanding.[6] The scope of exemptions from aggregation include the ownership interests of limited partners in pooled accounts,[7] discretionary accounts and customer trading programs of futures commission merchants ("FCM"),[8] and eligible entities with independent account controllers that manage customer positions ("IAC" or "IAC exemption").[9] Market participants claiming one of the exemptions from aggregation are

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[1] 7 U.S.C. 1 et seq.
[2] See 17 CFR part 150. Part 150 of the Commission's regulations establishes federal position limits on certain enumerated agricultural contracts; the listed commodities are referred to as enumerated agricultural commodities.
[3] See 17 CFR 150.2.
[4] See 17 CFR 150.3.
[5] See 17 CFR 150.4.
[6] See 17 CFR 150.4(a) and (b).
[7] See 17 CFR 150.4(c).
[8] See 17 CFR 150.4(d).
[9] See 17 CFR 150.3(a)(4).

subject to a call by the Commission for information demonstrating compliance with the conditions applicable to the claimed exemption.[10]

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B. Proposed Modifications to the Policy for Aggregation Under Part 151 of the Commission's Regulations

The Commission adopted part 151 of its regulations in November 2011 under the authority of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which President Obama signed on July 21, 2010.[11] Title VII of the Dodd-Frank Act[12] amended the CEA to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

As amended by the Dodd-Frank Act, sections 4a(a)(2) and 4a(a)(5) of the CEA authorize the Commission to establish limits for futures and option contracts traded on a designated contract market ("DCM"), as well as swaps that are economically equivalent

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[10] See 17 CFR 150.3(b) and 150.4(e).

[11] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm.

[12] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

to such futures or options contracts traded on a DCM. In response to this new authority, the position limits regime adopted in part 151 would have applied to 28 physical commodity futures and option contracts and physical commodity swaps that are economically equivalent to such contracts.[13] The regulations in the part 151 position limits regime are in three components that are generally similar to the three components of part 150.[14] With regard to determining which accounts and positions a person must aggregate, regulation 151.7 largely adopted the Commission's existing aggregation policy under regulation 150.4.[15] Regulation 151.7, however, also provided additional exemptions for underwriters of securities, and for where the sharing of information between persons would cause either person to violate federal law or regulations adopted

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[13] See Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011). In an Order dated September 28, 2012, the District Court for the District of Columbia vacated part 151 of the Commission's regulations, with the exception of the revised position limit levels in amended section 150.2. See International Swaps and Derivatives Association v. United States Commodity Futures Trading Commission, 887 F. Supp. 2d 259 (D.D.C. 2012).

In a separate proposal approved on the same date as this proposal, the Commission is proposing to establish speculative position limits for 28 exempt and agricultural commodity futures and option contracts, and physical commodity swaps that are "economically equivalent" to such contracts (as such term is used in section 4a(a)(5) of the CEA). In connection with establishing these limits, the Commission is also proposing to update some relevant definitions; revise the exemptions from speculative position limits, including for bona fide hedging; and extend and update reporting requirements for persons claiming exemption from these limits. See Position Limits for Derivatives (November 5, 2013).

The Commission is proposing these amendments to regulation 150.4 and certain related regulations separately from its proposed amendments to position limits because it believes that these proposed amendments regarding aggregation of provisions could be appropriate regardless of whether the position limit amendments are adopted. The Commission anticipates that it could adopt these amendments related to aggregation separately from the amendments to the position limits.

If both proposals are finalized, the modifications proposed here to the aggregation provisions of part 150 would apply to the position limits regimes for both the futures and option contracts on nine agricultural commodities and the 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts.

[14] See notes 2 through 5, above, and accompanying text.

[15] See notes 6 through 9, above, and accompanying text.

thereunder.[16] With the exception of the exemption for underwriters, regulation 151.7 required market participants to file a notice with the Commission demonstrating compliance with the conditions applicable to each exemption.[17]

On May 30, 2012, the Commission proposed, partially in response to a petition for interim relief from part 151's provision for aggregation of positions across accounts,[18] certain modifications to its policy for aggregation under the part 151 position limits regime (the "Part 151 Aggregation Proposal").[19] In brief, the Part 151 Aggregation Proposal included the following five elements.

First, the Commission proposed to amend regulation 151.7(i) to make clear that the exemption from aggregation for situations where the sharing of information was restricted under law would include circumstances in which the sharing of information would create a "reasonable risk" of a violation – in addition to an actual violation – of federal law or regulations adopted thereunder. The Commission also proposed extending the exemption to situations where the sharing of information would create a "reasonable risk" of a violation of state law or the law of a foreign jurisdiction. But the Commission did not propose to modify the requirement that market participants file an opinion of counsel to rely on the exemption in regulation 151.7(i).

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[16] See regulations 151.7(g) and (i), respectively.
[17] See regulation 151.7(i).
[18] A copy of the petition (the "aggregation petition") can be found on the Commission's website at www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/wgap011912.pdf. The aggregation petition was originally filed by the Working Group of Commercial Energy Firms; certain members of the group later reconstituted as the Commercial Energy Working Group. Both groups (hereinafter, collectively, the "Working Groups") presented one voice with respect to the aggregation petition.
[19] See Aggregation, Position Limits for Futures and Swaps, 77 FR 31767 (May 30, 2012).

Second, the Commission proposed regulation 151.7(b)(1), which would establish a notice filing procedure to permit a person in specified circumstances to disaggregate the positions of a separately organized entity ("owned entity"), even if such person has a 10 percent or greater interest in the owned entity. The notice filing would need to demonstrate compliance with certain conditions set forth in proposed regulation 151.7(b)(1)(i), and such relief would not be available to persons with a greater than 50 percent ownership or equity interest in the owned entity. Similar to other exemptions from aggregation, the Commission would be able to subsequently call for additional information as well as reject, modify or otherwise condition such relief. Further, such person would be obligated to amend the notice filing in the event of a material change to the circumstances described in the filing. The proposed criteria to claim relief in proposed regulation 151.7(b)(1)(i) would have required a demonstration that the person filing for disaggregation relief and the owned entity do not have knowledge of the trading decisions of the other; that they trade pursuant to separately developed and independent trading systems; that they have, and enforce, written procedures to preclude one entity from having knowledge of, gaining access to, or receiving data about, trades of the other; that they do not share employees that control trading decisions and that employees do not share trading control with respect to both entities; and that they do not have risk management systems that permit the sharing of trades or trading strategies with the other.

Third, the Commission proposed regulation 151.7(j), which would allow higher-tier entities to rely upon a notice for exemption filed by the owned entity, but such reliance would only go to the accounts or positions specifically identified in the notice. The proposed regulation also would require that a higher-tier entity that wishes to rely

upon an owned entity's exemption notice must comply with conditions of the applicable aggregation exemption other than the notice filing requirements.

Fourth, the Commission proposed an aggregation exemption in proposed regulation 151.7(g) for an ownership interest of a broker-dealer registered with the SEC, or similarly registered with a foreign regulatory authority, in an entity based on the ownership of securities acquired as part of reasonable activity in the normal course of business as a dealer. However, the proposed exemption would not have applied where a broker-dealer acquires more than a 50 percent ownership interest in another entity.

Fifth, the Commission proposed to expand the definition of independent account controller to include the managing member of a limited liability company, so that "regulation 4.13 commodity pools" (i.e., a commodity pool, the operator of which is exempt from registration under regulation 4.13) established as limited liability companies would be accorded the same treatment as such pools formed as limited partnerships.

The Commission received approximately 26 written comments on the Part 151 Aggregation Proposal.[20]

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II. Proposed Rules

The Commission is now proposing to amend regulation 150.4, and certain related regulations, to include rules to determine which accounts and positions a person must aggregate that are substantially similar to the corresponding rules in part 151, as it was proposed to be amended in May 2012. In addition, the amendments now being proposed to regulation 150.4 reflect the Commission's consideration of the comments that were

[20] The written comments are available on the Commission's website at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1208.

received on the Part 151 Aggregation Proposal. Thus, the discussion below covers the amendments in the Part 151 Aggregation Proposal, the comments on those proposed amendments, and the amendments that the Commission is now proposing.[21]

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A. Proposed Rules on the Information Sharing Restriction

B.

1. Part 151 Proposed Approach – Amendment to Regulation 151.7(i)

As noted above, regulation 151.7(i) provided exemptions from aggregation under certain conditions where the sharing of information would cause a violation of Federal law or regulation. These exemptions had not previously been available. In the Part 151 Aggregation Proposal, the Commission proposed to amend regulation 151.7(i) to make clear that the exemption to the aggregation requirement would include circumstances in which the sharing of information would create a "reasonable risk" of a violation – in addition to an actual violation – of federal law or regulations adopted thereunder. The Commission noted that whether a reasonable risk exists would depend on the interconnection of the applicable statute and regulatory guidance, as well as the particular facts and circumstances as applied to the statute and guidance.

The proposed amendments to part 151 retained the requirement that market participants file an opinion of counsel to rely on the exemption in regulation 151.7(i). The Commission explained that requiring an opinion would allow Commission staff to review the legal basis for the asserted regulatory impediment to the sharing of information, and would be particularly helpful where the asserted impediment arises from

[21] For additional background on part 150 and part 151 and the existing provisions for aggregation, see the Part 151 Aggregation Proposal.

laws or regulations that the Commission does not directly administer. Further, Commission staff would have the ability to consult with other federal regulators as to the accuracy of the opinion, and to coordinate the development of rules surrounding information sharing and aggregation across accounts. The Commission also noted that the proposed clarification regarding a "reasonable risk" of violation should address the concerns that obtaining an opinion of counsel could be difficult if the Commission read the existing standard to include only per se violations.

The Commission also noted that, notwithstanding the Commission's facts and circumstances review of potentially conflicting federal laws or regulations, the exemption in regulation 151.7(i) would be effective upon filing of the notice required in regulation 151.7(h) and opinion of counsel. Further, these provisions authorized the Commission to request additional information beyond that contained in the notice filing, and the Commission may amend, suspend, terminate or otherwise modify a person's aggregation exemption upon further review. Last, the Commission noted that as it gained further experience with the exemption for federal law information sharing restriction in regulation 151.7(i), it anticipated providing further guidance to market participants.

a. Part 151 Proposed Rules for Information Sharing Restriction – Foreign Law

For the same reasons the Commission adopted the exemption for federal information sharing restrictions, the Commission proposed extending the exemption to the law of a foreign jurisdiction. In addition, similar to the clarification for the exemption for federal law information sharing restriction, the Commission also proposed an exemption where the sharing of information creates a "reasonable risk" of violating the

law of a foreign jurisdiction. However, the Commission remained concerned that certain market participants could potentially use the existing and proposed expansion of the exemption in regulation 151.7(i) to evade the requirements for the aggregation of accounts. In this regard, the proposed amendment to part 151, consistent with the exemption for federal law information sharing restriction, included the requirement to file an opinion of counsel specifically identifying the particular law and facts requiring a market participant to claim the exemption.

The Commission noted that the aggregation petition references information sharing restrictions that arise from "international" law, and the Commission sought comment on the types of "international" law, if any, which could create information sharing restrictions other than the law of a foreign jurisdiction. The Commission asked if the regulation 151.7(i) exemption should include "international" law or whether it was sufficient to refer to the "law of a foreign jurisdiction."

b. Part 151 Proposed Rules for Information Sharing Restriction – State Law

The Commission also proposed to establish an exemption for situations where information sharing restrictions could trigger state law violations. In addition, similar to the clarification related to information sharing restrictions under federal law, the Commission also proposed that the state law information sharing restriction apply where the sharing of information creates a "reasonable risk" of violating the state law. However, as noted above, the Commission remained concerned about the potential for evasion within the context of this exemption. In this regard, the Part 151 Aggregation Proposal, consistent with the federal law information sharing restriction, included the

requirement to file an opinion of counsel specifically identifying the restriction of law and facts particular to the market participant claiming the exemption.

The clarification and expansion of the violation of law exemption in the Part 151 Aggregation Proposal addressed concerns raised in the aggregation petition. First, the clarification and extension of the violation of law exemption responded to concerns that market participants could face increased liability under state, federal and foreign law. While the aggregation petition and other commenters argued that an owned non-financial entity exemption would reduce the risk of liability under antitrust and other laws, the clarification and expansion in the Part 151 Aggregation Proposal would also reduce risk of liability under antitrust or other laws by allowing market participants to avail themselves of the violation of law exemption in those circumstances where the sharing of information created a reasonable risk of violating the above mentioned bodies of law.

The Commission solicited comments as to the appropriateness of extending the information sharing exemption to state law. The Commission also considered, as an alternative, a case-by-case approach, through petitions submitted pursuant to CEA section 4a(a)(7), where the Commission would otherwise rely upon the preemption of state law in administering its aggregation policy.

The Commission noted that the aggregation petition cites to Texas Public Utility Code Substantive Rule 25.503, which provides that "a market participant shall not collude with other market participants to manipulate the price or supply of power."[22] That provision applies to intra-state transactions and resembles regulations of the Federal

[22] Aggregation petition at 24.

Energy Regulatory Commission.[23] In this regard, the Commission asked if it should limit application of the proposed exemption for state law information sharing restrictions to laws that have a comparable provision at the federal level, and what criteria it should use in identifying state laws that a person may rely upon for an exemption from aggregation. The Commission also solicited additional comment as to the types of state laws, including specific laws, which could create an information sharing restriction in conflict with the Commission's aggregation policy.

The Commission further noted that the aggregation petition seeks to extend the exemption to information sharing restrictions that arise from "local" law.[24] However, the aggregation petition did not provide examples of local laws that could create restrictions on information sharing, and the Commission was concerned that an exemption for local law would be difficult to implement due to the large number of such laws and/or regulations that would need to be considered and the vast numbers of localities that might issue such laws and/or regulations.

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

[23] See, e.g., 18 CFR 1c.1 and 1c.2.
[24] Aggregation petition at 24.

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2. Commenters' Views

One commenter said that the information sharing exemption should not be expanded, but should instead be limited to violations of federal law.[25] This commenter also said that the exemption from aggregation for potential violations should not be included, because it is impractical to determine if potential violations actually justify disaggregation, and that if the exemption is expanded, only "foreign law," not "international law," should be a basis for the exemption since international law (such as a treaty) is not directly applicable to information sharing.[26]

Other commenters said that the proposed exemptions for information sharing requirements under state or foreign law are appropriate, and that a "reasonable risk" of violation is the right standard for the exemptions.[27] Commenters also said that requirements under state law should be a valid basis for an exemption regardless of whether a comparable federal law exists, and even if federal law pre-empts state law.[28] These commenters cited state utility regulations and state regulation of local gas distribution companies as examples of the types of state laws that could prohibit information sharing. Without citing any examples of such laws that may restrict

[25] Institute for Agriculture and Trade Policy on June 29, 2012 ("CL-IATP").
[26] CL-IATP.
[27] EEI on June 29, 2012 ("CL-EEI"), FIA on June 29, 2012 ("CL-FIA"), International Swaps and Derivatives Association and Securities Industry and Financial Markets Association, jointly on June 29, 2012 ("CL-ISDA/SIFMA").
[28] American Gas Association on June 29, 2012 ("CL-AGA"), American Petroleum Institute on June 29, 2012 ("CL-API"), Atmos Energy Holdings on June 29, 2012 (erroneously dated July 29, 2012) ("CL-Atmos"), CL-EEI, CL-FIA, Coalition of Physical Energy Companies on June 29, 2012 ("CL-COPE").

information sharing, two commenters said that local law should also be a valid basis for an exemption.[29]

Regarding which types of legal provisions should be treated as "state law," commenters said it should include state statutes, regulations and common law (including, e.g., fiduciary duties under common law),[30] and rules, regulations, administrative rulings and court orders imposed by state commissions or other governmental authorities with jurisdiction.[31]

Addressing the requirement of an opinion of counsel, some commenters said that the requirement in the existing rule should not be changed.[32] These commenters reasoned that the presumption should be that aggregation is required in all but the most clear-cut cases, and for those cases an opinion would be available. [33]

Other commenters said that a memorandum of law prepared by internal or external counsel should suffice if it sets out a legal basis for the exemption.[34] These commenters generally pointed out that formal legal opinions can be expensive to obtain, typically contain many qualifications, and otherwise are not a practical means of advancing the goals mentioned in the Part 151 Aggregation Proposal.[35] One commenter said that as an alternative to a memorandum of law, a person claiming the exemption

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[29] CL-API, Working Group of Commercial Energy Firms and Sutherland Asbill & Brennan LLP, on behalf of The Commercial Energy Working Group, jointly on June 29, 2012 ("CL-WGCEF").
[30] CL-FIA, Private Equity Growth Capital Council on June 29, 2012 ("CL-PEGCC").
[31] CL-AGA, Alternative Investment Management Association Limited on July 6, 2012 ("CL-AIMA"), CL-Atmos.
[32] Better Markets, Inc. on June 29, 2012 ("CL-Better Markets"), CL-IATP.
[33] CL-Better Markets, CL-IATP.
[34] CL-API, CL-EEI, CL-FIA, CL-ISDA/SIFMA, CL-PEGCC, CL-WGCEF.
[35] CL-API, CL-EEI, CL-FIA, CL-ISDA/SIFMA, CL-PEGCC, CL-WGCEF. Commenters also said that persons should be able to rely on a general legal opinion (as compared to a legal opinion or memorandum prepared specifically for that person) with respect to laws that impose a broadly applicable prohibition of information sharing.

should be allowed simply to provide a copy of the court order, administrative ruling or other document showing the prohibition of information sharing.[36]

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3. Proposed Rule

The Commission is proposing to adopt rule 150.4(b)(8), which is largely similar to rule 151.7(i) as it was proposed to be amended. The Commission notes that many of the commenters agreed that the proposed amendment to part 151 appropriately required that the sharing of information create "a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder." Based on the comments received and further consideration, the Commission does not believe it is necessary that the person show that a comparable federal law exists in order for a state law to be the basis for an exemption.

The Commission has carefully considered the comments asserting that local law and international law should be a basis for the exemption. However, the Commission does not believe that this would be appropriate. First, the Commission notes that the commenters were divided on this point, and only some supported incorporating local law and international law into the exemption. With regard to local law, the Commission continues to believe, as stated in the Part 151 Aggregation Proposal, that an exemption for local law would be difficult to implement due to the number of laws and regulations that would need to be considered and the number of localities that might issue them. Also, even though the number of such laws and regulations may be large, the Commission is not persuaded that there would be a significant number of instances where

[36] CL-AIMA.

these laws and regulations would prohibit information sharing that would otherwise be permitted under federal and state law.[37] In this respect, the Commission notes that even commenters supportive of including exceptions for local law did not cite any local laws that restrict the information sharing necessary to comply with the Commission's aggregation policy. Furthermore, the Commission is concerned that reviewing notices of exemptions based on local laws would create a substantial administrative burden for the Commission. That is, balancing the possibility that including local law as a basis for the exemption would be helpful to market participants against the possibility that doing so would lead to confusion or inappropriate results, the Commission preliminarily concludes that the better course is not to provide for local law to be a basis for the exemption.

With regard to international law, the Commission is persuaded by the commenter who pointed out that the sources of international law, such as treaties and international court decisions, would be unlikely to include information sharing prohibitions that would not otherwise apply under foreign or federal law, and that therefore including international law as a basis for the exemption is unnecessary.

The Commission's proposed rule 150.4(b)(8) differs from the proposed amendment to rule 151.7, in that instead of requiring a person to provide an opinion of counsel regarding the reasonable risk of a violation of law, the proposed rule would require the person to provide a written memorandum of law (which may be prepared by an employee of the person or its affiliates) which explains the legal basis for determining that information sharing creates a reasonable risk that either person could violate federal,

[37] In addition, in those instances where local law would impose an information sharing restriction that is not present under state or federal law, the Commission believes that it could be inappropriate to favor the local law serving a local purpose to the detriment of the position limits under federal law that serve a national purpose.

state or foreign law. The Commission is persuaded by the commenters saying that requiring a formal opinion of counsel may be expensive and may not provide benefits, in terms of the purposes of this requirement, as compared to a memorandum of law. As noted in the Part 151 Aggregation Proposal, the purpose of this requirement is to allow Commission staff to review the legal basis for the asserted regulatory impediment to the sharing of information (which should be particularly helpful when the asserted impediment arises from laws that the Commission does not directly administer), to consult with other regulators as to the accuracy of the assertion, and to coordinate the development of rules surrounding information sharing and aggregation. The Commission expects that a written memorandum of law would, at a minimum, contain information sufficient to serve these purposes.

The Commission preliminarily believes that if there is a reasonable risk that persons in general could violate a provision of federal, state or foreign law of general applicability by sharing information associated with position aggregation, then the written memorandum of law may be prepared in a general manner (i.e., not specifically for the person providing the memorandum) and may be provided by more than one person in satisfaction of the requirement. For example, the Commission is aware that trade associations commission law firms to provide memoranda on various legal issues of concern to their members. Under the proposed rule, such a memorandum (i.e., one that sets out in detail the basis for concluding that a certain provision of federal, state or foreign law of general applicability creates a reasonable risk of violation arising from information sharing) could be provided by various persons to satisfy the requirement, so

long as it is clear from the memorandum how the risk applies to the person providing the memorandum.

On the other hand, the Commission is not persuaded that, as suggested by some commenters, simply providing a copy of the law or other legal authority would be sufficient, because this would not set out the basis for a conclusion that the law creates a reasonable risk of violation if the particular person providing the document shared information associated with position aggregation. If the effect of the law is clear, the written memorandum of law need not be complex, so long as it explains in detail the effect of the law on the person's information sharing.

