

CFTC PROPOSES CHANGES TO POSITION LIMITS AGGREGATION RULES

On May 18, 2012, the Commodity Futures Trading Commission (“CFTC”) proposed rules that would modify the aggregation provisions for limits on speculative positions set forth in part 151 of the CFTC’s position limits rules. The position limits rules, published in the Federal Register on November 18, 2011, establish a new position limits regime for 28 exempt and agricultural commodity futures and options contracts and economically equivalent physical commodity swaps.¹ The CFTC issued the proposed rules in response to a request by industry groups for relief from certain provisions of the position limits rules.²

The position limits rules became effective January 17, 2012, and provide tiered compliance dates. The compliance date for all spot-month limits and non-spot-month limits for “legacy” agricultural commodities already subject to federal limits will be 60 days after the CFTC defines “swap,” which has not yet occurred. The compliance date for all other non-spot-month limits will be set by CFTC order approximately twelve months after collection of swap positional data. The CFTC intends to finalize all aspects of the proposed rules prior to these compliance dates.

POSITION LIMITS AGGREGATION RULES AND INDUSTRY CONCERNS

For purposes of determining compliance with position limits, the position limits rules generally require a person to aggregate all positions for which that person controls trading or has a 10 percent or more ownership interest in an account or position. The rules provide exemptions from aggregation for ownership interests of limited partners in pooled accounts, discretionary accounts, and customer trading programs of futures commission merchants; eligible entities with independent account controllers that manage customer positions; and underwriters of securities. They further provide an exemption where sharing of information would cause a person to violate federal law or regulations.

Industry groups petitioned the CFTC for exemptive relief from the position limits aggregation rules, arguing that requiring aggregation based on ownership absent control of trading decisions would impose substantial burdens on market participants and could harm market liquidity. They also argued, among other things, that the exemption from sharing information should be broadened to cover not only violations of federal law, but also violations of state and foreign law.

PROPOSED MODIFICATIONS TO POSITION LIMITS AGGREGATION RULES

In response to industry comments, the CFTC proposed certain modifications to the position limits rules.

Aggregation based on ownership. The CFTC proposed a three-tiered approach to aggregation while reaffirming its position that a person’s ownership or equity interest in an account or position is an appropriate basis for requiring aggregation. Entities with less than a 10 percent interest would not have to aggregate positions. Entities with an interest between 10 percent and 50 percent would have the option of filing a notice of disaggregation upon a proper showing. Entities with more than a 50 percent interest would have to aggregate positions. The CFTC thus rejected requests for an “owned non-financial entity exemption” that would have permitted disaggregation even if the owned

¹ See Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626 (Nov. 18, 2011) (to be codified at 17 C.F.R. pts. 1, 150 & 151).

² The CFTC may grant entities exemptive relief from the new position limits regime under Commodity Exchange Act section 4a(a)(7).

entity were a wholly owned company and instead imposed an irrebuttable presumption of aggregation for interests exceeding 50 percent.

The proposed disaggregation notice filing would require a person to demonstrate its independence from the owned entity by showing that it:

- Lacks knowledge of trading decisions;
- Trades pursuant to separately developed and independent trading systems;
- Maintains and enforces written procedures to preclude knowledge of, access to, or receipt of, data about trades;
- Does not share employees that control trading decisions; and
- Does not have risk management systems that permit the sharing of trades or trading strategy.

The notice filing would be effective upon submission but subject to modification or rejection by the CFTC.

Information sharing in violation of state or foreign law. The proposed rules would extend the violation of federal law exemption to also include an exemption where sharing information would violate the law of a state or foreign jurisdiction. The exemption would be available when sharing information creates a “reasonable risk” of violating federal, state, or foreign law, whereas the current rules provide an exemption only when sharing information “would cause” a violation of federal law. Consistent with the exemption as originally approved, the person claiming the exemption must file an opinion of counsel identifying the restriction of law and relevant facts.

Relief for “higher tier entities.” The proposed rules would provide filing relief to persons whose owned entity had already filed the requisite notice for the exemptions discussed above. Subject to certain conditions, a person with an ownership or equity interest of 10 percent or more in an owned entity would not have to file a separate notice identifying the positions and accounts previously identified in the owned entity’s filing.

Other modifications proposed in the rules include:

- Expanding disaggregation relief for the underwriting of securities to include ownership interests acquired through the market-making activities of an affiliated broker-dealer; and
- Expanding the definition of “independent account controller” to include the managing member of a limited liability company, thus allowing commodity pools structured as limited liability companies to rely on the exemption from aggregation for independent account controllers.

Comments on the proposed rules must be received 30 days after their publication in the Federal Register, which has not yet occurred.

The proposed rules are available [here](#).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

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