AMERICAN BENEFITS COUNCIL

February 10, 2014

Ms. Melissa D. Jurgens
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: RIN 3038–AD82 – Aggregation of Positions, 78 Fed. Reg. 68,496 (Nov. 15, 2013)

Dear Ms. Jurgens:

The American Benefits Council (the "Council") appreciates this opportunity to provide comments to the Commodity Futures Trading Commission ("Commission" or "CFTC") regarding its proposal to amend the aggregation requirements in its position limits rule (the "Aggregation Proposal").[1] *See* Schedule A.

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] In a separate release, the Commission has proposed to materially amend the remainder of the Commission's position limits rule (the "Position Limits Proposal"). *See* Position Limits for Derivatives, 78 Fed. Reg. 75,680 (Dec. 12, 2013). The Position Limits Proposal would 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"). Moreover, the Position Limits Proposal calls for designated contract markets ("DCMs") and swap execution facilities ("SEFs," and together with DCMs, "exchanges") 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). Our comments in this letter do not focus on the Position Limits Proposal.

OVERVIEW

The Aggregation Proposal, among other things, enumerates the limited circumstances in which an investor in an investment fund would be required to count the fund's derivatives positions, along with the investor's other derivatives positions, in determining whether the investor has breached applicable position limits (imposed either by the CFTC or by the exchanges). In addition, the Aggregation Proposal enumerates the limited circumstances in which an asset manager is exempt from the Commission's aggregation requirements, including the Commission's longstanding independent account controller ("IAC") exemption.

As discussed in greater detail below, the Council has three concerns with regard to these specific aspects of the Aggregation Proposal:

- First, it is unclear if proposed Rule 150.4(b)(1)(iii)[2] is meant to require a passive investor that holds 25% or more of the interest (a "Significant Investor") in a 4.13(a)(3) fund to aggregate the fund's positions with those of the Significant Investor.[3] The Commission has not provided any rationale for, or evaluated the costs of, such a requirement, and the Council believes that compliance with any such requirement would be impractical, if not impossible. Accordingly, the Council requests that any final rulemaking clarify that proposed Rule 150.4(b)(1)(iii) does not apply to 4.13(a)(3) funds.

- Second, the Council is very concerned about proposed Rule 150.4(a)(2), which would require an investor that invests in two funds with "substantially identical trading strategies" to aggregate each fund's derivatives contracts, along with the investor's other derivatives contracts, in determining whether the investor has breached applicable position limits. The Aggregation Proposal contains no discussion or explanation of this proposed requirement, and importantly, the proposed rule text provides no definition of a "substantially identical trading strategy." As such, an ERISA plan would have no idea when it invests in funds

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[2] In relevant part, proposed Rule 150.4(b)(1)(iii) states that an investor in a fund "need not aggregate the accounts or positions of the [fund] . . . except . . . if such [investor] . . [h]as, by power of attorney or otherwise directly or indirectly, a 25 percent or greater ownership or equity interest in a [fund], the operator of which is exempt from registration under § 4.13 of this chapter." *See* Schedule A at 68,976.

[3] A "4.13(a)(3) fund," as used herein, means an investment fund whose commodity pool operator ("CPO") has claimed an exemption from registering as a CPO with respect to such pool under CFTC Rule 4.13(a)(3). As a condition of eligibility for the exemption in CFTC Rule 4.13(a)(3), a fund must at all times ensure either (i) the aggregate amounts it has posted as initial margin, premium or minimum security deposits for its commodity interest positions are equal to or less than 5% of the 4.13(a)(3) fund's liquidation value (the "Aggregate Initial Margin Restriction"), or (ii) the aggregate net notional value of its commodity interest positions is equal to or less than 100% of the fund's liquidation value (the "Aggregate Net Notional Restriction," and collectively, the "Trading Restrictions").

that have "substantially identical trading strategies" and could, without knowing, be responsible for aggregating 100% of those funds' derivatives positions (as opposed to only the plan's pro rata share of each fund's positions). Full compliance with any such requirement would be impractical, if not impossible, and would vastly exaggerate an investor's ownership or control of derivatives positions. Accordingly, the Council requests that the Commission delete this aspect of the Aggregation Proposal.