Proposed rule 150.4(b)(8) also reflects the addition of a parenthetical clause to clarify that the types of information that may be relevant in this regard may include, only by way of example, information reflecting the transactions and positions of a such person and the owned entity. The Commission believes it is helpful to clarify in the rule text what types of information may potentially be involved. The mention of transaction and position information as examples of this information is not intended to limit the types of information that may be relevant.

Finally, the Commission preliminarily believes that the question of what legal authorities, in particular, constitute "state law" or "foreign law," where it is relevant, is a question to be addressed in the written memorandum of law. In general, any state-level or foreign legal authority that is binding on the person could be a basis for the exemption.

The Commission solicits comment as to all aspects of proposed rule 150.4(b)(8). In particular, the Commission solicits comment as to the appropriateness of requiring that a person provide a written memorandum of law, rather than an opinion of counsel,

regarding the reasonable risk of a violation of law. Also, what types of information may potentially be the subject of the sharing that is of concern in this rule?

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C. Ownership of Positions Generally

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1. Part 151 Proposed Approach

The Part 151 Aggregation Proposal reflected the Commission's long-standing incremental approach to exemptions from the aggregation requirement for persons owning a financial interest in an entity. The Part 151 Aggregation Proposal highlighted the relevant statutory language of section 4a(a)(1) of the CEA, which requires aggregation of an entity's positions on the basis of either ownership or control of the entity, and the related legislative history and regulatory developments which support the Commission's approach. In addition, the Part 151 Aggregation Proposal also explained that the Commission's historical practice has been to craft narrowly-tailored exemptions, when and if appropriate, to the basic requirement of aggregation when there is either ownership or control of an entity.[38]

Regarding the threshold level at which an exemption from aggregation on the basis of ownership would be available, the Commission noted in the Part 151 Aggregation Proposal that it has generally found that an ownership or equity interest of less than 10 percent in an account or position that is controlled by another person who makes discretionary trading decisions does not present a concern that such ownership interest results in control over trading or can be used indirectly to create a large

[38] See also note 41, below, and accompanying text.

speculative position through ownership interests in multiple accounts. As such, the Commission has exempted an ownership interest below 10 percent from the aggregation requirement.[39] Prior comments discussed in the Part 151 Aggregation Proposal suggested that a similar analysis should prevail for an ownership interest of 10 percent or more where such ownership represents a passive investment that does not involve control of the trading decisions of the owned entity, because such passive investments would present a reduced concern that ownership would result in trading pursuant to direct or indirect control, as well as a reduced risk for persons with positions in multiple accounts to hold an unduly large overall position.

While other Commission rulemakings prior to the Part 151 Aggregation Proposal generally restricted exemptions from aggregation based on ownership to FCMs, limited partner investors in commodity pools, and independent account controllers managing customer funds for an eligible entity, a broader passive investment exemption has previously been considered but not enacted by the Commission.[40] Further, the

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[39] The Commission codified this aggregation threshold in its 1979 statement of policy on aggregation, which was derived from the administrative experience of the Commission's predecessor. See Statement of Policy on Aggregation of Accounts and Adoption of Related Reporting Rules ("1979 Aggregation Policy"), 44 FR 33839, 33843 (June 13, 1979). Note, however, that consistent with the approach taken in 151.7(d), proposed rule 150.4(d) will separately require aggregation of investments in accounts with identical trading strategies.

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

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

Commission reiterated its belief in incremental development of aggregation exemptions over time.[41] Consistent with that incremental approach, the Commission considered the additional information provided and the concerns raised by the aggregation petition, and proposed relief from the ownership criteria of aggregation.

The Part 151 Aggregation Proposal would have established a notice filing procedure to permit a person with an ownership or equity interest in a separately organized entity ("owned entity") of 10 percent or greater, but no more than 50 percent, to disaggregate the positions of the owned entity in specified circumstances. Under that proposal, the notice filing would demonstrate compliance with certain conditions set forth in the proposed amendment to part 151. Similar to other exemptions from aggregation, the notice filing would be effective upon submission to the Commission, but the Commission would be able to subsequently call for additional information as well as reject, modify or otherwise condition such relief. Further, such person would be

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> In particular, certain instances have come to the Commission's attention where beneficial ownership in several otherwise unrelated accounts may be greater than ten percent, but the circumstances surrounding the financial interest clearly exclude the owner from control over the positions. The Commission is requesting comment on whether further revisions to the current Commission rules and policies regarding ownership are advisable in light of the exemption hereby being proposed. If such financial interests raise issues not addressed by the proposed exemption for independent account controllers, what approach best resolves those issues while maintaining a bright-line aggregation test?

[41] See 77 FR 31767, 31773. This incremental approach to account aggregation standards reflects the Commission's historical practice. See, e.g., 53 FR 41563, 41567, Oct. 24, 1988 (the definition of eligible entity for purposes of the IAC exemption originally only included CPOs, or exempt CPOs or pools, but the Commission indicated a willingness to expand the exemption after a "reasonable opportunity" to review the exemption.); 56 FR 14308, 14312, Apr. 9, 1991 (the Commission expanded eligible entities to include commodity trading advisors, but did not include additional entities requested by commenters until the Commission had the opportunity to assess the current expansion and further evaluate the additional entities); and 64 FR 24038, May 5, 1999 (the Commission expanded the list of eligible entities to include many of the entities commenters requested in the 1991 rulemaking).

obligated to amend the notice filing in the event of a material change to the circumstances described in the filing.

a. Initial Proposed Ownership Threshold for Disaggregation Relief

The proposed amendment to part 151 would have conditioned disaggregation relief on a demonstration that the person does not have greater than a 50 percent ownership or equity interest in the owned entity. The Part 151 Aggregation Proposal explained that an equity or ownership interest above 50 percent constitutes a majority ownership or equity interest of the owned entity and is so significant as to require aggregation under the ownership prong of Section 4a(a)(1) of the CEA. As noted in the Part 151 Aggregation Proposal, the proposed amendment to part 151 would have provided certainty and an easily administrable bright-line test, and would have addressed concerns about circumvention of position limits by coordinated trading or direct or indirect influence between entities. To the extent that the majority owner may have the ability and incentive to direct, control or influence the management of the owned entity, the proposed bright-line test would be a reasonable approach to the aggregation of owned accounts pursuant to Section 4a(a)(1). A person with a greater than 50 percent ownership interest in multiple accounts would have the ability to hold and control a significant and potentially unduly large overall position in a particular commodity, which position limits are intended to prevent.

The owned entity exemption in the Part 151 Aggregation Proposal would have applied to both financial and non-financial entities that have passive ownership interests. Market participants that qualify for the exemption could file a notice with the

Commission demonstrating independence between entities and, thereafter, forgo the development of monitoring and tracking systems for the aggregation of accounts. The Commission sought comment as to whether such passive interests present a significantly reduced risk of coordinated trading compared to owned entities that fail the criteria for the proposed exemption. In addition, the Commission specifically requested comment as to whether the proposed relief should be limited to ownership interests in non-financial entities.

While the owned non-financial entity exemption mentioned in the aggregation petition would permit disaggregation even if the owned entity is wholly owned, the Commission was concerned that an ownership interest greater than 50 percent presents heightened concerns for coordinated trading or direct or indirect influence over an account or position, and that permitting disaggregation at that level of ownership would be inconsistent with the statutory requirement to aggregate on the basis of ownership. The Part 151 Aggregation Proposal noted that while small ownership interests of less than 10 percent do not warrant aggregation, and although 10 percent or greater ownership has served as a useful threshold for aggregation, the Commission believed relief may be warranted for passive investments above 10 percent. However, for the reasons discussed above, aggregation would be inappropriate where an ownership interest is greater than 50 percent. Therefore, the Commission proposed limiting the availability of the exemption to those having an ownership interest no greater than 50 percent.

b. Initial Proposed Criteria for Disaggregation Relief

The proposed criteria to claim relief under the proposed amendment to part 151 addressed the Commission's concerns that an ownership or equity interest of 10 percent

and above may facilitate or enable control over trading of the owned entity or allow a person to accumulate a large position through multiple accounts that could overall amount to an unduly large position. The Part 151 Aggregation Proposal grouped these criteria into four general categories.

First, the proposed amendment to part 151 would have conditioned aggregation relief on a demonstration that the person filing for disaggregation relief and the owned entity do not have knowledge of the trading decisions of the other. The Commission noted that where an entity has an ownership interest in another entity and neither entity shares trading information, such entities demonstrate independence, but persons with knowledge of trading decisions of another in which they have an ownership interest are likely to take such decisions into account in making their own trading decisions.

Second, the proposed amendment to part 151 would have conditioned aggregation relief on a demonstration that the person seeking disaggregation relief and the owned entity trade pursuant to separately developed and independent trading systems. Further, a demonstration that such person and the owned entity have, and enforce, written procedures to preclude the one entity from having knowledge of, gaining access to, or receiving data about, trades of the other, would also be required. Such procedures would address document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities. The Part 151 Aggregation Proposal noted that these conditions would strengthen the independence between the two entities for the owned entity exemption.

Third, the proposed amendment to part 151 would have conditioned aggregation relief on a demonstration that the person does not share employees that control the owned

entity's trading decisions, and the employees of the owned entity do not share trading control with such persons. The Part 151 Aggregation Proposal noted that, similar to the restriction on information sharing, the sharing of employees with knowledge of trading decisions presents a strong risk to the independence of trading between entities. In the Part 151 Aggregation Proposal, the Commission sought comment regarding whether the sharing of employees such as attorneys, accountants, risk managers, compliance and other mid- and back-office personnel compromises independence because it would provide each entity with knowledge of the other's trading decisions.[42]

Fourth, the proposed amendment to part 151 would have conditioned aggregation relief on a demonstration that the person and the owned entity do not have risk management systems that permit the sharing of trades or trading strategies with the other. This condition, which is similar to a condition proposed in the aggregation petition, addressed concerns that risk management systems that permit the sharing of trades or trading strategies with each other present a significant risk of coordinated trading through the sharing of information. The Part 151 Aggregation Proposal did not include a condition that the risk management systems of the two entities be separately developed, and the Commission sought comment as to whether independence of trading between the two entities can be maintained when their risk management systems do not communicate trade information.

c. Initial Proposed Notice Filing Requirement

[42] In the aggregation petition, the Working Groups asserted that entities should be permitted to share "attorneys, accountants, risk managers, compliance and other mid- and back-office personnel." Aggregation petition at Exhibit A.

With regard to filing requirements for the exemption in the proposed amendment to part 151, the Commission noted that market participants would be required to file in accordance with regulation 151.7(h). As such, market participants would be required to file a notice with the Commission with a description of how they adhere to the criteria in the proposed amendment to part 151 and a certification that the conditions are met. This certification, as well as any other certification made under regulation 151.7(h), would be required to be made by a senior officer of the market participant with knowledge as to the contents of the notice.[43] Further, regulation 151.7(h)(3) requires market participants to promptly update a notice filing in the event of a material change of the information contained in the notice filing.[44]

With regard to the type of material necessary to file a notice to claim an exemption under the proposed amendment to part 151, the Commission noted that each submission would have to be specific to the facts of the particular entity. The person claiming the exemption would be required to provide specific facts that demonstrate compliance with each condition of relief. Such a demonstration would likely include an organizational chart showing the ownership and control structure of the involved entities, a description of the risk management system, a description of the information-sharing systems (including bulletin boards, and common email addresses of the entities identified), an explanation of how and to whom the trade data and position information is

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[43] See proposed rule 151.7(h)(1)(ii), 77 FR 31767, 31782.

[44] In this regard, the Commission clarified that a material change would include, among other events, if the person making the original certification is no longer employed by the company. See also CEA sections 6(c)(2) and 9(a)(3).

distributed (including the responsibilities of the individual receiving such information), and the officers that receive reports of the trade data and position information.[45]

d. Initial Proposed Treatment of Higher Tier Entities

In connection with its request for the Commission to include an owned non-financial entity exemption, the aggregation petition also requested that the Commission provide relief from the filing requirements for claiming the exemption. Specifically, it argued that if an entity files a notice and claims the owned non-financial entity exemption, then "every higher-tier company (a company that holds an interest in the company that submitted the notice) need not aggregate the referenced contracts of the owned non-financial entities identified in the notice."[46] After consideration of this request, the Commission proposed rules that would provide relief to such "higher-tier entities" within the context of a corporate structure.[47]

The proposed amendments to part 151 would have provided that higher-tier entities may rely upon a notice for exemption filed by the owned entity, and such reliance would only go to the accounts or positions specifically identified in the notice. For example, if company A had a 30 percent interest in company B, and company B filed an exemption notice for the accounts and positions of company C, then company A could rely upon company B's exemption notice for the accounts and positions of company C.

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[45] The Commission noted that this list was not meant to be exhaustive of the factors that would indicate an exemption is warranted and should not be interpreted as being solely sufficient to claim the exemption because each filing is fact specific. And, as noted earlier, the Commission is able to demand additional information regarding the exemption within its discretion.

[46] Aggregation petition at 23.

[47] For purposes of the discussion below, "higher-tier" entities include entities with a 10 percent or greater ownership interest in an owned entity.

Should company A wish to disaggregate the accounts or positions of company B, company A would have to file a separate notice for an exemption.

The proposed amendments to part 151 would have also provided that a higher-tier entity that wishes to rely upon an owned entity's exemption notice would be required to comply with conditions of the applicable aggregation exemption other than the notice filing requirements. Although higher-tier entities would not have to submit a separate notice to rely upon the notice filed by an owned entity, the Commission noted that it would be able, upon call, to request that a higher-tier entity submit information to the Commission, or allow an on-site visit, demonstrating compliance with the applicable conditions.

The Part 151 Aggregation Proposal stated that the proposed amendments to part 151 should significantly reduce the filing requirements for aggregation exemptions. Further, the Commission did not anticipate that the reduction in filing would impact the Commission's ability to effectively surveil the proper application of exemptions from aggregation. The first filing of an owned entity exemption notice should provide the Commission with sufficient information regarding the appropriateness of the exemption, while repetitive filings of higher-tier entities would not be expected to provide additional substantive information. However, the Commission again noted that higher-tier entities would still be required to comply with the conditions of the exemption specified in the owned entity's notice filing.

The Commission specifically requested comments as to the appropriateness of the owned entity exemption as well as the conditions applicable to the exemption, and whether the Commission should add additional criteria and if so, what criteria and why.

The Commission also asked if it should require market participants to submit additional information to claim the exemption, and if so, what information and why. With regard to the owned entity exemption, the Commission asked if it should alter the scope of the exemption, and if so, how it should be altered and why. Further, the Commission asked commenters to address the percentage ownership interest, if any, at which a market participant should no longer be able to claim the exemption in the proposed amendments to part 151, and whether there are specific circumstances in which a percentage of ownership higher than 50 percent would be appropriate to claim the exemption notwithstanding the concerns described above regarding coordinated trading, direct or indirect influence, and significantly large and potentially unduly large overall positions in a particular commodity. In addition, the Commission invited comment on the owned non-financial entity exemption set forth in appendix A of the aggregation petition as an alternative to the proposed owned entity exemption.

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2. Commenters' Views

a. Comments on the Initial Proposed Ownership Threshold for Disaggregation Relief

Some commenters supported the proposed rules requiring that, to obtain relief from the aggregation requirement, a person must own 50 percent or less of an owned entity. One commenter said that unless the standards for an independent account controller are met, any exemption from aggregation for greater than 50 percent-owned entities would constitute an unacceptable weakening of the position limits regime.[48] This

[48] CL-Better Markets.

commenter also noted that CEA section 4a(a)(1) requires aggregation of positions held by any persons "directly or indirectly" controlled by a person, and "ownership is the paradigm example of indirect control."[49]

Two commenters said that the proposed rules went too far in allowing exemptions from aggregation. These commenters were concerned that the exemptions in the Part 151 Aggregation Proposal could impede prevention of excessive speculation on agricultural futures, which requires the imposition of position limits based on consistent aggregation of positions,[50] and that allowing owners of more than 10 percent of another entity not to aggregate could "potentially spark additional 'herd-like' behavior, thus causing another commodities futures boom-bust cycle."[51]

The other commenters on the Part 151 Aggregation Proposal said that the requirement of ownership of 50 percent or less of the owned entity should not apply, and disaggregation relief should be available to any person demonstrating that the owned entity's trading is independent according to criteria along the lines of proposed rule 151.7(b)(1)(i).[52] Some of these commenters also said that, as an alternative to providing relief for any person that could demonstrate independent trading by the owned entity, disaggregation relief should be available to the extent specifically provided by the

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[49] CL-Better Markets.

[50] CL-IATP.

[51] International Association of Machinists and Aerospace Workers on June 29, 2012 ("CL-IAMAW").

[52] American Benefits Council on June 29, 2012 ("CL-ABC"), CL-AGA, CL-AIMA, CL-API, Barclays Capital on June 29, 2012 ("CL-Barclays"), Commodity Markets Council on June 29, 2012 ("CL-CMC"), CL-COPE, CL-EEI, CL-FIA, Iberdrola Renewables, LLC and Iberdrola Energy Services LLC, jointly on June 29, 2012 ("CL-Iberdrola"), CL-ISDA/SIFMA, Managed Funds Association on June 28, 2012 ("CL-MFA") and CL-WGCEF.

Commission in response to a specific request for relief,[53] or if the person makes an additional demonstration of why majority ownership of the owned entity does not result in trading control or information sharing that warrants aggregation.[54] One commenter representing private investment funds suggested rules allowing disaggregation relief if a person could demonstrate independent trading by the owned entity and one of three alternative conditions were met: (i) The owner uses information about the owned entity's trading only for risk management, (ii) the owned entity only enters into bona fide hedging transactions, or (iii) the owned entity is not consolidated on the owner's financial statements, representatives of the owner on the owned entity's board of directors do not control the owned entity's trading and the owned entity's trading qualifies as bona fide hedging.[55]

The commenters opposed to the requirement of ownership of 50 percent or less of the owned entity provided various reasons for why the requirement should not apply. Some of these commenters said that although ownership of more than 50 percent of an entity is an indicator of control, such ownership does not always equate to control,[56] because ownership of an entity does not provide control unless the owner has an ability to direct or influence management[57] or because treating ownership as tantamount to control

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[53] CL-AIMA, CL-API. Two commenters' first position (not an alternative position) was along these lines – that disaggregation relief should be available to the extent provided by the Commission. CL-Atmos, CL-MFA.

[54] CL-ISDA/SIFMA, CL-WGCEF, CL-PEGCC. One of these commenters said that, instead of requiring aggregation of positions, the Commission should consider requiring that additional safeguards be in place for majority-owned entities, such as requiring that both the person and the owned entity to make certain annual certifications. CL-WGCEF.

[55] CL-PEGCC and Private Equity Growth Capital Council supplemental letter on August 20, 2012 ("CL-PEGCC Supp.").

[56] CL-AGA, CL-MFA, CL-PEGCC, CL-WGCEF.

[57] CL-API, CL-Atmos.

is contrary to principles of corporate separateness.[58] Other commenters said that aggregation is consistent with the underlying purposes of the position limits regime only if a person has direct and actual control of the trading of another person or has access to information about the other entity's trading that facilitates its own trading.[59]

Other commenters claimed that the requirement of ownership of 50 percent or less of the owned entity is inconsistent with the CEA or past practices of the Commission. These commenters said that while CEA section 4a(a)(1) refers to positions held by "controlled" persons, it does not refer to positions held by owned persons,[60] that the Commission does not require aggregation of positions of owned commodity pools, or of positions (even those held by the entity itself) if there is an independent account controller,[61] and that the "bright line" standard at 50 percent ownership is arbitrary,[62] inconsistent with both a 1979 policy statement of the Commission that trading control is a question of fact and with prior practice of DCMs to allow owners to demonstrate lack of control of an owned entity's trading,[63] or unnecessary in light of the Commission's Part 151 Aggregation Proposal of factors to determine whether a person controls the trading of an owned entity.[64]

Another reason cited by commenters against the requirement of ownership of 50 percent or less of the owned entity is that in certain corporate structures, majority ownership may not provide for control of the owned entity. Commenters said, for

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[58] CL-ISDA/SIFMA, CL-PEGCC.
[59] CL-CMC, CL-EEI.
[60] CL-ISDA/SIFMA, CL-PEGCC.
[61] CL-PEGCC.
[62] CL-AGA, CL-API, CL-COPE.
[63] CL-API, CL-WGCEF.
[64] CL-AIMA.

example, that limited partners may not control the trading of a limited partnership, even though they own a majority equity interest in the limited partnership,[65] or a joint venture may contain contractual provisions that prevent the venture partners from controlling its trading,[66] or a passive majority investor in a commercial company may not control the company's trading.[67] Commenters also said that it would be inappropriate to treat two companies that operate in different regions or at different levels of commerce (e.g., wholesale and retail) as trading under common control simply because both companies are owned by a common holding company.[68]

Commenters also described other factors that they believe weigh against the requirement of ownership of 50 percent or less of the owned entity in order to disaggregate. One commenter said that requiring persons to aggregate the positions of all majority-owned entities would lead to more information sharing and coordinated trading between such entities, which the Commission should seek to prevent, and it would also likely lead to incorrect position reporting while disaggregation would encourage more granular and more accurate reporting.[69] Another commenter was concerned that the Commission's adoption of aggregation rules would lead DCMs and SEFs to apply similar aggregation rules for the position limits regimes that they enforce, thereby increasing the

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[65] CL-CMC, CL-COPE, CL-WGCEF.

