

Client Alert

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CFTC Proposes Supplement to Aggregation Proposed Rules for Position Limits

By Julian E. Hammar

On September 22, 2015, the Commodity Futures Trading Commission (“CFTC”) issued for public comment a supplement (the “Supplemental Aggregation Proposal”) to its proposed aggregation rules for position limits for related entities that were issued in November 2013. The Supplemental Aggregation Proposal, if adopted, will in many cases make it easier for closely affiliated entities to obtain an exemption from aggregation of their derivatives positions and, therefore, will permit affiliated entities to engage in a larger amount of overall trading. Under the Supplemental Aggregation Proposal, the key change from the 2013 proposed rules is that a market participant that owns greater than 50% of another entity would be allowed to obtain an exemption from aggregation with respect to positions of the owned entity by filing a notice that includes certifications regarding trading independence with the CFTC under the same process that market participants with 10% to 50% ownership interest are permitted to use. By contrast, under the 2013 aggregation proposed rules, in order to obtain an exemption for majority-owned entities, market participants would have been required to obtain affirmative approval from the CFTC and to provide certain additional certifications. The Supplemental Aggregation Proposal will be open for public comment for 45 days after publication in the Federal Register, which is forthcoming. The Supplemental Aggregation Proposal is available [here](#).

BACKGROUND

Under the 2013 proposed rules, entities would presumptively be required to aggregate their positions for purposes of the CFTC’s position limit rules if one entity owned greater than 10% of another entity. However, the proposed rules included an exemption from such aggregation for entities that owned between 10% and 50% of another entity, provided that a notice filing containing certain certifications regarding trading independence was made to the CFTC. Entities that had a greater than 50% ownership interest in another entity would have been required to file an application for exemption with the CFTC and obtain the CFTC’s approval before entering into a transaction that, with aggregation, would exceed an applicable position limit. In addition to demonstrating trading independence, as required of 10% to 50% owned entities, entities with greater than 50% ownership interest would have been required to certify that the owned entity was not required to be, and was not, consolidated on the financial statements of the owner entity and that either all of the owned entity’s positions would qualify as bona fide hedging positions or the owned entity’s positions that did not qualify as bona fide hedging positions would not exceed 20% of any applicable position limit threshold in effect. Further, each representative of the owner entity on the owned entity’s board would have been required to attest that he or she did not control the trading decisions of the owned entity.¹

¹ For further background information regarding the 2013 proposed rules and the CFTC’s proposed position limits, please see our client alert [here](#).

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SUPPLEMENTAL AGGREGATION PROPOSAL

The Supplemental Aggregation Proposal would apply the same conditions applicable to 10% to 50% owned entities to the greater than 50% owned entities under the same notice filing process. Under the Supplemental Aggregation Proposal, the rule would provide that a person with a 10% or greater ownership interest in an owned entity (i.e., including owners of greater than 50% and up to 100% of the owned entity) would be permitted to disaggregate the positions of the owned entity with any other accounts or positions that such person would be required to aggregate, provided that such person, including any entity whose positions such person is required to aggregate, and the owned 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 person from having knowledge of, gaining access to, or receiving data about, trades of the other, and such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities;
- Do not share employees who control the trading decisions of either; and
- Do not have risk management systems that permit the sharing of trades or trading strategy.

In order to obtain the exemption, the person (i.e., the owner entity) would only be required to file a notice with the CFTC, and such notice would be effective upon submission. The notice would have to include a description of the relevant circumstances that warrant disaggregation and a statement of a senior officer of the entity certifying that the above conditions have been met.

As under the 2013 proposed rules, the CFTC would be able to subsequently call for additional information and to amend, terminate or otherwise modify the person's aggregation exemption for failure to comply with the conditions of the exemption, and the person would be obligated to amend the notice filing in the event of a material change in circumstances described in the filing. The CFTC also notes that, notwithstanding satisfaction of the trading independence criteria described above, entities, irrespective of ownership, may still be required to aggregate if they are acting, for example, pursuant to an express or implied agreement.²

CONCLUSION

The Supplemental Aggregation Proposal, by treating 10% to 50% owners and greater than 50% owners in the same manner, will provide, if adopted, welcome relief for many U.S. companies with greater than 50% owned subsidiaries. Many such companies would have been ineligible for aggregation relief under the 2013 proposed rules, whether because of the requirement that financial statements could not be consolidated on the financial statements of the owner entity or because of the other additional conditions applicable to greater than 50% owned entities, which would no longer apply under the Supplemental Aggregation Proposal. The Supplemental

² The CFTC is also proposing in the Supplemental Aggregation Proposal a conforming change that would remove a cap of 50% on the ownership interest for broker-dealers to disaggregate.

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Aggregation Proposal will similarly provide a welcome change for those companies that were otherwise eligible for the exemption under the 2013 proposed rules, but would have been required to file an application with the CFTC and await CFTC approval, rather than simply making the notice filing required under the Supplemental Aggregation Proposal.

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