- Third, the Council disagrees with proposed Rule 150.4(c)(1), which would require a filing in order to rely on the IAC exemption. The IAC exemption has long provided investment managers with an exemption from aggregating positions (outside of the spot month) in accounts controlled by a third person who has been authorized by the investment manager to independently control the trading decisions for such accounts without the day-to-day direction of the investment manager.[4] Throughout this time, no filing has been necessary to rely on the IAC exemption, and the Aggregation Proposal provides no justification for deviating from this established practice. Accordingly, the Council requests that the Commission delete the proposed filing requirement for the IAC exemption.

I. The Commission Must Clarify the Applicability of Proposed Rule 150.4(b)(1)(iii) to 4.13(a)(3) Funds.

A. The Commission Has Never Articulated a Rationale for Applying the Aggregation Requirement to 4.13(a)(3) Funds.

Current Rule 150.4(c)(3) obligates an investor with a 25% or greater ownership or equity interest in a fund whose CPO has claimed an exemption from registration under Rule 4.13 to aggregate all of the speculative positions of the fund. However, this requirement was never intended to apply to 4.13(a)(3) funds. As we explain below, the Commission's rationale for initially adopting this aggregation requirement has never been applicable to, and still is not applicable to, 4.13(a)(3) funds.

Current Rule 150.4(c)(3) was adopted by the Commission in May 1999. At that time, however, Rule 4.13 consisted only of subparagraphs (a)(1) and (a)(2). In May 1999, Rules 4.13(a)(1) and (a)(2) provided, just as they provide today, exemptions from CPO registration to operators of small funds or funds with predictably homogenous participants.[5] The Commission adopted the aggregation requirement in Rule 150.4(c)(3)

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[4] *See* 17 C.F.R. §§ 150.1 and 150.3 (2013).

[5] 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

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to address concerns about these types of small or single-investor funds in which an investor who contributes all or most of the fund's capital is involved to some degree in the fund'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.[6] In May 1999, there was no Rule 4.13(a)(3) exemption; there were no 4.13(a)(3) funds.

It was not until more than four years later, in August, 2003, that Rule 4.13(a)(3) was adopted by the Commission.[7] The Commission never amended the reference to "Rule 4.13" in Rule 150.4(c)(3) to account for the addition of a new subparagraph (a)(3). Nor did the Commission propose a new rationale explaining why the reference to "Rule 4.13" in Rule 150.4(c)(3) after August 2003 properly applied to 4.13(a)(3) funds. To be clear, to the extent that the aggregation requirement in Rule 150.4(c)(3) can be read to apply to Significant Investors in 4.13(a)(3) funds, it would be the result of an act of omission, not an act of commission, by the Commission.

The Aggregation Proposal neither discusses nor examines the history of Rule 150.4(c)(3), even as it proposes to significantly expand the aggregation requirements therein. It would be an incorrect assumption by the Commission to assume that a compelling rationale has been provided for applying the aggregation requirement in 150.4(c)(3) to Significant Investors in 4.13(a)(3) funds. The Commission has never offered any such rationale for such application and the Aggregation Proposal similarly offers no rationale for such application. Instead, like the history of Rule 150.4(c)(3), the Aggregation Proposal does not discuss, or even mention, 4.13(a)(3) funds or subparagraph (a)(3) of CFTC Rule 4.13.

B. *The Aggregation Proposal Fails To Recognize the Significant Impact of Recent Changes to Other Commission Regulations and Interpretations.*

To the extent that proposed Rule 150.4(b)(1)(iii) is intended to apply to 4.13(a)(3) funds, the Council is concerned by the Commission's failure to consider recent changes to the CEA and other Commission regulations and new Commission interpretations that would have a significant impact on the Commission's proposal, particularly if the

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ordinary administrative expenses. Revisions of Commodity Pool Operator and Commodity Trading Advisor Regulations; 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. *Id*.