[66] CL-API, CL-CMC.

[67] U.S. Chamber of Commerce and the Real Estate Roundtable, jointly on June 29, 2012 ("CL-Chamber"). Other commenters along these lines added that to requiring passive investors to aggregate the positions of majority-owned companies would inhibit legitimate commercial and investment activity, CL-FIA, and that providing relief from aggregation for passive investors would be similar to the lack of aggregation for passive owners of commodity pools. CL-PEGCC.

[68] CL-AGA, CL-Iberdrola. Another commenter added that since the independent account controller exemption would generally not be available to holding companies owning operating companies, the requirement of ownership of 50 percent or less of the owned entity in order to disaggregate creates a regulatory imbalance between such holding companies and the entities to which the independent account controller exemption is available. CL-WGCEF.

[69] CL-CMC.

importance of the aggregation rules to a wider variety of firms using many different types of swaps.[70] A commenter representing employee benefit plans said that the Commission should not require aggregation of the positions of a corporate entity that is the sponsor of an employee benefit plan with the positions of the plan even if the employees of the plan sponsor (or its subsidiaries) control the investments of the plan, because such employees have a legal duty to act solely in the interests of the plan.[71]

b. Comments on the Initial Proposed Criteria for Disaggregation Relief

There were a variety of comments on the criteria in the proposed amendment to part 151 that must be met in order for a person to obtain disaggregation relief with respect to an owned entity. One general point raised by several commenters was that the limits on sharing information between the person and the owned entity should not apply to employees that do not direct or influence trading (such as attorneys or risk management and compliance personnel), although the employees may have knowledge of the trading of both the person and the owned entity.[72] A commenter representing employee benefit plan managers said that restrictions on information sharing are, in general, a problem for plan managers, which have a fiduciary duty to inquire as to an owned entities' activities,

[70] CL-Chamber.

[71] CL-ABC. This commenter also asked for clarification whether a person that owns an entity that controls the trading of an employee benefit plan would be required to aggregate the positions of such plan with such person's positions. Id.

[72] CL-AGA, CL-API, CL-Atmos, CL-Cargill, CL-EEI. Commenters said that shared knowledge among employees is not relevant if they are not involved in trading and do not serve as conduit for sharing trading information, CL-AGA, CL-AIMA, CL-Atmos, and that it is important that risk management and compliance personnel have continuous knowledge of trading. CL-EEI.

so the Commission should recognize that acting as required by fiduciary duties does not constitute a violation of the information sharing restriction.[73]

Summarized below are the comments on each of the four general categories of criteria for disaggregation relief in the proposed rule.

No shared knowledge of trading decisions. Commenters said that this proposed amendment to part 151 should be clarified to indicate that it prohibits the sharing only of knowledge held by personnel with the ability to direct or participate in trading decisions by either the person or the owned entity that would allow them to trade in anticipation or in concert, and that it allows post-trade information sharing for risk management, accounting, compliance, or similar purposes and information sharing among mid- and back-office personnel that do not control trading.[74] Another commenter said that this proposed amendment to part 151 should be clarified to provide that information sharing resulting when the person and the owned entity (or two owned entities) are counterparties in an arm's length transaction should not be a violation of the rule.[75]

Trade pursuant to separately developed and independent trading systems; have and enforce written procedures to preclude sharing of trading information and other procedures to maintain independence, including separate physical locations. Commenters said that this requirement should not apply to commercial energy firms which use similar trading systems,[76] or where existing systems can be modified to prevent coordinated trading,[77] or to prevent the use of third party "off-the-shelf"

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[73] CL-ABC.
[74] CL-AIMA, CL-EEI, CL-MFA, CL-WGCEF.
[75] CL-COPE.
[76] CL-WGCEF.
[77] CL-API.

execution algorithms.[78] Other commenters said the requirement should apply only to systems that direct trading decisions, and not trade capture, trade risk or trade facilitation systems.[79] One commenter said this provision of the proposed amendment to part 151 should be deleted, because it is the use of the system, not its development, which is relevant.[80] Commenters also said that this proposed amendment to part 151 should apply only with respect to personnel directing or participating in trading decisions,[81] and it should permit the sharing of virtual documentation, so long as such document can be accessed only by persons that do not manage or control trading.[82] Commenters said that the requirement of separate physical locations should not require that personnel be located in separate buildings, so long as the relevant employees of the person and the owned entity do not have access to each other's physical premises.[83] One commenter said that the requirement to have specified policies and procedures should not apply to the owned entity, because it does not control its owner.[84]

No shared employees that control trading decisions. Commenters on this proposed amendment to part 151 said it should not prohibit sharing of board or advisory committee members who do not influence trading decisions, sharing of research personnel, or sharing for training, operational or compliance purposes, so long as trading of the person and the owned entity remains independent.[85]

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[78] CL-AIMA. The commenter said that, in this case, the rule should require only that the systems be independently operated.
[79] CL-EEI, CL-FIA.
[80] CL-COPE.
[81] CL-WGCEF.
[82] CL-FIA.
[83] CL-API, CL-EEI, CL-WGCEF.
[84] CL-AIMA.
[85] CL-API, CL-Cargill.

No risk management systems that permit shared trading. Commenters said that this proposed amendment to part 151 should permit continuous sharing of position information so long as such information is used only for risk management and surveillance purposes and is not shared with trading personnel.[86]

c. Comments on the Initial Proposed Notice Filing Requirement

Commenters also addressed the burdens that would result from the requirement that a filing be made to support disaggregation relief for persons owning more than 10 percent of an owned entity. Two commenters questioned the statement in the Part 151 Aggregation Proposal that allowing persons that own more than 50 percent of an owned entity to file requests for disaggregation relief would be burdensome, saying that such filings would be required only if the person were seeking disaggregation relief, and that such filings could be tailored so as to provide the necessary information in an efficient way.[87] One of these commenters also said that requiring private investment funds to aggregate positions held by majority-owned entities would be burdensome because it would lead to persons owning between 10 and 50 percent of the fund to make filings to support disaggregation relief.[88] Another commenter said that a single aggregate notice filing (with annual updates for material changes) should be permitted, where the person would list all owned entities for which it claims an exemption from the aggregation requirement and make the required certifications, that the filing should be effective retroactively to the beginning of the prior filing period, and that affiliates at same level of

[86] CL-FIA, CL-WGCEF.
[87] CL-Atmos, CL-PEGCC.
[88] CL-PEGCC.

ownership should be able to rely on each other's notice filings (as do higher tier owners) if the filings contain the appropriate demonstrations of compliance by the affiliates.[89] Last, one commenter said that no filing should be required to support disaggregation relief or, in the alternative, a filing should be required only where the absence of control of the owned entity is not obvious and the filing should not be required until 90 days after the threshold level of ownership of the owned entity is obtained.[90]

d. Comments on Other Issues Relating to Disaggregation Relief in the Part 151 Aggregation Proposal

Commenters addressed several miscellaneous issues arising from the proposed amendments to part 151 requiring ownership of 50 percent or less of the owned entity in order to disaggregate. In response to the Commission's request for comment on whether applications for exemption from the aggregation requirements should be handled on a case-by-case basis, several commenters said that doing so would not be efficient and the process in the proposed rule is preferable.[91] One commenter said that the final regulation on aggregation adopted by the Commission should also apply for exemptions from the aggregation requirements of DCMs and SEFs.[92] Another commenter requested a transition period of at least six months after the date that compliance with the position limits regime is required before compliance with the aggregation requirements would be

[89] CL-FIA.
[90] CL-Barclays. Another commenter said that requiring a person owning 50 percent or less of an owned entity to make a filing in support of disaggregation relief is overly burdensome, and such filings should be required only if the person owns more than 50 percent of the owned entity. CL-ISDA/SIFMA.
[91] CL-AGA, CL-EEI, CL-FIA.
[92] CL-MFA.

required.[93] Several commenters said that when aggregation of positions are required, the positions should be attributed from the owned entity to the owner on a basis that is pro rata to the owner's interest in the owned entity, to avoid double counting and an artificial limit on trading that may affect liquidity.[94] Two commenters addressed information that the Commission may request under the proposed amendments to part 151, saying they should be amended to specifically limit such information to that which is relevant to establishing whether a person meets the criteria for disaggregation and will be kept confidential.[95]

One commenter said that the Commission should not adopt a rule regarding aggregation of positions of owned entities and that the Commission should instead rely on information provided on reports on Commission Form 40, which includes information regarding whether the respondent controls, or is controlled by, any other entity.[96] Another commenter said that the position limits regime is long overdue and there should be a general requirement of aggregation, with no exceptions or waivers.[97]

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3. Proposed Rule

The Commission continues to believe, as stated in the Part 151 Aggregation Proposal, that ownership of an entity is an appropriate criterion for aggregation of that entity's positions. Section 4a(a)(1) of the CEA provides for the general aggregation standard with regard to position limits, and specifically provides:<EXTRACT>

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[93] CL-FIA.
[94] CL-ABC, CL-Barclays, CL-FIA.
[95] CL-API, CL-WGCEF.
[96] CL-Barclays.
[97] CL-Ja Sto.

> In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person.[98]</EXTRACT>

The legislative history to the enactment of this provision in 1968 states that Congress added this language to expressly incorporate prior administrative determinations of the Commodity Exchange Authority (predecessor to the Commission) into the statute.[99] These prior administrative determinations, as well as regulations of the Commodity Exchange Authority, announced standards that included control of trading and financial interests in positions. As early as 1957, the Commission's predecessor issued determinations requiring that accounts in which a person has a financial interest be included in aggregation.[100] In addition, the definition of "proprietary account" in

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[98] 7 U.S.C. 6a(a)(1).

[99] See S. Rep No. 947, 90th Cong., 2 Sess. 5 (1968) regarding the CEA Amendments of 1968, Public Law 90-258, 82 Stat. 26 (1968). This Senate Report provides:

> Certain longstanding administrative interpretations would be incorporated in the act. As an example, the present act authorizes the Commodity Exchange Commission to fix limits on the amount of speculative "trading" that may be done. The Commission has construed this to mean that it has the authority to set limits on the amount of buying or selling that may be done and on the size of positions that may be held. All of the Commission's speculative limit orders, dating back to 1938, have been based upon this interpretation. The bill would clarify the act in this regard….
>
> Section 2 of the bill amends section 4a(1) of the act to show clearly the authority to impose limits on "positions which may be held." It further provides that trading done and positions held by a person controlled by another shall be considered as done or held by such other; and that trading done or positions held by two or more persons acting pursuant to an express or implied understanding shall be treated as if done or held by a single person.

[100] See Administrative Determination ("A.D.") 163 (Aug. 7, 1957) ("[I]n the application of speculative limits, accounts in which the firm has a financial interest must be combined with any

regulation 1.3(y), which has been in effect for decades, includes any account in which there is 10 percent ownership.[101]

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trading of the firm itself or any other accounts in which it in fact exercises control."). In addition, the Commission's predecessor, and later the Commission, provided the aggregation standards for purposes of position limits in the large trader reporting rules. See Supersedure of Certain Regulations, 26 FR 2968, Apr. 7, 1961. In 1961, then regulation 18.01 read:

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

In the 1979 Aggregation Policy, the Commission discussed regulation 18.01, stating:

> *Financial Interest in Accounts.* Consistent with the underlying rationale of aggregation, existing reporting Rule 18.10(a) a (sic) basically provides that if a trader holds or has a financial interest in more than one account, all accounts are considered as a single account for reporting purposes. Several inquiries have been received regarding whether a nomial (sic) financial interest in an account requires the trader to aggregate. Traditionally, the Commission's predecessor and its staff have expressed the view that except for the financial interest of a limited partner or shareholder (other than the commodity pool operator) in a commodity pool, a financial interest of 10 percent or more requires aggregation. The Commission has determined to codify this interpretation at this time and has amended Rule 18.01 to provide in part that, "For purposes of this Part, except for the interest of a limited partner or shareholder (other than the commodity pool operator) in a commodity pool, the term 'financial interest' shall mean an interest of 10 percent or more in ownership or equity of an account."
>
> Thus, a financial interest at or above this level will constitute the trader as an account owner for aggregation purposes.
>
> 1979 Aggregation Policy, 44 FR at 33843.

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

[101] 17 CFR 1.3(y). This provision has been in Regulation 1.3(y)(1)(iv) since at least 1976, which the Commission adopted from regulations of its predecessor, with "for the most part, procedural, housekeeping-type modifications, conforming the regulations to the recently enacted CFTCA." See 41 FR 3192, 3195 (January 21, 1976).

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. The Commission also believes that aggregation of positions across accounts based upon ownership is a necessary part of the Commission's position limit regime.[102]

Also, an ownership standard establishes a bright-line test that provides certainty to market participants and the Commission.[103] Without aggregation on the basis of ownership, the Commission would have to apply a control test in all cases, which would pose significant administrative challenges to individually assess control across all market participants. Further, the Commission considers that if the statute required aggregation based only on control, market participants may be able to use an ownership interest to directly or indirectly influence the account or position and thereby circumvent the aggregation requirement.

The Commission does not believe, as suggested by some commenters, that an aggregation requirement would lead to more information sharing and significantly

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[102] See Revision of Federal Speculative Position Limits and Associated Rules, 64 FR 24038, 24044, May 5, 1999 ("[T]he Commission…interprets the 'held or controlled' criteria as applying separately to ownership of positions or to control of trading decisions."). See also, Exemptions from Speculative Position Limits for Positions which have a Common Owner but which are Independently Controlled and for Certain Spread Positions, 53 FR 13290, 13292, Apr. 22, 1988. In response to two separate petitions, the Commission proposed the independent account controller exemption from speculative position limits, but declined to remove the ownership standard from its aggregation policy.

[103] In this regard, the Commission is mindful of the point raised by some commenters that the aggregation rules adopted by the Commission would be a precedent for aggregation rules enforced by DCMs and SEFs, leading to the application of the aggregation rules to a wide variety of firms. See CL-Chamber. The Commission believes that for this reason, it is important that the aggregation rules set out, to the extent feasible, "bright line" rules that are capable of easy application by a wide variety of market participants while not being susceptible to circumvention.

increased levels of coordinated speculative trading by the entities subject to aggregation. Among other things, the position limits would affect the trading of only the relatively small number of entities that hold positions in excess of the limits.[104]

For example, the following table shows the relatively small number of persons that held positions over the applicable limit during the period of January 17 to September 12, 2012. For comparison, the table also shows the number of persons with positions at a level in excess of 60 percent or 80 percent of the applicable limit. It is important to note that this table was prepared by applying the current aggregation requirements in regulation 150.4 without applying any of the current exemptions to aggregation that may be available. Thus, this table reflects the maximum number of persons that may hold positions of the level shown, assuming that no exemptions to aggregation apply.

NUMBER OF UNIQUE PERSONS OVER 60, 80, AND 100 PERCENT OF LEVELS OF RULE 150.2 FEDERAL SPECULATIVE POSITION LIMITS
January 17, 2012 to September 30, 2012[105]

		Spot Month		Single month		All months	
Contract/**DCM**	Percent of Limit Level	Total Number of Unique Persons Over Level	Number of Person-Days	Total Number of Unique Persons Over Level	Number of Person-Days	Total Number of Unique Persons Over Level	Number of Person-Days
Chicago Board of Trade							
Corn and Mini-Corn	60	97	517	22	1347	26	2289
	80	72	372	11	643	13	1069
	100	26	198	5	315	9	822
Oats	60	*	*	6	436	8	527
	80	*	*	*	*	5	283
	100	*	*	*	*	4	217
Soybeans and Mini-Soybeans	60	59	316	33	2751	36	3044
	80	39	223	20	1580	25	1962
	100	19	102	11	979	16	1244
Wheat and	60	19	95	33	2877	32	3181

[104] See, e.g., Position Limits for Futures and Swaps, 76 FR 71626, 71668 (Nov. 18, 2011) (describing the number of traders estimated to be subject to position limits).

[105] In this table, "*" means fewer than 4 unique owners exceeded the level, and "--" means no unique owner exceeded the level.

Mini-Wheat							
	80	12	53	18	1660	23	2342
	100	6	32	13	1050	15	1446
Soybean Oil	60	54	211	36	3291	47	3568
	80	34	126	25	2161	32	2589
	100	12	47	14	1281	17	1551
Soybean Meal	60	26	158	33	2546	37	2690
	80	18	99	18	1480	21	1645
	100	8	45	7	895	12	930
Kansas City Board of Trade							
Hard Winter Wheat	60	10	38	6	334	7	450
	80	5	28	*	*	*	*
	100	4	20	*	*	*	*
Minneapolis Grain Exchange							
Hard Red Spring Wheat	60	5	12	--	--	*	*
	80	5	12	--	--	--	--
	100	*	*	--	--	--	--
ICE Futures U.S.							
Cotton No. 2	60	5	31	35	3386	39	3417
	80	5	30	21	2133	25	2554
	100	5	25	14	1363	17	1701

Also, some of the entities subject to aggregation, which is based on common ownership or control, might already share information regarding their trading activities. Thus, the Commission continues to believe, as it explained in the Part 151 Aggregation Proposal, that the regulations proposed here will not result in a significantly increased level of information sharing that would increase coordinated speculative trading. The Commission notes that these proposed regulations will provide further aggregation exemptions, lessening the need to share information regarding speculative trading to ensure compliance with position limits.

As a final introductory point, the Commission has considered that relief from any rule requiring the aggregation of positions held by separate entities is only necessary where the entities would be below the relevant limits on an individual basis, but above a limit when aggregated. Thus, if a group of affiliated entities can take steps to maintain an

aggregate position that does not exceed any limit, then the group will not have to seek disaggregation relief.

In other words, seeking disaggregation relief is one option for those groups of affiliated entities that may exceed a limit on an aggregate basis but will remain below the relevant limits on an individual basis. Other avenues are also available to corporate groups that seek to remain in compliance with the position limit regime. For example, the affiliated entities may put into place procedures to avoid exceeding the limits on an aggregate basis.[106] One potential approach that could be available to a holding company with multiple subsidiaries would be to assign each subsidiary an internal limit based on a percentage of the level of the position limit. The holding company would allocate no more in aggregate internal limits than the level of the position limit.[107] Further, a breach of an internal limit would provide the holding company with notice that it should consider filing for bona fide hedging exemptions or taking other compliance steps, as applicable.

a. Disaggregation Relief for Ownership or Equity Interests of 50 Percent or Less

[106] The procedures adopted by the affiliates may obviate more complex steps such as the implementation of real-time monitoring software to consolidate all derivative activities of the affiliates, especially if the group currently does not have an aggregate position approaching the size of a position limit and has historically not changed position sizes day-over-day by a significant percentage of the position limit.

[107] An even more cautious approach would be for the holding company to limit the overall allocation to the subsidiaries to less than 100% of the position limit. For example, a holding company with three subsidiaries may assign each subsidiary an internal limit equal to 30% of the level of the federal limit. Thus, the holding company has allocated permission to subsidiaries to hold, in the aggregate, positions equal to up to 90% of the level of the relevant position limit. Each subsidiary would simply report at close of business its derivative position to the holding company. The 10% cushion provides the holding company with the ability to remain in compliance with the limit, even if all subsidiaries slightly exceed the internal limits on the same side of the market at the same time.

The Commission is proposing to adopt rule 150.4(b)(2), which is largely similar to proposed rule 151.7(b)(1). Proposed rule 150.4(b)(2) would continue the Commission's longstanding rule that persons with either an ownership or an equity interest in an account or position of less than 10 percent need not aggregate such positions solely on the basis of the ownership criteria, and persons with a 10 percent or greater ownership interest would still generally be required to aggregate the account or positions.[108] However, rule 150.4(b)(2) would establish a notice filing procedure, effective upon submission, to permit a person with either an ownership or an equity interest in an owned entity of 50 percent or less to disaggregate the positions of an owned entity in specified circumstances, even if such person has a 10 percent or greater interest in the owned entity.[109] The notice filing would have to demonstrate compliance with certain conditions set forth in proposed rule 150.4(b)(2). As discussed in the Part 151 Aggregation Proposal, and similar to other exemptions from aggregation, the notice filing would be effective upon submission to the Commission, but the Commission would be able to subsequently call for additional information, and to amend, terminate or otherwise modify the person's aggregation exemption for failure to comply with the provisions of rule 150.4(b)(2). Further, the person would be obligated to amend the notice filing in the event of a material change to the circumstances described in the filing.

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[108] For purposes of aggregation, the Commission believes that contingent ownership rights, such as an equity call option, would not constitute an ownership or equity interest.

[109] Under the approach proposed here, and in a manner similar to current regulation, if a person qualifies for disaggregation relief, the person would nonetheless have to aggregate those same accounts or positions covered by the relief if they are held in accounts with substantially identical trading strategies. See proposed rule 150.4(a)(2). The exemptions in proposed rule 150.4 are set forth as alternatives, so that, for example, the applicability of the exemption in paragraph (b)(2) would not affect the applicability of a separate exemption from aggregation (e.g., the independent account controller exemption in paragraph (b)(5)).

