AMERICAN BENEFITS COUNCIL

June 29, 2012

Mr. David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: RIN 3038–AD32 – Aggregation, Position Limits for Futures and Swaps, 77 Fed. Reg. 31,767 (May 30, 2012) ("Schedule A")

Dear Mr. Stawick:

The American Benefits Council (the "Council") appreciates this opportunity to provide comments to the Commodity Futures Trading Commission ("CFTC" or "Commission") regarding its proposal to amend the aggregation requirements in the position limit rule, codified in part 151 of the CFTC's rules, that the Commission adopted in November 2011 (the "Position Limit Rule").[1]

The Council is a public policy organization principally representing Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

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[1] The Position Limit Rule will impose speculative position limits on 28 core referenced futures contracts (and options thereon) in metal, energy and agricultural commodities, as well as certain economically equivalent swaps (collectively "Referenced Contracts"). *See* 17 C.F.R. part 151. Moreover, the Position Limit Rule calls for designated contract markets ("DCMs") and swap execution facilities ("SEFs") to impose position limits on all physical commodity and financial commodity derivatives contracts that are executed pursuant to DCM or SEF rules (with the option of using position accountability levels for certain contracts). *See* 17 C.F.R. § 151.11.

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We are pleased that the Commission decided to propose amendments to the aggregation requirements in the Position Limit Rule in response to commenters' concerns. *See* Schedule A at 31,768. We are concerned, however, that even as proposed to be amended the aggregation requirements could nonetheless be read to:

(i) require aggregation of the speculative positions of plan sponsors with the speculative positions of their ERISA plans ("plans") which are managed by plan sponsor employees and/or an affiliated plan manager, even though those plan managers are ERISA fiduciaries who are required to act solely in the best interest of the plan rather than the plan sponsor;

(ii) require a plan to aggregate the speculative positions of certain entities in which the plan invests solely as a result of an ERISA plan fiduciary, consistent with its duties under ERISA, making prudent inquiries of managers and officers regarding the entity's investments and trading strategies; and

(iii) continue to require ERISA plans and other investors to aggregate the speculative positions of certain funds whose use of commodity interests is limited to a *de minimis* amount, even though the plans and other investors would not face mandatory aggregation of the speculative positions of other entities in which they have the same level of ownership interest.

We also ask the Commission to consider the unintended consequences of the Position Limit Rule's aggregation requirements, which will be to discourage institutional investors from utilizing collective investment vehicles. Collective investment vehicles are an efficient method of investing for pension plans in that they can provide instant diversification and sometimes better liquidity than direct investing. However, the aggregation requirements of the Position Limit Rule will cause pension plans to reconsider the benefits of collective investment vehicles because the Rule (i) could require plans to obtain detailed position information from collective investment vehicles on an ongoing basis or face regulatory violations and sanctions and (ii) could attribute to plans, for speculative position limit purposes, 100 percent of a collective investment vehicle's speculative positions.[2]

We recognize that the Commission's Position Limit Rule only applies to speculative positions and that ERISA plans utilize derivatives primarily for hedging purposes. However, plans also may use derivatives for portfolio management purposes to gain quick and efficient economic exposure to certain markets and financial instruments. Without the revisions we suggest in this letter, we are concerned that such activities

[2] As discussed below, for purposes of determining the plan's compliance with position limits, it is problematic to require a pension plan to aggregate the positions of any collective investment vehicle which is not 100% owned or effectively controlled by a pension plan.

could be severely restricted as a result of the Commission's aggregation requirements which could attribute the speculative positions or accounts of other entities to ERISA plans, plan managers, and plan sponsors in circumstances that present few or none of the concerns that are the impetus for imposing aggregation requirements.[3]

I. Plan Sponsors Should Not Be Required to Aggregate Speculative Plan Positions Controlled by the Plan Sponsor's Employees or by Affiliated Plan Managers

We are concerned that under the aggregation requirements in the Position Limit Rule, as proposed to be amended, an ERISA plan sponsor could be required to aggregate the positions of its ERISA pension plans with the plan sponsor's corporate positions for purposes of determining whether the plan sponsor was close to or over a position limit. This aggregation of a pension plan's positions with a plan sponsor's positions could be read to be required under the Position Limit Rule, as proposed to be amended, if (i) the plan sponsor utilizes its employees to make investment decisions on behalf of the pension plans or (ii) the plan sponsor has a subsidiary which manages the pension plans' assets. Such aggregation could be required even though the plan sponsor's employees or subsidiary has a legal duty under ERISA to act solely in the best interest of the pension plans.