[6] *See* Revision of Federal Speculative Position Limits and Associated Rules, 63 Fed. Reg., 38,525, 38,532 (July 17, 1998); Revision of Federal Speculative Position Limits and Associated Rules, 64 Fed. Reg. 24,038 (May 5, 1999).

[7] *See* Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors, 67 Fed. Reg. 47,721 (Aug. 8, 2003).

Position Limits Proposal is adopted.[8] Together, these recent changes have greatly increased (and may still further increase) the number of 4.13(a)(3) funds, so it logically follows that any changes to the Commission's aggregation requirements concerning 4.13(a)(3) funds now would impact far more ERISA plans and other investors than ever before. Yet the Aggregation Proposal fails to make any mention of these changes or their consequential impact on 4.13(a)(3) funds either under Rule 150.4(c)(3) or proposed Rule 150.4(b)(1)(iii).

Similarly, the Aggregation Proposal does not consider that the Position Limits Proposal simultaneously proposes to dramatically expand the application of the Commission's position limits regime. As we have stated before, the position limits regime would have a comparatively small impact on ERISA plans and other investors if the Commission's position limits were to still apply only to nine agricultural contracts.[9] However, if position limits are extended to cover the Referenced Contracts in the Position Limits Proposal or accountability levels are imposed on the remaining physical commodity and financial commodity derivatives contracts – including futures, options and swaps – executed pursuant to DCM or SEF rules, a far greater number of ERISA plans and other investors will face a significant increase in their position limits compliance costs. To the extent proposed Rule 150.4(b)(1)(iii) is intended to apply to 4.13(a)(3) funds, the Council notes that the Commission has not considered the impact of the proposed expansion of the Commission's position limits regime on ERISA plans and other investors in Rule 4.13(a)(3) funds.

C. It Would Be Arbitrary for the Commission To Require Significant Investors in 4.13(a)(3) Funds to Aggregate the Fund's Entire Position.

If proposed Rule 150.4(b)(1)(iii) is meant to implicate 4.13(a)(3) funds, the Commission has not provided any rationale for requiring the direct and indirect investors in 4.13(a)(3) funds to aggregate 100% of the fund's speculative positions, as

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[8] For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amended the CEA to add a definition of "commodity pool," which includes any "investment trust, syndicate or similar form of enterprise formed for the purpose of trading 'commodity interests,'" including swaps. The Commission separately determined to expansively interpret this definition of "commodity pool" while simultaneously repealing the exemption from CPO registration in Rule 4.13(a)(4). *See, e.g.*, Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11,252, 11,258, 11,263 (Feb. 24, 2012) (indicating that the Commission views any pooled investment vehicle that uses even a single swap as falling within the "commodity pool" definition). Furthermore, the application of the Trading Restrictions in Rule 4.13(a)(3) to "funds-of-funds" remains unresolved pending the issuance of "revised guidance" from the Commission. *See* CFTC Staff Letter 12-38. Many of these funds-of-funds may ultimately wind up as 4.13(a)(3) funds, but it is impossible to know how many until the Commission releases its revised guidance.

[9] *See* American Benefits Council comment letter dated June 29, 2012 (in response to 77 Fed. Reg. 31,767).

opposed to aggregating only their pro rata share of the fund's speculative positions.[10] This systematic over-counting of a 4.13(a)(3) fund's speculative positions will distort the Commission's measurement of a Significant Investor's speculative positions and will unfairly reduce the number of speculative positions a Significant Investor otherwise can hold.