The Commission preliminarily believes that a 50 percent limit on the ownership interest in another entity is a reasonable, "bright line" standard for determining when aggregation of positions is required, even where the ownership interest is passive. As explained in the Part 151 Aggregation Proposal, majority ownership (i.e., over 50 percent) is indicative of control, and this standard addresses the Commission's concerns about circumvention of position limits by coordinated trading or direct or indirect influence between entities. To the extent that a majority owner would have the ability and incentive to direct, control or influence the management of the owned entity, the 50 percent limit is a reasonable approach to the aggregation of owned accounts pursuant to Section 4a(a)(1) of the CEA. Aggregation based upon an ownership or equity interest of greater than 50 percent is appropriate to address the heightened risk of direct or indirect influence over the owned entity.[110]

Moreover, greater than 50 percent ownership is a standard used by other government agencies and reflects a general understanding that ownership at this level poses substantial potential for direct or indirect control over an owned entity. For example, the U.S. Federal Trade Commission and U.S. Department of Justice use a 50 percent ownership threshold test to determine "control" for the purpose of defining pre-

[110] The Commission notes that, as stated in the Part 151 Aggregation Proposal, the requirement in proposed rule 150.4(b)(2) of aggregation based on ownership depends on a person's ownership interest in another entity, regardless of the person's voting control of that entity. However, as discussed further below, the Commission believes that relief from the aggregation requirement may be appropriate in some circumstances, where the owned entity is not consolidated on the owner's financial statements. Since the extent of the owner's voting interest in the owned entity may be a factor in determining whether financial consolidation is required, the voting interest may indirectly be a factor in determining if aggregation is required.

merger and acquisition filing requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1974.[111]

The Commission notes that a requirement of ownership of 50 percent or less of the owned entity in order to obtain disaggregation relief by making a notice filing would not affect a person's ability to obtain other exemptions. For example, exemptions from position limits for bona fide hedging positions or from aggregation for independent account controllers, if applicable, would still be utilized to the extent an owned entity is entering into positions for bona fide hedging or on behalf of customers, as provided in those exemptions.

Regarding those commenters who said that if an owned entity's positions are aggregated with the owner's position, the aggregation should be pro rata to the ownership interest, the Commission believes that a pro rata approach could be administratively burdensome for both owners and the Commission. For example, the level of ownership interest in a particular owned entity may change over time for a number of reasons, including stock repurchases, stock rights offerings, or mergers and acquisitions, any of which may dilute or concentrate an ownership interest. Thus, it may be burdensome to determine and monitor the appropriate pro rata allocation on a daily basis. Moreover, the Commission has historically interpreted the statute to require aggregation of all the

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[111] 15 U.S.C. 18(a); see also 16 CFR 801.1(b) (defining "control" for purpose of implementing regulations to include "[h]olding 50 percent or more of the outstanding voting securities of an issuer or, in the case of any unincorporated entity, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity"); Premerger Notification; Reporting and Waiting Period Requirements, 43 FR 33450, 33457 (July 31, 1978) ("'Control' was defined at the level of 50 percent stock ownership for two reasons. First, it supplied an objective, easily administrable criterion. Second, except for cases in which the holding is exactly 50 percent, majority ownership will always enable the holder to direct the day-to-day activities of the controlled entity, even though for many large corporations, de facto control may arise from holdings well below 50 percent").

relevant positions of owned entities, absent an exemption. This is consistent with the view that a holder of a significant ownership interest in another entity may have the ability to influence all the trading decisions of the entity in which such ownership interest is held.

The Commission invites commenters to address whether the Commission should adopt an approach that would require aggregation of only a pro-rata allocation of owned-entity positions to equity owners based on the percentage of ownership interest. How could aggregation in a manner pro rata to the ownership interest be effected in practice? What procedures could be used to implement a pro rata method, and what would those procedures entail? If procedures to implement a pro rata method are suggested, please address the burden those procedures could place on the owners and on the Commission.

The Commission also solicits comment on whether the Commission should permit a person to file a notice that would inform the Commission of that person's ownership interest in an owned entity, and permit that person to aggregate only a pro rata allocation of the owned-entity's positions based on that person's less than 100 percent ownership. In light of the potential administrative burdens associated with the adoption of an aggregation methodology based on allocation pro rata to ownership interest, should the Commission provide for aggregation of an owned-entity's positions to the owner based on ownership tiers? Commenters may address, for example, the establishment of two ownership tiers, one for an ownership interest of 10 percent to 25 percent, with an attribution of 25 percent of the owned-entity's positions (rather than 100 percent of the affiliate's position) to the owner, and another tier for an ownership interest of greater than 25 percent to 50 percent, with an attribution of 50 percent of the owned-entity's positions

(rather than 100 percent of the affiliate's position) to the owner. Would a tiered approach such as this alleviate concerns about aggregation in general? What are the potential burdens of applying this approach? If this approach is implemented, should owners be required to file a notice with the Commission when the relevant ownership interest changes from one tier to another?

Regarding those commenters who said that there should be a transition period for application of the requirement of ownership of 50 percent or less of the owned entity in order to obtain disaggregation relief, the Commission notes that this proposal would apply to existing position limits currently in effect, and as noted above, would provide further aggregation exemptions.

The Commission also considered comments that aggregation of positions is unnecessary because information about ownership and control is available to the Commission through reports on Commission Form 40. However, the Commission is not persuaded that these reports are a sufficient substitute for the position limits regime. While these reports provide some information necessary for surveillance of positions, some owned entities may not file these reports. Also, the obligation to provide updates to the Commission if there are material changes to the relevant information, which is included in the proposed revision of rule 150.4, may not necessarily apply to information provided in the reports on Form 40. On a more fundamental level, the Commission believes that compliance with the position limit rules, including aggregation of the positions of owned entities, is primarily the responsibility of the owned entities and their owners. Even if the information on Form 40 were sufficient, it would be impractical and inefficient for the Commission to use that information to monitor compliance with the

position limit rules, as compared to the ability of the entities themselves to maintain compliance with the position limits.

Similarly, the Commission is not persuaded by the commenter who asserted that aggregation of positions would, in general, lead to inaccurate reporting of positions. Rather, the Commission believes that the proposed rule would facilitate accurate reporting by providing a "bright line" rule for determining when aggregation is required.[112] The Commission emphasizes the responsibility of those who are subject to the aggregation and position reporting requirements to ensure that the information required by the Commission's regulations is provided accurately.

b. Disaggregation Relief for Ownership or Equity Interests of Greater Than 50 Percent

The Commission continues to believe, as stated in the Part 151 Aggregation Proposal, that an equity or ownership interest above 50 percent constitutes a majority ownership or equity interest of the owned entity and is so significant as to justify aggregation under the ownership prong of Section 4a(a)(1) of the CEA. A person with a greater than 50 percent ownership interest in multiple accounts would have the ability to hold and control a significant and potentially unduly large overall position in a particular commodity, which position limits are intended to prevent. Also, as noted above, in general this "bright line" approach would provide administrative certainty.

While the Commission continues to believe that relief from the aggregation requirement should not be available merely upon a notice filing by a person who has a greater than 50 percent ownership or equity interest in the owned entity, the Commission

[112] See note 103 and accompanying text, supra.

has considered the points raised by commenters in this regard. In view of the comments, the Commission understands that in some limited situations disaggregation relief may be appropriate even for majority owners if the owned entity is not required to be, and is not, consolidated on the financial statement of the person, if the person can demonstrate that the person does not control the trading of the owned entity, based on the criteria in proposed rule 150.4(b)(2)(i), and if both the person and the owned entity have procedures in place that are reasonably effective to prevent coordinated trading. The person would have to demonstrate that it does not control the owned entity's trading even though the person is the majority owner of the owned entity.

To provide such limited relief in order to address issues raised by commenters would represent a break by the Commission from past practice. The Commission is authorized to provide such relief by the plenary authority granted to the Commission in section 4a(a)(7) of the CEA to provide relief from the requirements of the position limits regime.

Consequently, the proposed rules includes a provision (proposed rule 150.4(b)(3)) that would permit a person with a greater than 50 percent ownership of an owned entity to apply to the Commission for relief from aggregation on a case-by-case basis. The person would be required to demonstrate to the Commission that:

i. the owned entity is not required to be, and is not, consolidated on the financial statement of the person,

ii. the person does not control the trading of the owned entity (based on criteria in rule 150.4(b)(2)(i)), with the person showing that it and the owned entity

have procedures in place that are reasonably effective to prevent coordinated trading in spite of majority ownership,[113]

iii. each representative of the person (if any) on the owned entity's board of directors attests that he or she does not control trading of the owned entity, and

iv. the person certifies that either (a) all of the owned entity's positions qualify as bona fide hedging transactions or (b) the owned entity's positions that do not so qualify do not exceed 20 percent of any position limit currently in effect, and the person agrees in either case that:

- if this certification becomes untrue for the owned entity, the person will aggregate the owned entity for three complete calendar months and if all of the owned entity's positions qualify as bona fide hedging transactions during that time the person would have the opportunity to make the certification again and stop aggregating,
- upon any call by the Commission, the owned entity(ies) will make a filing responsive to the call, reflecting the owned entity's positions and transactions only, at any time (such as when the Commission believes the owned entities in the aggregate may exceed a visibility level), and
- the person will provide additional information to the Commission if any owned entity engages in coordinated activity, short of common control

[113] The Commission points out that since this criterion requires a person to certify that the person does not control trading of its owned entity, the criterion could not be met by a natural person or any entity, such as a partnership, where it is not possible to separate knowledge and control of the person from that of the owned entity.

(understanding that if there were common control, the positions of the owned entity(ies) would be aggregated).

The Commission wishes to clarify that this relief would not be automatic, but rather would be available only if the Commission finds, in its discretion, that the four conditions above are met. Thus, persons applying for this relief should not assume that relief would be granted. The proposed rule would not impose any time limits on the Commission's process for making the determination of whether relief is appropriately granted, and relief would be available only if and when the Commission acts on a particular request for relief.

The first requirement would be that the owned entity is not, and is not required to be, consolidated on the financial statements of the person. The Commission is aware that, for most entities, ownership of more than 50 percent of another entity's voting shares is the point at which consolidation of the owned entity on the owner's financial statements is required under U.S. Generally Accepted Accounting Principles ("GAAP").[114] Consequently, if a person holds an equity or ownership interest above 50 percent in another entity, but does not hold a greater than 50 percent voting interest in that entity, it may be possible that the owned entity would not be required to be consolidated on the person's financial statements and the person would, therefore, be able to apply to the Commission for relief from the aggregation requirement. Similarly, in some cases, limited partners holding a greater than 50 percent equity or ownership interest in a limited partnership are not required to consolidate the limited partnership

[114] See Financial Accounting Standards Board Accounting Standards Codification Topic 810, at paragraphs 810-10-15-8 and 10, available at https://asc.fasb.org/. See also Accounting Research Bulletin 51 at paragraph 3 and Statement of Financial Accounting Standard No. 94 at paragraph 2.

because it is controlled by the general partner.[115] Also, the Commission realizes that there are exceptions to the consolidation requirement for certain types of entities. For example, financial consolidation may also not be required for entities that are "investment companies" under GAAP, and certain broker-dealers may not be required to consolidate certain owned entities over which the broker-dealer is likely to have only temporary control. The Commission reiterates that lack of financial consolidation would be only one of the factors in determining whether aggregation relief would be granted, and even if the owned entity is not consolidated and other requirements for relief are satisfied, the Commission could nevertheless, in its discretion, determine that relief is not appropriate.

The Commission preliminarily believes, based in part on points raised by commenters, that the presence of certain additional factors may, in particular circumstances, be favorable to granting relief from the aggregation requirement (although no such factor would be dispositive and the Commission could deny granting relief even in the presence of any or all such factors). These factors could include certain points raised by commenters, such as the owned entity being a newly acquired standalone business or a joint venture subject to special restrictions on control, or two different owned entities conducting operations at different levels of commerce (such as retail and

[115] Thus, proposed rule 150.4(b)(3) would address those commenters who said that aggregation should not be required by limited partners who own a majority equity interest in a limited partnership but do not control its trading. Where a limited partner does not consolidate the limited partnership on its financial statements, and the other conditions of the proposed rule are met, the limited partner could apply to the Commission for relief from the aggregation requirement.

wholesale).[116] Under the proposed approach, the Commission would interpret factors such as these to be favorable to granting relief from the aggregation requirement.

If a person with greater than 50 percent ownership of an owned entity could not meet the conditions in proposed rule 150.4(b)(3), the person could apply to the Commission for relief from aggregation under CEA section 4a(a)(7).[117] Persons wishing to seek such relief should apply to the Commission stating the particular facts and circumstances that justify the relief. For example, if the owned entity is consolidated on the financial statement of the person, the person could describe the facts and circumstances which the person believes indicate that the person should not be considered to own or control the owned entity's positions, notwithstanding that financial consolidation may be associated with ownership and control. The Commission notes that CEA section 4a(a)(7) does not impose any time limits on the Commission's process for determining whether relief under that section is appropriate, nor does it prescribe or limit the factors that the Commission may consider to be relevant in determining whether to grant relief. The Commission solicits comment as to whether relief from aggregation under CEA section 4a(a)(7) should be available to persons with greater than 50 percent ownership of owned entities who cannot meet the conditions in proposed rule 150.4(b)(3), and as to the facts and circumstances that the Commission should take into account in considering such relief.

The Commission has considered the comment that a corporate entity that is the sponsor of an employee benefit plan should not be required to aggregate the positions of

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[116] See generally CL-AGA, CL-API, CL-Chamber, CL-CMC, CL-Iberdrola.

[117] Section 4a(a)(7) of the CEA provides authority to the Commission to grant relief from the position limits regime.

the plan with the sponsor's proprietary positions.[118] The Commission notes that the sponsor of an employee benefit plan is an "eligible entity" as defined in regulation 150.1(d),[119] and the Commission preliminarily believes it is appropriate to provide relief in this regard that is similar to the provisions that apply to positions controlled by an IAC. In particular, the Commission proposes to treat the manager of the employee benefit plan as an IAC and the plan's positions as client positions. To effect this treatment, the Commission is proposing amended rule 150.1(e)(5) and proposed rule 150.4(b)(5) that would allow managers of employee benefit plans (i.e., persons that manage a commodity pool, the operator of which is excluded from registration as a commodity pool operator under rule 4.5(a)(4)) to be treated as an IAC, on the condition that an IAC notice filing is made as required under rule 150.4(c). The Commission emphasizes that this proposed relief would be limited to employee benefit plans.

c. Proposed Criteria for Disaggregation Relief

The Commission is proposing criteria to claim disaggregation relief in proposed rule 150.4(b)(2)(i) that are similar to the criteria set forth in proposed rule 151.7(b)(1)(i). Essentially, the criteria are the conditions that would have to be met in order for a person to rebut the presumption that an ownership or equity interest of between 10 and 50 percent (inclusive) requires aggregation of the positions of the owned entity.[120]

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[118] CL-ABC.

[119] The definition of "eligible entity" in regulation 150.1(d) includes the operator of a trading vehicle which is excluded from the definition of the term "pool" under regulation 4.5, which in turn excludes, in regulation 4.5(a)(4), the sponsors of most employee benefit plans.

[120] As noted in the Part 151 Aggregation Proposal, the criteria would apply to the person filing the notice as well as the owned entity. In addition, for purposes of meeting the criteria, such "person" would include any entity that such person must aggregate pursuant to proposed rule 150.4. For example, if company A files a notice under proposed rule 150.4(c) for company A's equity interest of 30 percent in company B, then company A must comply with the conditions for

In general, the Commission proposes that these criteria would be interpreted and applied in accordance with the Commissions' past practices in this regard.[121] In accordance with these precedents, the Commission would not expect that the criteria would impose requirements beyond a reasonable, plain-language interpretation of the criteria. For example, routine pre- or post-trade systems to effect trading on an operational level (such as trade capture, trade risk or order-entry systems) would not, broadly speaking, have to be independently developed in order to comply with the criteria. Also, employees that do not direct or participate in an entity's trading decisions would generally not be subject to these requirements. A brief discussion of each of the five criteria in proposed rule 150.4(b)(2)(i) is set forth below.

Proposed rule 150.4(b)(2)(i)(A) would condition aggregation relief on a demonstration that the person filing for disaggregation relief and the owned entity do not have knowledge of the trading decisions of the other. The Commission preliminarily believes that where an entity has an ownership interest in another entity and neither entity shares trading information, such entities demonstrate independence. In contrast, persons with knowledge of trading decisions of another in which they have an ownership interest are likely to take such decisions into account in making their own trading decisions, which implicates the Commission's concern about independence and enhances the risk

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the exemption, including any entity with which company A aggregates positions proposed rule 150.4. In this connection, if company A controlled the trading of company C, then company A's 150.4(c) notice filing must demonstrate that there is independence between company B and company C.

[121] See, e.g., 1979 Aggregation Policy, 44 FR 33839 (providing indicia of independence); CFTC Interpretive Letter No. 92-15 (CCH ¶ 25,381) (ministerial capacity overseeing execution of trades not necessarily inconsistent with indicia of independence); revision of federal speculative position limits, 64 FR 24038, 24044 (May 5, 1999) (intent in issuing final aggregation rule "merely to codify the 1979 Aggregation Policy, including the continued efficacy of the [1992] interpretative letter").

for coordinated trading.[122] As noted above, this proposed criterion would address concerns regarding knowledge of employees who control, direct or participate in an entity's trading decisions, and would not prohibit information sharing solely for risk management, accounting, compliance, or similar purposes and information sharing among mid- and back-office personnel that do not control, direct or participate in trading decisions. In response to comments on this criterion, the Commission wishes to clarify that this criterion would generally not require aggregation solely based on knowledge that a party gains during execution of a transaction regarding the trading of the counterparty to that transaction, nor would it encompass knowledge that an entity would gain when carrying out due diligence under a fiduciary duty, so long as such knowledge is not directly used to affect the entity's trading.

Proposed rule 150.4(b)(2)(i)(B) would condition aggregation relief on a demonstration that the person seeking disaggregation relief and the owned entity trade pursuant to separately developed and independent trading systems. Further, proposed rule 150.4(b)(2)(i)(C) would condition relief on a demonstration that such person and the owned entity have, and enforce, written procedures to preclude the one entity from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures would have to include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the

[122] As noted in the Part 151 Aggregation Proposal, the Commission does not consider knowledge of overall end-of-day position information to necessarily constitute knowledge of trading decisions, so long as the position information cannot be used to dictate or infer trading strategies. As such, the knowledge of end-of-day positions for the purpose of monitoring credit limits for corporate guarantees does not necessarily constitute knowledge of trading information. However, the ability to monitor the development of positions on a real time basis could constitute knowledge of trading decisions because of the substantial likelihood that such knowledge might affect trading strategies or influence trading decisions of the other.

independence of their activities. As noted in the Part 151 Aggregation Proposal, the Commission has applied these same conditions in connection with the IAC exemption to ensure independence of trading between an eligible entity and an affiliated independent account controller.[123] Similar to the IAC exemption, proposed rule 150.4(b)(2) permits disaggregation in certain circumstances where there is independence of trading between two entities. Thus, the Commission is proposing the above conditions, which are already applicable and working well in the IAC context, and which are expected to strengthen the independence between the two entities for the owned entity exemption.

The Commission proposes that the phrase "separately developed and independent trading systems" should be interpreted in accordance with the Commission's prior practices in this regard.[124] The Commission generally does not expect that this criterion would prevent an owner and an owned entity from both using the same "off-the-shelf" system that is developed by a third party. Rather, the Commission's concern is that trading systems (in particular, the parameters for trading that are applied by the systems) could be used by multiple parties who each know that the other parties are using the same trading system as well as the specific parameters used for trading and, therefore, are indirectly coordinating their trading.[125]

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[123] See regulation 150.3(a)(4) (proposed here to be replaced by proposed rule 150.4(b)(5)). Such conditions have been useful in ensuring that trading is not coordinated through the development of similar trading systems, and that procedures are in place to prevent the sharing of trading decisions between entities.

[124] See, e.g., 1979 Aggregation Policy, 44 FR 33839, 33840-1 (futures commission merchant (FCM) "deemed to control" trading of customer accounts in trading program where FCM gives specific advice or recommendations not made available to other customers, unless such accounts and programs are traded independently and for different purposes than proprietary accounts).

[125] Compare id. at 33841. "However, the Commission also recognizes that purportedly different programs which in fact are similar in design and purpose and are under common control may be initiated in an attempt to circumvent speculative limit and reporting requirements."

The requirement of "separate physical locations" in proposed rule 150.4(b)(2)(i)(C) would not necessarily require that the relevant personnel be located in separate buildings. The Commission believes that the important factor is that there be a physical barrier between the personnel that prevents access between the personnel that would impinge on their independence. For example, locked doors with restricted access would generally be sufficient, while merely providing the purportedly "independent" personnel with desks of their own would not. Similar principles would apply to sharing documents or other resources.

Proposed rule 150.4(b)(2)(i)(D) would condition aggregation relief on a demonstration that the person does not share employees that control the owned entity's trading decisions, and the employees of the owned entity do not share trading control with such persons. The Commission continues to be concerned that, as stated in the Part 151 Aggregation Proposal, shared employees with control of trading decisions may undermine the independence of trading between entities. Regarding the comments on the sharing of attorneys, accountants, risk managers, compliance and other mid- and back-office personnel, the Commission proposes, as noted above, that sharing of such personnel between entities would generally not compromise independence so long as the employees do not control, direct or participate in the entities' trading decisions.[126]

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[126] As noted in the Part 151 Aggregation Proposal, the condition barring the sharing of employees that control the owned entity's trading decisions would include a prohibition on sharing of the types of employees described in the aggregation petition (attorneys, accountants, risk managers, compliance and other mid-and back-office personnel), to the extent such employees participate in control of the trading decisions of the person or the owned entity. For further clarification, see previous discussion regarding the condition under proposed rule 150.4(b)(2)(i)(A) (conditioning aggregation relief on a demonstration that the person filing for disaggregation relief and the owned entity do not have knowledge of the trading decisions of the other, and discussing what constitutes "knowledge" for this purpose).