Under the Position Limit Rule, the aforementioned aggregation can occur when a person has either control or ownership of another account or entity. With respect to situations involving control, the Position Limit Rule requires a person to aggregate his own speculative positions with the speculative positions in any account that he directly or indirectly controls.[4] For purposes of the Position Limit Rule, this direct or indirect control may be established through power of attorney or otherwise.[5]

With respect to situations involving ownership, the Position Limit Rule requires a person to aggregate his own speculative positions with the speculative positions of any entity that is not a commodity pool (*e.g.*, an operating company) in which the person has a 10 percent-or-greater ownership or equity interest.[6] In this regard, proposed rule

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[3] The Commission has stated the aggregation requirements are meant to address the concern that "a single trader, through common ownership or control of multiple accounts, may establish positions in excess of the position limits and thereby increase the risk of market manipulation or disruption." *See* Position Limits for Futures and Swaps, 76 Fed. Reg. 71, 626, 71, 652 (Nov. 18, 2011).

[4] 17 C.F.R. § 151.7(a).

[5] *Id.*

[6] A "commodity pool" is statutorily defined as any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests, but has been interpreted by the Commission to include virtually any pooled investment vehicle that trades a single futures contract or swap contract. *See* 7 U.S.C. § 1a(10); Commodity Pool Operators and Commodity Trading

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151.7(b)(1), which sets forth an "Owned Entity Exemption," could be construed to require a person with a greater than 50 percent ownership or equity interest in an entity (such as a plan sponsor's ownership in a subsidiary which manages the plan sponsor's pension plans) to aggregate, not only the proprietary positions of the entity, but also the accounts or positions of accounts (*e.g.*, the plan sponsor's pension plans) managed by the entity.

If the foregoing interpretation is correct, the consequences would be severe and far-reaching. Requiring a plan sponsor to aggregate such positions would disrupt carefully crafted ERISA protections for plans which require plan fiduciaries to act solely in the interest of the relevant plan and which require separation between plan and plan sponsor investments. In fact, such aggregation requirements would actually create a conflict of interest situation that did not exist previously. A plan sponsor which manages in-house its ERISA plan's assets, either directly or through a subsidiary, would now be conflicted in establishing positions for the plan because, under this interpretation, such positions would be aggregated with the plan sponsor's corporate positions with potentially detrimental financially consequences to the plan sponsor or to the plan.

ERISA generally prohibits a plan fiduciary from acting as a fiduciary when it is subject to a conflict of interest. See ERISA section 406(b). In all cases, the plan sponsor functions as a fiduciary either directly in controlling investments or indirectly in overseeing those controlling investments. If the plan sponsor is subject to a conflict of interest under the Position Limit Rule due to the aggregation provision, the Rule could function to prohibit plans' investment in speculative positions, which would be a very inappropriate limitation on plan investments and could not have been intended. Moreover, even if there were no such prohibition, there is no reason for aggregation of plan sponsor investments and ERISA plan investments, since under ERISA section 404, ERISA plan investments must be made for the sole purpose of benefiting the plan without regard to the interests of the plan sponsor.

Therefore, the Council believes that because a plan manager, as an ERISA fiduciary, is required to act solely in the best interest of the relevant plan, a plan sponsor should not be required to aggregate a plan's speculative positions with its own positions as a

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Advisors: Compliance Obligations, 77 Fed. Reg. 11,252, 11,258, 11,263 (Feb. 24, 2012). The Position Limit Rule treats ownership interests in "commodity pools" differently than ownership interests in all other entities. *See* 17 C.F.R. § 151.7(b). Under the Position Limit Rule, a 10 percent-or-greater ownership interest in a commodity pool does not require aggregation unless (i) the person with the ownership interest also controls or "operates" the commodity pool, (ii) the person with the ownership interest is a principal or affiliate of the entity that controls or "operates" the commodity pool, subject to an exception set forth therein, or (iii) or the person with the ownership interest has a 25 percent-or-greater interest and the entity that controls or "operates" the commodity pool is exempt from registration as a "commodity pool operator" under Rule 4.13.

result of the plan being controlled by the plan sponsor's employees or by an affiliated plan manager.[7] Consistent with our view, in connection with adopting final rule amendments, we respectfully request that the Commission clarify that the aggregation requirements for the Position Limit Rule do not impose any such mandate.