Under these circumstances, if an ERISA plan were given the choice between gaining exposure to a particular strategy or asset class by becoming a Significant Investor in a 4.13(a)(3) fund or by setting up a separate account with an investment manager (wherein the manager, on behalf of the plan, would replicate the Significant Investor's fund exposure by establishing correlated positions directly through the separate account), the plan may choose to establish positions directly through a separate account because of its ability to aggregate positions in the separate account on a pro rata basis. The avoidance of 4.13(a)(3) funds on this basis would be a deleterious result. Pooled investment vehicles provide ERISA plans and other investors with instant diversification (the fund's positions already exist) and lower transactional fees (the fund's transactional fees are lower because, on average, its transactions are larger) than are otherwise unavailable to separate account investors. As such, Rule 4.13(a)(3) funds represent an efficient means of investment for plans. Depending on their strategy, pooled investment vehicles can provide ERISA plans with instant diversification, and such diversification greatly benefits plan participants. To the extent that the Commission's aggregation policies would discourage ERISA plans from investing in 4.13(a)(3) funds, plan participants could be harmed.

Finally, if proposed Rule 150.4(b)(1)(iii) is intended to apply to 4.13(a)(3) funds, it could lead to the potentially bizarre result where a Significant Investor – who holds nothing but securities in 4.13(a)(3) funds and has no direct or indirect control over the trading in such 4.13(a)(3) funds – may "violate" the Commission's speculative position limits as a result of the Commission's interpretation of its aggregation requirements. An ERISA plan could find itself, as a result of minority holdings in funds, in violation of position limits because all of the positions of each fund are attributed to the ERISA plan. Ironically, an ERISA plan which invested the same amount directly, rather than through funds, may not be in violation of the position limits.[11] This is an unfair, arbitrary and punitive result. The Council does not believe this result is intended or justifiable.

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[10] The closest the Commission comes to providing a justification for this over-counting is stating that "the Commission has historically interpreted the statute to require aggregation of all the relevant positions of owned entities" and that "[t]his 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." *See* Schedule A at 68,959. This view is not applicable to passive investors in commodity pools, irrespective of the percentage of their ownership or equity interest.

[11] In the context of a 4.13(a)(3) fund-of-funds, the effects of this punitive treatment are even more exaggerated. For example, if an ERISA plan had a 25% equity interest in a 4.13(a)(3) fund that is a

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D. *The Aggregation Proposal Fails To Consider Whether Investors in 4.13(a)(3) Funds Even Could Comply with the Aggregation Requirement.*

1. *Legal, Operational or Trading Reasons for Funds Not To Provide Investors with Required Information*

If proposed Rule 150.4(b)(1)(iii) is intended to apply to Rule 4.13(a)(3) funds, the Aggregation Proposal fails to consider whether it would even be possible for ERISA plans and other investors in 4.13(a)(3) funds to comply. The Council believes that it would be impractical, if not impossible, for an investor to aggregate the positions of a 4.13(a)(3) fund (even on a pro-rata basis) because a 4.13(a)(3) fund, for legal, operational or trading reasons, will likely not provide such fund's real-time position-level information. Further, investors in such funds may have limited or no recourse if such information is not provided by a fund.

The Council believes that 4.13(a)(3) funds and their managers will be reluctant to provide such information (A) because the selective disclosure of fund position information to only certain investors could raise legal liability issues under the federal securities laws;[12] (B) because of concern that an ERISA plan could utilize position information provided by the fund to deduce proprietary and confidential investment strategies of the adviser/manager to such funds; and (C) because the operational burdens associated with the fund providing such information to an ERISA plan, to the extent not legally prohibited, may be deemed too costly.

2. *Practical Problems with Compliance*

Even if this this type of information sharing were somehow were possible, investors and investment managers would need to devote substantial costs to individually negotiating agreements to govern the manner and timeliness of the production of such information, and to limit the investors' use of such information. Furthermore, even getting such information on a real-time basis will not ensure that an ERISA plan will be in compliance with the Commission's position limit rules; rather, a plan would need to get such information in advance of a 4.13(a)(3) fund establishing any position so that, if

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fund-of-funds, and that 4.13(a)(3) fund-of-funds had a 25% equity interest in an investee pool, then the ERISA plan could wind up aggregating 400% of its pro rata interest in the positions held by the investee pool. This result would be illogical.