Similarly, sharing of board or advisory committee members, research personnel or sharing of employees for training, operational or compliance purposes would not result in a violation of the criteria if the personnel do not influence (e.g., "have a say in") or direct the entities' trading decisions.[127]

Proposed rule 150.4(b)(2)(i)(E) would condition aggregation relief on a demonstration that the person and the owned entity do not have risk management systems that permit the sharing of trades or trading strategies with the other. This condition would address concerns that risk management systems that permit the sharing of trades or trading strategies with each other present a significant risk of coordinated trading through the sharing of information.[128] The Commission proposes that this criterion generally would not prohibit sharing of information to be used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that, as noted above, control, direct or participate in the entities' trading decisions. Thus, sharing with employees who use the information solely for risk management or compliance purposes would generally be permitted, even though those

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[127] In this respect, proposed rule 150.4(b)(2)(i)(D) would be consistent with the Commission's Interpretive Letter No. 92-15 (CCH ¶ 25,381), where an employee both oversaw the execution of orders for a commodity pool, as well as maintained delta neutral option positions in non-agricultural commodities for the proprietary account of an affiliate of the sponsor of the commodity pool. The Commission concluded that the use of clerical personnel who are dual employees of both affiliates would not require aggregation when the clerical personnel engage in ministerial activities and steps are taken to maintain independence, such as: (i) Limiting trading authority so that the personnel do not have responsibility for the two entities' activities in the same commodity; and (ii) separating the times at which the personnel conduct activities for the two entities.

[128] The Commission remains concerned, as stated in the Part 151 Aggregation Proposal and as noted above, that a trading system, as opposed to a risk management system, that is not separately developed from another system can subvert independence because such a system could apply the same or similar trading strategies even without the sharing of trading information.

employees' risk management or compliance activities could be considered to have an "influence" on the entity's trading.

d. Proposed Notice Filing Requirement

The Commission is proposing a notice filing requirement in proposed rule 150.4(c) that is similar to the criteria set forth in proposed rule 151.7(h)(1), with a modification to add an application procedure for ownership interests of more than 50 percent under proposed rule 150.4(b)(3). The proposed rule contemplates that the filing under proposed rule 150.4(c)(1) would be made before the exemption from aggregation is needed, since the filing is a pre-requisite for obtaining the exemption. However, where a prior filing is impractical (such as where a person lacks information regarding a newly-acquired subsidiary's activities), the Commission proposes that the filing under proposed rule 150.4(c)(1) should be made as promptly as practicable.

Even though a filing under proposed rule 150.4(c)(1) may be made after an ownership or equity interest is acquired, the Commission proposes that the exemption from aggregation would not be effective retroactively because the filing is a pre-requisite to the exemption. The Commission believes that retroactive application of such filings could result in administrative difficulty in monitoring the scope of exemptions from aggregation and negatively affect the Commission staff's surveillance efforts.

Generally, the Commission proposes that entities could consolidate these filings in any efficient manner by, for example, discussing more than one owned entity in a single filing, so long as the scope of the filing is made clear.[129] The Commission also

[129] In response to commenters on the Part 151 Aggregation Proposal, the Commission clarifies that section 8 of the CEA would apply to the information that the Commission may request under

wishes to emphasize that if an entity determines to no longer apply an exemption (or if an exemption is no longer available), the entity would be required to inform the Commission by making a filing under proposed rule 150.4(c) because this would constitute a material change to the prior filing. Of course, once an exemption no longer applies to an owned entity, the person would be required to subsequently aggregate the positions of the entity in question.

In order to implement an application procedure for ownership interests of more than 50 percent under proposed rule 150.4(b)(3), as noted above, the Commission is also proposing proposed rule 150.4(c)(2), under which filings would not be effective until the Commission's finding that the person has satisfied the conditions of proposed rule 150.4(b)(3).

The Commission solicits comment as to all aspects of proposed rule 150.4. Commenters are invited to address the potential effects and implications of the proposed rule as the scope of the position limits regime may change in the future. For example, what issues or concerns arising from the scope and the requirements of the disaggregation relief in the proposed rule would have to be addressed if the Commission were to adopt its proposal to establish speculative position limits for 28 exempt and agricultural commodity futures and option contracts, and physical commodity swaps that are "economically equivalent" to such contracts?[130]

If the Commission were to adopt its proposal to establish position limits on physical commodity swaps, are there any implications with respect to the interplay

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proposed rule 150.4(c), and sets out the extent to which such information will be treated confidentially.

[130] See Position Limits for Derivatives (November 5, 2013).

between the disaggregation relief in the proposed rule and the Commission's other rules relating to swaps? For instance, the Commission understands that various corporate groups organize the swap activities of the affiliated entities within corporate groups in different ways. Some corporate groups centralize some or all swap activities in a particular affiliate, while in other groups the affiliates engage in swaps independently. Also, corporate groups may apply centralized risk management policies to varying degrees, which may affect how the affiliated entities in the group engage in swaps. What are the implications of the disaggregation relief in the proposed rule for the various ways that affiliated entities in corporate groups organize their swap activities? In considering the proposed rule, what other Commission rules should the Commission take into account and what are the implications of how other Commission rules may affect affiliated entities? Have corporate groups begun to organize their swap activities to comply with other Commission rules in ways that could be affected by the proposed rule? If so, what considerations should the Commission take into account in this regard?

The Commission also solicits comment as to the appropriateness of the conditions for disaggregation relief in proposed rule 150.4(b), and whether relief should be available for persons that have a greater than 50 percent ownership or equity interest in an owned entity. If such relief should be available, is it appropriate to condition such relief on the owned entity not being, and not being required to be, consolidated on the financial statements of the owner? Is financial consolidation a relevant consideration in this regard? Why or why not? For example, is financial consolidation a useful proxy for other characteristics that are relevant to the position limits regime, such as ownership and control?

Regarding the condition in proposed rule 150.4(b)(3)(iii), is it clear when an individual board member is considered the "representative" of a person on the board of directors? Are there modifications to this condition that would help to identify which board members should be required to make the certification?

e. Proposed Revisions to Clarify Regulations

In connection with the proposed modifications to rule 150.4, the Commission has reviewed whether the text of existing regulation 150.4 is easy to understand and apply. In this regard, the Commission notes that the existing regulation may be unclear, especially in terms of the relationship between the provisions of paragraphs (a) through (d) of the existing regulation and whether a particular paragraph is an exception to another. Also, as more different types of market participants have studied existing regulation 150.4 (and regulation 151.7, which has similar provisions), both in connection with the Dodd-Frank Act and otherwise, questions have arisen about the application of the aggregation requirements to a wide variety of circumstances. The Commission believes it is important that the rules setting forth the aggregation requirements be clear in their application to both the circumstances in which they currently apply, and the various circumstances in which they may apply in the future. These textual modifications are not intended to effect any substantive change to the meaning of rule 150.4, and the Commission invites commenters to address whether any of these modifications change the meaning of the aggregation requirements in their particular circumstances.[131]

[131] The textual modifications proposed here relate to the Commission regulations currently in effect. The Commission notes that its proposal regarding position limits includes amendments to the text of certain Commission regulations. See Position Limits for Derivatives (November 5, 2013). If both of the proposals are adopted, conforming technical changes to reflect the interplay between the two amendments may be necessary.

Therefore, the Commission is proposing to modify the text to clarify that paragraph (a) of rule 150.4 states the general requirement to aggregate positions a person may hold in various accounts, and paragraph (b) of the rule sets out the exemptions to the aggregation requirement that may apply. The Commission believes that this format clarifies that the exemptions in rule 150.4(b) are alternatives; that is, aggregation is not required to the extent that any of the exemptions in rule 150.4(b) may apply.

In rule 150.4(b), the Commission is proposing text for rule 150.4(b)(1) that is substantially similar to existing regulation 150.4(c). The Commission believes that stating this provision as the first exemption will clarify that any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest in a pooled account or positions may apply this exemption. That is, if the requirements of this exemption are satisfied with respect to a person, then the person need not determine if the requirements of the exemption in paragraph (b)(2) or (b)(3) are satisfied. The text of paragraphs (b)(2) and (b)(3), in turn, state that they apply to persons with an ownership or equity interest in an owned entity, other than an interest in a pooled account which is subject to paragraph (b)(1).

Proposed rule 150.4(b)(1) states that for any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest in a pooled account or positions, aggregation of the accounts or positions of the pool is not required, except as provided in paragraphs

(b)(1)(i), (b)(1)(ii) or (b)(1)(iii). Although existing regulation 150.4(c) does not contain any explicit statement of this rule, the lack of an aggregation requirement in these circumstances is implicit in the existing regulation's statement that aggregation is required only in certain specified circumstances. Thus, proposed rule 150.4(b)(1)(i) states explicitly a principle that is implicit in the existing regulation.[132] Paragraphs (b)(1)(i), (b)(1)(ii) and (b)(1)(iii) of proposed rule 150.4 set out the circumstances in which aggregation requirements apply; these circumstances are substantially similar to those covered by paragraphs (c)(1), (c)(2) and (c)(3) of existing regulation 150.4, but the text of the rule has been modified to simplify the wording of the provisions.[133]

Paragraphs (b)(4) to (b)(8) of rule 150.4 set forth other exemptions that may apply in various circumstances. The exemption for certain accounts held by FCMs in paragraph (b)(4) is substantially the same as existing regulation 150.4(d), except that it has been rephrased in a form of a statement of when an exemption is available, instead of the statement in the existing regulation that the aggregation requirement applies unless certain conditions are met. Paragraph (b)(5) sets forth the exemption for accounts carried by an IAC that is substantially similar to existing regulation 150.3(a)(4). Paragraphs (b)(6), (b)(7) and (b)(8) set forth the exemptions for underwriting, broker-dealer activity and circumstances where laws restrict information sharing that are discussed in more detail above. Paragraph (b)(9) describes how higher-tier entities may apply an exemption pursuant to a notice filed by an owned entity.

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[132] This modification to the rule is not intended to effect a substantive change. Rather, it is intended to state explicitly a rule that the Commission has applied since at least 1979. See note 100, above.

[133] The revised text also includes references to a "limited member" in addition to the references in the existing regulation to a limited partner in a pool.

The Commission solicits comment as to whether the revised text of rule 150.4 is easy to understand and apply.

<HD2>

D. Underwriting

<HD3>

1. Part 151 Proposed Approach

As noted above, regulation 151.7(g) includes an exemption from aggregation where an ownership interest is in an unsold allotment of securities. In the Part 151 Aggregation Proposal, the Commission noted that the ownership interest of a broker-dealer[134] in an entity based on the ownership of securities acquired as part of reasonable activity in the normal course of business as a dealer is largely consistent with the ownership of an unsold allotment of securities covered by the underwriting exemption in regulation 151.7(g). In both circumstances, the ownership interest is likely transitory and not to hold for investment purposes. Accordingly, the Commission proposed to include an aggregation exemption in regulation 151.7(g) for such activity.[135]

However, the Commission noted in the Part 151 Aggregation Proposal that this exemption would not have applied where a broker-dealer acquires more than a 50 percent ownership interest in another entity because such acquisition would not be consistent with holding a transitory interest for the purpose of market making and runs a higher risk

[134] Broker-dealers are those persons registered as such with the SEC, see 15 U.S.C. 78o, or similarly registered with a foreign regulatory authority.

[135] The Commission specifically noted that this proposed exemption would not apply to registered broker-dealers that acquire an ownership interest in securities with the intent to hold for investment purposes.

of coordinated trading.[136] Therefore, a broker-dealer that acquires a greater than 50 percent ownership interest in another entity would be required to aggregate the positions of that entity, in the absence of another aggregation exemption.

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

<HD3>

2. Commenters' Views

FIA commented on the Part 151 Aggregation Proposal, saying that the underwriting exemption should not require that ownership be acquired "as part of [the] reasonable activity" of a broker-dealer, because the normal course requirement is sufficient and the additional requirement that the acquisition be part of reasonable activity creates uncertainty.[137] FIA also said that broker-dealers should be able to use the underwriting exemption for any level of ownership, i.e., even a more than 50 percent ownership interest, or, alternatively, the ownership interests that a broker-dealer holds in its capacity as a broker-dealer should not be aggregated with ownership interests held by the broker-dealer or its affiliates in any other capacity. [138]

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[136] The proposed rules would encompass within the proposed exemption a broker-dealer's ownership of securities in anticipation of demand or as part of routine life cycle events, if the activity was in the normal course of the person's business as a broker-dealer.
[137] CL-FIA.
[138] CL-FIA.

3. Proposed Rule

The Commission continues to believe that any acquisition by a broker-dealer of a greater than 50 percent ownership interest in an owned entity (other than in a distribution of securities directly by an issuer or through an underwriter) requires aggregation, and further relief from this requirement is not appropriate. For example, if a broker-dealer has a 49 percent ownership interest in an entity and then acquires a 2 percent ownership interest in the same entity in the normal course of the broker-dealer's activity, aggregation of the owned entity's positions should be required.

On the other hand, the Commission is proposing an exemption from aggregation where an ownership interest is in an unsold allotment of securities in proposed rule 150.4(b)(7) that is essentially the same as the exemption in regulation 151.7(g). However, proposed rule 150.4(b)(7) does not include the phrase "as part of reasonable activity," as was suggested by a commenter on the Part 151 Aggregation Proposal, because the Commission proposes to interpret the phrase "reasonable activity" to be effectively synonymous with the phrase "normal course of business" in this context.

The Commission solicits comment as to all aspects of proposed rule 150.4(b)(7). In particular, the Commission solicits comment as to the appropriateness of the proposed treatment of ownership interests acquired in the normal course of the broker-dealer's activity.

<HD2>

E. Independent Account Controller for Eligible Entities

<HD3>

1. Part 151 Proposed Approach

As noted above, regulation 150.3(a)(4) provides an eligible entity with an exemption from aggregation of the eligible entity's customer accounts that are managed and controlled by independent account controllers. The definition of eligible entity in regulation 150.1(d) includes "the limited partner or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter…." However, with regard to a CPO that is exempt under regulation 4.13, the definition of an independent account controller in regulation 150.1(e)(5) only extends to "a general partner of a commodity pool the operator of which is exempt from registration under §4.13 of this chapter." At the time the Commission expanded the IAC exemption to include regulation 4.13 commodity pools, market participants generally structured such pools as limited partnerships.[139]

The Commission understands that today, not all regulation 4.13 commodity pools are formed as partnerships. For example, regulation 4.13 pools may be formed as limited liability companies and have managing members, not general partners. Accordingly, in the Part 151 Aggregation Proposal, the Commission proposed to expand the definition of independent account controller to include the managing member of a limited liability company, and to amend the definitions of eligible entity and independent account controller to specifically provide for regulation 4.13 commodity pools established as limited liability companies.

<HD3>

2. Commenters' Views

[139] See 63 FR 38532.

One commenter said that the independent account controller rule should be expanded to apply to any person with a role equivalent to a general partner in a limited partnership or managing member of a limited liability company, to accommodate various structures that are used for commodity pools in jurisdictions outside the U.S.[140]

Another commenter addressed 4.13 pools more broadly, and said that the Commission's rules should treat ownership of 4.13 pools in the same way that the rules treat ownership of operating companies.[141] In particular, this commenter said that the Commission should eliminate the requirement that the positions of a 4.13 pool be aggregated with the positions of any person that owns more than 25% of the 4.13 pool.[142]

<HD3>

3. Proposed Rule

The Commission proposes to adopt rule 150.4(b)(5) to take the place of the existing IAC rule in regulation 150.3(a)(4), so that the IAC exemption is in the regulatory section providing for aggregation of positions. Proposed rule 150.4(b)(5) is substantially similar to existing regulation 150.3(a)(4) except that, in response to the commenters, the Commission proposes to modify it (and the related definitions in regulation 150.1) so that it could be applied with respect to any person with a role equivalent to a general partner in a limited liability partnership or a managing member of a limited liability company.

Regarding the treatment of regulation 4.13 pools in a manner that is equivalent to the treatment of operating companies, the Commission believes that this is a matter that

[140] CL-AIMA.
[141] CL-ABC.
[142] CL-ABC.

could be the subject of relief granted under CEA section 4a(a)(7).[143] Persons wishing to seek such relief should apply to the Commission stating the particular facts and circumstances that justify the relief.

The Commission solicits comment as to all aspects of the proposed rule 150.4(b)(5) and the related amendments to regulation 150.1. In particular, the Commission solicits comment as to the appropriateness of treating limited liability companies that are commodity pools in the same way as limited liability partnerships that are commodity pools. Commenters are invited to provide information regarding the considerations that determine whether commodity pools are, in practice, structured as limited liability companies or limited liability partnerships and whether there are any relevant differences in the two types of entities. Also, what are the facts and circumstances that commenters believe would justify relief under CEA section 4a(a)(7)?

<HD1>III. Related Matters

<HD2>

A. Considerations of Costs and Benefits

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

[143] Section 4a(a)(7) of the CEA provides authority to the Commission to grant relief from the position limits regime.

other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

On May 30, 2012, the Commission proposed, partially in response to a petition for interim relief from part 151's provision for the aggregation of positions across accounts,[144] certain modifications to its policy for aggregation under the part 151 position limits regime (the "Part 151 Aggregation Proposal"). In an order dated September 28, 2012, the District Court for the District of Columbia vacated part 151 of the Commission's regulations. The Commission is now proposing modifications to part 150 of the Commission's regulations that are substantially similar to the modifications proposed to part 151.

The Part 151 Aggregation Proposal provided the public with an opportunity to comment on the Commission's considerations of costs and benefits of the proposed rules. In the Part 151 Aggregation Proposal, the Commission explained its position that the proposed changes to the aggregation policy would, on net, lower costs for market participants without lessening the effectiveness of the Commission's position limits regime. The Commission requested comment on all aspects of its consideration of costs and benefits, including identification and assessment of any costs and benefits not discussed therein. In addition, the Commission requested that commenters provide data and any other information or statistics that they believe supports their positions with respect to the Commission's consideration of costs and benefits.

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

The modifications to part 150 proposed herein reflect the Commission's consideration of the comments that were received on the proposed amendments to part 151. The Commission summarizes the proposed modifications to part 150 below, including those provisions proposed to be modified or amended in response to public comment on the Part 151 Aggregation Proposal, describes expected costs and benefits of the proposed regulations, requests public comment on its considerations of costs and benefits, and considers the proposed regulations in light of the five factors outlined in Section 15(a).[145]

<HD3>

1. Background

As discussed above, the Commission's historical approach to position limits generally includes three components: (1) The level of the limits, which set a threshold that restricts the number of speculative positions that a person may hold in the spot-month, in any individual month, and in all months combined, (2) an exemption for positions that constitute bona fide hedging transactions, and (3) rules to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.

The proposed rules address the third component of the Commission's position limits regime – aggregation – which is set out in regulation 150.4. This regulation generally requires that unless a particular exemption applies, a person must aggregate all positions for which that person: (1) Controls the trading decisions, or (2) has a 10

[145] The Commission notes that the opinions and beliefs expressed herein are preliminary assertions based on comments from previous releases, and are subject to change after consideration of any further comments. The Commission welcomes public comment on all aspects of this release in order to better inform its policy determinations.

percent or greater ownership interest in an account or position; and in doing so the person must treat positions that are held by two or more persons pursuant to an express or implied agreement or understanding as if they were held by a single person.

<HD3>

2. Part 151 Aggregation Proposal

As noted above, the Commission received the aggregation petition on January 19, 2012.[146] The aggregation petition requested interim relief under CEA section 4a(a)(7) from, among other things, part 151's provision for aggregation of positions across accounts. The Commission also received letters that were generally supportive of the aggregation petition. In addition, several commenters opined on the aggregation rules in connection with the Commission's request for comment on the spot-month position limits on cash-settled contracts established on an interim final basis in November 2011.[147] As further discussed in the Part 151 Aggregation Proposal, the aggregation petition and the interim final regulation commenters asserted that the Commission should clarify regulation 151.7(i), which provides an exemption where the sharing of information would cause a violation of federal law, and expand the exemption to include circumstances in which the sharing of information would cause a violation of state or foreign law. In addition, the aggregation petition and commenters to the interim final regulation requested that the Commission create an aggregation exemption for owned non-financial entities. In this connection, some interim final regulation commenters argued that the Commission should only aggregate on the basis of control and not ownership. Finally, one interim final regulation commenter requested that the Commission expand the

[146] See note 18, supra.
[147] See Proposed Rules, 77 FR at 31769, fn. 24.

exemption provided in § 151.7(g) for the ownership interests of broker-dealers connected with specific market-making activity.

As regards the violation-of-laws exemption in §151.7(i), the Part 151 Aggregation Proposal clarified that the exemption would apply where the sharing of information presents a "reasonable risk" of violating the applicable law(s), retained the requirement to submit an opinion of counsel, and expanded the violation-of-laws exemption to include state law and the law of foreign jurisdictions.