II. Plans Should Not Be Required To Aggregate the Speculative Positions of Certain Owned Entities or *De Minimis* Funds

A. Because ERISA plan managers are required as fiduciaries to make prudent inquiries into the investments and trading decisions of entities in which they cause plans to invest, such inquiries and related information disclosures should not preclude plans from qualifying for the Owned Entity Exemption.

The Commission's proposed Owned Entity Exemption provides an exemption from the Position Limit Rule's ownership aggregation requirement[8] for persons who own at least 10 percent but no greater than 50 percent of another entity, provided that such entity is not a commodity pool but rather an operating company. *See* Schedule A at 31,782. The proposed Owned Entity Exemption turns on whether the person (*e.g.*, an ERISA plan) and the owned entity can demonstrate independent management and control. We see no reason why, if the conditions demonstrating independent management and control are satisfied, the Owned Entity Exemption should be capped at a 50 percent ownership interest. We recommend that the Commission extend its proposed Owned Entity Exemption to apply to any ownership interest of at least 10 percent in an entity.[9]

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[7] The Council notes that, consistent with ERISA, a plan could never be an "owned entity" of the plan sponsor. Although it is common for a plan sponsor to make contributions to a plan, sometimes constituting more than 50 percent of a plan's total assets, under ERISA, a plan sponsor does not retain any beneficial interest in its contributions to a plan. Instead, the contributions become assets of the plan at the time the contributions are made, at which point they may be used solely to provide benefits to plan participants and their beneficiaries and to defray the reasonable expenses of administering the plan. *See* Department of Labor Field Assistance Bulletin No. 2008-01 ("The Department has taken the position that employer contributions become an asset of the plan only when the contribution has been made."); ERISA section 403(c).

[8] Ownership or equity interests of less than 10 percent generally are not required to be aggregated. *See* 17 C.F.R. 151.7(b).

[9] If the Commission adopts an Owned Entity Exemption that is capped at ownership interests above 50 percent, companies will be required to aggregate the speculative positions of majority-owned subsidiaries. Because position limit violations can occur on an intra-day basis, companies will be required to develop systems to monitor the real-time trading activities of their subsidiaries. Making the Owned Entity Exemption available to ownership interests above 50 percent would eliminate the need for majority-owned subsidiaries to develop expensive real-time trade monitoring systems.

In addition, the Owned Entity Exemption would be subject to the following conditions, the first, third, and fifth of which are problematic in the ERISA context:

1. Neither the person nor the entity in which the plan invests has knowledge of the trading decisions of the other;

2. Each entity trades pursuant to separately developed and independent trading systems;

3. Each entity has, and enforces, written procedures to preclude the other entity from having knowledge of, gaining access to, or receiving data about, trades of the entity;

4. Neither shares employees that control trading decisions of the other entity; and

5. Neither has risk management systems that permit the sharing of trades or trading strategy with the other. *See* Schedule A at 31,782.

The first, third, and fifth conditions enumerated above – all of which, in effect, prohibit having or acquiring information about an operating company's trading decisions, trades, or trading strategies – would pose a concern for plan fiduciaries in exercising their fiduciary duties under ERISA. As part of their fiduciary duties, plan fiduciaries are required to undertake an independent analysis of the credit risks and market risks associated with the investments they cause plans to make.[10] When a plan makes an investment in an entity, the plan fiduciary's required analysis could very well entail making prudent inquiries into the trading activities and investments of the entity.[11]

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[10] *See,* Letter from Oleana Berg, Assistant Secretary for Pension and Welfare Benefits, to Eugene A. Ludwig, Comptroller of the Currency (Mar. 21, 1996); ("Berg Letter"); *see also* Harley v. Minnesota, Mining and Manufacturing Co., 898 F. Supp. 2d 898, 906 (D. Minn. 1999) ('[A] fiduciary is required to undertake an independent investigation into the merits of an investment and to use appropriate, prudent methods in conducting the investigation."), aff'd, 284 F.3d 901 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003); 29 C.F.R. § 2550.404a-1(b)(2) (providing that an investment fiduciary, when evaluating an investment, must take into consideration the risk of loss associated with the investment)

[11] *See* Berg Letter (noting that the fiduciary of a plan investing in a pooled fund "should obtain . . . sufficient information to determine the pooled fund's strategy with respect to the use of derivatives in its portfolio, the extent of investment by the fund in derivatives, and such other information as would be appropriate under the circumstances); *see also* Advisory Council on Employee Welfare and Pension Benefit Plans, Report on Hedge Fund and Private Equity Investments, at 19 (Nov. 2011) (stating that the due diligence process undertaken prior an investment in a hedge fund or private equity fund "should evaluate fund performance, investment risk, use of leverage and derivatives, credit risk, operational risk, legal risk, valuation and reporting").

