

CLIENT MEMORANDUM

CFTC Finalizes Position Aggregation Rules

December 22, 2016

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The Commodity Futures Trading Commission has adopted amendments to its rules governing the aggregation of futures and options on futures positions.¹ CFTC aggregation rules specify when such positions must be aggregated for purposes of determining compliance with speculative position limits. The amendments clarify the scope of current aggregation requirements and exemptions from aggregation and incorporate certain additional exemptions. Most notably, the Rules (i) include an exemption from aggregation for positions held in the account of an owned entity and (ii) will require any person relying on the independent account controller (“IAC”) exemption to file a notice with the CFTC. The Rules become effective on February 14, 2017.

The CFTC has separately re-proposed amendments to its Part 150 rules that would, among other things, establish speculative position limits for other exempt and agricultural commodity futures and option contracts and swaps that are

¹ 81 Fed. Reg. 91454 (Dec. 16, 2016). Rules affected by these amendments include CFTC Rule 150.1, Rule 150.3 and Rule 150.4 (as amended, the “Rules”). For more information on the CFTC’s proposal to amend its position aggregation rules, please see our client memoranda entitled “CFTC Supplements Proposed Amendments to Position Aggregation Rules” (Oct. 9, 2015), available [here](#), and “CFTC Proposes Amendments to Position Aggregation Rules” (Dec. 16, 2013), available [here](#).

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economically equivalent to such contracts.² If these position limits are adopted, the Rules will also apply to such contracts and swaps.

Aggregation Requirement

Generally, current CFTC rules require a trader to aggregate all positions it holds or trades directly with (i) any positions in accounts, or of entities, in which the trader has a 10% or greater ownership interest or for which it controls trading and (ii) the positions of any other person with whom such trader is acting pursuant to an express or implied agreement, unless an exemption from aggregation is available with respect to any such accounts or positions.

The amendments generally do not alter the current standard for determining when aggregation is required.³ However, the Rules will require a trader to also aggregate, on a pro rata basis, all positions held or traded in accounts or pools with “substantially identical trading strategies,” regardless of the level of the trader’s ownership interest in such accounts or pools.⁴ Further, the Rules will not permit disaggregation based on any other exemption otherwise available under the Rules in the case of accounts or pools with substantially identical trading strategies.

Exemptions from the Aggregation Requirement

In general, the amendments to the aggregation rules clarify the scope of current exemptions from aggregation and expand the circumstances in which a trader or entity will be permitted to disaggregate its positions from those of another trader or entity.⁵ At the same time, the Rules will require those relying on certain new and existing aggregation exemptions to make notice filings with the CFTC, whereas current exemptions are generally self-executing.⁶

A trader that fails to timely file an exemption notice will be deemed to have violated only the notice filing requirement, and not the applicable position limit(s), during the time in which the requisite filing has not been made, provided the trader files the requisite notice within five business days of becoming aware of its noncompliance.

² For more information on the CFTC’s recent proposal to amend its position limit rules, please see our client memorandum entitled “CFTC Reproposes Position Limit Regulations” (Dec. 22, 2016), available [here](#).

³ We note that the CFTC’s interpretation of Section 4a(a)(1) of the Commodity Exchange Act as requiring the aggregation of positions of an owned entity on the basis of ownership alone was subject to extensive discussion between market participants and the CFTC during the notice and comment period.

⁴ “Substantially identical trading strategies” is not defined in the Rules.

⁵ The amendments to the aggregation rules effect certain other technical modifications not discussed in this memorandum.

⁶ Generally, all persons claiming an exemption would also be subject to call by the CFTC, which is consistent with current requirements.

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Owned Entity Exemption

Under the Rules, an entity (the “owning entity”) that holds a 10% or greater ownership interest in another entity (the “owned entity”) must aggregate any positions held or traded by such owned entity with any positions the owning entity holds or trades directly, unless each entity satisfies certain criteria for disaggregating such positions.

Specifically, the Rules will permit disaggregation if each entity (or, if the owning entity is not aware, and should not be aware, of the trading activities and practices of the owned entity, the owning entity only):

- i. does not have knowledge of the trading decisions of the other entity;
- ii. trades pursuant to a separately developed and independent trading system;
- iii. has and enforces written procedures to preclude it and the other entity from having knowledge of, gaining access to or receiving data about the other’s trades;
- iv. does not share employees that control the trading decisions of such entity with the other entity; and
- v. does not have risk management systems that permit the sharing of its trades or trading strategy with employees that control the trading decisions of the other entity.

