

CLIENT ALERT

Common Control: CFTC Settlement Highlights the Importance of Who Supervises Trading Accounts

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On April 30, 2018, the Commodity Futures Trading Commission (“**CFTC**”) published an order accepting a settlement offer from, and imposing a \$2 million civil monetary penalty against, Glencore Agriculture B.V. and Glencore Ltd. for violations of speculative position limits, reporting rules and exchange for related position (“**EFRP**”) rules.¹ According to the Order, a single trading manager (“**Head of Cotton**”) oversaw the cotton trading activity of both Glencore Agriculture B.V. and Glencore Ltd., including acting as the direct supervisor of cotton futures traders for both affiliates. As discussed below, common control of the trading accounts of both companies created exposure across a number of CFTC and exchange rules.

Speculative Position Limits

The CFTC imposes speculative position limits on the number of futures positions that a market participant may control or hold in the Cotton No. 2 futures contract traded on ICE Futures U.S. It is a violation to exceed the limit without an applicable exemption. When calculating a position subject to the limit, a market participant must aggregate all futures positions that the participant controls, or in which it holds a 10 percent or greater ownership interest.² According to the Order, the accounts of Glencore Agriculture B.V. and Glencore Ltd. were under common control, so the accounts should

¹ See *In Re Glencore Agriculture B.V. and Glencore Ltd.*, Commodity Futures Trading Commission Docket No. 18-12 (Apr. 30, 2018) (hereinafter the “**Order**”) ([available here](#)).

² Although not relevant to this Order, there are exemptions from aggregation if a market participant holds a 10 percent or greater ownership interest in an entity and there are certain indicia of independence between the two entities.

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have been aggregated for position limits purposes. The aggregated accounts exceeded the 5,000 contract single month limit “on multiple days during May 2013, June 2013, May 2014, and June 2014.”

The Order notes that the Head of Cotton “remained generally apprised of trader activities and positions across Glencore entities and participated in discussions regarding certain trade-level decisions at both Glencore Grain B.V. and Glencore Ltd.” Although the Head of Cotton’s awareness of positions across entities, by itself, may not have established that the accounts were under common control, his participation in trade-level decisions was likely the determinative factor. For companies with global businesses across multiple affiliates, the Order serves as a reminder to be aware of individuals who supervise and participate in trading decisions when determining which accounts to aggregate or disaggregate for position limits purposes.

Reporting of Hedge Positions on Form 304

If a market participant’s cotton futures position exceeds the speculative position limit on the last business day of the week, the participant must file a monthly Form 304 report detailing the participant’s hedgeable cash market positions. The main purpose of the Form 304 is for the CFTC to verify that a market participant’s futures position in excess of a speculative position limit is eligible for a *bona fide* hedge exemption. According to the Order, Glencore B.V. filed two erroneous Form 304 reports that overstated the quantities of its fixed-price cotton cash positions.

Exchange for Physical Transactions

CFTC Rule 1.38 provides that market participants may privately negotiate EFRP transactions and not comply with the futures competitive execution requirement if they comply with the rules of the applicable futures exchange. Of relevance here, ICE Futures U.S. allows affiliated accounts to execute an EFRP only if the accounts are independently controlled.

As noted above, the Order states that the Head of Cotton controlled the accounts of both Glencore B.V. and Glencore Ltd., so the two accounts were not independent. As a result, the execution of twenty-four (24) exchange for physical transactions between the Glencore B.V. and Glencore Ltd. accounts from January 2013 to November 2015 constituted illegal wash trades. Market participants that engage in EFRPs between affiliated accounts need to be aware of who trades each account and ensure that there is independent control of decision making for each account.

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