MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

June 28, 2012

Via Electronic Mail: http://comments.cftc.gov

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

Re: RIN 3038-AD82: Aggregation of Position Limits for Futures and Swaps

Dear Mr. Stawick:

Managed Funds Association[1] ("MFA") appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (the "Commission" or "CFTC") on its notice of proposed rulemaking to modify the Commission's aggregation requirements under its position limits rules[2] (the "Aggregation Proposal").[3] MFA generally supports the disaggregation relief for "owned entities" (*i.e.*, an entity owned by another person) provided in the Aggregation Proposal. MFA believes, however, that the Aggregation Proposal should be clarified to permit disaggregation in instances of commonly owned entities that share certain employees who do not control trading decisions, even if such employees have knowledge of trading decisions. MFA also believes that Commission staff should be provided with the authority to permit disaggregation on a case-by-case basis where passive ownership in the owned entity exceeds the 50 percent ownership threshold established by the Aggregation Proposal. We provide a few comments and recommendations in this respect, which we believe are consistent with the Commission's objectives in the Aggregation Proposal.

[1] The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and all other regions where MFA members are market participants.

[2] See 17 CFR Part 151.

[3] Aggregation, Position Limits for Futures and Swaps, Notice of Proposed Rulemaking, 77 Fed. Reg. 31767 (May 30, 2012).

I. The Aggregation Proposal

The Aggregation Proposal addresses the section of the Commission's position limit rules that determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.[4] The Aggregation Proposal proposes to:

- adopt the following bright-line tests for the aggregation of a person's accounts and positions with the accounts and positions of any entities that are owned by such person (*i.e.*, the "owned entity"):
    - ownership in the owned entity of under 10 percent would not require aggregation absent common control;
    - ownership in the owned entity of over 50 percent would require aggregation; and
    - ownership in the owned entity from 10 percent up to and including 50 percent would not require aggregation if the person (*i.e.*, the owner of the owned entity) files with the Commission a certification demonstrating that it 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;
- allow "higher-tier entities" that have an ownership interest in a person filing a certification for disaggregation relief with the Commission to rely on such certification, provided that the higher-tier entity complies with the applicable conditions of disaggregation relief;
- expand and clarify the exemption from aggregation for those entities for whom sharing information to comply with position limits would violate certain laws;
- expand the exemption for the underwriting of securities to include ownership interests acquired through the market-making activities of an affiliated broker-dealer; and
- expand the definition of independent account controller under CFTC Rule 151.1 to include the managing member of a limited liability company.

[4] *See* 17 CFR 151.7.

II. Comments to Disaggregation Relief for Owned Entities

A. MFA Supports the Disaggregation Relief for Owned Entities

MFA believes that the disaggregation relief in the Aggregation Proposal strikes an appropriate balance between ensuring that a person does not create a large speculative position through ownership interests in multiple accounts, and permitting the legitimate trading activity of commonly owned and independently operated entities. MFA supports the amendments in the Aggregation Proposal that provide disaggregation relief to owned entities. MFA agrees with the Commission that ownership interests of less than 10 percent do not warrant aggregation and should not be subject to a notice filing. Likewise, MFA does not object to the proposed requirement of a notice filing to permit disaggregation when passive ownership is between 10 percent and 50 percent. As discussed below, however, MFA believes that ownership of greater than 50 percent should not presumptively constitute control in all circumstances, and that there should be a process for Commission staff to have the ability to grant disaggregation relief when passive ownership is greater than 50 percent, subject to demonstration by the commonly owned entities of the absence of de facto common trading control.

MFA supports the Commission's application of the proposed owned entity exemption to both financial and non-financial entities that have passive ownership interests. MFA believes that asset managers and corporate enterprises should be free to allocate capital efficiently across all types of business lines (including speculative trading ventures and commercial enterprises - both financial and non-financial) and independent managers without fear that this independent trading will be subject to aggregated position limits, possibly affecting their ability to participate in a given market.[5]

The Aggregation Proposal would permit the parent company of an entity relying on the owned entity exemption to rely on the exemption as well, without having to separately make a notice filing. The parent company, however, would need to comply with the other conditions of the exemption. MFA supports this proposed filing relief for "higher-tier" entities, which would eliminate filing redundancies by entities within the corporate structure. MFA does not believe that the proposed filing relief would affect the Commission's ability to see how exemptions are applied in the market because it retains the right to require the higher-tier entity to provide information regarding their claim for exemption.[6]

B. MFA Recommendations

1. Sharing of Personnel and Departmental Functions.

Two proposed conditions for disaggregation relief are that the commonly owned entities do not have knowledge of the trading decisions of the other and do not share employees that

[5] See Letter from Richard H. Baker, President and CEO, Managed Funds Association, to David A. Stawick, Secretary, Commodity Futures Trading Commission (March 28, 2011) available at: http://www.managedfunds.org/wp-content/uploads/2011/06/3.28.11-MFA_Position_Limits_final.3.28.pdf

[6] Aggregation Proposal, Rule 151.7(j)(3).

control the trading decisions of either entity.[7] In the Aggregation Proposal, the Commission requests comment on whether the sharing of attorneys, accountants, risk managers, compliance and other mid- and back-office personnel compromises the independence of trading because it would provide each entity with knowledge of the other's trading decisions.[8]

MFA believes that "knowledge" by either the owner entity or the owned entity should be attributed only if the individuals *that control the trading decisions* of the entity have information about the positions of the other. The positions of the two entities should not be aggregated simply because there are non-trading personnel that may have access to information about the positions of both entities through the performance of their regular responsibilities, provided that such individuals have no control over the trading decisions of either entity, and the entities have policies and procedures reasonably designed to prevent the disclosure of this information to individuals that have control over trading decisions.

