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## CFTC Adopts Amended Position Limit Aggregation Rules – Action by Asset Managers May Be Required

### Overview

The U.S. Commodity Futures Trading Commission (the “CFTC”) has issued [amended aggregation rules](#) for determining compliance with speculative position limits established by the CFTC in futures contracts and options thereon.<sup>1</sup> The amended rules largely continue the CFTC’s existing aggregation policy, which generally requires that a person aggregate all positions in accounts or funds for which a person *directly or indirectly* either controls trading or holds a 10% or greater ownership interest, as well as the positions of any other person with whom the person trades pursuant to an express or implied agreement. The amended rules retain modified versions of existing exemptions from aggregation, create several additional exemptions, newly require aggregation for substantially identical trading strategies, and impose a filing requirement to rely on certain exemptions. These rules apply to all market participants, regardless of their registration status. Accordingly, asset managers, including managers of private funds, registered investment companies, hedge funds and multi-manager complexes, should assess their compliance with the amended rules. *Asset managers that intend to rely on an exemption from the federal aggregation requirements may need to file a notice with the CFTC by February 14, 2017.*

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### New Requirement for Aggregation

The amended rules impose a new requirement for aggregating positions, pursuant to which a person must aggregate all positions that it owns or controls in accounts or funds with substantially identical trading strategies, on a pro rata basis, with all positions held or controlled by the person and with all positions that the person is otherwise required to aggregate. The CFTC has not defined what would constitute a substantially identical trading strategy, but in the proposing and adopting rule releases, commodity index funds and passively managed index funds are mentioned in this regard. Notably, this new requirement for aggregation is not subject to any ownership threshold or any aggregation exemptions, and applies only to the person’s pro rata ownership of accounts or funds.

### Aggregation Exemptions

#### *Ownership of 10% or More in Another Entity*

The amended rules make available a new exemption from aggregation to persons who would otherwise be required to aggregate positions of separately organized entities in which they have a 10% or greater ownership interest, including portfolio companies and affiliated asset managers, but excluding pooled investment vehicles (discussed below under “Limited Partners, Shareholders and Other Fund Investors”) (“Owned Entities”). Under this exemption, a person is not required to aggregate the accounts or positions of the Owned Entity with any other accounts or positions that it is required to aggregate, provided that (a) the person, (b) any person with which it must aggregate its accounts or positions, and (c) 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 from

<sup>1</sup> CFTC position limits currently apply to futures contracts and options thereon on corn and mini-corn, oats, soybeans and mini-soybeans, wheat and mini-wheat, soybean oil, soybean meal, hard red spring wheat, cotton no. 2 and hard winter wheat. The CFTC has issued a rule proposal that would expand the contracts subject to federal position limits to include 25 physical commodity futures contracts and options thereon as well as economically equivalent swaps. If the rule proposal is adopted, the CFTC’s aggregation rules will apply to these instruments as well. It is unclear at this point if or when the proposed federal position limit rules will be adopted.

having knowledge of, gaining access to, or receiving data about, trades of the other (including security arrangements, including separate physical locations, which would maintain the independence of their activities), do not share employees that control the trading decisions of either, and do not have risk management systems that permit the sharing of its trades or its trading strategy with employees that control the trading decisions of the other. These conditions apply to the extent that the person is aware or should be aware of the activities and practices of the aggregated entity or the owned entity. In the adopting rule release, the CFTC explained that “should be aware” means that the owner is charged with awareness of the owned entity’s activities if it is, in effect, able to control the owned entity or routinely has access to relevant information about the owned entity. *Any person who intends to rely on this exemption from the federal aggregation requirements must file a notice with the CFTC by February 14, 2017.*

#### *Independent Account Controller*

Aggregation is not required with respect to accounts of an “eligible entity”<sup>2</sup> managed by an “independent account controller”<sup>3</sup> except for the spot month in physical delivery contracts, so long as the independent account controller does not exceed the federal limits and certain conditions are met.<sup>4</sup> The amended rules expand the definition of an eligible entity to include any person with a role equivalent to a general partner in a limited liability partnership or a managing member of a limited liability company. *Any person who intends to rely on this exemption from the federal aggregation requirements must file a notice with the CFTC by February 14, 2017.*

