

CLIENT MEMORANDUM

CFTC Provides Relief From Certain Position Aggregation Requirements

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AUTHORS

Rita M. Molesworth | Paul J. Pantano, Jr. | Deborah A. Tuchman | Neal E. Kumar | James E. Lippert | Michael A. DeNiro

The staff of the Commodity Futures Trading Commission has issued no-action relief related to certain exemptions from the CFTC's position aggregation requirements.¹ The relief modifies the notice filing requirements for such exemptions. Market participants will be permitted to make notice filings upon request, rather than in advance of relying on an exemption. In addition, the relief expands the scope of the independent account controller ("IAC") exemption, and limits the scope of when a participant must aggregate positions in accounts with substantially identical trading strategies. The relief also narrows certain of the representations required to be made in connection with reliance on the owned entity exemption.

The relief is time-limited and is set to expire on August 12, 2019. During the relief period, the CFTC staff expects to evaluate the impact of the relief and consider whether to make any amendments to its aggregation rules. Although the

¹ CFTC Letter No. 17-37 (August 10, 2017).

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relief applies for purposes of CFTC-set limits only, the staff noted that several exchanges intend to apply the same policy outlined in the relief for purposes of exchange-set limits.²

Background

In December 2016, the CFTC adopted amendments to its aggregation rules, which set forth the general circumstances under which a person must aggregate positions or accounts on the basis of ownership or control for purposes of determining compliance with CFTC-established position limits.³ The aggregation rules also set forth exemptions from aggregation, subject to certain conditions. To rely upon certain exemptions, the rules require that a market participant submit a notice filing to the CFTC that sets forth the circumstances warranting disaggregation, along with a certification from a senior officer that the person is eligible for an exemption. The amended rules became effective on February 14, 2017. On February 6, 2017, the CFTC staff issued time-limited no-action relief from the notice filing requirement provided a person was otherwise eligible to rely on an exemption.⁴ Such relief was set to expire on August 14, 2017.

In July of this year, certain industry groups submitted requests for no-action relief pertaining to certain aspects of the CFTC's amended aggregation rules. Among other things, the no-action requests urged the staff to allow participants to submit notice filings in response to a request from the CFTC or an exchange in light of the significant burdens associated with submitting notice filings in advance of relying upon an exemption. The industry groups also requested that the staff make the IAC exemption available to a larger number of persons. Finally, the industry groups requested that the staff clarify that a person is required to aggregate positions held in accounts or pools with "substantially identical trading strategies" only if the person holds the positions to willfully circumvent applicable position limits.

Summary of No-Action Relief

Notice Filing Requirement

Pursuant to the relief, if an exemption from aggregation requires a notice filing pursuant to CFTC Rule 150.4(c), a person that is eligible to claim the exemption is not required to file a notice unless the person receives a request from the CFTC

² At present, the CFTC imposes limits on nine agricultural futures contracts: CBOT Corn, CBOT Oats, CBOT Soybeans, CBOT Soybean Oil, CBOT Soybean Meal, CBOT Wheat, MGEX Hard Red Spring Wheat, IFUS Cotton No. 2, and KCBT Hard Winter Wheat. The CFTC has proposed amendments to its position limit regulations that would expand this list to include certain additional contracts. For more information, please see our client memorandum entitled "CFTC Reproposes Position Limit Regulations" (Dec. 22, 2016), available [here](#).

³ Aggregation of Positions, 81 Fed. Reg. 91454 (Dec. 16, 2016). For more information on the CFTC's amendments to its position aggregation rules, please see our client memorandum entitled "CFTC Finalizes Position Aggregation Rules" (Dec. 22, 2016), available [here](#).

⁴ CFTC Letter No. 17-06 (Feb. 6, 2017).

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staff or from an exchange. Upon receipt of any such request, the recipient will have five business days to file a notice.⁵ Importantly, the notice filing need only address the specific entities, accounts and/or positions identified in the request.

Although the relief modifies the notice filing requirement, the relief does not change the requirement that a market participant meet all other conditions in advance of relying upon an exemption. Market participants should evaluate the conditions necessary to rely on an exemption and take steps to ensure compliance with those conditions.

Owned Entity Exemption

Under the amended aggregation rules, a person is exempt from aggregating the positions of an entity in which it owns a 10% or greater ownership interest provided certain conditions demonstrating independence are met. The application of such conditions varies depending on an owner's awareness of the owned entity's activities. If the owner is not aware (and should not be aware) of the owned entity's activities, then only the owner needs to meet the conditions of independence (the "Awareness Clause"). By comparison, if the owner is aware (or should be aware) of the activities of the owned entity, then both the owner and the owned entity must meet the conditions of independence.

According to the preamble of the amended aggregation rules, an owner is charged with awareness of an owned entity's activities if such owner is, in effect, able to control the owned entity or routinely has access to relevant information about the owned entity. Pursuant to the relief, an owner is not charged with awareness of an owned entity's activities if the owner does not have awareness of the *derivatives* trading activities and practices of the owned entity. The staff explained that the term "derivatives" refers to those contracts subject to CFTC-established position limits. As a result, awareness of other activities, such as cash market trading activity, does not preclude an owner from relying on the Awareness Clause.

Further, the relief provides that an owner may rely on the Awareness Clause if the owner does not *actually* control the owned entity's derivatives trading activity and does not have *actual* routine access to information regarding the owned entity's derivatives trading. Therefore, an owner with the potential to control an owned entity's derivatives trading or the potential to obtain routine access to derivatives trading information may nonetheless rely on the Awareness Clause provided the owner does not actually control or have routine access.

Lastly, one of the conditions of independence is that the owner and owned entity do not have knowledge of the other's trading decisions. The relief provides that this condition applies to knowledge of *derivatives* trading decisions (*i.e.*, contracts subject to CFTC-established position limits), and does not apply to knowledge of trading decisions for other instruments.

⁵ The five business day time frame stems from CFTC Rule 150.4(c)(3). The relief notes that CFTC staff may extend the five business day period.

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IAC Exemption

Generally, under the amended aggregation rules any person that satisfies the definition of “eligible entity” may disaggregate positions and accounts that are controlled by an IAC. The definition of eligible entity is limited to certain enumerated categories of persons. Likewise, the IAC definition is limited to certain enumerated categories of persons and, most notably, does not include an unregistered commodity trading advisor.

The relief expands the “eligible entity” definition to include any person that authorizes an IAC to act in a fiduciary capacity by independently controlling the trading of such person’s accounts or positions, provided the other requirements of the exemption are satisfied. In addition, the relief also expands the definition of an IAC to include a commodity trading advisor that is exempt from CFTC registration.

“Substantially Identical Trading Strategies”

Under the amended aggregation rules, a person generally must aggregate positions in accounts or pools with “substantially identical trading strategies,” regardless of whether an exemption may otherwise be available with respect to such positions. The relief provides that a person will be required to aggregate positions in accounts that trade pursuant to “substantially identical trading strategies” only where such person has allocated positions among such accounts for the purpose of willfully circumventing the position limits.

If you have any questions regarding this memorandum, please contact Rita M. Molesworth (212-728-8727, rmolesworth@willkie.com), Paul J. Pantano, Jr. (202-303-1211, ppantano@willkie.com), Deborah A. Tuchman (212-728-8491, dtuchman@willkie.com), Neal E. Kumar (202-303-1143, nkumar@willkie.com), James E. Lippert (212-728-8945, jlippert@willkie.com), Michael A. DeNiro (212-728-8147, mdeniro@willkie.com) or the Willkie attorney with whom you regularly work.

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