Proposed rule 151.7(b)(1) in the Part 151 Aggregation Proposal provided that any person with an ownership or equity interest in an entity (financial or non-financial) of between 10 percent and 50 percent (inclusive) may disaggregate the owned entity's positions upon demonstrating compliance with each of several specified indicia of independence. The proposed indicia were that such person and the owned entity: (1) Do not have knowledge of the trading decisions of the other; (2) trade pursuant to separately developed and independent trading systems; (3) have in place policies and procedures to preclude sharing knowledge of, gaining access to, or receiving data about, trades of the other; (4) do not share employees that control the trading decisions of the other; and (5) maintain a risk management system that does not allow the sharing of trade information or trading strategies between entities.

The Commission also proposed to expand the exemption for the underwriting of securities in regulation 151.7(g) to include ownership interests acquired through the market-making activities of an affiliated broker dealer. The Part 151 Aggregation Proposal proposed to exempt from aggregation ownership interests acquired as part of a person's reasonable market-making activity in the normal course of business as a broker-

dealer registered with the SEC or comparable registration in a foreign jurisdiction, so long as there is no other ownership interests or indicia of control or concerted action. The Commission said in the Part 151 Aggregation Proposal that this exemption would apply to ownership interests that are likely transitory and not for investment purposes.

Proposed rule 151.7(j) in the Part 151 Aggregation Proposal extended filing relief to "higher-tier" entities – i.e., entities with an ownership interest in the entity that is itself the owner of an entity and the subject of a filing for relief from aggregation. As such, the proposed rule allowed higher-tier entities to rely on exemption notices filed by owned entities. The Part 151 Aggregation Proposal explained that such an exemption would reduce the burden of filing exemption notices by eliminating redundancies.

The Commission also proposed in the Part 151 Aggregation Proposal to amend the IAC exemption in regulation 151.7(f), which includes commodity pools exempt from registration under §4.13 that are structured as limited partnerships, to also encompass commodity pools structured as limited liability companies.

As discussed below, the Commission received comments on the Part 151 Aggregation Proposal.[148] The amendments now being proposed to regulation 150.4 reflect the Commission's consideration of the comments that were received on the Part 151 Aggregation Proposal. Thus, the discussion below covers the amendments in the Part 151 Aggregation Proposal and the comments on those proposed amendments.[149] The Commission considers these comments, discusses the current proposed amendments to the aggregation provisions in §150.4, considers the costs and benefits of the current

[148] The written comments are available on the Commission's web site at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1208.

[149] For additional background on part 150 and part 151 and the existing provisions for aggregation, see the Part 151 Aggregation Proposal.

proposal, and evaluates the current proposal in light of the five enumerated factors of Section 15(a)(2) of the CEA.

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3. Comments on the Part 151 Aggregation Proposal

The Commission received numerous comments regarding the proposed changes to the aggregation policy in §151.7. This section summarizes the issues raised in those comments relevant to the Commission's considerations of costs and benefits; a more thorough discussion of comments relating to each provision of the Part 151 Aggregation Proposal can be found in section II of this release.

The proposed owned-entity exemption and its attendant indicia of independence was a topic in the majority of comments. Several commenters requested the Commission extend the owned entity exemption to a person with a greater than 50 percent ownership in the owned entity, so long as the person and the owned entity can both demonstrate independence.[150] These commenters generally objected to the 50 percent ceiling on the grounds that ownership above 50 percent is potentially indicative of control but does not equate to control, and that ownership of an entity regardless of control over that entity is not an appropriate measure to determine aggregation.[151] Some commenters asserted that the "bright-line test" of 50 percent ownership is arbitrary.[152] Another claimed that passive ownership poses little risk of coordinated trading and that requiring aggregation even when management and trading are independent inhibits legitimate commercial

[150] CL-ABC, CL-AGA, CL-AIMA, CL-API, CL-Barclays, CL-CMC, CL-COPE, CL-EEI, CL-FIA, CL-Iberdrola, CL-ISDA/SIFMA, CL-MFA, CL-WGCEF.
[151] CL-AGA, CL-MFA, CL-PEGCC, CL-WGCEF, CL-API, CL-Atmos, CL-CMC, CL-Chamber, CL-EEI.
[152] CL-AGA, CL-API, CL-COPE.

activity.[153] Some commenters expressed concern that the aggregation standards may require information sharing and coordination between entities that had previously constructed barriers to preclude such activity, and that relaxing those barriers to comply with aggregation standards may create antitrust concerns.[154]

Conversely, other commenters expressed support for the Commission's proposed 50 percent ceiling as reasonable and appropriate.[155] Two commenters suggested that the Commission should not expand the exemption for owned entities.[156]

Commenters presented several alternatives to the 50 percent threshold. Some commenters suggested that ownership over 50 percent should create a "rebuttable presumption," requiring entities to demonstrate why ownership above that threshold does not result in trading control or information sharing.[157] Others supported disaggregation relief for an entity with greater than 50 percent ownership only in circumstances in which the Commission had specifically approved a request for relief.[158] One commenter requested an exemption specifically for private equity investment funds that meet certain criteria.[159] Another requested an exemption for pension plans to free them from aggregating a plan sponsor's corporate positions with the plan's positions given that pension plan managers are subject to fiduciary responsibilities to the plans they manage.[160] In lieu of a new rule on owned entities, one commenter urged the Commission to rely on Form 40 reports and raise the presumptive control standard to 50

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153 CL-FIA.
154 CL-WGCEF, CL-CMC, CL-COPE.
155 CL-Better Markets, Chris Barnard on June 21, 2012 ("CL-Barnard").
156 CL-IAMAW, CL-IATP.
157 CL-ISDA/SIFMA, CL-WGCEF, CL-PEGCC.
158 CL-AIMA, CL-API, CL-Atmos, CL-MFA.
159 CL-PEGCC.
160 CL-ABC.

percent instead of 10 percent, thus never requiring aggregation below 50 percent ownership.[161]

Commenters also expressed concerns about the costs associated with the owned-entity exemption – in particular, the direct and indirect costs of the 50 percent "ceiling" for disaggregation imposed by §151.7(b)(1)(ii). Several noted that developing a system to coordinate trading among aggregated entities will be costly for market participants.[162] One commenter said it would be costly to implement a system to monitor when ownership of an entity exceeds 10 percent.[163]

More specifically, two commenters said that the rules would require entities that are currently operated and managed separately, but who have common upstream ownership greater than 50 percent, to implement information sharing systems solely to comply with the Commission's position limits regime. These commenters noted that these systems would be costly to implement without providing a corresponding benefit because these entities are not currently operating in concert.[164] Similarly, another commenter said that aggregation is impractical for commercial entities engaged in independent operations under common ownership and may put such entities at a competitive disadvantage.[165] Another commenter noted that automatic aggregation at 50 percent would require sophisticated information controls and expensive trade monitoring systems.[166]

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[161] CL-Barclays.
[162] CL-API, CL-Chamber, CL-CMC.
[163] CL-Barclays.
[164] CL-COPE, CL-Iberdrola.
[165] CL-Chamber.
[166] CL-WGCEF.

Commenters also stated concerns about costs of complying with the 50 percent "ceiling" for private funds and pension plans. One commenter noted that private funds would need entirely new (and costly) programs to monitor, allocate, and coordinate trading across portfolio companies though the fund company was not previously involved in trading.[167] Another commenter had the same concern regarding the costs incurred by pension plans, which do not currently collect position or trading information from owned collective investment vehicles, to monitor positions in real-time across potentially hundreds of these vehicles.[168]

Commenters were also concerned that the automatic aggregation at 50 percent would lead to indirect costs by unnecessarily limiting hedging, because commonly owned companies will have to remain below position limits unless a bona fide hedging exemption is available.[169] Commenters were also concerned about potential impacts on investment in other entities; one opined that the rules would discourage investment because owners would have to be more deeply involved in the operations of owned companies, including by overseeing trading.[170] One commenter said that automatic aggregation at 50 percent would hinder management and could limit joint-venture formation.[171]

Commenters also weighed in on the other aspects of the Commission's proposed rules. Regarding the filing of exemptions, one commenter noted that the Commission's estimated costs of aggregation filings appeared to be correct. This commenter also

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[167] CL-PEGCC.
[168] CL-ABC.
[169] CL-API, CL-Chamber, CL-PEGCC.
[170] CL-CMC, CL-Chamber.
[171] CL-WGCEF.

disputed the validity of the Working Group's "fear of vast new information infrastructure" and said that entities affected by the provisions will have the resources to apply for and receive the proposed exemptions from aggregation.[172]

Regarding the violation-of-laws exemption, several commenters generally expressed support for the "reasonable risk" of violation standard,[173] and the proposed exemption for federal, state, or foreign laws.[174] One commenter expressed that the exemption should be limited to violations of federal law, and that exemption from aggregation for potential violations is impractical and should not be allowed.[175] Further, some commenters opined that a memorandum of law, prepared by internal, as opposed to outside, counsel, should suffice, thereby mitigating outside legal fees.[176] Another commenter noted it had no objection to the proposed opinion of counsel requirement,[177] while others expressed support for the requirement as proposed, on grounds that aggregation relief should be available in only the most clear-cut cases.[178]

Some commenters asserted that aggregation should be applied on a pro-rata basis to avoid the double-counting of positions and a potential limit on trading that may affect liquidity.[179] One commenter said that the aggregation requirements would cause pension plans to reconsider investing in collective investment vehicles. This commenter also maintained that the current federal position limits regime has had little effect on

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[172] CL-IATP.
[173] CL-EEI, CL-FIA.
[174] CL-ISDA/SIFMA.
[175] CL-IATP.
[176] CL-API, CL-EEI, CL-FIA, CL-ISDA/SIFMA, CL-PEGCC, CL-WGCEF.
[177] CL-Atmos.
[178] CL-Better Markets, CL-IATP.
[179] CL-ABC, CL-Barclays, CL-FIA.

commodity pools because position limits were imposed on only nine agricultural products.[180]

One commenter noted that the Part 151 Aggregation Proposal to allow higher-tier entities to rely on filings by subsidiaries strikes an appropriate cost balance.[181] Another commenter expressed support for the alternative of a single aggregate notice filing, that filing should be effective retroactively, and that sister affiliates of the filing entity should be able to rely on the filing.[182]

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4. The Proposed Amendments to Part 150

a. Aggregation of Positions in Owned Entities

The Commission is proposing two exemptions concerning the aggregation of positions in owned entities. First, as proposed in the Part 151 Aggregation Proposal, the Commission is proposing to allow a person to disaggregate the positions of an owned entity provided such person demonstrates compliance with the conditions of the exemption. Such conditions include ownership of less that 50 percent of the owned entity, independent trading systems, prohibition of the sharing of trading knowledge between the entities, and the other criteria found in proposed regulations 150.4(b)(2)(i)(A-E). Second, the Commission is proposing to allow persons with a greater than 50 percent ownership interest to apply for relief in accordance with proposed regulation 150.4(b)(3), subject to the conditions of that section and the approval of the Commission or its delegate.

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[180] CL-ABC.
[181] CL-IATP.
[182] CL-FIA.

As noted above and in the Part 151 Aggregation Proposal, the Commission's general policy on aggregation is derived from CEA Section 4a(a)(1), which directs the Commission to aggregate positions based on separate considerations of ownership, control, or persons acting pursuant to an express or implied agreement. The Commission's historical approach to its statutory aggregation obligation has thus included both ownership and control factors in a manner designed to prevent evasion of prescribed position limits. The Commission continues to believe that ownership of an entity is an appropriate criterion for aggregation of that entity's positions.

Some commenters on the Part 151 Aggregation Proposal opposed the requirement that a person own 50 percent or less of another entity in order to obtain relief from the aggregation requirement, asserting that an ownership stake of greater than 50 percent does not necessarily indicate control. However, as explained in part II.B.3. above, this requirement of 50 percent or less ownership is in line with the language in CEA section 4a, the legislative history of that section, subsequent regulatory developments, and the Commission's historical practices in this regard. Moreover, the ability for persons owning 50 percent or less of another entity (subject to establishing the indicia of independence) to disaggregate the positions of the owned entity would substantially liberalize the Commission's approach to aggregation for position limits. The Commission does not consider this ceiling on disaggregation to be arbitrary; rather, ownership above 50 percent of an entity is a level at which there is a strong likelihood that a person would be able to use its ownership interest to directly or indirectly influence the owned entity's accounts or positions. As noted above, 50 percent ownership is a standard used by other government agencies and reflects a general understanding that

greater than 50 percent ownership level poses substantial potential for direct or indirect control over an owned entity. Accordingly, the Commission views the 50 percent ceiling to be a reasonable outer limit in most cases on the general availability of aggregation exemptions, even for passively-owned entities.

However, the Commission recognizes that in certain specific circumstances it may be appropriate to allow exemptions from aggregation of an owned entity's positions, even at greater than 50 percent ownership. In particular, the Commission notes that while, in many instances, ownership of more than 50 percent of an entity requires the owner to consolidate the financial statements of the owned entity, consolidation is not always required. Thus, as discussed in more detail in section II.B3.b of this release, the proposed amendments to part 150 include a provision for a person with more than 50 percent ownership of an owned entity, but that does not consolidate that entity in its financial statements, to apply to the Commission for aggregation relief on a case-by-case basis, provided the applicant can demonstrate adherence to stringent indicia of independence. Notwithstanding that it represents a relaxation from historical practice, the Commission believes that allowing case-by-case applications for disaggregation addresses commenters' concerns without jeopardizing the effectiveness of the Commission's position limits regime.

The Commission expects no material negative effects on market quality as a result of the proposed relief from aggregation that would be available to persons that hold ownership interests in other entities. The Commission does not believe that a material reduction in hedging will result from the proposed requirement that, to obtain relief from aggregation based on notice only, a person must own 50 percent or less of an entity,

because hedge exemptions would be available to any entity regardless of position aggregation. In addition, the proposed aggregation exemptions are more permissive than the 10 percent threshold currently applied. Impacts from the proposed regulations on investment activity where the investor desires a passive interest should also be minor, as these proposed regulations permit a passive investor to have a larger ownership interest and still claim an exemption from aggregation. As noted above, prior rules required aggregation at a 10 percent ownership level, so these proposed regulations allowing for relief from aggregation at higher ownership levels should lower the overall impact of aggregation on market quality factors.

The Commission requests comment on its proposed amendments to regulation 150.4. Are there other potential impacts on market quality factors that the Commission should consider? What costs and benefits may attend the proposed owned entity exemptions in proposed regulations 150.4(b)(2) and 150.4(b)(3) that the Commission should consider?

b. Consideration of Alternative Approaches to Aggregation of Positions in Owned Entities

The Commission believes that the approach reflected in these proposed regulations – a bright-line ceiling on the availability of notice relief from aggregation at 50 percent ownership, with the potential for case-by-case relief in appropriate circumstances – is preferable to the various alternatives suggested by commenters for a variety of reasons.

Several commenters to the Part 151 Aggregation Proposal suggested that the aggregation requirements should be loosened further than was proposed by allowing

persons with a more than 50 percent ownership interest in another entity to obtain relief from aggregation by demonstrating independent trading by the two entities. While this approach would make relief from the aggregation requirements available to more entities in more different situations, the Commission believes, as noted above, that CEA Section 4a(a)(1) requires the aggregation of positions of an owned entity and that a 50 percent ownership interest is a reasonable indicator that a person is the owner of an entity and therefore aggregation should be required. The Commission notes that the proposed amendments to regulation 150.4 would allow an entity with a more than 50 percent ownership interest in another entity to apply for relief from the aggregation requirement on a case-by-case basis if it meets the other conditions in regulation 150.4(b)(3). Through an exemption application, such entities may be able to rebut the presumption that greater than 50 percent ownership results in trading control or information sharing; however, the Commission does not believe it is appropriate to grant such entities a broader exemption based only on a notice filing, because of the importance of the ownership standard in the statute as described above. The Commission has not proposed the commenters' alternative because, while to loosen the standards as requested might lower immediate compliance burdens, the Commission believes it would also lessen the effectiveness of the position limits regime.

Another commenter on the Part 151 Aggregation Proposal urged that the Commission not require aggregation of positions and instead rely on information reported on Form 40. However, the Commission notes that not necessarily all subsidiaries file those reports, and in any case the Commission believes that effective and efficient compliance with position limit regulations, including compliance with aggregation

requirements, is better served when it is primarily the responsibility of each market participant. The Commission believes that each entity can track its own compliance more efficiently compared to the Commission tracking the compliance of all the market participants involved; thus, the Commission does not endorse the shifting of the compliance burden from large traders to the Commission. For these reasons, the Commission believes that this proposed alternative does not have advantages that would justify its acceptance, and instead it could potentially impede compliance with the position limits regime.

The Commission believes that aggregation on a pro-rata basis, as suggested by some commenters, would be administratively burdensome for both owners of financial interests and the Commission. For example, since the level of financial interest in a particular company may change over time, it would be burdensome to determine and monitor the appropriate pro rata allocation on a daily basis. Moreover, a pro rata approach would be inconsistent with the Commission's historical requirement of aggregation of all the relevant positions of owned entities, absent an exemption. This is consistent with the view that a holder of a significant ownership interest in another entity may have the ability to influence all the trading decisions of that entity in which such ownership interest is held. For these reasons, the Commission declines to propose amending the policy in §150.4 to require a pro-rata aggregation of positions.

c. Other §150.4 Exemptive Relief

The Commission is proposing the violation-of-laws exemption largely as previously adopted in part 151 with the proposed changes in the Part 151 Aggregation Proposal, with one amendment. The Commission has proposed the alternative posed by

commenters to allow a memorandum of law, which can be prepared by internal counsel, to satisfy the requirement that the applicant explain the potential for a violation of law. This requirement is intended to provide the Commission with the ability to review the legal basis for the asserted regulatory impediment to the sharing of information, particularly where the asserted impediment arises from laws and/or regulations that the Commission does not directly administer; to consult with other federal regulators as to the accuracy of the opinion; and to coordinate the development of rules surrounding information sharing and aggregation across accounts in the future. The Commission believes that a memorandum of law prepared by internal counsel could provide the information and legal analysis to accomplish these goals, and a formal opinion of counsel is not required. Thus, the proposed amendments to part 150 include the requirement suggested by commenters on the Part 151 Aggregation Proposal.

The Commission requests comment as to the costs and benefits of proposed rule 150.4(b)(8). In particular, the Commission requests comment as to the relative costs and benefits of requiring a written memorandum of law, rather than an opinion of counsel, regarding the reasonable risk of a violation of law.

Regarding higher-tier entities, the Commission is proposing regulation 150.4(b)(9), which is identical to previously proposed regulation 151.7(j). The exemption in proposed regulation 150.4(b)(9) would allow higher-tier entities to rely on exemption notices filed by the owned entity, with respect to the accounts or positions specifically identified in the notice. In response to the suggestion of one Part 151 Aggregation Proposal commenter that aggregate notice filings should be permitted, the Commission notes, as discussed above, that entities would be able to utilize the

exemption in the manner most efficient for their enterprise. However, the Commission is not persuaded by the commenter's assertion that the filing should be permitted to be effective retroactively, because retroactive application would result in administrative difficulty in monitoring the scope of exemptions from aggregation and negatively affect the Commission staff's surveillance efforts.

The Commission is also proposing exemptions for underwriting activity in proposed regulation 150.4(b)(6) and for broker dealer activity in proposed regulation 150.4(b)(7). The Commission believes that such activity may present less of a risk of coordinated trading because in both circumstances, the ownership interest is likely transitory and not held for investment purposes.

Finally, consistent with the approach taken in 151.7(d), proposed rule 150.4(d) will require aggregation of investments in accounts with substantially identical trading strategies.

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5. Costs and Benefits

In the Part 151 Aggregation Proposal, the Commission stated its goal in proposing to amend the aggregation provisions of part 151:<EXTRACT>

> It is the Commission's goal that this proposal uphold part 151's regulatory aims without diminishing its effectiveness. In so doing, the Commission adheres to its belief that aggregation represents a key element to prevent evasion of prescribed position limits and that its historical approach towards aggregation—one that appropriately blends consideration of ownership and control indicia—remains sound."[183]</EXTRACT>

Similarly, in proposing these amendments to part 150, the Commission aims to achieve an appropriate balance between reducing costs for market participants and maintaining

[183] 77 FR 31767 at 31779.

the effectiveness of part 150's regulatory objectives. The Commission believes that the regulations proposed herein would contribute to that goal by maintaining the Commission's historical approach to aggregation while simultaneously updating that approach with thoughtful exemptions that relieve the burdens of aggregation for those market participants who can demonstrate compliance with certain criteria and who choose to avail themselves of the exemptions – without undermining the effectiveness of the Commission's position limits regime.

In adopting the now-vacated part 151, the Commission noted that the amendments to regulation 151.7 largely tracked regulation 150.4 and therefore reflected continuity in the position limits regime. In this release, the Commission is proposing to provide the same exemptions that it had provided in regulation 151.7, along with the additional exemptions proposed in the Part 151 Aggregation Proposal, with some changes to reflect the views of commenters on that release.[184]

Using existing part 150 as the standard for comparison, the Commission will consider the incremental costs and benefits that arise from these proposed amendments. That is, if these proposed regulations are not adopted, the aggregation standards that would apply would be those described in regulation 150.4 as it currently exists.

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[184] In regulation 151.7, the Commission added a requirement that accounts trading pursuant to identical trading strategies be aggregated. The Commission also provided exemptions for the underwriters of securities and for instances in which the sharing of information between persons would cause either person to violate federal law or regulations adopted thereunder. The Commission proposed in the Part 151 Aggregation Proposal to extend the violation-of-laws exemption to include state law and the laws of a foreign jurisdiction; to include an exemption for broker-dealers engaged in market-making activity; to allow higher-tier entities to file notices on behalf of lower-tier entities; to expand the applicability of the IAC exemption to include limited liability companies; and to provide a limited exemption for entities owning greater than 10 but less than 50 percent of another entity.