To claim the exemption, an owning entity must file a notice with the CFTC describing the circumstances warranting disaggregation and certifying that the criteria listed above have been satisfied. The notice will be effective upon filing. Notably, the filing will be effective retroactively in circumstances where an owned entity has been acquired through a merger or similar transaction, provided such filing is made within 60 days of the acquisition.

Relief for Higher-Tier Entities

The Rules will permit an owning entity that files a notice claiming an exemption from the aggregation requirements with respect to the positions of an owned entity to file such notice on behalf of itself *and* any of its affiliates, provided a senior officer of each affiliate signs the notice. Any affiliate of the owning entity that wishes to rely on its claim for relief from the aggregation requirements with respect to the positions of the owned entity that are identified in the notice filing must separately comply with the criteria of the owned entity exemption, other than the requirement to file a notice, and may not otherwise control the trading of the owned entity.

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Information Sharing Exemption

Under the Rules, a trader may claim an exemption from the requirement to aggregate its positions with those of an owned entity where the sharing of information in connection with such aggregation would cause the trader and/or the owned entity to violate, or creates a reasonable risk that either person could violate, applicable federal, state or foreign laws or regulations.

In order to claim the exemption, the trader must file a notice and a memorandum of law setting forth the basis for the trader's conclusion that information sharing would result in a violation of applicable laws or regulations. Further, neither the trader nor the owned entity may have actual knowledge of information associated with such aggregation, such as information regarding the positions or transactions of the other entity.

Exemption for Participants in Pooled Accounts

Generally, a trader that has a 10% or greater ownership interest as a limited partner, limited member or shareholder in a pooled account is not required to aggregate the pool's positions with any other positions such trader is required to aggregate, unless the trader (i) holds a 25% or greater ownership interest in a pool the operator of which is exempt from registration as a commodity pool operator ("CPO") under CFTC Rule 4.13 or (ii) is the pool's CPO.⁷ Also, a participant that (a) meets or exceeds the 10% threshold and (b) is a principal or affiliate of the pool's operator must aggregate its positions with those of the pool unless certain criteria are satisfied and a notice filing is made.

Independent Account Controller Exemption

CFTC rules currently permit an eligible entity that maintains positions with an IAC to disaggregate such positions from any other positions the eligible entity is required to aggregate, provided certain criteria are met. The amendments to the aggregation rules expand such relief to persons with a role equivalent to a general partner of a limited liability partnership or a managing member of a limited liability company.

The CFTC has also clarified that the IAC exemption is available with respect to an eligible entity's *client* positions or accounts only, and not its proprietary accounts.⁸ Notably, the IAC exemption will no longer be self-executing and, as a result, any trader currently relying on, or seeking to claim, the IAC exemption will be required to file a notice with the CFTC.

⁷ The Rules expand the relief to expressly include persons that are limited members in a pooled account.

⁸ The release does not address whether a pool co-owned by the eligible entity (or its affiliates) and such eligible entity's clients could be deemed a "client" account for purposes of the IAC exemption.

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Exemption for FCM Accounts

Under current CFTC rules, a futures commission merchant (“FCM”) is generally permitted to disaggregate positions held in discretionary accounts or accounts that are part of, participate in or receive trading advice from a customer trading program of an FCM or of any officers, partners or employees of such FCM or its affiliates if certain criteria are met. The Rules generally retain this exemption but will require an FCM to file a notice in order to claim the relief.

Exemptions for Underwriting and Broker-Dealer Activities

The Rules provide, in general, that a person is not required to aggregate the positions or accounts of an owned entity with its own positions if ownership of the entity (i.e., an ownership interest of 10% or greater) arises from either:

- the ownership of an unsold allotment in connection with such person’s participation in the distribution or underwriting of the securities of the owned entity; or
- the ownership of securities of the issuer in the normal course of such person’s business as a registered broker-dealer, provided such person has no actual knowledge of the owned entity’s trading decisions.

These exemptions will be self-executing.

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December 22, 2016

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