

Client Update

Proposed Revision to CFTC 2013 Proposal on Aggregation of Positions Under Part 150

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On September 22, 2015, the Commodity Futures Trading Commission (the “CFTC”) proposed revisions (the “2015 Proposal”)¹ to its previously proposed modifications² to the aggregation provisions of Part 150 issued in November 2013 (the “2013 Proposal”).

The 2015 Proposal would revise the proposed modifications to CFTC Regulation 150.4 set forth in the 2013 Proposal by eliminating the separate exemption for a greater than 50% ownership or equity interest in a separately organized entity (an “owned entity”) and subjecting such ownership interests to the same exemption that would apply to ownership or equity interests of between 10% and 50% under the 2013 Proposal.

Comments on the 2015 Proposal must be received by November 13, 2015.

¹ The text of the 2015 Proposal is available at: <https://www.federalregister.gov/articles/2015/09/29/2015-24596/aggregation-of-positions>.

² In November 2013, the CFTC issued proposed rules that would revise Part 150 (and other related provisions) of the CFTC Regulations by establishing position limits for 28 exempt and agricultural commodity (i.e., “physical commodity”) futures and option contracts and swaps that are economically equivalent to such contracts, and separately issued proposed rules that would modify the aggregation provisions in Part 150. For additional information, see our client memorandum, “Proposed CFTC Rules on Position Limits,” available at: <http://www.debevoise.com/insights/publications/2013/11/proposed-cftc-rules-on-position-limits>. If both sets of proposed rules are adopted, the proposed modifications to the aggregation requirements would apply to all of the 28 futures, options and swaps contracts covered by the proposed position limits. However, the CFTC may adopt the proposed aggregation rules without adopting the proposed position limits.

CURRENT AGGREGATION POLICY AND 2013 PROPOSAL

The CFTC's existing aggregation policy under current Regulation 150.4 generally requires that unless a particular exemption applies, a person must aggregate all positions it holds (directly or indirectly) or for which it controls trading decisions with (1) all accounts or positions in which that person has a 10% or greater ownership or equity interest and (2) all positions held jointly by such person with another person (or persons) pursuant to an express or implied agreement or understanding (as if such positions were held solely by such person).

The 2013 Proposal would maintain the general aggregation requirement in current Regulation 150.4, expanding it to cover all contracts subject to federal position limits. Specifically, the 2013 Proposal provides that, as under the current Part 150, for purposes of applying the position limits in Part 150 (including the additional position limits proposed in 2013, if adopted), unless an exemption applies, as a general rule, the positions held and trading done by a person must be aggregated with all positions in accounts (1) for which the person directly or indirectly controls trading or (2) in which the person holds a 10% or greater ownership interest.

Exemptions from Aggregation

The 2015 Proposal provides several exemptions from the aggregation requirement, including the exemptions described below with respect to owned entities.

Exemptions for Ownership of Less than 50% in an Owned Entity

The 2013 Proposal would permit a person with either an ownership or equity interest in an owned entity of 50% or less (but more than 10%) (other than an interest in a pooled account)³ to disaggregate the positions of the owned entity (the "10–50% Ownership Exemption") if such person (including any entity with which such person must aggregate) and the owned entity:

- Do not have knowledge⁴ of the trading decisions of the other;

³ The 2015 Proposal retains the aggregation requirement applicable to pooled accounts under the current Part 150.

⁴ Under the 2013 Proposal, this criterion would generally not require aggregation solely based on knowledge obtained during execution of a transaction regarding a counterparty's trading, nor would it encompass knowledge obtained in carrying out due diligence under a fiduciary duty (unless directly used to affect trading).

- Trade pursuant to separately developed and independent trading systems;
- Have and enforce written procedures to preclude each entity from having knowledge of, gaining access to or receiving data about trades of the other;
- Do not share employees that control the trading decisions of either; and
- Do not have risk management systems that permit the sharing of trades or trading strategies.

Any person relying on this exemption must file a notice of exemption with the CFTC.

Exemption for Ownership of Greater than 50% in an Owned Entity

In addition to the exemption for interests of between 10% and 50% in an owned entity, the 2013 Proposal also would permit disaggregation relief in limited circumstances even for persons with a majority ownership or equity interest in an owned entity (the “Majority Ownership Exemption”).

However, under the 2013 Proposal, this Majority Ownership Exemption would not be available merely upon a notice filing by the owner. Rather, under the 2013 Proposal, in order for a person with a greater than 50% ownership or equity interest in an owned entity (other than a pooled account) to be permitted to disaggregate the owned entity’s positions and accounts, it would be required to submit a formal disaggregation request to the CFTC and the CFTC would have to find, in its discretion, that certain conditions are met.⁵

2015 PROPOSAL

The 2015 Proposal would revise the 2013 Proposal to remove the Majority Ownership Exemption and to modify the 10–50% Ownership Exemption so that it would apply to all persons with an ownership or equity interest in an owned entity of 10% or greater.

⁵ These conditions include, among other things, that: (1) the owner has procedures in place to prevent coordinated trading decisions between the owner, any entity whose positions it must aggregate and the owned entity; (2) each representative (if any) of the owner on the owned entity’s board of directors (or equivalent body) certifies that he does not control the owned entity’s trading decisions; (3) the owner certifies that its positions that do not qualify as “bona fide hedging transactions” (if any) do not exceed 20% of any position limit currently in effect; and (4) the owner certifies that the owned entity is not required under U.S. GAAP to be, and is not, consolidated on the owner’s financial statements.

In other words, if the 2015 Proposal (and the 2013 Proposal) were to be adopted, majority (or 100%) owners of an owned entity would not be required to submit a formal request for disaggregation and await the CFTC's determination. Rather, all owners of 10% or more of an owned entity (*i.e.*, the owners of up to and including 100% of an owned entity) would be permitted to disaggregate the positions of the owned entity by following the notice filing procedure set forth in the 2013 Proposal with respect to the 10–50% Ownership Exemption if the other conditions for the 10–50% Ownership Exemption are met.

In the release accompanying the 2015 Proposal, the CFTC explains that it agrees with certain commenters on the 2013 Proposal that ownership of a greater than 50% interest in an entity (and the related consolidation of financial statements) may not mean that the owner actually controls day-to-day trading decisions of the owned entity. In addition, the CFTC notes that applying the criteria in the 2013 Proposal for the 10–50% Ownership Exemption to majority ownership interests would appropriately indicate whether an owner with a greater than 50% interest in an owned entity has control over or knowledge of the trading activity of the owned entity, and will therefore be adequate to prevent circumvention of position limits through the use of multiple subsidiaries.

However, satisfaction of these conditions would not mean that an owner and owned entity would be entirely exempted from aggregation in all circumstances. For instance, aggregation is and would continue to be required under both the existing Regulation 150.4 and the 2013 Proposal if two or more persons act pursuant to an express or implied agreement, regardless of whether such persons are affiliated.

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Please do not hesitate to contact us with any questions.