Although the Commission anticipates certain costs as a result of the proposed regulations – including a greater number of entities preparing and filing notices and memoranda of law, among other costs, since the availability of relief from aggregation has been expanded – the Commission believes that the regulations proposed herein, on a net basis, would cause market participants that use the exemptions in the regulations to incur a smaller burden as compared to the burden they would have incurred under regulation 150.4.

a. Costs

There are a myriad of ways a market participant could conceivably ensure proper compliance with the proposed amendments to regulation 150.4, depending on the particular circumstances of each market participant. In general, however, the Commission anticipates that entities who wish to take advantage of the exemptions in proposed regulation 150.4 will incur direct costs associated with the following: (1) Developing a system for aggregating positions across owned entities; (2) initially determining which owned entities, other persons, or transactions qualify for any of the exemptions in regulation 150.4; (3) developing and maintaining some system of determining the scope of such exemptions over time; (4) potentially amending current operational structures to achieve eligibility for such exemptions; and (5) preparing and filing notices of exemption with the Commission, including memoranda of law if claiming the violation-of-laws exemption.[185]

[185] The Commission notes that direct costs associated with how a particular entity aggregates its positions would be dependent upon that entity's individual ownership structure, how and why the entity chooses to avail themselves of any particular exemption, and the methods employed by the entity to ensure compliance. Thus, as noted in the Part 151 Aggregation Proposal, costs relating

To a large extent, market participants have incurred many of these costs to comply with existing regulation 150.4. For example, market participants that are affected by the existing aggregation requirement should already have a system in place for aggregating positions across owned entities. This rulemaking does not increase the costs of complying with the basic aggregation requirements of part 150, and in fact may decrease those costs by providing for relief from the aggregation requirements in certain situations. Because the Commission and DCMs generally have required aggregation of positions starting at a 10 percent ownership threshold under the current regulatory requirements of part 150 and the acceptable practice found in the prior version of part 38, the Commission expects that market participants active on DCMs have developed systems of aggregating positions across owned entities. [186]

Thus, the main direct costs associated with the proposed amendments to regulation 150.4, relative to the standard of existing regulation150.4, would be those incurred by entities as they determine whether they may be eligible for the proposed exemptions, and as they make subsequent filings required by the exemptions. For example, the Commission recognizes that there may be costs to market participants to adapt their systems in order to allow such systems to be used to determine whether persons qualify for the exemptions from the aggregation requirement proposed herein.

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to this rule are highly entity-specific; actual costs may be higher or lower than the Commission can anticipate accurately.

[186] The 10 percent threshold has been in place for the nine agricultural contracts with federal limits for decades, and for other contracts where limits were imposed by DCMs and enforced by the Commission. See supra, note 39 (citing to the statement of policy on aggregation issued in 1979, where the Commission codified its view, that, except in certain limited circumstances, a financial interest in an account at or above 10 percent "will constitute the trader as an account owner for aggregation purposes." 44 FR 33839, 33843, June 13, 1979).

Some entities may also incur direct costs to modify existing operational procedures – such as firewalls and reporting schemes – in order to be eligible to claim an exemption.

The Commission does not believe that these proposed regulations would result in material indirect costs to market participants or the public. For market participants, these proposed regulations provide for relief in certain circumstances from the requirement to aggregate positions. For the public, the Commission believes that these proposed regulations appropriately balance the need for exemptions from aggregation in certain circumstances with the public interest in maintaining the effectiveness of the Commission's position limits regime.

The direct costs of the proposed regulations are impracticable to quantify in the aggregate because such costs are heavily dependent on the characteristics of each entity's current systems, its corporate structure, its use of derivatives, the specific modifications it would implement in order to qualify for an exemption, and other circumstances. However, the Commission believes that market participants would choose to incur the costs of qualifying for and using the exemptions in the proposed regulations only if doing so is less costly than complying with the position limits. Thus, by providing these market participants with a lower cost alternative (i.e., qualifying for and using the exemptions) the proposed regulations may ease the overall compliance burden resulting from position limits, for it is reasonable to assume that no entity will elect the exemption if the benefits of doing so do not justify the costs. Accordingly, the Commission anticipates that notwithstanding the additional costs of determining eligibility and filing exemptions, the net result of the proposed rules for impacted market participants would be a reduction in costs as compared to the current standard in regulation 150.4.

In the Part 151 Aggregation Proposal, the Commission requested "that commenters submit data from which the Commission can consider and quantify the costs of the proposed rules" because it recognized that "costs associated with the aggregation of positions are highly variable and entity-specific." No commenter on that rule provided data, leaving the Commission without additional data or another basis to quantify the incremental direct costs to determine eligibility and file for exemptions beyond those previously estimated by the Commission.

One commenter asserted that the compliance with the rules would cost in excess of the $5.9 million estimate stated in the Part 151 Aggregation Proposal; however, the Commission notes that this comment relates to an estimate of costs relating to now-vacated regulation 151.7 and not the costs relating to the proposed rules in this release. Another commenter, without providing estimates, described a list of costs that could be incurred by each affected entity, including: (1) Evaluating its business structure and determine whether or not it qualifies for disaggregation relief; (2) planning for being compelled to aggregate should corporate structure change; (3) designing, testing, and implementing systems to aggregate positions across multiple entities across jurisdictions to ensure intraday compliance with position limits; and (4) incurring the "as yet unknown and ongoing cost of complying" with the proposed rules. The Commission again notes that entities who have been transacting in futures markets have been subject to these aggregation requirements for decades, and should have means of aggregating positions across multiple owned entities.

Some of the costs mentioned above likely relate to the imposition of the Commission's aggregation provision on swaps contracts as well as on the additional

contract markets that would have been subject to federal position limits under the now-vacated part 151. Although part 151 is no longer in effect, the Commission has proposed, in accordance with the Dodd-Frank Act revisions to CEA section 4a, amendments to part 150 that would, among other things: expand the number of contract markets subject to federal position limits; impose speculative limits on swaps contracts; and require exchanges to conform their aggregation policies to the Commission's aggregation policy in §150.4.[187] That proposed rulemaking thus may have significant implications for the Commission's considerations of costs and benefits of the instant proposal.

Should that rule be adopted as proposed, the aggregation policies proposed herein would apply on a federal level to commodity derivative contracts, including swaps, based on an additional 19 commodities. This expansion may create additional compliance costs for futures market participants, who would have to expand current procedures for aggregating futures positions in order to include swaps positions, as well as for swaps market participants, who would be required to develop a system to comply with aggregation policies or expand already existing policies and procedures to incorporate the aggregation rules. Further, should the other proposed rulemaking be adopted as proposed, exchanges would be required to conform their aggregation policies to the Commission's aggregation policy. As such, all contracts with speculative position limits, including exempt commodity contracts, would utilize the Commission's aggregation policy, including the amendments to that policy proposed in this rulemaking.

Until and unless that proposal is finalized by the Commission, part 150 applies to only the nine contracts enumerated in current §150.2; in that case, the Commission

[187] See Position Limits for Derivatives (November 5, 2013).

believes that many of the costs described by commenters would be substantially less than previously estimated. The Commission requests that commenters submit data from which the Commission can quantify the costs of the proposed rules amending §150.4. The Commission also requests that commenters provide data that would help the Commission to compare the potential cost implications of the instant proposal in the event that the other amendments to part 150 are adopted to the potential cost implications in the event that they are not.

The Commission understands that the additional exemptions proposed herein may create additional costs to file the proper exemptive notices in accordance with regulations 150.4(c) and 150.4(d). However, the exemptions are elective, so no entity is required to make this filing if that entity determines the costs of doing so do not justify the potential benefit resulting from the exemption. Thus, the Commission does not anticipate the costs of obtaining any of the exemptions to be overly burdensome. Nor does the Commission anticipate the costs would be so great as to discourage entities from utilizing available exemptions, as applicable.

In accordance with the Paperwork Reduction Act (PRA) the Commission has estimated the costs of the paperwork required to claim the proposed exemptions. As stated in the PRA section of this release, the Commission estimates that 240 entities will submit a total of 340 responses per year and incur a total burden of 7,100 labor hours at a cost of approximately $852,000 annually in order to claim exemptive relief under regulation 150.4.[188] This burden includes a recounting of the estimates included in the final regulations promulgating now vacated part 151, as those exemptions are being re-

[188] See Section III.B of this release for a more detailed summary of the Commission's PRA burden estimates.

proposed in part 150; however, the estimates have been reduced from that rulemaking because of the relatively smaller sphere of impact for part 150 as compared to part 151. That is, as part 151 extended federal position limits to swap contracts, the impact of that rule was broader than the impact anticipated for the proposed regulations herein. Should the proposed amendments to other sections of part 150 be adopted, the Commission anticipates the PRA burden would increase accordingly.

The Commission requests comment on its consideration of the costs imposed by the proposed regulations. Are there other direct or indirect costs that the Commissions should consider? Has the Commission accurately characterized the nature of the costs to be incurred? Commenters are specifically encouraged to submit both qualitative and quantitative estimates of the potential costs associated with the proposed changes to §150.4, as well as data or other information to support such estimates.

b. Benefits

As discussed above, the Commission's goal in proposing amendments to its aggregation policy in regulation 151.7 was to reduce costs for market participants without jeopardizing the effectiveness of its aggregation policy and by extension its position limits regime. Similarly, the Commission believes that the proposed amendments to regulation 150.4 would help to realize that goal, essentially benefiting both market participants (through lower costs) and the market at large (through an effective position limits regime).

The Commission continues to view aggregation as an essential part of its position limits regime. The proposed regulations include exemptions from the aggregation policy, the purpose of which is to prevent evasion of position limits through coordinated trading.

The Commission believes that because the proposed exemptions would require demonstration of eligibility and qualification for an entity to take advantage of them, only those entities whose activities impose a lesser risk of coordinated trading would be exempted from the aggregation requirements. In this way, the Commission believes that the exemptions that would be available through these proposed regulations would not inhibit the effectiveness of the Commission's aggregation policy in particular or position limits regime in general.

However, for those entities who represent a lesser risk of coordinated trading—as demonstrated by their eligibility to obtain an applicable exemption—the proposed rule represents a benefit in the form of lower costs of complying with the Commission's position limits regime while preserving the important protections of the existing aggregation policy. Based on the comments received on the part 151 Aggregation Proposal, the Commission has attempted where possible to minimize the regulatory burden of applying for the exemption—for example, allowing a memorandum of law prepared by internal counsel instead of a formal opinion—to increase the net benefits available to market participants. The Commission also proposed an avenue for certain entities to apply for relief on a case-by-case basis, providing additional flexibility for market participants.

The Commission requests comment on its considerations of the benefits of the proposed rules. Are there other benefits to markets, market participants, and/or the public that the Commission should consider? Commenters are specifically encouraged to include both quantitative and qualitative assessments of the potential benefits of the

proposed regulations in §150.4, as well as data or other information to support such assessments.

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6. Section 15(a) Considerations

As the Commission has long held, position limits are an important regulatory tool that is designed to prevent concentrated positions of sufficient size to manipulate or disrupt markets. The aggregation of accounts for purposes of applying position limits represents an integral component that impacts the effectiveness of those limits. The rules proposed herein would amend the Commission's longstanding aggregation policy to introduce certain exemptions. The Commission believes these proposed regulations would preserve the important protections of the existing aggregation policy, but at a lower cost for market participants.

a. Protection of Market Participants and the Public

The Commission believes these proposed rules would not materially affect the level of protection of market participants and the public provided by the aggregation policy reflected currently in regulation 150.4. Given that the account aggregation standards are necessary to implement an effective position limit regime, it is important that the exemptions proposed herein be sufficiently tailored to exempt from aggregation only those accounts that pose a low risk of coordinated trading. The owned-entity exemption would maintain the Commission's historical presumption threshold of 10 percent ownership or equity interest and make that presumption rebuttable only where several conditions indicative of independence are met. This proposed exemption focuses on the conditions that impact trading independence. In addition, by providing an avenue

to apply for relief when ownership is greater than 50 percent of the owned entity, the proposed rules would allow market participants greater flexibility in meeting the requirements of the position limits regulations, provided they are eligible to apply. The Commission believes that these proposed exemptions would allow the Commission to direct its resources to monitoring those entities that pose a higher risk of coordinated trading and thus a higher risk of circumventing position limits, without reducing the protection of market participants and the public that the Commission's aggregation policy affords.

The Commission believes the proposed exemptions would reduce costs for market participants without compromising the integrity or effectiveness of the Commission's aggregation policy.

b. Efficiency, Competition, and Financial Integrity of Markets

As discussed above, the Commission does not believe that the proposed regulations would negatively impact market quality indicators, such as liquidity or incentive for investment, to the detriment of the efficiency, competitiveness, or integrity of derivatives markets. Rather, the Commission believes that these proposed regulations would balance appropriately the need to preserve account aggregation as a tool to uphold the integrity of the part 151 position limit regime, while also providing for relief from the aggregation requirements where they are not necessary to prevent coordinated speculative trading. The Commission expects the proposed rules to further the Commission's mission to deter and prevent manipulative behavior while maintaining sufficient liquidity for hedging activity and protecting the price discovery process. Prior rules required aggregation at a 10 percent ownership level, so these regulations, which propose relief

from aggregation at higher ownership levels, should lower the overall impact of aggregation on market quality factors without imposing unnecessary or inappropriate restrictions on trading.

c. Price Discovery

Similarly, because the Commission has structured the exemptions in these proposed regulations to maintain the effectiveness of the position limits regime in part 150, the Commission believes that these rules would not impact the price discovery process, which the position limit regime (including the account aggregation provisions in regulation 150.4) is designed to protect. Because the exemptions in and of themselves do not directly impact the formation of prices – only the aggregation of positions – the rules would not impact the price discovery process.

d. Risk Management

The Commission has stated previously that the imposition of position limits requires market participants to ensure they do not amass positions of sufficient size to disrupt the orderly flow of the market or to influence unduly the formation of prices. In so doing, market participants protect themselves – and the market as a whole – from the disruption that such large positions could cause, when traded improperly.[189] The proposed rules would allow entities to not aggregate positions in circumstances where the Commission has determined that the positions are at a lesser risk of disrupting the market through the coordinated trading of affiliated entities. Thus, the Commission believes these rules, if adopted, would not lessen the effectiveness of the sound risk management practices that the position limits regime promotes. The Commission does not expect the

[189] 76 FR 71626 at 71675.

proposed regulations to materially inhibit the use of derivatives for hedging, because hedge exemptions are available to any entity regardless of position aggregation and the proposed regulations would be more permissive than the 10 percent threshold for aggregation that applied in existing regulation 150.4.

e. Other Public Interest Considerations

The Commission has not identified any other public interest considerations related to the costs and benefits of the rules.

<HD2>

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[190] A regulatory flexibility analysis or certification typically is required for "any rule for which the agency publishes a general notice of proposed rulemaking pursuant to" the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[191] The requirements related to the proposed amendments fall mainly on registered entities, exchanges, FCMs, swap dealers, clearing members, foreign brokers, and large traders. The Commission has previously determined that registered DCMs, FCMs, swap dealers, major swap participants, eligible contract participants, SEFs, clearing members, foreign brokers and large traders are not small entities for purposes of the RFA.[192] While the

[190] 44 U.S.C. 601 et seq.
[191] 5 U.S.C. 601(2), 603–05.
[192] See Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619, Apr. 30, 1982 (DCMs, FCMs, and large traders) ("RFA Small Entities Definitions"); Opting Out of Segregation, 66 FR 20740, 20743, Apr. 25,

requirements under the proposed rulemaking may impact non-financial end users, the Commission notes that position limits levels apply only to large traders. Accordingly, the Chairman, on behalf of the Commission, hereby certifies, on behalf of the Commission, pursuant to 5 U.S.C. 605(b), that the actions proposed to be taken herein would not have a significant economic impact on a substantial number of small entities. The Chairman made the same certification in the Proposal,[193] and the Commission did not receive any comments on the RFA in relation to the proposed rulemaking.

<HD2>

C. Paperwork Reduction Act

<HD3>

1. Overview

The Paperwork Reduction Act ("PRA") imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget ("OMB"). Certain provisions of the proposed regulations would result in amendments to a previously-approved collection of information requirements within the meaning of the PRA. Therefore, the Commission is submitting to OMB for review in accordance with 44

2001 (eligible contract participants); Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626, 71680, Nov. 18, 2011 (clearing members); Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548, June 4, 2013 (SEFs); A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, Aug. 29, 2001 (DCOs); Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, Jan. 19, 2012, (swap dealers and major swap participants); and Special Calls, 72 FR 50209, Aug. 31, 2007 (foreign brokers).

[193] See 77 FR 31780.

U.S.C. 3507(d) and 5 CFR 1320.11 the information collection requirements proposed in this rulemaking proposal as an amendment to the previously-approved collection associated with OMB control number 3038-0013.

If adopted, responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, headed "Commission Records and Information." In addition, the Commission emphasizes that section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974. In January of 2012, the Commission received a petition requesting relief under section 4a(a)(7) of the CEA and clarification of certain aggregation requirements in regulation 151.7.

On May 30, 2012, the Commission published in the Federal Register a notice of proposed modifications to part 151 of the Commission's regulations. The modifications addressed the policy for aggregation under the Commission's position limits regime for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. In an Order dated September 28, 2012, the District Court for the District of Columbia vacated part 151 of the Commission's regulations. The Commission is now proposing modifications to the aggregation provisions of part 150 of the Commission's regulations that are substantially similar to the aggregation modifications proposed to part 151, except that the

modifications address the policy for aggregation under the Commission's position limits regime for futures and option contracts on nine agricultural commodities set forth in part 150.

The Commission is also proposing to amend other sections of part 150 in a separate rulemaking that would, among other things: expand the number of contract markets subject to federal position limits; impose speculative limits on swaps contracts; and require exchanges to conform their aggregation policies to the Commission's aggregation policy in part 150.4.[194] Given the increase in scope proposed in the other rulemaking, the Commission anticipates a corresponding increase in the PRA burdens arising from this proposal should the amendments to other sections of part 150 be adopted. Unless and until that rulemaking is finalized, however, the instant proposal applies only to the nine commodities enumerated in current §150.2. The Commission requests comment regarding the impact on its PRA analysis should the amendments to part 150 proposed in the separate rulemaking be adopted.

Specifically, regulation 150.4(b)(2) proposes an exemption for a person to disaggregate the positions of a separately organized entity ("owned entity"). To claim the exemption, a person would need to meet certain criteria and file a notice with the Commission in accordance with regulation 150.4(c). The notice filing would need to demonstrate compliance with certain conditions set forth in regulations 150.4(b)(2)(i)(A)-(E). Similar to other exemptions from aggregation, the notice filing would be effective upon submission to the Commission, but the Commission may call for additional information as well as reject, modify or otherwise condition such relief. Further, such

[194] See Position Limits for Derivatives (November 5, 2013).

person is obligated to amend the notice filing in the event of a material change to the filing.

The proposed rules also contain proposed regulation 150.4(b)(3) which establishes a similar but separate owned-entity exemption with more intensive qualifications for exemption. To claim the exemption, a person would need to meet certain criteria above and beyond that imposed by regulation 150.4(b)(2) and file an application for exemption with the Commission in accordance with regulation 150.4(c). The notice filing would need to demonstrate compliance with certain conditions as well as additional information that could inform the Commission's decision to grant or not to grant the person's application. Similar to other exemptions from aggregation, the notice filing would be effective upon submission to the Commission, but the Commission may call for additional information as well as reject, modify or otherwise condition such relief. Further, such person is obligated to amend the notice filing in the event of a material change to the filing.

The Commission is also proposing to amend the definitions of eligible entity and independent account controller in part 150.1 and 150.4(5) to specifically provide for regulation 4.13 commodity pools established as limited liability companies. In addition, the Commission is proposing to amend the definition of independent account controller to specifically provide for commodity pool operators that operate excluded pools as defined under regulation 4.5(a)(4) of the Commission's regulations. These amendments would likely expand the number of entities that can file for the independent account controller aggregation exemption.

The proposal includes two provisions in proposed regulations 150.4(b)(6) and 150.4(b)(7) providing exemptions from aggregation for underwriting agents and broker-dealers engaging in market making activity, respectively. Both exemptions are self-executing and do not require a notice filing.

The proposal also includes proposed regulation 150.4(b)(8) which provides an exemption from aggregation where the sharing of information between persons would cause either person to violate federal law. The exemption would apply to a situation where the sharing of information creates a reasonable risk of a violation of federal, state, or foreign law or regulations adopted thereunder The rules also propose a requirement that market participants file a notice demonstrating compliance with the condition, including an internal memorandum of counsel. The memorandum allows Commission staff to review the legal basis for the asserted regulatory impediment to the sharing of information, and is particularly helpful where the asserted impediment arises from laws and/or regulations that the Commission does not directly administer. Further, Commission staff will have the ability to consult with other federal regulators as to the accuracy of the opinion, and to coordinate the development of rules surrounding information sharing and aggregation across accounts in the future.

Finally, the proposed rules propose relief from notice filings for “higher-tier” entities, which, under proposed regulation 150.4(b)(9), may rely on the filings submitted by owned entities. A “higher-tier” entity need not submit a separate notice pursuant to the notice filing requirements to rely upon the notice filed by an owned entity as long as it complies with conditions of the applicable aggregation exemption.

