

CFTC Proposes Amendments to Aggregation Requirements for Position Limits

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On May 30, 2012, the Commodity Futures Trading Commission (CFTC) published in the Federal Register a notice of proposed rulemaking (Proposal) that, if adopted, would broaden key exemptions from and make what the CFTC characterizes as “technical changes” to the aggregation requirements under the position limits rule (Final Rule) adopted in November 2011.¹ These proposed amendments are being issued, in part, in response to a petition for exemptive relief that was submitted by the Working Group of Commercial Energy Firms in January 2012. The comment period on the Proposal ends on June 29, 2012.

What Would Change?

Owned Entity Exemption

The Final Rule requires persons with an ownership or equity interest of at least 10 percent in another entity (an “owned entity”) to aggregate the accounts and positions owned or controlled by the owned entity with the person’s own accounts or positions.² The Proposal would provide an exemption from the aggregation requirement to a person with an ownership or equity interest in an owned entity of at least 10 percent but not greater than 50 percent, provided that the following five conditions are satisfied:

- Neither the person nor the owned entity has knowledge of the trading decisions of the other;
- Each entity trades pursuant to separately developed and independent trading systems;
- Each entity has, and enforces, written procedures to preclude the other entity from having knowledge of, gaining access to, or receiving data about, trades of the entity;
- Neither shares employees that control trading decisions of the other entity; and
- Neither have risk management systems that permit the sharing of trades or trading strategy with the other.³

As with other exemptions from aggregation, persons seeking to claim this exemption would be required to file a notice in accordance with CFTC Rule 151.7(h).⁴ The Proposal would continue to require aggregation of an owned entity’s accounts and positions if a person has a greater than 50 percent ownership or equity interest in the owned entity.⁵

1 Aggregation Under Part 151, Position Limits for Futures and Swaps, [77 Fed. Reg. 31767](#) (May 30, 2012). For a discussion of the Final Rule, see Skadden’s November 18, 2011 [Client Alert](#).

2 17 C.F.R. § 151.7(b)(1). The Final Rule exempts participants in commodity pools, subject to certain conditions, from this owned entity aggregation requirement. 17 C.F.R. § 151.7(b), (c).

3 77 Fed. Reg. at 31782.

4 77 Fed. Reg. at 31775.

5 77 Fed. Reg. at 31774.

Market Making Exemption

The Final Rule provides an exemption from aggregation where a person's ownership or equity interests in an owned entity result from underwriting activities.⁶ The Proposal would expand this underwriting exemption to include reasonable market making activities.⁷ Specifically, the Proposal would exempt a broker-dealer registered with the Securities and Exchange Commission (SEC) from aggregating an owned entity's accounts and positions if the ownership interest was acquired as part of "reasonable activity in the normal course of [its] business as a dealer, provided that the [broker-dealer] does not have actual knowledge of the trading decisions of the owned entity."⁸ The CFTC notes in the preamble (but not in the proposed rule text) that the market making exemption would not apply where a broker-dealer acquires more than a 50 percent ownership or equity interest because the CFTC does not believe that such a large interest would be consistent with market making.⁹

Information Sharing Restriction Exemption

Under the Final Rule, a person is exempted from aggregating the positions of an owned or controlled entity if sharing information about the owned or controlled entity's positions would cause either the person or the entity to violate a federal law or regulation.¹⁰ The Proposal would broaden this information sharing restriction exemption to include state and foreign laws and regulations, as well as federal law.¹¹ The Proposal also would recognize that a person need not claim that sharing such information would result in a per se violation of federal, state or foreign law in order to claim the exemption, only that sharing such information would present a "reasonable risk" of a violation.¹² The CFTC indicates that whether a "reasonable risk" exists is a facts-and-circumstances analysis and will depend on "the interconnection of the applicable statute and regulatory guidance."¹³ The amended information sharing restriction exemption would continue to require an opinion of counsel that a reasonable risk exists.¹⁴

Higher-Tier Entities

The Proposal would allow a person to rely on the aggregation exemptions claimed by an owned entity.¹⁵ The CFTC provides the following example: "if company A has a 30 percent interest in company B, and company B has filed an exemption notice for the accounts and positions of company C, then company A may rely upon company B's exemption notice for the accounts and positions of company C."¹⁶ A higher-tier person would not need to file a notice of exemption with respect to the accounts and positions identified in the owned entity's notice filing provided that the following three conditions are satisfied:

- The person complies with the conditions applicable to the exemption specified in the owned entity's notice filing, other than the filing requirements;

6 77 Fed. Reg. at 31776.

7 *Id.*

8 *Id.*

9 77 Fed. Reg. at 31776, 31782.

10 17 C.F.R. § 151.7(i).

11 77 Fed. Reg. at 31771-72.

12 77 Fed. Reg. at 31771.

13 *Id.*

14 77 Fed. Reg. at 31772.

15 *Supra* note 6.

16 *Supra* note 6.

- The person does not otherwise control trading of the accounts or positions identified in the owned entity's notice filing; and
- Upon call by the CFTC, the person provides information concerning his compliance with these requirements.¹⁷

Various Technical Changes

The CFTC includes in the Proposal various amendments that it views as “technical changes.”¹⁸ These changes would include requiring a futures commission merchant (FCM) to file a notice of exemption in accordance with Rule 151.7(h) in order to claim the FCM aggregation exemption, clarifying that the notice filing required in the information sharing restriction exemption is the same notice required under Rule 151.7(h), and revising the language in Rule 151.10(b)(4) to make clear that the notice required by Rule 151.7(h) is effective upon filing.¹⁹ The CFTC also includes as a “clarification” language in Rule 151.7(h) that would require such notice to be certified by a senior officer and that would impose a duty to promptly amend any notice in the event of a material change.²⁰ Finally, the Proposal would amend the definitions of “eligible entity” and “independent account controller” to include limited members and managing members, respectively, of a commodity pool that is structured as a limited liability corporation and whose operator is exempt from registration under Rule 4.13.²¹

When Would These Amendments Take Effect?

The Proposal does not provide any guidance on when the CFTC will finalize these amendments or, upon adoption, when the amendments will take effect. The Final Rule adopted in November 2011 will be phased-in beginning 60 days after the CFTC and SEC publish in the Federal Register a joint final rule to further define the term “swap.” While the Proposal does not address timing, the abbreviated 30-day comment period for this Proposal may be an indication that the CFTC expects to adopt amendments to the Final Rule's aggregation requirements prior to the implementation of the Final Rule.

17 77 Fed. Reg. at 31782.

18 *Supra* note 12.

19 *Supra* note 12.

20 *Supra* note 4.

21 77 Fed. Reg. at 31777.