

CFTC ADOPTS FINAL RULES ON POSITION LIMITS

The Commodity Futures Trading Commission recently adopted final rules on speculative position limits.¹ Among other things, the rules establish new speculative position limits that will apply to 28 futures contracts and any economically equivalent futures, options and swaps (collectively, “Referenced Contracts”). The rules also establish new reporting requirements for persons holding or controlling positions in certain Referenced Contracts in excess of particular limits and amend the scope of the bona fide hedging exemption. While the rules modify current account aggregation standards, they retain the longstanding independent account controller exemption.

Speculative Position Limits*Spot-month position limits*

Generally, traders will be prohibited from holding or controlling a position in excess of 25% of the estimated spot-month deliverable supply of any Referenced Contracts on the same commodity. Cash-settled NYMEX Henry Hub Natural Gas contracts, however, will be subject to special rules.²

Non-spot-month position limits

With respect to legacy Referenced Contracts,³ generally no person will be permitted to hold or control a position in the same commodity in excess of certain limits established by the rule.

With respect to non-legacy Referenced Contracts, generally no person will be permitted to hold or control a position in the same commodity, either on an all-months-combined (including the spot-month) basis or in a single month, in excess of 10% of the first 25,000 contracts, and 2.5% thereafter, of average all-months-combined aggregate open interest.

¹ The CFTC adopted the final rules by a 3-2 vote on October 18, 2011. The rules are being implemented pursuant to Section 737 of The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, H.R. 4173, enacted July 16, 2011 (the “Dodd-Frank Act”).

² NYMEX Henry Hub Natural Gas Referenced Contracts will be subject to both a cash-settled spot-month position limit and an aggregate spot-month position limit (i.e., both cash-settled and physical-delivery Referenced Contracts), set at five times 25% of the estimated spot-month deliverable supply.

³ Legacy Referenced Contracts refer to the agricultural futures contracts in Part 150 of the CFTC Regulations (“Part 150”) and any economically equivalent futures, options and swaps on those contracts. These futures contracts include CBOT Corn, Oats, Soybean Meal, Soybean Oil, Soybeans and Wheat, ICE Futures U.S. Cotton No. 2, KCBT Hard Winter Wheat and MGEX Hard Red Spring Wheat.

Effective Dates for Speculative Position Limits

Spot-month position limits

- Sixty days after the term “swap” is further defined by the CFTC pursuant to the Dodd-Frank Act, certain new spot-month position limits will go into effect.
- On the first day of January of the second calendar year after the term “swap” is further defined, the CFTC will fix new spot-month position limits. Such limits will generally be set at 25% of the estimated spot-month deliverable supply.
- Every year thereafter in the case of agricultural Referenced Contracts, and every two years thereafter in the case of energy and metal Referenced Contracts, the CFTC will fix new spot-month position limits. Such limits will generally be set at 25% of the estimated spot-month deliverable supply.

Non-spot-month position limits

- Sixty days after the final rules are published in the Federal Register, current Part 150 will be amended to set new position limits for certain futures contracts.
- Sixty days after the term “swap” is further defined, the CFTC will fix new non-spot-month position limits for legacy Referenced Contracts, which will supersede amended Part 150.
- One month after the CFTC has obtained or estimated 12 months of data on cleared and uncleared swaps on physical commodities, and every two years thereafter, the CFTC will fix new non-spot-month position limits for non-legacy Referenced Contracts. Such limits will generally be set at 10% of the first 25,000 contracts, and 2.5% thereafter, of average all-months-combined aggregate open interest.

Independent Account Controller Exemption

Although the CFTC proposed to eliminate the independent account controller exemption in its original rule proposal, the exemption was retained, with some modification, in the final rules. Under the current exemption, certain eligible entities are not required, for purposes of speculative position limits, to aggregate positions controlled by an independent account controller, if such controller (i) trades independently of the eligible entity and any other independent account controllers, (ii) has no knowledge of trading decisions by any other independent account controller, and (iii) is registered with the CFTC (or exempt from such registration in narrow circumstances).

The adopting release states that the independent account controller exemption does not extend to proprietary positions.

In addition, persons intending to rely on the independent account controller exemption, as well as other aggregation exemptions, will be required to file a notice with the CFTC. Generally, such notices will be effective upon submission.

Visibility Reports

The final rules introduce a new visibility reporting regime. Generally, persons holding or controlling positions exceeding certain levels in energy and metal Referenced Contracts will have to file “visibility” reports with the CFTC. Such reports will include, among other things, position and pricing information.

Bona Fide Hedging Exemption

Under the final rules, only certain enumerated types of transactions or positions may qualify for a bona fide hedging exemption. These enumerated hedges include, among others, anticipated merchandizing transactions, royalties, and service contracts. In addition, such transactions or positions must generally represent a substitute for transactions or positions in a physical marketing channel, be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, and arise from the potential change in the value of certain assets, liabilities or services. If a transaction or a position is not one of the types of enumerated transactions or positions, but otherwise meets the criteria listed above, a person engaging in risk-reducing practices commonly used in the market may petition the CFTC staff for relief.

Persons intending to rely on a bona fide hedging exemption must file a notice with the CFTC, which will generally be effective upon the date of submission, except in the case of certain anticipatory hedges.

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If you have any questions concerning the foregoing or would like additional information, please contact Rita Molesworth (212-728-8727, rmolesworth@willkie.com), Gabriel Acri (212-728-8833, gacri@willkie.com), Jonathan Burwick (212-728-8108, jburwick@willkie.com), James Lippert (212-728-8945, jlippert@willkie.com), or the Willkie attorney with whom you regularly work.

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