[12] If the investment manager of a 4.13(a)(3) fund were to selectively disclose the pool's detailed position-level data to Large Investors, it would implicate basic concerns about an issuer's disclosure of material nonpublic information and about an investment adviser's preferential treatment of particular clients. Either of these situations could give rise to violations of the federal securities laws. *See, e.g.*, 15 U.S.C. §§78j(b), 80b-4a and 80b-6; 17 C.F.R. § 240.10b-5 (2013).

necessary or even possible, the plan could take remedial efforts to attempt to avoid any possible position limits violation.[13] In order for any direct investor in a 4.13(a)(3) fund to aggregate that fund's positions, the investor would need to receive regular, detailed reports from the 4.13(a)(3) fund's investment manager about the fund's positions in Referenced Contracts – in advance of such positions actually being established by the asset manager.[14]

Every ERISA plan with any ownership interest in a 4.13(a)(3) fund would need to develop procedures to monitor the percentage of its ownership in such fund and negotiate redemption rights if the plan's investment exceeds 25%. This too is impractical and problematic because it may require a fund to report daily to an ERISA plan the plan's percentage of fund ownership, which is the same as providing the ERISA plan with sensitive and material information regarding the redemption rate of a fund. Fund sponsors will likely be reluctant to provide such information, particularly if they believe that such information is "material" to investors, to avoid being accused of selective disclosure in violation of applicable securities laws.

Even with up-to-date knowledge of its percentage ownership of a fund, any ERISA plan with a 25%-or-greater ownership interest in a 4.13(a)(3) fund that could not obtain the real-time position-level information from the fund would likely seek to reduce its holding in such fund to below 25%. However, such a reduction or liquidation may be prohibited by the fund, require the fund's adviser's, general partner's or managing member's prior consent (which could be withheld) or be restricted to certain amounts at only specified intervals. As a result, ERISA plans, despite their best efforts, may not be able to comply with position limit rules for reasons beyond their control.

E. Neither of the Commission's Proposed Solutions Would Resolve the Flaws with the Proposed Aggregation Requirement.

The fact that investors in a 4.13(a)(3) fund can rely on the IAC exemption or – as the Commission suggested in the Aggregation Proposal – individually request an

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[13] An ERISA plan would have even less ability to obtain the position-level information necessary to calculate the plan's aggregated positions in the fund-of-funds context. For example, if a plan had a 25%-or-greater ownership or equity interest in a 4.13(a)(3) fund that is a fund-of-funds, and that pool had a 25%-or-greater ownership or equity interest in another 4.13(a)(3) fund ("Underlying Fund"), then the plan could be expected to aggregate all of the positions of the Underlying Fund as well as the fund-of-funds. It is inconceivable that the plan would have any ability to obtain the position-level information necessary to calculate the plan's aggregated positions in this situation.

[14] Once accountability levels are imposed on the remaining physical commodity and financial commodity derivatives contracts executed pursuant to DCM or SEF rules, investors in many more 4.13(a)(3) funds would need to receive even more detailed information about the pools' positions.

exemption from aggregation under CEA Section 4a(a)(7) would not resolve any of the issues the Council has identified.[15]

As explained above, the Commission has never articulated any basis for applying the aggregation requirements in current Rule 150.4(c)(3) or in proposed Rule 150.4(b)(1)(iii) to investors in 4.13(a)(3) funds. Therefore, if proposed Rule 150.4(b)(1)(iii) is intended to apply to 4.13(a)(3) funds, the fact that the IAC exemption or CEA Section 4a(a)(7) may be available to investors in 4.13(a)(3) funds would do nothing to address this deficiency in rationale.

Moreover, even if the IAC exemption were available to ERISA plans or other investors in 4.13(a)(3) funds, the exemption still would not afford any relief from having to aggregate spot month positions in physical-delivery Referenced Contracts. As a consequence, investors in 4.13(a)(3) funds would still be required to implement the procedures necessary to comply with the IAC exemption and systems to monitor trading by 4.13(a)(3) funds in spot month physical-delivery Referenced Contracts. The Commission has never provided any reason why these costs should be imposed on ERISA plans or other investors in 4.13(a)(3) funds. .

