

## Court Vacates CFTC Position Limit Rules

*If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.*

**Mark D. Young**  
Washington, D.C.  
202.371.7680  
mark.d.young@skadden.com

**Maureen A. Donley**  
Washington, D.C.  
202.371.7570  
maureen.donley@skadden.com

**Prashina J. Gagoomal**  
Washington, D.C.  
202.371.7522  
prashina.gagoomal@skadden.com

\* \* \*

*This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.*

1440 New York Avenue, NW,  
Washington, D.C. 20005  
Telephone: 202.371.7000

Four Times Square, New York, NY 10036  
Telephone: 212.735.3000

**WWW.SKADDEN.COM**

On September 28, 2012, Judge Robert Wilkins of the U.S. District Court for the District of Columbia granted the summary judgment motion of the International Swaps and Derivatives Association and Securities Industry and Financial Markets Association (collectively, Plaintiffs) to vacate and remand the position limit rules adopted by the Commodity Futures Trading Commission (CFTC) on October 18, 2011.<sup>1</sup> The CFTC's rules would have imposed federal limits on speculative positions in futures contracts (and options thereon) on 28 agricultural, energy and metals commodities as well as swaps that are economically equivalent to those futures. Additionally, the CFTC's rules included position aggregation requirements and "bona fide hedging" and other exemptions from position limits that many viewed as more narrow than exemptions the CFTC has granted in the past. The CFTC's position limit rules would have taken effect on October 12, 2012.

In the position limit litigation, both Plaintiffs and the CFTC conceded that prior to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), the Commodity Exchange Act (CEA) vested the CFTC with discretion to impose speculative position limits "from time to time" "as the [CFTC] finds are necessary to diminish, eliminate or prevent [burdens arising from excessive speculation]."<sup>2</sup> The parties differed, however, in their interpretations of the CFTC's position limit authority under the CEA as amended by Dodd-Frank.

According to Plaintiffs, Dodd-Frank did not alter what Plaintiffs viewed as a statutory requirement that the CFTC make a finding that position limits are "necessary" before imposing them and, indeed, Dodd-Frank added a requirement that the CFTC also determine the imposition of limits to be "appropriate." Among other claims, Plaintiffs argued that because the CFTC had not made such statutorily required findings before promulgating its position limit rules, the rules should be vacated and remanded to the agency. The CFTC, for its part, contended that the Dodd-Frank amendments to the CEA required the CFTC to impose position limits and to do so expeditiously *without regard* to the necessity or appropriateness of imposing limits.

In its opinion, the court found that the CEA language that was left unamended by Dodd-Frank — referring to the CFTC promulgating limits "as the [CFTC] finds are necessary" — did require the CFTC to make a necessity finding before imposing position limits. However, the court said that Congress did not make clear whether the Dodd-Frank amendments adding other language in the CEA required the CFTC to impose position limits without making such a finding. Because the CFTC had based its position limit rulemaking on the erroneous conclusion that Dodd-Frank clearly and unambiguously mandated the imposition of position limits no matter what, the court determined that the CFTC's position limit rules must be vacated and remanded to the agency. Finding this basis for vacatur and remand, the court did not address Plaintiffs'

<sup>1</sup> The CFTC's position limit rule provisions amending Part 150 of the CFTC's regulations were not challenged by Plaintiffs and are not being vacated by the Court. Part 150 sets forth the position limit regulations for the nine agricultural commodity futures contracts (and options thereon) currently subject to CFTC position limits. The CFTC's amendment to Part 150 increases the position limit levels for those contracts. See 17 C.F.R. § 150.2.

<sup>2</sup> See 7 U.S.C. § 6a.

other claims that the position limits rulemaking and specific features of the rules violated the CEA and the Administrative Procedure Act.

The court noted that on remand the CFTC has an obligation to “bring its expertise and experience to bear” to resolve the ambiguities in the CEA as amended by Dodd-Frank. Any promulgation of position limit rules by the CFTC would have to be based on a reasonable interpretation of the ambiguous statutory language. The court did not “foreclose the possibility that the CFTC could, in the exercise of its discretion, determine that it should impose position limits without a finding of necessity and appropriateness,” but reiterated that “it is not plain and clear that the statute requires this result.”<sup>3</sup>

---

<sup>3</sup> See *International Swaps and Derivatives Association, et al. v. United States Commodity Futures Trading Commission*, No. 11-cv-2146, Memorandum Opinion at 39 (D.D.C. Sept. 28, 2012).