

CFTC Proposes Exemptions from Aggregation under Its Position Limits Rule

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On May 18, 2012, the Commodity Futures Trading Commission, by seriatim vote, proposed rules (the “**Proposal**”) to provide additional exemptions, and to clarify several existing exemptions, from the aggregation requirements of the CFTC’s new Part 151 position limit rules. The Part 151 rules were adopted in October 2011 and establish position limits for futures and options on 28 exempt (metals and energy) and agricultural commodities and swaps, futures, and options that are economically equivalent to those contracts.¹

The Proposal would significantly liberalize the aggregation provisions of Part 151. According to the proposing release, the additional exemptions are designed to address a rulemaking petition submitted to the CFTC in January 2012 by a group of commercial energy firms and comments from market participants on Part 151.

Comments on the Proposal are due 30 days after the Proposal is published in the Federal Register. The CFTC did not provide for a delay in the effectiveness of Part 151, under which the new position limits generally become effective 60 days after the term “swap” is further defined by the CFTC and SEC. This suggests that the CFTC intends to finalize the Proposal before the new Part 151 position limits become effective.

Part 151 Aggregation Requirements

Part 151, as adopted, requires a person to aggregate all referenced contract positions in accounts (i) for which the person directly or indirectly holds positions or controls trading and (ii) held by the person and one or more other persons acting pursuant to an expressed or implied agreement or understanding, as if the positions were held by or trading of the positions were done by the person. New Part 151 further specifies that a person must aggregate referenced contract positions “in all accounts or positions in which the person . . . directly or indirectly has a 10 percent or greater ownership or equity interest.”

Special provisions apply to ownership interests of limited partners, shareholders, or other similar types of commodity pool participations. These provisions would not be affected by the Proposal.

¹ For a detailed description of the final position limits rule, please see our client memo, [CFTC Adopts Final Position Limits for 28 Physical Commodity Futures, Options, and Swaps](#).

Disaggregation of Owned Entities

The Proposal would provide relief from the Part 151 aggregation requirement for a greater-than-10% owned entity, subject to several conditions. The Proposal would permit a person to disaggregate the positions of an entity in which the person has no greater than a 50% ownership or equity interest, provided that the person and the 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. These procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities; and
- do not share employees that control the trading decisions of either.

To rely on this exemption, a person must submit a notice filing in accordance with the procedures under § 151.7(h). The notice filing would be required to include, among other things, a description of how the person adheres to the conditions listed above and a statement of a senior officer of the entity certifying that the conditions had been met. The proposing release notes that a demonstration of compliance with the conditions would be expected to include an organizational chart reflecting the ownership and control structure of the involved entities, a description of the risk management system, a description of the information-sharing systems, an explanation of how and to whom trade data and position information are distributed, and identification of the officers that receive reports of trade data and position information.

Information Sharing Exemption

The Proposal would clarify the exemption provided in Rule 151.7(i) permitting disaggregation if the sharing of information in connection with aggregation “would cause either person to violate federal law or regulations.” New Part 151 requires a person seeking to rely on this exemption to file an opinion of counsel that sharing of information in connection with aggregation would cause a violation of federal law or regulations.

Market participants raised concerns that this exemption was of little use because it could be read to be unavailable unless a person would, as a certainty, be in violation of federal law by complying with the aggregation requirements. Moreover, Part 151 did not provide analogous exemptions for information sharing restrictions imposed by state or foreign law.

The Proposal would modify the exemption in Part 151 to permit a person to rely on the exemption if the sharing of information in connection with aggregation “creates a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder.” While the Proposal would retain the requirement for the filing of an opinion of counsel, the opinion would be required only to provide that the sharing of information creates a “reasonable risk” that either person would violate applicable law.

Other Key Provisions

The Proposal would broaden and clarify several other aggregation provisions:

- **Underwriting Exemption.** The Proposal would expand the final rule’s aggregation exemption for underwriting activities. The Proposal would permit disaggregation by a broker-dealer that would otherwise be required to aggregate the positions of an owned entity, if the broker-dealer’s ownership in the entity “is based on the ownership of securities acquired as part of reasonable activity in the normal course of business as a dealer.” To rely on this exemption, the broker-dealer must not have actual knowledge of the trading decisions of the owned entity.
- **Higher Tier Entities.** The Proposal would permit the parent company of an entity relying on the owned entity exemption also to rely on the exemption, without having to separately make a notice filing. The parent company would, however, need to comply with the other conditions of the exemption.
- **Exemption Notice Filings.** A person must file a notice with the CFTC to claim specified aggregation exemptions. The filing must include, among other things, a certification that the conditions of the relevant exemption are satisfied. The Proposal would clarify that the certification must be made by a senior officer of an entity submitting the filing.

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