Finally, the Commission's suggestion that investors in Rule 4.13(a)(3) funds could individually request exemptions pursuant to CEA Section 4a(a)(7) is unrealistic. Although not acknowledged by the CFTC in the Aggregation Proposal, recent changes in other Commission regulations and new Commission interpretations have dramatically increased the number of 4.13(a)(3) funds.[16] Without an understanding of how many Rule 4.13(a)(3) funds currently exist, it is impossible for the Commission to determine whether individual requests for exemptions could be processed in a manner that would address the issues potentially created by proposed Rule 150.4(b)(1)(iii). Notably, since the enactment of the Dodd-Frank Act, the Commission has consistently struggled to timely issue exemptive relief where necessary.[17] ERISA plans may not be able to obtain a fund's specific positions and/or actual or potential future trading strategies in advance of their investment, if at all, to determine if there was even a need to file a notice. Obtaining such information, for the reasons stated above, may be impossible or impractical. If such information was hypothetically available, any delay in providing relief so as to permit investment in a fund could still cause harm to ERISA plans. If proposed Rule 150.4(b)(1)(iii) is intended to apply to 4.13(a)(3) funds, the

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[15] As relevant, Section 4a(a)(7) permits the Commission, by rule, regulation or order, to exempt any person or class of persons from any requirement it may establish under this section with respect to position limits. 7 U.S.C. § 6a(a)(7).

[16] As stated above, the current number of 4.13(a)(3) funds is likely to increase upon the expiration of CFTC Staff Letter 12-38. *See supra* note. 11.

[17] *See e.g.* Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 43,785 (July 22, 2013) (extending the relief granted by a prior exemtpive relief that expired on July 12, 2013).

Council does not believe CEA Section 4a(a)(7) is a realistic solution to the problems that would be created and could cause ERISA plans to forego profitable investment opportunities to the harm of such plans.

F. The Commission Has Not Considered any Costs Associated with Applying the Aggregation Requirement to 4.13(a)(3) Funds.

Nowhere in the Aggregation Proposal has the Commission considered the costs that would be imposed if proposed Rule 150.4(b)(1)(iii) is intended to be applied to 4.13(a)(3) funds. To the contrary, the Commission claims that "[t]o a large extent, market participants have incurred many of these costs to comply with existing regulation 150.4" and that the proposed amendments "[do] not increase the costs of complying with the basic aggregation requirements of part 150, and in fact may decrease those costs by providing relief from the aggregation requirements in certain situations." *See* Schedule A at 68,970. The Council is optimistic that these statements reveal that the Commission interprets proposed Rule 150.4(b)(iii), just like current Rule 150.4(c)(3), to apply only to investors in funds whose CPOs have claimed an exemption under Rules 4.13(a)(1) or (a)(2).[18] If not, then for the reasons explained above, the Council notes that proposed Rule 150.4(b)(1)(iii) would impose extraordinary costs on investors in 4.13(a)(3) funds and on such funds' investment managers.[19]

II. The Commission Should Delete Its Proposal To Require Aggregation Based on "Substantially Identical Trading Strategies."

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[18] It is especially important to the Council that the Commission clarify the inapplicability of the aggregation requirement to 4.13(a)(3) fund investors because the Aggregation Proposal would ***significantly expand the requirement to aggregate***. Under proposed Rule 150.4(b)(1)(iii), aggregation would be required not only by Significant Investors, but also by "any person or entity who has, by power of attorney or otherwise, directly or indirectly, a [25%-or-greater] ownership or equity interest," in a fund whose CPO has claimed an exemption under Rule 4.13. Other than appearing in the proposed rule text, this change is neither acknowledged nor discussed anywhere in the Aggregation Proposal and the Commission provides no rationale for this potentially significant expansion. Further, the Aggregation Proposal offers no explanation of what it means for an investor to have an "indirect" ownership or equity interest in a 4.13(a)(3) fund nor does it address how an investor would be expected to determine – or whether it even could determine – the existence of an indirect ownership or equity interest.

