

CLIENT MEMORANDUM

CFTC Proposes Amendments to Position Aggregation Rules

December 16, 2013

AUTHORS

Rita M. Molesworth | Deborah A. Tuchman | Lisa J. Eskenazi | Jonathan C. Burwick

The Commodity Futures Trading Commission has proposed amendments to its position aggregation rules.¹ CFTC aggregation rules specify when a trader's futures, options on futures and swaps positions must be combined with those of another trader for purposes of determining compliance with speculative position limits. The Proposal is intended to clarify current aggregation requirements and includes several new exemptions from such requirements. Certain of these exemptions are substantially similar to exemptions proposed in May 2012.² Comments on the Proposal are due by January 14, 2014.

¹ [CFTC Notice of Proposed Rulemaking: Aggregation of Positions](#), 78 Fed. Reg. 68946 (Nov. 15, 2013) (the "Proposal").

² The CFTC's speculative position aggregation rules are contained in its Part 150 regulations ("Part 150"). In late 2011, the CFTC adopted its Part 151 regulations ("Part 151"), which were intended to replace Part 150. Among other things, Part 151 incorporated a modified version of the Part 150 aggregation rules and exemptions. In May 2012, the CFTC proposed amendments to Part 151 that, if adopted, would have granted broader relief from the Part 151 aggregation requirements (the "2012 Release"). In September 2012, however, the United States District Court for the District of Columbia (the "Court") vacated Part 151. As a result, Part 150 remained in effect and the aggregation relief proposed in the 2012 Release was never adopted.

CFTC Proposes Amendments to Position Aggregation Rules

Continued

Current Aggregation Requirements and Exemptions

Generally, Part 150 requires a person to aggregate all positions the person owns or controls. The CFTC has proposed to retain the existing aggregation requirements and exemptions, including, among others, the exemptions for bona fide hedge positions, passive investors in commodity pools, owners of less than 10% of entities other than commodity pools (each, an “owned entity”), and “eligible entities” utilizing “independent account controllers” (each as defined in Part 150).

The bona fide hedging exemption generally provides that a person need not count, for position limit (and thus, aggregation) purposes, any positions that constitute bona fide hedges (as defined in CFTC rules). The passive investor and owned entity exemptions provide that neither a passive investor in a commodity pool nor an owner of less than 10% of an owned entity is generally required to aggregate the positions owned by such commodity pool or entity, respectively, with such person’s other positions.³ Finally, the independent account controller exemption generally provides that an “eligible entity” need not aggregate any of its positions controlled by an “independent account controller” (except for certain spot month positions) with the person’s other positions, so long as certain conditions are satisfied.

The Proposal

The CFTC has proposed to clarify the language of the existing aggregation requirements, without changing the substantive meaning of such requirements, and to expand the definition of “eligible entity” to permit greater reliance on the independent account controller exemption.

The CFTC has also proposed new exemptions from the aggregation requirements that would generally provide aggregation relief where (i) sharing information in order to aggregate positions would create a reasonable risk of a violation of state, federal or foreign law or regulations, (ii) a person has an ownership interest of between 10% and 50% in an owned entity, (iii) a person has an ownership interest of greater than 50% in a non-consolidated owned entity or (iv) a distributor of securities or a broker-dealer, acting as an underwriter, has an ownership interest in an unsold allotment of

For more information on the adoption of Part 151, please see our client memoranda entitled [CFTC Adopts Final Rules on Position Limits: Independent Account Controller Exemption Retained](#) and [CFTC Adopts Final Rules on Position Limits](#), dated Oct. 19, 2011 and Nov. 17, 2011, respectively.

For more information on the proposed amendments to Part 151, please see our client memorandum entitled [CFTC Proposes Modifications to Position Limit Aggregation Rules](#), dated May 31, 2012.

For more information on the Court’s decision to vacate Part 151, please see our client memorandum entitled [Court Vacates and Remands CFTC Position Limit Rule](#), dated Oct. 1, 2012.

³ A passive investor in a commodity pool operated pursuant to CFTC Rule 4.13, however, must aggregate the positions of the pool with its own positions if such investor owns 25% or more of the pool and no exemption from aggregation is available. In such a situation, the CFTC stated in the Proposal that the passive investor may apply to the CFTC for aggregation relief.

CFTC Proposes Amendments to Position Aggregation Rules

Continued

securities of an owned entity. The ability to rely on certain of these exemptions would be conditioned on making a notice filing with, or receiving approval from, the CFTC.