Such inquiries and other due diligence are not limited to the initial investment decision in an entity but also are part of monitoring a plan's investment in such entity and analyzing on an ongoing basis whether to retain or sell such interest.[12] For example, a pension plan may make a significant investment in a privately held company which utilizes derivatives in its operations. At the time of investment, it was indicated to the pension plan that such company utilizes derivatives only for particular purposes related to its operations. It may be prudent for an ERISA fiduciary to meet with the private equity sponsor of such company and/or company officials from time to time to inquire regarding the company's operations, which inquiries may reasonably include questions regarding the company's use of derivatives including trading activities and strategies. Plans would not be looking to coordinate their own trading activities with such company but would be seeking to proactively evaluate their investment in such company. If such company were to be in financial distress as a result, in part or whole, of the company's derivative positions, it would be perfectly reasonable for the ERISA fiduciary in the interest of monitoring its investment in the company to inquire of the private equity sponsor or company management as to what positions or activities have placed the company in such stress and threatened the value of the pension plan's holdings. Such reasonable due diligence inquiries, which are consistent with an ERISA fiduciary's duties under ERISA, and the information obtained as a result of such inquiries should not result in an ERISA plan having the speculative positions of such company attributed to the plan for speculative position limit purposes. Similarly, if an operating company's management believes it is obligated under law or as a matter of good business practice to inform its shareholders of its derivative positions and trading strategies and/or the company's efforts to mitigate losses to the company associated with such positions, a shareholder's knowledge of such information should not constitute "knowledge of trading decisions" in violation of the conditions of the proposed Owned Entity Exemption.

To the extent that such ordinary and extraordinary fiduciary due diligence activities cause a plan, by virtue of the action of the plan manager, to "have knowledge" of the "trading decisions" or trading plans of the entity in which it invests or to "gain access to" or "receive data about" the "trades" of the entity, a plan would be ineligible for the Owned Entity Exemption. As written, the CFTC's proposal, therefore, leaves a plan manager with an unworkable menu of choices: either (i) fail to comply with its fiduciary duties under ERISA when the plan takes a 10 percent-or-greater ownership or equity

[12] *See* Investor's Committee, Principles and Best Practices for Hedge Fund Investors: Report of the Investors' Committee to the President's Working Group on Financial Markets, at 16 (Jan. 15, 2009) ("Monitoring a manager and a hedge fund investment is a continuation of the initial due diligence process. . . . Fiduciaries and investment staff should take reasonable steps to identify any events or circumstances that may result in a hedge fund that were originally required to include the hedge fund in an investment portfolio."); *see also* Hunt v. Magnell, 758 F. Supp. 1292, 1299 (D. Minn. 1991) ("ERISA fiduciaries must monitor investments with reasonable diligence and dispose of investments which are improper to keep.").

stake in an entity, or (ii) simply avoid causing the plan to take stakes of 10 percent-or-greater in an entity – even if such an investment would be beneficial to the plan and its participants – so the manager can continue to make inquiries as dictated by ERISA's prudential requirements. Either outcome would unquestionably be detrimental to the plan and its plan participant beneficiaries.

In the interest of avoiding any detrimental effects on plan participants, the Council asks that the Commission explicitly recognize in the final rules that plan managers, acting on behalf of a plan, can perform all activities necessary to execute their fiduciary duties under ERISA, including the ones described above, without such activities causing a plan to violate the conditions of the proposed Owned Entity Exemption.[13]

In order for a plan to avail itself of the Owned Entity Exemption, a plan fiduciary would have to also ensure itself that the entity in which the plan has an investment " ha[s] and enforce[s], written procedures to preclude . . . [the plan] from having knowledge of, gaining access to, or receiving data about, trades of the [entity]. " This requirement by itself makes, in our opinion, the Owned Entity Exemption impracticable. We do not believe that a pension plan with less than a 50 percent ownership in a private or publicly held company can force the company's management to adopt or enforce any policy, let alone a policy which precludes shareholders of such company from receiving information from the company about activities of the company. Accordingly, we would ask that such condition be removed from the Owned Entity Exemption.