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2. Methodology and Assumptions

It is not possible at this time to precisely determine the number of respondents affected by the proposed rules. Many of the regulations that impose PRA burdens are exemptions that a market participant may elect to take advantage of, meaning that without intimate knowledge of the day-to-day business decisions of all its market participants, the Commission could not know which participants, or how many, may elect to obtain such an exemption. Further, the Commission is unsure of how many participants not currently in the market may be required to or may elect to incur the estimated burdens in the future.

These limitations notwithstanding, the Commission has made best-effort estimations regarding the likely number of affected entities for the purposes of calculating burdens under the PRA. The Commission used its proprietary data, collected from market participants, to estimate the number of respondents for each of the proposed obligations subject to the PRA by estimating the number of respondents who may be close to a position limit and thus may file for relief from aggregation requirements.

The Commission's estimates concerning wage rates are based on 2011 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association ("SIFMA"). The Commission is using a figure of $120 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2011, modified to account for an 1800-hour work-year, adjusted to account for the average rate of inflation in 2012. This figure was then multiplied by 1.33 to account for

benefits[195] and further by 1.5 to account for overhead and administrative expenses.[196] The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their relative weight); "programmer (average of senior and non-senior)" (15% weight), "senior accountant" (15%) "compliance manager" (30%), and "assistant/associate general counsel" (40%). All monetary estimates have been rounded to the nearest hundred dollars.

The Commission welcomes comment on its assumptions and estimates.

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3. Reporting Burdens

Proposed regulation 150.4(b)(2) would require qualified persons to file a notice in order to claim exemptive relief from aggregation. Further, proposed regulation 150.4(b)(2)(ii) states that the notice is to be filed in accordance with proposed regulation 150.4(c), which requires a description of the relevant circumstances that warrant disaggregation and a statement that certifies that the conditions set forth in the exemptive provision have been met. Regulation 150.4(b)(3) specifies that qualified persons may

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[195] The Bureau of Labor Statistics reports that an average of 32.8% of all compensation in the financial services industry is related to benefits. This figure may be obtained on the Bureau of Labor Statistics website, at http://www.bls.gov/news.release/ecec.t06.htm. The Commission rounded this number to 33% to use in its calculations.

[196] Other estimates of this figure have varied dramatically depending on the categorization of the expense and the type of industry classification used (see, e.g., BizStats at http://www.bizstats.com/corporation-industry-financials/finance-insurance-52/securities-commodity-contracts-other-financial-investments-523/commodity-contracts-dealing-and-brokerage-523135/show and Damodaran Online at http://pages.stern.nyu.edu/~adamodar/pc/datasets/uValuedata.xls. The Commission has chosen to use a figure of 50% for overhead and administrative expenses to attempt to conservatively estimate the average for the industry.

request an exemption from aggregation in accordance with proposed regulation 150.4(c). Such a request would be required to include a description of the relevant circumstances that warrant disaggregation and a statement certifying the conditions have been met. Persons claiming these exemptions would be required to submit to the Commission, as requested, such information as relates to the claim for exemption. An updated or amended notice must be filed with the Commission upon any material change.

The release also proposes to extend relief available under 150.4(b)(5) to additional entities; the Commission expects that, as a result of the expanded exemptive relief available to these entities, a greater number of persons will file exemptive notices under 150.4(b)(5). The Commission also expects entities to file for relief under proposed regulation 150.4(b)(8), which allows for entities to file a notice, including a memorandum of law, in order to claim the exemption.

Given the expansion of the exemptions that market participants may claim, the Commission anticipates an increase in the number of notice filings. However, because of the relief for "higher-tier" entities under regulation 150.4(b)(9) the Commission expects that increase to be offset partially by a reduction in the number of filings by "higher-tier" entities. Thus, the Commission anticipates a net increase in the number of filings under regulation 150.4 as a result of the adoption of these proposed rules. The Commission believes that this increase will create an increase in the annual labor burden. However, because entities have already incurred the capital, start-up, operating, and maintenance costs to file other exemptive notices—such as those currently allowed for independent account controllers and futures commission merchants under regulation 150.4—the Commission does not anticipate an increase in those costs.

The Commission estimates that 100 entities will each file two notices annually under proposed regulation 150.4(b)(2), at an average of 20 hours per filing. Thus, the Commission approximates a total per entity burden of 40 labor hours annually. At an estimated labor cost of $120, the Commission estimates a cost of approximately $4,800 per entity for filings under proposed regulation 150.4(b)(2).

The Commission estimates that 25 entities will each file one notice annually under proposed regulation 150.4(b)(3), at an average of 30 hours per filing. Thus, the Commission approximates a total per entity burden of 30 labor hours annually. At an estimated labor cost of $120, the Commission estimates a cost of approximately $3,600 per entity for filings under proposed regulation 150.4(b)(3).

The Commission estimates that 75 entities will each file one notice annually under proposed regulation 150.4(b)(5), at an average of 10 hours per filing. Thus, the Commission approximates a total per entity burden of 10 labor hours annually. At an estimated labor cost of $120, the Commission estimates a cost of approximately $1,200 per entity for filings under proposed regulation 150.4(b)(5).

The Commission estimates that 40 entities will each file one notice annually under proposed regulation 150.4(b)(8), including the requisite memorandum of law, at an average of 40 hours per filing. Thus, the Commission approximates a total per entity burden of 40 labor hours annually. At an estimated labor cost of $120,[197] the Commission estimates a cost of approximately $4,800 per entity for filings under proposed regulation 150.4(b)(8).

[197] See above, text accompanying note 196.

In sum, the Commission estimates that 240 entities will submit a total of 340 responses per year and incur a total burden of 7,100 labor hours at a cost of approximately $852,000 annually in order to claim exemptive relief under regulation 150.4.

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4. Comments on Information Collection

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

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

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

As noted above, the following proposed amendments to part 150 may require conforming technical changes if the Commission also adopts any proposed amendments to its regulations regarding position limits. [198]

<LSTSUB><HED>List of Subjects in 17 CFR Part 150

Position limits, Bona fide hedging, Referenced contracts.</LSTSUB>

For the reasons discussed in the preamble, the Commission proposes to amend 17 CFR part 150 as follows:

<PART><HED>PART 150 – LIMITS ON POSITIONS

1. The authority citation for part 150 is revised to read as follows:

<AUTH><HED>Authority:<P> 7 U.S.C. 6a, 6c, and 12a(5), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

2. Amend §150.1 to revise paragraphs (d), (e)(2), and (e)(5) to read as follows:

§150.1 Definitions.

* * * * *

(d) Eligible entity means a commodity pool operator; the operator of a trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term "pool" or "commodity pool operator," respectively, under §4.5 of this chapter; the limited partner, limited member or shareholder in a commodity pool the

[198] See Position Limits for Derivatives (November 5, 2013).

operator of which is exempt from registration under § 4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:

(1) Which authorizes an independent account controller independently to control all trading decisions with respect to the eligible entity's client positions and accounts that the independent account controller holds directly or indirectly, or on the eligible entity's behalf, but without the eligible entity's day-to-day direction; and

(2) Which maintains:

(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities to the managed positions and accounts, and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or

(ii) If a limited partner, limited member or shareholder of a commodity pool the operator of which is exempt from registration under §4.13 of this chapter, only such limited control as is consistent with its status.

(e) * * *

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities to the managed positions and accounts to fulfill its duty to supervise diligently the trading done on its behalf or as consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

* * * * *

(5) Who is:

(i) Registered as a futures commission merchant, an introducing broker, a commodity trading advisor, 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 § 4.5(a)(4) of this chapter or § 4.13 of this chapter, provided that such general partner, managing member or manager complies with the requirements of § 150.4(c).

* * * * *

§150.3 [Amended]

3. Amend §150.3 as follows:

a. Remove the semicolon and the word "or" at the end of paragraph (a)(3);

b. Add a period at the end of paragraph (a)(3); and

c. Remove paragraph (a)(4).

4. Revise §150.4 to read as follows:

§150.4 Aggregation of positions.

(a) Positions to be aggregated—(1) Trading control or 10 percent or greater ownership or equity interest. 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 percent or greater ownership or equity interest must be aggregated with the positions held and trading done by such person. For the purpose of determining the positions in accounts for which any person controls trading or holds a 10 percent or greater ownership or equity interest, positions or ownership or equity interests held by, and trading done or controlled by, two or more persons acting

pursuant to an expressed or implied agreement or understanding shall be treated the same as if the positions or ownership or equity interests were held by, or the trading were done or controlled by, a single person.

(2) Substantially identical trading. Notwithstanding the provisions of paragraph (b) of this section, for the purpose of applying the position limits set forth in §150.2, any person that, by power of attorney or otherwise, holds or controls the trading of positions in more than one account or pool with substantially identical trading strategies, must aggregate all such positions.

(b) Exemptions from aggregation. For the purpose of applying the position limits set forth in §150.2, and notwithstanding the provisions of paragraph (a)(1) of this section, but subject to the provisions of paragraph (a)(2) of this section, the aggregation requirements of this section shall not apply in the circumstances set forth in this paragraph (b).

(1) Exemption for ownership by limited partners, shareholders or other pool participants. Any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest in a pooled account or positions need not aggregate the accounts or positions of the pool with any other accounts or positions such person is required to aggregate, except that such person must aggregate the pooled account or positions with all other accounts or positions owned or controlled by such person if such person:

(i) Is the commodity pool operator of the pooled account;

(ii) Is a principal or affiliate of the operator of the pooled account, unless:

(A) The pool operator has, and enforces, written procedures to preclude the person from having knowledge of, gaining access to, or receiving data about the trading or positions of the pool;

(B) The person does not have direct, day-to-day supervisory authority or control over the pool's trading decisions;

(C) The person, if a principal of the operator of the pooled account, maintains only such minimum control over the commodity pool operator as is consistent with its responsibilities as a principal and necessary to fulfill its duty to supervise the trading activities of the commodity pool; and

(D) The pool operator has complied with the requirements of paragraph (c) of this section on behalf of the person or class of persons; or

(iii) Has, by power of attorney or otherwise directly or indirectly, a 25 percent or greater ownership or equity interest in a commodity pool, the operator of which is exempt from registration under § 4.13 of this chapter.

(2) Exemption for certain ownership of greater than 10 percent in an owned entity. Any person with an ownership or equity interest in an owned entity of 10 percent or greater but not more than 50 percent (other than an interest in a pooled account subject to paragraph (b)(1) of this section), need not aggregate the accounts or positions of the owned entity with any other accounts or positions such person is required to aggregate, provided that:

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

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

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

(C) Have and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities;

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

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

(ii) Such person complies with the requirements of paragraph (c) of this section.

(3) Exemption for certain ownership of greater than 50 percent in an owned entity. Any person with a greater than 50 percent ownership or equity interest in an owned entity (other than an interest in a pooled account subject to paragraph (b)(1) of this section), need not aggregate the accounts or positions of the owned entity with any other accounts or positions such person is required to aggregate, provided that:

(i) Such person certifies to the Commission that the owned entity is not required under U.S. generally accepted accounting principles to be, and is not, consolidated on the financial statement of such person;

(ii) Such person, including any entity that such person must aggregate, and the owned entity meet the requirements of paragraphs (b)(2)(i)(A) through (E) of this section and such person demonstrates to the Commission that procedures are in place that are reasonably effective to prevent coordinated trading decisions by such person, any entity that such person must aggregate, and the owned entity;

(iii) Each representative (if any) of the person on the owned entity's board of directors (or equivalent governance body) certifies that he or she does not control the trading decisions of the owned entity;

(iv) Such person certifies to the Commission that either all of the owned entity's positions qualify as bona fide hedging transactions or the owned entity's positions that do not so qualify do not exceed 20 percent of any position limit currently in effect, and agrees with the Commission that:

(A) If such certification becomes untrue for any owned entity of the person, such person will aggregate the accounts or positions of the owned entity with any other accounts or positions such person is required to aggregate; however, after a period of three complete calendar months in which such person aggregates such accounts or positions and all of the owned entity's positions qualify as bona fide hedging transactions, such person may make such certification again and be permitted to cease such aggregation;

(B) Any owned entity of the person shall, upon call by the Commission at any time, make a filing responsive to the call, reflecting only such owned entity's positions and transactions, and not reflecting the inventory of the person or any other accounts or positions such person is required to aggregate (this requirement shall apply regardless of whether the owned entity or the person is subject to §18.05 of this chapter); and

(C) Such person shall inform the Commission, and provide to the Commission any information that the Commission may request, if any owned entity engages in coordinated activity regarding the trading of such owned entity, such person, or any other accounts or positions such person is required to aggregate, even if such coordinated

activity does not conflict with any of the requirements of paragraphs (b)(2)(i)(A) to (b)(2)(i)(E) of this section;

(v) The Commission finds, in its discretion, that such person has satisfied the conditions of this paragraph (b)(3);

(vi) Such person, when first requesting disaggregation relief under this paragraph, complies with the requirements of paragraph (c)(2) of this section; and

(vii) Such person complies with the requirements of paragraph (c)(1) of this section if, subsequent to a Commission finding that the person has satisfied the conditions of this paragraph (b)(3), there is a material change to the information provided to the Commission in the person's original filing under paragraph (c)(2) of this section.

(4) Exemption for accounts held by futures commission merchants. A futures commission merchant or any affiliate of a futures commission merchant need not aggregate positions it holds in a discretionary account, or in an account which is part of, or participates in, or receives trading advice from a customer trading program of a futures commission merchant or any of the officers, partners, or employees of such futures commission merchant or of its affiliates, if:

(i) A person other than the futures commission merchant or the affiliate directs trading in such an account;

(ii) The futures commission merchant or the affiliate maintains only such minimum control over the trading in such an account as is necessary to fulfill its duty to supervise diligently trading in the account;

(iii) Each trading decision of the discretionary account or the customer trading program is determined independently of all trading decisions in other accounts which the

futures commission merchant or the affiliate holds, has a financial interest of 10 percent or more in, or controls; and

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

(5) Exemption for accounts carried by an independent account controller. An eligible entity need not aggregate its positions with the eligible entity's client positions or accounts carried by an authorized independent account controller, as defined in §150.1(e), except for the spot month in physical-delivery commodity contracts, provided that the eligible entity has complied with the requirements of paragraph (c) of this section, and that the overall positions held or controlled by such independent account controller may not exceed the limits specified in §150.2.

(i) Additional requirements for exemption of affiliated entities. If the independent account controller is affiliated with the eligible entity or another independent account controller, each of the affiliated entities must:

(A) Have, and enforce, written procedures to preclude the affiliated entities from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities; provided, however, that such procedures may provide for the disclosure of information which is reasonably necessary for an eligible entity to maintain the level of control consistent with its fiduciary responsibilities to the managed positions and accounts and necessary to fulfill its duty to supervise diligently the trading done on its behalf;

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

(C) Market such trading systems separately; and

(D) Solicit funds for such trading by separate disclosure documents that meet the standards of § 4.24 or § 4.34 of this chapter, as applicable, where such disclosure documents are required under part 4 of this chapter.

(6) Exemption for underwriting. A person need not aggregate the positions or accounts of an owned entity if the ownership or equity interest is based on the ownership of securities constituting the whole or a part of an unsold allotment to or subscription by such person as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(7) Exemption for broker-dealer activity. A broker-dealer registered with the Securities and Exchange Commission, or similarly registered with a foreign regulatory authority, need not aggregate the positions or accounts of an owned entity if such broker-dealer does not have greater than a 50 percent ownership or equity interest in the owned entity and the ownership or equity interest is based on the ownership of securities acquired in the normal course of business as a dealer, provided that such person does not have actual knowledge of the trading decisions of the owned entity.

(8) Exemption for information sharing restriction. A person need not aggregate the positions or accounts of an owned entity if the sharing of information associated with such aggregation (such as, only by way of example, information reflecting the transactions and positions of a such person and the owned entity) creates a reasonable risk that either person could violate state or federal law or the law of a foreign

jurisdiction, or regulations adopted thereunder, provided that such person does not have actual knowledge of information associated with such aggregation, and provided further that such person has filed a prior notice pursuant to paragraph (c) of this section and included with such notice a written memorandum of law explaining in detail the basis for the conclusion that the sharing of information creates a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder. However, the exemption in this paragraph shall not apply where the law or regulation serves as a means to evade the aggregation of accounts or positions. All documents submitted pursuant to this paragraph shall be in English, or if not, accompanied by an official English translation.

(9) Exemption for higher-tier entities. If an owned entity has filed a notice under paragraph (c) of this section, any person with an ownership or equity interest of 10 percent or greater in the owned entity need not file a separate notice identifying the same positions and accounts previously identified in the notice filing of the owned entity, provided that:

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

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

(iii) Upon call by the Commission, any person relying on the exemption in this paragraph (b)(9) shall provide to the Commission such information concerning the person's claim for exemption. Upon notice and opportunity for the affected person to

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

(c) Notice filing for exemption. (1) Persons seeking an aggregation exemption under paragraph (b)(1)(ii), (b)(2), (b)(3)(vii), (b)(4), (b)(5), or (b)(8) of this section shall file a notice with the Commission, which shall be effective upon submission of the notice, and shall include:

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

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

(2) Persons with a greater than 50 percent ownership or equity interest in an owned entity seeking an aggregation exemption under paragraph (b)(3)(vi) of this section shall file a request with the Commission, which shall not become effective unless and until the Commission finds, in its discretion, that such person has satisfied the conditions of paragraph (b)(3) of this section, and shall include:

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

(ii) A statement of a senior officer of the entity certifying that the conditions set forth in paragraph (b)(3) of this section have been met;

(iii) A demonstration that procedures are in place that are reasonably effective to prevent coordinated trading decisions by such person, any entity that such person must aggregate, and the owned entity; and

(iv) All certifications required under paragraph (b)(3) of this section.

(3) Upon call by the Commission, any person claiming an aggregation exemption under this section shall provide such information demonstrating that the person meets the

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

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

(5) Any notice filed under this paragraph (c) shall be submitted in the form and manner provided for in paragraph (d) of this section.

(d) Form and manner of reporting and submitting information or filings. Unless otherwise instructed by the Commission or its designees, any person submitting reports under this section shall submit the corresponding required filings and any other information required under this part to the Commission using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission. Unless otherwise provided in this section, the notice shall be effective upon filing. When the reporting entity discovers errors or omissions to past reports, the entity shall so notify the Commission and file corrected information in a form and manner and at a time as may be instructed by the Commission or its designee.

(e) Delegation of authority to the Director of the Division of Market Oversight. (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (b)(3) of this section:

(A) To determine, after consultation with the General Counsel or such other employee or employees as the General Counsel may designate from time to time, if a person has satisfied the conditions of paragraph (b)(3) of this section; and

(B) To call for additional information from a person claiming the exemption in paragraph (b)(3) of this section, reflecting such owned entity's positions and transactions (regardless of whether the owned entity or the person is subject to §18.05 of this chapter).

(ii) In paragraph (b)(9)(iii) of this section to call for additional information from a person claiming the exemption in paragraph (b)(9)(i) of this section.

(iii) In paragraph (d) of this section for providing instructions or determining the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

<SIG><DATED>Issued in Washington, DC, on November 8, 2013, by the Commission.

<NAME>Christopher J. Kirkpatrick,

<TITLE>Deputy Secretary of the Commission.</SIG>

<HD1>Appendices to Aggregation of Positions – Commission Voting Summary and Statement of Chairman

<NOTE><HED>Note:<P> The following appendices will not appear in the Code of Federal Regulations.</EDNOTE>

<HD1>Appendix 1 – Commission Voting Summary<EXTRACT>

On this matter, Chairman Gensler and Commissioners Chilton, O'Malia, and Wetjen voted in the affirmative; no Commissioner voted in the negative.</EXTRACT>

<HD1>Appendix 2 – Statement of Chairman Gary Gensler<EXTRACT>

I support the proposed rule that would modify the CFTC's aggregation provisions for limits on speculative positions.

As we move forward on position limits for futures and swaps, it is important to concurrently implement reforms to the Commission's current regulations regarding which positions are totaled up as being owned or controlled by a particular entity. These total, aggregated positions under common control are then subject to the speculative position limits, taking into consideration any relevant exemptions.

We live in a time when companies often have numerous affiliated entities, sometimes measured in the hundreds or thousands. Thus, it is appropriate to look at how speculative position limits apply across the enterprise. When Lehman Brothers failed, it had 3,300 legal entities within its corporate family. The question is – do you count all those 3,300 legal entities that Lehman Brothers once controlled, or do you apply a limit for each and every one of the 3,300? If we chose the second, that would be, in practice, a loophole around congressional intent. That's why this issue of aggregation comes into play.

The proposal generally provides for aggregation when various entities are under common control. For instance, if the ownership interest is greater than 50 percent, it will be presumed to be aggregated and part of the group.

The proposal provides for certain exemptions from aggregation for the following reasons:

- Where sharing of information would violate or create reasonable risk of violating a federal, state or foreign jurisdiction law or regulation;
- Where an ownership interest is less than 50 percent and trading is independently controlled;
- Where an ownership interest is greater than 50 percent in a non-consolidated entity whose trading is independently controlled, and an applicant certifies that such entity's positions either qualify as bona fide hedging positions or do not exceed 20 percent of any position limit; or
- Where ownership of less than 50 percent results from broker-dealer activities in the normal course of business.</EXTRACT>

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