MFA believes that the list of individuals who can attribute "knowledge" to an entity should not include any individual in any department who does not control the trading decisions of the entity. This would include attorneys, accountants, compliance and other mid- and back-office personnel that may provide services to both entities. This also may include employees who are involved in risk management of both entities, but who do not control the trading decisions of the entities. On the other hand, if the risk management personnel have the authority to influence the trading decisions of an entity, those individuals should not be permitted to be shared between entities that wish to disaggregate their trading positions. MFA also believes that knowledge should not be attributed to an entity if a board director or member of an advisory committee or advisory board of the owned entity is an employee of the owner who is not involved in the day-to-day trading decisions of the owned entity and who does not have real time information regarding the positions or trades of the owned entity that would permit the director or advisory committee member to influence trading decisions of the owner or owned entity. Similarly, the mere sharing of research personnel between the owner and the owned entity should not constitute knowledge on behalf of either entity. Sharing research as to market fundamentals, or technical indicators, does not itself constitute a trading decision or the exercise of trading control.[9] Research is simply one input into trading decisions that may be considered, among many others, by the recipient of the research. There should be no aggregation when the research personnel does not have control of the trading decisions of either entity, is not making trading recommendations for one entity based on its knowledge of the positions of the other entity, and the trading programs of the related entities have been independently developed and are implemented independently. The sharing of non-trading personnel between commonly owned entities would allow for continued operating efficiency and administrative convenience, and does not create a substantial risk that the entities together will knowingly create a large speculative position through their common ownership interest.

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[7] Aggregation Proposal, Rule 151.7(b)(1)(i)(A) and (D).

[8] Aggregation Proposal, at 31774.

[9] By analogy, the purchase of the same third-party research by the owner and the owned entity would not result in trading control by the third-party research provider.

2. CFTC Staff Approval of Disaggregation Relief for Ownership of Greater than 50 Percent.

While a bright-line test where passive ownership is greater than 50 percent provides certainty to market participants and the Commission, MFA does not agree that ownership of greater than 50 percent necessarily constitutes control in all circumstances. There may be instances where passive ownership is greater than 50 percent and disaggregation is warranted based on the particular facts and circumstances. If the Commission adopts a 50 percent bright-line test, MFA believes that the rules should permit a person to make a filing with the CFTC demonstrating compliance with the same criteria as required in the notice filing for disaggregation of 10 percent to 50 percent ownership (*i.e.*, no knowledge of trading decisions, separate and independent trading systems, procedures to prevent sharing of trading information, no shared employees that control trading decisions and a risk management system that does not allow sharing of trade information), but the filing would not become effective until it is reviewed and approved by Commission staff (rather than upon filing). MFA believes this strikes the appropriate balance between the rationale for the bright-line test in the Aggregation Proposal and Commissioner Sommer's concerns about the level at which this bright line is set.[10] This approach takes into account the varying needs of a very diverse group of market participants, while establishing a more flexible disaggregation approach that the Commission can effectively administer.

In an instance where passive ownership is greater than 50 percent, MFA acknowledges that there is a greater possibility for control of the entity that could require a careful analysis of the facts and circumstances before disaggregation is approved. MFA believes this is important to ensure that positions are not needlessly aggregated, perhaps at the expense of the entities' legitimate trading strategy. For example, if Holdco is a holding company that has a passive 51 percent investment in the publicly traded securities of each of Entity X, Entity Y and Entity Z, each of which are independently operated companies, Holdco should not be precluded from having the opportunity to demonstrate to CFTC staff its compliance with the requirements of passive ownership and not be required to aggregate the positions. In these instances, MFA believes that it would be appropriate for Commission staff to have the authority to review and approve an application for disaggregation relief where ownership in the owned entity exceeds 50 percent.

3. Clarification of Application of CFTC Rule 151.7.

MFA suggests that the Commission clarify a potential ambiguity in its rules regarding the application of the aggregation and exemptions from aggregation standards for federal position limits to the position limits established by a designated contract market ("DCM") or swap execution facility ("SEF"). While CFTC Rule 151.11(e) specifies that DCM/SEF position limits are subject to the aggregation standards of CFTC Rule 151.7, the aggregation standards in CFTC

[10] *See* Statement of Commissioner Jill E. Sommers, Aggregation Proposal, at 31783, ("I question whether a bright-line approach is the correct approach, and if it is, whether the line should be drawn at 50%. In the absence of knowledge of, and control over, trading of an owned entity, is there a real difference between owning 49 percent and owning 50%? I don't think there is.")

Rule 151.7 refer only to the aggregation and exemptions from aggregation for the federal position limits, without specifically providing for a parallel exemption from aggregation from DCM/SEF limits. For the sake of clarity and to provide consistent treatment of position limits established by the CFTC and trading facilities, MFA believes that aggregation standards in CFTC Rule 151.7 also should refer to the aggregation and exemptions from aggregation for the DCM/SEF position limits.

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We appreciate the opportunity to offer suggestions to the Aggregation Proposal. We would be happy to discuss our comments or any other issues raised in the Aggregation Proposal at greater length with the Commission or its staff. If the staff has any questions, please do not hesitate to call Jennifer Han or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & Managing Director,
General Counsel

Cc: The Hon. Gary Gensler, Chairman
The Hon. Bart Chilton, Commissioner
The Hon. Jill E. Sommers, Commissioner
The Hon. Scott D. O'Malia, Commissioner
The Hon. Mark P. Wetjen, Commissioner