[19] To the extent that proposed Rule 150.4(b)(1)(iii) could be interpreted to apply to direct and indirect interests in 4.13(a)(3) funds, the Council would find the Commission's proposal to ***significantly expand the requirement to aggregate***, considering that the Commission has never specifically applied the existing aggregation requirement in Rule 150.4(c)(3) to direct Significant Investors in 4.13(a)(3) funds nor cited to a single instance in which a Significant Investor has used, or was alleged to have used, its holdings in a 4.13(a)(3) fund to circumvent the Commission's position limits.

Whereas proposed Rule 150.4(b)(1)(iii) would require a 25% or greater investor in a 4.13.(a)(3) fund to aggregate the fund's applicable derivatives positions with its own for purposes of determining compliance with position limits, proposed Rule 150.4(a)(2) goes even further by requiring ***any investor of any size in any fund*** which holds applicable derivative positions (whether or not a 4.13(a)(3) fund) to aggregate the positions of such fund with the investor's own positions for purposes of determining compliance with position limits. This is required if an investor (i) **has *any* ownership interest in more than one fund, account or pool with "substantially identical trading strategies,**" (ii) controls the trading of positions in more than one fund, account or pool with substantially identical trading strategies, or (iii) has any combination of the ownership interest in (i) and the control interest in (ii) with respect to more than one fund, account or pool with substantially identical trading strategies (collectively, we refer to these as the "Proposed SITS Aggregation Requirement").

If an ERISA plan were subject to the Proposed SITS Aggregation Requirement as drafted, it would be required to aggregate *all* of the positions in any accounts, pools or funds with substantially identical trading strategies, without regard to the ERISA plan's actual percentage of ownership in such accounts or funds.[20] Furthermore, none of the Commission's current or proposed exemptions from aggregation would apply to the Proposed SITS Aggregation Requirement.[21]

The Council could easily envision how an ERISA plan fiduciary may prudently seek to invest in multiple funds with similar investment objectives, but different managers, so as to provide diversification benefits to the plan from multiple managers. Such diversification, under the proposed Rule, could have the unintended consequence of additional and burdensome compliance obligations without any real benefit from a policy perspective. Such a plan would have to aggregate, for position limit purposes, all the positions of each fund and, as a practical matter, would be penalized for taking prudent investment measures.

The Aggregation Proposal does not explain why this new basis for aggregation is necessary. The Council can imagine that concerns about evasionary tactics may have been among the Commission's reasons for the Proposed SITS Aggregation Requirement. However, the Commission has offered no evidence or example of investors using passive interests in two or more funds with "substantially identical trading strategies" to circumvent applicable position limits. To the extent that evasion was among the Commission's concerns, the Council believes the Commission's proposal is overly broad to address such a narrow and infrequent occurrence.

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[20] *See* Proposed Rule 150.4(a)(2).

[21] *Id*.

The Aggregation Proposal also does not provide any indication of its intended scope (*e.g.*, the term "substantially identical trading strategies" is not defined). Whereas it is typical for a fund to disclose its investment objectives and the general types of instruments that it is permitted to hold, it is less typical for a fund to disclose the specific investment strategies that it is employing at any particular time (as compared to strategies it is restricted from using or is generally permitted to employ). Accordingly, the Council and its members do not know how an ERISA plan investor will know whether Fund A has "substantially identical trading strategies" to Fund B at any particular time unless Fund A and Fund B provide the ERISA plan with real time trading strategy information to compare. Nor does the Council believe that funds will provide real time (or even delayed) disclosure of a fund's specific trading strategies to investors. Accordingly, all of the practical and legal issues and policy concerns with proposed Rule 150.4(b)(1)(iii) discussed above pertaining to obtaining necessary information from a fund also apply to proposed Rule 150.4(a)(2)

