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CFTC Proposes Revisions to Pending Aggregation Rules

The Commodity Futures Trading Commission (CFTC) has voted to seek public comment on revisions to its proposed rules requiring the aggregation of certain accounts for purposes of the CFTC's speculative position limits. (View the notice [here](#).) If included with the final rules package, the proposed revisions would significantly reduce the administrative burdens placed on certain entities that desire to take advantage of the so-called "owned entity" exemption from aggregation. Importantly, the previously proposed requirements for persons with a greater than 50 percent ownership interest in another entity, summarized below, would be removed.

The proposed aggregation rules were initially published for comment in November 2013 and remain pending. As explained in [our November 2013 advisory](#), the proposed rules would continue the current practice of evaluating positions on the basis of both ownership and control, requiring the aggregation of all positions in accounts in which a trader either (1) holds a direct or indirect ownership of 10 percent or more, or (2) controls trading, by power of attorney or otherwise, subject to certain exemptions set out in the rule.

The current proposal would revise the pending owned entity exemption.¹ As originally proposed, the pending exemption distinguished between entities that share direct or indirect ownership between 10 and 50 percent, in which case the entities may claim an exemption by a simple notice filing with the CFTC, and entities that share ownership greater than 50 percent, in which case the entities must apply for an exemption:

- **Owned Entity Exemption (10 to 50 Percent Ownership).** A person whose ownership or equity interest in another entity is between 10 and 50 percent would not be required to aggregate its positions with that entity's positions if such person files a notice with the CFTC and both parties: (1) do not have knowledge of each other's trading decisions; (2) trade pursuant to separately developed and independent trading systems; (3) have established written information barriers that include documented routing procedures, security procedures and separate physical locations to maintain independence; (4) do not share employees that control trading decisions; and (5) do not have risk management systems that permit the sharing of trades or trading strategy.
- **Owned Entity Exemption (Greater Than 50 Percent Ownership).** A person with an ownership interest of greater than 50 percent would be permitted to apply to the CFTC for an aggregation exemption if: (1) all of the conditions in the prior paragraph

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¹ The proposal would also remove a 50 percent cap on the ownership or equity interest that a broker-dealer may acquire in another entity, in the normal course of its business as a dealer, without being required to aggregate the owned entity's positions. The other exemptions from the CFTC's aggregation rules with respect to: (1) eligible entities with so-called independent account controllers; (2) ownership interests of limited partners in pooled accounts; and (3) discretionary accounts and customer trading programs of futures commission merchants remain unchanged.

are satisfied; (2) the applicant does not and is not required by US generally accepted accounting principles to consolidate the owned entity under the applicant's financial statements; (3) each representative of the applicant on the owned entity's board certifies that he or she does not control the trading decisions of the owned entity; and (4) the owned entity's positions are held for *bona fide* hedging purposes or do not exceed 20 percent of the position limit. The owned entity exemption would also apply to higher-tier entities (such as upstream holding companies) that comply with the applicable requirements. An exemption for this latter category would not be automatic and would be available only if the CFTC finds, at its discretion, that the four conditions above are met. The CFTC would not be required to grant or deny the application within a particular time.

Responding to comments that the proposed exemption procedures for entities with greater than 50 percent ownership would be unworkable, requiring entities, *inter alia*, "to establish an extensive compliance monitoring and coordination program across independently managed, disparate businesses," the CFTC has proposed to remove this exemption and extend the exemption originally proposed for entities with ownership interests of 10 to 50 percent to include all entities with ownership interests of 10 percent or more (up to and including interests of 100 percent). As proposed to be revised, therefore, all affected entities would be permitted to claim an exemption from aggregation by a simple notice filing with the CFTC.

In joining his fellow commissioners in approving the request for comment on the proposed revisions, Commissioner J. Christopher Giancarlo expressed concern that the revised rule would not permit disaggregation when an owner and subsidiary entity have risk management systems that permit the sharing of trades or trading strategy. According to Mr. Giancarlo,

[this] proposed rule may stymie critical risk-mitigation efforts. Owners and their affiliates may need to share information regarding trades or trading strategy to verify compliance with applicable credit limits as well as restrictions and collateral requirements for inter-affiliate transactions, among other risk-management and compliance related objectives.

The CFTC will accept comments on its revised aggregation rule proposals for 45 days following publication in the *Federal Register*.

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