B. Because "de minimis" commodity pools are subject to structural limits on their commodity interest trading, investors in such pools – including plans – should be subject to the higher ownership threshold for mandatory aggregation that would apply to investors in operating companies and other owned entities.

As stated above, an ownership interest in a "commodity pool" is treated differently for purposes of aggregation than an ownership interest in a non-commodity pool (*e.g.*, an operating company). Unlike an ownership interest in an operating company, a person with a 10 percent-or-greater ownership interest in a commodity pool generally is <u>not</u> required to aggregate the pool's speculative positions.[14] This general exemption (the "Pool Participant Exemption") is subject to certain conditions.

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13 Such a clarification would not be anything new, as the Position Limit Rule already includes a similar proviso in the independent account controller exemption ("IAC Exemption"), which reads: ". . . 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 and necessary to fulfill its duty to supervise diligently the trading done on its behalf." 17 C.F.R. § 151.7(f)(1)(i).

14 17 C.F.R. § 151.7(b).

One of the Pool Participant Exemption conditions is that a person cannot have a 25 percent-or-greater ownership interest (the "25 Percent Limit") in a commodity pool whose operator is exempt from registration under Rule 4.13 (a "Rule 4.13 pool").[15] If a person does have a 25 percent-or-greater ownership interest in one of these Rule 4.13 pools, then the person will not qualify for the Pool Participant Exemption.[16] In this situation, a pool participant will be required to aggregate all of the pool's speculative positions along with his own.[17]

Both the Pool Participant Exemption and the 25 Percent Limit are about to become much more important. As a result of a new statutory definition of "commodity pool"[18] and the Commission's broad interpretation of that definition,[19] the universe of funds and similar vehicles that are "commodity pools" is about to expand exponentially.[20] When this happens, a sizable portion of those new "commodity pools" will only have *de minimis* amounts of transactions in commodity interests (a "*de minimis* pool") and their operators likely will claim an exemption from registration under Rule 4.13(a)(3), thus, making them Rule 4.13 pools.

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[15] 17 C.F.R. § 151.7(b)(3). A "commodity pool operator" is statutorily defined as any person engaged in a business that is of the nature of a commodity pool…and who, in connection therewith, solicits, accepts, or receives from others funds, securities or property…for the purpose of trading in commodity interest…" 7 U.S.C. § 1a(11).

[16] We recognize that such an investor may attempt to rely on the IAC exemption in Rule 151.7(f) in such circumstances. *See* definition of "eligible entity" in Rule 151.1, as proposed to be amended. However, that exemption does not provide relief from having to aggregate spot month positions in physical-delivery Referenced Contracts. As a consequence, to ensure compliance with applicable speculative position limits, plans and plan managers would be required to develop systems and procedures to monitor trading by Rule 4.13(a)(3) *de minimis* pools to determine if such pools utilize spot month physical-delivery Referenced Contracts. For this and other reasons, it is not likely to be practical or cost effective for plans and plan mangers to rely on the IAC exemption with respect to their investments in Rule 4.13(a)(3) *de minimis* pools.

[17] As discussed below, the requirement to aggregate 100 percent of the pool's speculative positions is a disincentive to plans and other large investors who regularly make sizable investments in commodity pools, and this disincentive will become more broadly applicable when the definition of commodity pool is expanded to include any pooled vehicles that invest in swaps.

[18] *See* 7 U.S.C. § 1a(10).

[19] *See e.g.*, Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11,252, 11,258, 11,263 (Feb. 24, 2012).

[20] The Commission has indicated that it may view any pooled investment vehicle that uses even a single swap as falling within the "commodity pool" definition. *Id.* Therefore, mutual funds, hedge funds, private equity funds, real estate funds, liquidity funds, etc. all may be considered "commodity pools" if they use even a single swap.

However, there are very compelling reasons not to subject investments in Rule 4.13(a)(3) *de minimis* pools to the 25 Percent Limit. Because these pools use only a *de minimis* amount of commodity interests, ownership interests in these pools that exceed 25 percent, as further explained below, should be treated identically to ownership interests in operating companies.