Amendment to the Definition of “Eligible Entity”

The CFTC has proposed to expand the definition of “eligible entity” so that the independent account controller exemption may be applied with respect to any person with a role equivalent to a general partner in a limited liability partnership or a managing member of a limited liability company.

Information Sharing Exemption

The CFTC has proposed a new exemption from the aggregation requirement where the sharing of information necessary to aggregate positions could result in the violation of certain laws or regulations. Specifically, under the proposed rule, a person need not aggregate the positions or accounts of an owned entity if the sharing of information associated with such aggregation would create a reasonable risk that either person could violate state, federal or foreign law or regulations.⁴ To rely on this exemption, a person could not have actual knowledge of the other party’s positions.

The information sharing exemption would require that a notice filing be made with the CFTC. The CFTC has proposed to require the filing to be accompanied by a written memorandum explaining the basis for the conclusion that the sharing of information would create a reasonable risk that either person could violate applicable law or regulations.

Owned Entity Exemption (10% to 50% ownership)

The CFTC has proposed an exemption from the aggregation requirement for any person with an ownership interest in an owned entity of between 10% and 50%, provided, generally, that such person (including any entity with which such person must aggregate) and the owned entity:

- do not have knowledge of the trading decisions of the other;
- trade pursuant to separately developed and independent trading systems;
- have and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about trades of the other;
- do not share employees who control the trading decisions of either; and

⁴ The exemption applies only to a potential violation of state, federal or foreign law or regulations. The CFTC stated that a potential violation of local or international law or regulations would not be sufficient.

CFTC Proposes Amendments to Position Aggregation Rules

Continued

- do not have risk management systems that permit the sharing of trades or trading strategies.

The five conditions described above are referred to herein as the “Owned Entity Conditions.”

This exemption would require that a notice filing be made with the CFTC.

Non-Consolidated Owned Entity Exemption (greater than 50% ownership)

The CFTC has proposed an exemption from the aggregation requirement for any person with a greater than 50% ownership interest in an owned entity, provided that, among other conditions:

- the Owned Entity Conditions are satisfied;
- the person demonstrates to the CFTC that procedures are in place to prevent coordinated trading decisions by such person, any entity with which such person must aggregate and the owned entity;
- such person certifies to the CFTC that the owned entity is not required to be, and is not, consolidated on the financial statement of such person;
- each representative of the person on the owned entity’s governing body certifies that he or she does not control the trading decisions of the owned entity; and
- such person certifies to the CFTC that either all of the owned entity’s positions qualify as bona fide hedging transactions or the owned entity’s positions that do not so qualify do not exceed 20% of any position limit currently in effect.

Use of this exemption would require approval by the CFTC.

Higher-Tier Entities

The CFTC has proposed to permit a parent company to rely on an owned entity exemption claimed by its subsidiary (without claiming its own exemption), so long as the parent company complies with the other conditions of its subsidiary’s exemption.

Distribution and Underwriting Exemptions

The CFTC has proposed exemptions to permit disaggregation in situations involving distribution and underwriting activities. Specifically, a person would not be required to aggregate the positions of an owned entity if ownership results from holding all or a part of an unsold allotment of securities as a participant in the distribution and/or underwriting of such securities.

CFTC Proposes Amendments to Position Aggregation Rules

Continued

In addition, a broker-dealer registered with the Securities and Exchange Commission, or similarly registered with a foreign regulatory authority, need not aggregate the positions of an owned entity, provided, generally, that:

- such broker-dealer does not have a greater than 50% ownership interest in the owned entity;
- the ownership interest is based on the ownership of securities acquired in the normal course of business as a dealer; and
- such person does not have actual knowledge of the trading decisions of the owned entity.

Both of these exemptions are self-executing.

If you have any questions regarding this memorandum, please contact Rita M. Molesworth (212-728-8727, rmolesworth@willkie.com), Deborah A. Tuchman (212-728-8491, dtuchman@willkie.com), Lisa J. Eskenazi (212-728-8509, leskenazi@willkie.com), Jonathan C. Burwick (212-728-8108, jburwick@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Paris, London, Milan, Rome, Frankfurt and Brussels. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

December 16, 2013

Copyright © 2013 Willkie Farr & Gallagher LLP.

WILLKIE FARR & GALLAGHER_{LLP}
