

CFTC Finally Finalizes Expansion to Position Limits Regime

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Introduction

Today, the Commodity Futures Trading Commission (the “CFTC”) finalized long-awaited amendments to its position limits rules in a 3-2 vote (the “Final Rule”). These amendments will likely have significant impacts on a wide range of market participants (such as asset managers, traders, and commercial end-users), many of whom will be subject to federal position limits for the first time.

Among other things, the Final Rule expands the CFTC’s federal position limits to cover 25 physically settled futures contracts and their linked cash-settled futures, options on futures, and economically equivalent swaps. The Final Rule also amends and expands certain aspects of the exemptions from position limits, such as the types of hedging practices that qualify as enumerated bona fide hedges. Additionally, the Final Rule creates a new process for requesting non-enumerated bona fide hedge exemptions from federal position limit requirements.

The Final Rule follows several attempts by the CFTC to amend its position limits regulations over the last decade. Specifically, today’s significant vote follows: (1) amendments to the position limits provisions in the Commodity Exchange Act from the Dodd-Frank Wall Street Reform and Consumer Protection Act,^[1] (2) four proposed rules intended to implement the amended statutory language (all of which have been withdrawn),^[2] (3) one final rule that was overturned by the District Court for the District of Columbia,^[3] and (4) a final rule related solely to aggregation of positions for position limits purposes, which is still in place.^[4]

This Client Alert provides a high-level overview of the Final Rule, but a more detailed publication will be released shortly.^[5]

Background

“Speculative” position limits are caps imposed on each trader’s positions in a given futures contract during the end of trading for a given delivery month (*i.e.*, the “spot month”). These limits are generally intended to prevent excessive speculation and the potential for manipulation, as well as unnatural price fluctuations.

Currently, the CFTC imposes position limits on futures and options on futures on nine agricultural commodities, which limits are imposed within and outside the spot month (*i.e.*, they are imposed regardless of when the contracts mature). On the other hand, regulated futures exchanges impose position limits on most other futures contracts that they list, but these limits are generally only imposed in the spot month for a given contract.

Both the CFTC and futures exchange rules currently provide for certain exemptions from position limits, including exemptions for positions that are established for “bona fide hedging” purposes, spread or arbitrage strategies, and risk-management strategies.

The Final Rule

The Final Rule expands the federally imposed position limits to cover all “Referenced Contracts,” which term includes: (1) 25 core futures contracts in (a) agricultural (including the nine legacy agricultural commodities), (b) metals, and (c) energy commodities (referred to as Core Referenced Futures Contracts, or CRFCs); (2) cash-settled futures and option contracts that are directly or indirectly linked to the price of a CRFC, or the same commodity for delivery at the same location as a CRFC; and (3) swaps that are “economically equivalent” to another Referenced Contract. In order for a swap to be deemed “economically equivalent,” the swap must have identical “material” contractual specifications, terms and conditions.

The Final Rule would impose federal position limits in the spot month on all Referenced Contracts (including economically equivalent swaps), but would only impose position limits outside of the spot month on the nine legacy agricultural contracts. All other Referenced Contracts would only be subject to exchange-set limits and/or position accountability levels outside of the spot month.

The Final Rule differs in many ways from the CFTC’s prior proposed and final rules on the subject, most notably in that it: (1) expands the types of hedging strategies that will be eligible for an exemption from position limits; and (2) requires the CFTC to find that position limits are necessary for each commodity prior to imposing limits. Partially because of the need to make a “necessity finding” before imposing limits on new commodities, Commissioners Dan Berkovitz and Rostin Behnam opposed the Final Rule and voted against it.

Market participants must comply with the amended requirements in the Final Rule no later than: (1) the effective date for the amended position limits for the nine legacy agricultural contracts, (2) January 1, 2023 for the position limits applicable to economically equivalent swaps, and (3) January 1, 2022 for all other aspects of the Final Rule.

As noted above, we intend to publish a subsequent client alert with more detail on the Final Rule shortly. In the meantime, we would be happy to assist you with assessing the impact of the Final Rule on any aspects of your business. If you have any questions about this client alert, please contact your Winston & Strawn relationship attorney.

¹¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, § 737(a)(4), Public Law 111–203, 124 Stat. 1376, 1723 (July 21, 2010).

¹² See Position Limits for Derivatives, 76 Fed. Reg. 4752 (Jan. 26, 2011); Position Limits for Derivatives, 78 Fed. Reg. 75680 (Dec. 12, 2013) (2013 Proposal); Position Limits for Derivatives: Certain Exemptions and Guidance, 81 Fed. Reg. 38458 (June 13, 2016) (2016 Supplemental Proposal); and Position Limits for Derivatives, 81 Fed. Reg. 96704 (Dec. 30, 2016) (2016 Reproposal).

¹³ See Position Limits for Futures and Swaps, 76 Fed. Reg. 71626 (Nov. 18, 2011); *Int’l Swaps & Derivatives Ass’n v. U.S. Commodity Futures Trading Comm’n*, 887 F. Supp. 2d 259 (D.D.C. 2012).

¹⁴ Aggregation of Positions, 81 Fed. Reg. 91454 (Dec. 16, 2016).

¹⁵ Further information regarding the Final Rule may be found in the CFTC press release, available [here](#). Information regarding the CFTC’s proposed rule that preceded the Final Rule can be found in our client alert on that rule, available [here](#).

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