



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of
Market Oversight

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No-Action
July 24, 2012
Division of Market Oversight

Staff No-Action Relief: Temporary Relief from the Aggregation Requirements of the Commission's Rule Regarding Position Limits for Futures and Swaps

On November 18, 2011, the Commodity Futures Trading Commission (the "Commission") published a rule entitled Position Limits for Futures and Swaps (the "Rule").¹ The Rule establishes a position limits regime for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. The Rule became effective on January 17, 2012, but does not require compliance with certain position limits (including all spot-month limits, and non-spot-month limits for legacy contracts) until "60 days after the term 'swap' is further defined pursuant to section 721 of the Dodd-Frank Act (*i.e.*, 60 days after the further definition of 'swap' as adopted by the Commission and the Securities and Exchange Commission is published by the **Federal Register**)."²

The Rule consists of three major components: (1) the level of the limits, which set a threshold that restricts the number of speculative positions a person may hold in the spot-month, an individual month, and all months combined; (2) an exemption for positions that constitute bona fide hedging transactions; and (3) rules to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.³

On January 19, 2012, the Commission received a petition seeking relief from, among other things, the aggregation provisions of the Rule.⁴ The Commission responded by issuing a notice of proposed rulemaking ("Aggregation Notice") seeking public comment on certain proposed changes to the aggregation provisions of the Rule.⁵ The Aggregation Notice proposes modifications or clarifications to the provisions of the Rule concerning the following: (1) definitions, 17 C.F.R. § 151.1; (2) ownership of accounts, 17 C.F.R. § 151.7(b); (3) notification filing, 17 C.F.R. § 151.7(h); (4) the exemption for underwriting, 17 C.F.R. § 151.7(g); (5) the exemption for information sharing prohibited by law, 17 C.F.R. § 151.7(i); (6) reporting

¹ 76 Fed. Reg. 71626, 71685 (Nov. 18, 2011), codified at 17 C.F.R. Part 151.

² 76 Fed. Reg. at 71632 (emphasis in original).

³ *See id.* at 71662

⁴ Working Group of Commercial Energy Firms, Petition for Order to Exempt Owned Non-Financial Entities from Aggregation for Compliance with Position Limits and Order to Broaden and Clarify Rule 151.7(i), *available at* <http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/wgap011912.pdf>

⁵ Aggregation, Position Limits for Futures and Swaps, 77 Fed. Reg. 31767 (May 30, 2012).

requirements for higher-tier entities, 17 C.F.R. § 151.7(j); and (7) the effectiveness date for a notice of disaggregation under the reporting regime, 17 C.F.R. § 151.10(b)(4). In the Aggregation Notice, the Commission noted its intention “to coordinate the disposition of the [Aggregation Notice] with the implementation of position limits under part 151.”⁶ The comment period for the Aggregation Notice closed on June 29, 2012.

On July 10, 2012, the Commission adopted a rule further defining the term “swap” pursuant to Section 721 of the Dodd-Frank Act. The Securities and Exchange Commission also has adopted this joint rule.⁷ Accordingly, the first compliance date for position limits will be sixty days from the publication in the Federal Register of the rule further defining the term “swap.”

In order to give effect to the Commission’s commitment to “coordinate the disposition of the” Aggregation Notice, and “to provide an orderly transition to the compliance dates,”⁸ the Division of Market Oversight (the “Division”) is issuing this notice of no-action relief. Accordingly, when compliance with the Rule is required, the Division will not recommend that the Commission commence an enforcement action against any person that:

- (1) complies with the Rule, as if it were amended to include the provisions proposed in the Aggregation Notice; or
- (2) complies with the Rule, except that the person does not aggregate any positions in Referenced Contracts (as defined in the Rule) held by another entity that the Rule would require be aggregated with the person’s positions, if:
 - (i) the person believes, based on advice of counsel, that information sharing with that entity would result in a reasonable risk of violating federal, state, or foreign law, rule, or regulation;⁹
 - (ii) the person has a 50% or lesser ownership or equity interest in that entity and has taken reasonable steps to ensure independence between the person and that owned entity, which may include but need not be limited to compliance with the current standards for independence set forth in § 150.3(a)(4)(i) or in § 151.7(f)(1); or
 - (iii) the person acquires a 50% or lesser ownership or equity interest in that entity in the normal course of business as a broker-dealer registered with the SEC or similarly registered with a foreign regulatory authority.

⁶ *Id.* at 31777.

⁷ The joint rulemaking also further defined the terms “security-based swap” and “security-based swap agreement.”

⁸ Aggregation Notice at 31777.

⁹ Written advice of counsel is not a *per se* requirement to take advantage of this no action relief, but the Division will consider the written advice that a market participant has obtained in determining whether the risk of violating federal, state or foreign law is reasonable. In this regard, the Division would consider an applicable order of a judicial or administrative body with jurisdiction to be part of federal, state or foreign law.

In addition, the person must provide notice to the Division stating that it is relying on such relief and stating the names of any entities holding positions that it is not aggregating as provided above. The notice must be filed with the Division using the email address dmonoaction@cftc.gov prior to the date upon which the person intends to rely on the relief.

This no-action position will remain in effect until the earlier of (i) sixty days after the Commission issues an order declining to take further action on the Aggregation Notice; (ii) sixty days after publication in the Federal Register of a rule finalizing changes to the Commission's aggregation policy; or (iii) December 31, 2012.

The no-action position taken herein is taken by the Division only and does not bind the Commission or any other Division or Office of the Commission's staff. The relief issued by this letter does not excuse any person from compliance with other applicable portions of the Rule, the Commodity Exchange Act or the Commission's regulations issued thereunder. The relief also does not address issues related to aggregation for other purposes under the CEA and regulations, including manipulation or other abusive practices. As with all no-action letters, the Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

If you have any questions regarding the content of this staff no-action letter, please contact Stephen Sherrod at ssherrod@cftc.gov, (202) 418-5452; or Riva Spear Adriance at radriance@cftc.gov, 202-418-5494.

Sincerely,

Richard A. Shilts
Director
Division of Market Oversight