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Hon. Gary Gensler
Chairman
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

VIA HAND DELIVERY

Re: *Position Limits for Derivatives*, RIN 3038–AD15 and 3038–AD16

Dear Chairman Gensler:

On behalf of the Working Group of Commercial Energy Firms (the "Working Group"),[1] Hunton & Williams LLP hereby submits the instant letter requesting that the Commodity Futures Trading Commission ("CFTC" or the "Commission") retain the owned-non financial entity exemption from the aggregation requirements as specifically proposed in the pending rulemaking addressing the position limits for derivatives.[2] The Commission is scheduled to vote to issue a final rule on this proceeding tomorrow, Tuesday, October 18, 2011. As the Commission conducts its final deliberations prior to this vote, the Working Group would like to reiterate its support for this exemption and highlight the strong public policy, regulatory and operational reasons for retaining it in the final rule.

Unduly narrowing (or potentially eliminating) the owned non-financial entity exemption would place undue restrictions on derivatives trading by entities that cannot and do not coordinate their trading strategies. To the extent a common owner does not direct the day-to-day trading activities or strategic direction of any non-financial subsidiaries or affiliates, this entity and its non-financial subsidiaries and affiliates should be treated as independent traders for purposes of determining compliance with applicable position limits. In the

1 The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial and residential consumers. Members of the Working Group are energy producers, marketers and utilities.

2 *Position Limits for Derivatives,* Notice of Proposed Rulemaking, 76 Fed. Reg. 4752 (Jan. 26, 2011)("*Position Limits NOPR*").

absence of "common control," there is no risk of coordinated behavior among these entities that could result in excessive speculation.

Moreover, unduly narrowing this exemption could have a substantial adverse impact on a broad cross section of U.S.-based producers, manufacturers and merchandisers - both inside and outside of the energy sector - that are passively owned by, and operate independently from, a financial entity parent. Requiring such independent operating subsidiaries to aggregate their positions with the financial entity parent will constrain liquidity in futures and swap markets and harm the ability of many businesses which are the core of the U.S. economy to effectively and efficiently manage risks.

Retaining the owned non-financial entity exemption as proposed in the *Position Limits NOPR* is generally consistent with current market practice in the energy industry by boards of trade and exempt commercial markets with significant price discovery contracts and, therefore, would minimize any potential disruption to energy markets. In addition, the policy rationale underlying the owned non-financial entity exemption is consistent with the body of well-developed precedent and guidance established by the Federal Energy Regulatory Commission ("FERC")[3] and the Securities and Exchange Commission ("SEC")[4] recognizing the fundamental corporate separation embedded in passive ownership structures and the inability of passive owners to manage, direct or otherwise control the day-to-day business operations of an energy company.

Specifically, unduly narrowing or eliminating the owned non-financial entity exemption also will have the unintended consequence of resulting in violations of certain federal and state laws governing the business relationship between a commercial energy firm and its affiliates. Commercial energy firms routinely engage in joint operations through affiliates, joint ventures and other special purpose entities. As is often the case, these joint operations are with competitors and must operate as independent, separate entities competing against each owner. To comply with the anti-trust and anti-competitive behavior laws and restrictions, these firms have strict, detailed and necessary rules and compliance programs to ensure that each of these joint operations remain truly, and legally, independent and competitive. Information sharing regarding prices, supply, customers and business plans and

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3 *FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060, at P 54 (2007); *AES Creative Res., L.P. et al*, 129 FERC ¶ 61,239 at PP 25-28 (2010); 16 U.S.C. § 824b; *AES Creative Res., L.P. et al*, 129 FERC ¶ 61,239 at P 28 (2010) ("*AES*"); *FPL Energy Mower County, et al.*, 121 FERC ¶ 61,252 (2007); *ITC Holdings Corp., et al.*, 102 FERC ¶ 61,182 at 42 (2010); *D.E. Shaw Plasma Power, LLC*, 102 FERC ¶ 61,265 at P 19 (2003).

4 *See Neptune, LLC*, 2005 WL 2000748 (2005); *Evercore NETC Investments Inc.*, 2003 WL 23095243 (2003); *k1 Ventures, et al.*, 2003 WL 21751451 (2003); *General Electric Capital Corp.*, 2002 WL 837537 (2002); *SW Acquisition L.P.*, 2000 WL 430610 (2000); but see, *Kaufman and Broad Inc.*, 1985 WL 55508 (1985) & *Noverco, Inc.*, 1987 WL 107878 (1987) (SEC declined to issue no action letters because the proposed passive ownership structure provided too much control over the voting securities).

projections is generally viewed as anti-competitive and in certain circumstances can carry significant penalties under federal anti-trust laws.[5]

In wholesale power markets, for instance, interactions between a traditional, franchised public utility with captive customers and its "market-regulated power sales affiliates" (*i.e.,* affiliated energy marketers) that are authorized to transact wholesale sales of electric energy at market-based rates pursuant to Federal Power Act ("FPA") Section 205 are subject to the Affiliate Restriction Regulations imposed by FERC.[6] To the extent that a traditional utility and its "market-regulated power sales affiliate" transacting in a market for an exempt commodity are forced to share position information to ensure "global" corporate compliance with applicable position limits, they would effectively violate FERC's Affiliate Restriction Regulations, notably the independent operation requirement and the prohibition on the sharing of market information.[7] The failure to comply with FERC's Affiliate Restriction Regulations, even an inadvertent failure, could expose these entities to civil penalties of up to $1 million per violation per day and could result in the suspension or revocation of their respective authorizations to engage in wholesale sales of electric energy at market-based rates under FPA Section 205.[8]

On behalf of the Working Group, we appreciate your consideration of this letter as the Commission works through the remaining details to the position limits final rule. If you have any questions, or if we can be of further assistance, please contact the undersigned at (202) 955-1500.

Respectfully submitted,

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5 *See* Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaboration Among Competitors*, at Section 3.34(a) (April 2000) (A consideration in the determination of anti-competitive behavior is the likelihood that competitively sensitive information concerning markets would be disclosed). *See also, United States v. Container Corp. of America,* 393 U.S. 333 (1969).

6 16 U.S.C. § 824d; 18 C.F.R. § 35.39. In relevant part, the Affiliate Restriction Regulations require the functional separation and independent operation of such entities, and are intended to prevent potential affiliate abuse, including cross-subsidization issues, that could benefit shareholders to the detriment of captive ratepayers.

7 *See Florida Power Corp., et al.*, 111 FERC ¶ 61,243 (2005).

8 16 U.S.C. § 825o-1.

cc: Commissioner Bart Chilton
Commissioner Michael Dunn
Commissioner Scott D. O'Malia
Commissioner Jill E. Sommers
Rick Shilts, Director, Division of Market Oversight