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CFTC Proposes Three Actions to Address Rulemaking Issues

On May 22, 2014, the Commodity Futures Trading Commission (Commission or CFTC) and its staff took three actions.

First, the Commission proposed to amend its existing definition of “swap dealer” in order to allow persons to engage in more dealing activity with certain types of special entities in the power industry.¹ Specifically, the Commission’s proposal would permit a person to exclude “utility operations-related swaps” that are entered into with a “utility special entity” in calculating whether such person has exceeded the \$25 million swap dealing threshold for swaps with special entities. If adopted, this proposed amendment would allow a person to count dealing activity in utility operations-related swaps with utility special entities toward the general \$8 billion swap dealing threshold as opposed to the lower \$25 million dealing threshold for swaps with special entities. The comment period for this proposal closes 30 days following publication of the proposed amendment in the Federal Register.

Second, the Commission will re-open the comment periods for its November 2013 proposal concerning position limits aggregation and its December 2013 proposal concerning position limits for physical commodity derivatives.² The comment period will begin on June 12, 2014, and continue through July 3, 2014, in order to coincide with a June 19, 2014, Commission-sponsored roundtable to discuss issues regarding position limits for physical commodity derivatives. Comments during this extended period are limited to the following issues:

- hedges of a physical commodity by a commercial enterprise, including gross hedging, cross-commodity hedging and anticipatory hedging;
- the process for obtaining a non-enumerated exemption;
- the setting of spot month limits in physical-delivery and cash-settled contracts and a conditional spot-month limit exemption;
- the setting of non-spot limits for wheat contracts;
- the aggregation exemption for certain ownership interests of greater than 50 percent in an owned entity; and
- aggregation based on substantially identical trading strategies.

¹ The proposed rule is available at: <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister052214-a1.pdf>. The proposed rule builds upon the March 2014 CFTC staff no-action letter 14-34, available at: <http://www.cftc.gov/ucm/groups/public/@rllettergeneral/documents/letter/14-34.pdf>.

² For a summary of these proposed rules, please see a previous Skadden client alert, available at: http://www.skadden.com/newsletters/CFTC_Re-Proposes_Speculative_Position_Limit_Rules_for_Futures_Options_and_Swaps_on_Physical_Commodities.pdf.

Finally, the Division of Market Oversight and the Division of Swap Dealer and Intermediary Oversight (together, the Divisions) issued a no-action letter providing temporary relief from particular recordkeeping requirements in CFTC Rule 1.35(a) to members of designated contract markets and swap execution facilities that are not registered or required to be registered with the Commission in any capacity (covered members).³ Under the terms of the no-action letter, the Divisions will not recommend that the Commission take enforcement action against a covered member for failing to comply with the provisions in CFTC Rule 1.35(a) to record text messages or to keep required records in a form and manner identifiable and searchable by transaction. The relief does not cover any other aspect of the recordkeeping requirements imposed under Rule 1.35(a), including recording of email and instant messages. The no-action relief remains effective until the effective date of a final Commission action concerning the recordkeeping requirements at issue in Rule 1.35 (or conversely, until the Commission determines to take no action with respect to such requirements).

³ See CFTC Letter No. 14-72 (May 22, 2014), available at: <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-72.pdf>.