The Council is deeply concerned with the Commission's proposal. The Aggregation Proposal contains no discussion of the Proposed SITS Aggregation Requirement, no attempt to justify the Proposed SITS Aggregation Requirement and no attempt to quantify the costs or benefits of the Proposed SITS Aggregation Requirement. In addition, the Commission's proposal fails to define, or even generally discuss, what is meant by "substantially identical trading strategies" or what an investor is to do if a fund does not provide information to enable it to determine its trading strategies. Accordingly, the Aggregation Proposal fails to provide the basic information about the Proposed SITS Aggregation Requirement that market participants or members of the public would need in order to meaningfully participate in the public comment period that is required by the Administrative Procedures Act. Accordingly, we respectfully request that the Commission delete its proposed Rule 150.4(a)(2).

III. The Commission Should Delete Its Proposal To Require Notice Filings for the IAC Exemption.

Under current Rule 150.3(a)(4), any ERISA plan manager that qualifies as an "eligible entity"[22] may use the IAC Exemption with respect to positions (not in the spot month) in accounts that are controlled by an IAC who has been authorized by the eligible entity to independently control the trading decisions for such accounts without the day-to-day direction of the eligible entity.[23] The current IAC Exemption does not require ERISA

[22] An "eligible entity" is defined to include any CPO, commodity trading advisor, operator of a pension plan or other pooled investment vehicle that is excluded from the definition of "pool" under Rule 4.5, operator of a pooled investment vehicle that has claimed the exclusion from the definition of "CPO" under Rule 4.5, limited partner or shareholder in a 4.13(a)(3) fund, a bank or trust company, a savings association, an insurance company or a separately organized affiliate of any of the foregoing entities.

[23] *See* 17 C.F.R. §§ 150.1 and 150.3.

plan managers to make a filing or any other affirmative submission to the Commission before an eligible entity can rely on the IAC Exemption.

The Commission's proposed Rule 150.4(c) would change this by requiring anyone relying on the IAC Exemption to file a written notice with the Commission describing the relevant circumstances warranting disaggregation and a certification from a "senior officer" that the conditions of the IAC Exemption have been satisfied.[24] Further, the Commission's proposal would require the filing to remain "evergreen" with respect to any material facts; any material change to the information in the notice filed with the Commission would require the eligible entity to promptly file an updated notice detailing the material change.[25]

The Council strongly discourages the Commission from adopting any notice filing requirement for the IAC Exemption. The Aggregation Proposal fails to identify any inadequacy or shortcoming with the Commission's current IAC Exemption and, accordingly, fails to justify the substantial costs that ERISA plan managers, and thus ERISA plans, would incur if an evergreen filing requirement were imposed as a condition of eligibility for the IAC Exemption. Therefore, we respectfully request that the Commission delete its proposal to condition eligibility for the IAC Exemption on a notice filing.

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We thank the Commission for the opportunity to comment on the Aggregation Proposal, and we strongly urge the Commission to clarify that proposed Rule 150.4(b)(1)(iii) does not apply to 4.13(a)(3) funds. The Council believes that any other position taken by the Commission would result in an inappropriate application of the Commission's aggregation requirements to ERISA plans and other investors that invest, directly or indirectly, in 4.13(a)(3) funds. We further believe that Commission should delete its proposal to require aggregation based on "substantially identical trading strategies" and to require a notice filing to claim the IAC Exemption.

We believe that by clarifying the scope of applicability of proposed Rule 150.4(b)(1)(iii), 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 4.13(a)(3) funds and other funds with "substantially identical trading strategies." If you have any questions, please do not hesitate to contact the undersigned, Lynn D. Dudley, Senior Vice President, Retirement and International Benefits Policy, at ldudley@abcstaff.org, or Jan

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[24] *See* Proposed Rule 150.4(c)(1).

[25] *See* Proposed Rule 150.4(c)(4).

Jacobson, Senior Counsel, Retirement Policy, at jjacobson@abcstaff.org. Both can be reached at 202-289-6700.

Sincerely,

Lynn D. Dudley
Senior Vice President, Retirement and
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