The 25 Percent Limit was added to the Pool Participant Exemption in 1999.[21] At the time the 25 Percent Limit was added, Rule 4.13 provided only two exemptions – one in subparagraph (a)(1) and the other in subparagraph (a)(2). These subparagraphs provided (and still provide) exemptions from CPO registration to operators of small pools or pools with predictably homogenous participants.[22] The Commission added the 25 Percent Limit to address concerns about small or single-investor pools in which an investor who contributes all or most of the pool's capital is involved to some degree in the pool's trading decisions and, thereby, is able to "establish positions in excess of the position limits and thereby increase the risk of market manipulation or disruption."[23]

In 2003, Rule 4.13 was amended to include the *de minimis* exemption in subparagraph (a)(3). Rule 4.13(a)(3) imposes a structural limitation, which prevents a pool from using commodity interests in anything more than a *de minimis* amount; therefore, an ownership interest in a *de minimis* pool could not possibly raise the same concerns as an ownership interest in a Rule 4.13(a)(1) or (a)(2) pool.[24] Indeed, the limits on the use of commodity interests by *de minimis* pools essentially renders moot any real concerns that a single investor could use its participation in a *de minimis* pool as a means of evading the Commission's position limits in order to manipulate or disrupt the markets. Further, the structural limits on a *de minimis* pool's commodity interest trading would make it not only extraordinarily unlikely, but also prohibitively expensive, for a participant to use a *de minimis* pool as a means to circumvent position limits.

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[21] Revision of Federal Speculative Position Limits and Associated Rules, 64 Fed. Reg. 24,038 (May 5, 1999).

[22] In the case of Rule 4.13(a)(1), the Commission adopted the exemption to accommodate investment clubs and family groups whose operators receive no compensation, save reimbursements for ordinary administrative expenses. 17 C.F.R. § 4.13(a)(1), Revisions of Commodity Pool Operator and Commodity Trading Advisor Regulations; Proposed Rules, 45 Fed. Reg. 51,600, 51,601 (Aug. 4, 1980). In the case of Rule 4.13(a)(2), the Commission adopted the exemption to accommodate investment vehicles whose capital comes mostly from participants who are all closely related. 17 C.F.R. § 4.13(a)(2), 45 Fed. Reg. at 51,601.

[23] Revision of Federal Speculative Position Limits and Associated Rules, 63 Fed. Reg., 38,525, 38,532 (July 17, 1998).

[24] 17 C.F.R. § 4.13(a)(6)(i)(B) (requiring the exempt CPO to deliver to investors a statement apprising investors of the exemption and a description of the criteria pursuant to which the CPO qualifies for such exemption.)

Because of these *de minimis* limits, the Council believes that ownership interests in *de minimis* pools should not be treated differently than ownership interests in operating companies. Accordingly, we feel that the Owned Entity Exemption should be extended to include persons with ownership or equity interests in *de minimis* pools. That is, as long as the investors in *de minimis* pools can demonstrate their passive participation (*i.e.*, the *de minimis* pool is independently managed and controlled), then they should not be required to aggregate the speculative positions of the *de minimis* pool.

The need to extend the Owned Entity Exemption is especially relevant given the pending expansion of the definition of "commodity pool," ostensibly to include any pooled investment vehicle that uses even a single swap.[25] This definition will dramatically expand the universe of entities that are commodity pools by tens of thousands and will likely result in at least a proportionate increase in the number of *de minimis* pools. Unless the Owned Entity Exemption is extended to participants in *de minimis* pools, plans and plan managers will be required to develop systems and procedures to collect trade data from *de minimis* pools with respect to spot month activity in physically delivered Referenced Contracts, despite the fact that such investments pose little concern vis-à-vis position limits evasion. The Council believes that the resources spent on the development of such systems and procedures are unnecessary expenditures that will be costly to plan participants and, ultimately, irrelevant in deterring or preventing manipulation or disruption of the markets. In this respect, we believe that a cost-benefit analysis of the Position Limit Rule's aggregation requirements weighs in favor of extending the Owned Entity Exemption.

Accordingly, at a minimum, the Council requests that the Commission extend the Owned Entity Exemption – as revised per the Council's recommendations in Section II.A. of this letter – to plans and other investors in *de minimis* pools so that such investors can rely on the Owned Entity Exemption and not be required to aggregate the pool's positions regardless of their level of ownership interest in the pool.

III. <u>The Position Limit Rule Will Impose Significant Compliance Costs and Burdens on Pension Plan Investors in Collective Investment Vehicles</u>

With the imminent expansion of both the Commission's position limit regime and the definition of "commodity pool," we are concerned that ERISA plans in collective investment vehicles will face unduly burdensome costs in applying the Commission's aggregation requirements to determine whether they are in compliance with the new position limits. The Commission's current position limit regime – which will remain in place until the new regime is fully implemented – has had a relatively small impact on plans because the current regime's position limits and corresponding aggregation

[25] *See* 77 Fed. Reg. at 11,263 (stating that a commodity pool with "one swap contract would be enough to trigger the [CPO] registration requirement.")

requirements only apply to nine agricultural contracts. However, as speculative position limits or accountability levels are imposed on more and more physical commodity contracts and particularly on financial derivatives contracts – including futures, options and swaps – executed pursuant to DCM or SEF rules, plans could have an inordinately greater compliance concern. For example, plans that meet or exceed the 25 Percent Limit in *de minimis* pools, which in turn would trigger a requirement to aggregate 100 percent of the pool's positions, would have to monitor on an ongoing basis all of the positions of such pools that trade any physical commodity or financial commodity derivatives contracts subject to position limits.

We urge the Commission to consider the onerous compliance costs for ERISA plans to monitor the speculative positions of collective investment vehicles in which they invest for purposes of determining the plans' compliance with position limits. A large plan could have hundreds of investments in collective investment vehicles. The Council does not believe that plans currently have the compliance systems or capabilities to monitor on a real-time basis the ongoing speculative positions of collective investment vehicles in which plans are invested. Nor is the Council confident that sponsors of collective investment vehicles will either be willing to provide such information or be capable of providing such information to investors on a real-time or other frequent basis. As position limits are expanded to financial commodity contracts, the issue becomes acute for plans because many, if not most, of the collective investment vehicles invested in by plans utilize some form of financial derivatives in their portfolio management. In light of these concerns, the Council requests that the Commission revise its Position Limit Rule with a view to ensuring that investments in collective investment vehicles are not discouraged due to costly compliance requirements imposed on plans.

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We thank the Commission for the opportunity to comment on the proposed amendments to the Position Limit Rule's aggregation requirements. While the Council strongly believes aggregation requirements should be based on a person's control, not ownership, of another entity, to the extent the Commission retains aggregation requirements that are based on ownership, we urge consideration of the very real economic impact that the Position Limit Rule's aggregation requirements, even as proposed to be amended, could potentially have on plan sponsors, plan managers and plans. Although the proposed Owned Entity Exemption is a step in the right direction, if the proposal is not revised to address the concerns expressed in this letter, the Position Limit Rule's aggregation requirements will (1) discourage plans from investing in collective investment vehicles, (2) attach very burdensome compliance obligations to the current passive ownership interests that impute to their owners no semblance of control – especially with respect to an entity's trading activities, and (3) create an artificial disparity between the aggregation treatment of investments in *de minimis* pools and other plan investments.

For the above stated reasons, we strongly encourage the Commission to clarify or revise the proposed aggregation requirements so that:

- a plan sponsor is not required to aggregate speculative positions of a pension plan managed by plan sponsor employees and/or an affiliated plan manager, because those plan managers are ERISA fiduciaries who are required to act solely in the best interest of the plan rather than the plan sponsor;

- plan fiduciaries, acting on behalf of a plan, can perform all activities necessary to execute their fiduciary duties under ERISA without such activities, or the information obtained as a result of such activities, causing a plan to be ineligible for the proposed Owned Entity Exemption;

- the Owned Entity Exemption is available to ownership and equity interests above 50 percent;

- the provision of the Owned Entity Exemption requiring that each entity "have, and enforce written procedures to preclude [the other entity] from having knowledge of, gaining access to, or receiving data about, trades of the [entity]" is removed;

- the Owned Entity Exemption extends to plans and other investors in *de minimis* pools; and

- plans are not required to aggregate their investments in collective investment vehicles.

We believe that by clarifying or revising the proposal to include the recommendations herein, the Commission's aggregation requirements will continue to target those areas where evasion of position limits might be a concern, but will avoid unnecessarily taxing the resources of pension plans by forcing plan managers and plan sponsors to needlessly develop systems and programs to monitor positions in owned entities and *de minimis* pools. If you have any questions, please do not hesitate to contact Lynn D. Dudley, Senior Vice President, Policy at ldudley@abcstaff.org or 202-289-6700.

Sincerely,

Lynn D. Dudley
American Benefits Council