#### *Limited Partners, Shareholder or other Fund Investors*

A person that is a limited partner, limited member, shareholder or other similar type of fund investor that directly or indirectly has a 10% or greater ownership or equity interest in a pooled vehicle need not aggregate the positions of the pooled vehicle with any other accounts or positions such person is required to aggregate. This exemption does not require a notice filing to be made unless the person who wishes to rely on the exemption is a principal or affiliate of the operator of the pooled vehicle, in which case *the principal or affiliate must file a notice with the CFTC by February 14, 2017* and satisfy additional conditions similar to the information barriers required for Owned Entities and the Independent Account Controllers. The exemption is not available to the commodity pool operator of a pooled vehicle and is also not available to a person that directly or indirectly has a 25% or greater ownership or equity interest in a fund whose operator is exempt from registration under the “de minimis” commodity interest trading exemption in CFTC Rule 4.13(a)(3).

#### *Information Sharing*

The amended rules contain an exemption from aggregating the accounts or positions of an Owned Entity if sharing the information associated with aggregation would create a reasonable risk that either person could violate state or federal law or the law of a non-U.S. jurisdiction, or regulations adopted thereunder. The person must not have actual knowledge

<sup>2</sup> An “eligible entity” is a commodity pool operator, the operator of a trading vehicle that is excluded, or that itself has qualified for exclusion from the definition of the term “pool” or “commodity pool operator,” respectively, under CFTC Rule 4.5, the limited partner, limited member or shareholder in a commodity pool the operator of which is exempt from registration under CFTC Rule 4.13, a commodity trading advisor, a bank or trust company, a savings association, an insurance company, or the separately organized affiliates of any of the above entities.

<sup>3</sup> An “independent account controller” is a registered futures commission merchant, a registered introducing broker, a registered commodity trading advisor, a registered associated person of any of the foregoing registrants, or a general partner, managing member, or manager of a commodity pool the operator of which is excluded from registration under CFTC Rule 4.5(a)(4) (for certain benefit plans) or exempt from registration under CFTC Rule 4.13.

<sup>4</sup> The independent account controller must be specifically authorized by an eligible entity to independently control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity; trade independently of the eligible entity and of any other independent account controller trading for the eligible entity; and have no knowledge of trading decisions by any other independent account controller. If the independent account controller is affiliated with the eligible entity or another independent account controller, each of the affiliated entities must have and enforce written procedures to preclude the affiliated entities from having knowledge of, gaining access to, or receiving data about, trades of the other; trade such accounts pursuant to separately developed and independent trading systems; market such trading systems separately, and solicit funds for such trading by separate disclosure documents where such disclosure documents are required under Part 4 of the CFTC’s rules.

of the information associated with aggregation. *Any person who intends to rely on this exemption from the federal aggregation requirements must file a notice with the CFTC by February 14, 2017.*

#### *Underwriting Activities*

The amended rules provide an exemption from aggregation of the positions or accounts of an Owned Entity if the person's ownership interest is based on the ownership of securities constituting all or part of an unsold allotment to or subscription by the person as a participant in the distribution of the securities by the issuer or by or through an underwriter.

#### *Broker-Dealer Activity*

A broker-dealer registered with the Securities and Exchange Commission or similarly registered with a non-U.S. regulatory authority need not aggregate the positions or accounts of an Owned Entity if the securities have been acquired in the ordinary course of business as a dealer, so long as the person does not have actual knowledge of the trading decisions of the Owned Entity.

#### *Accounts Held by Futures Commission Merchants*

A futures commission merchant (or any affiliate) need not aggregate positions it holds in a discretionary account, or in an account that is part of a customer trading program of a futures commission merchant (or any of the officers, partners, or employees of such futures commission merchant or of its affiliates), if a person other than the futures commission merchant or the affiliate directs trading in such an account; the futures commission merchant or the affiliate maintains only such minimum control over the trading in such an account as is necessary to fulfill its duty to supervise diligently trading in the account; and each trading decision of the discretionary account or the customer trading program is determined independently of all trading decisions in other accounts that the futures commission merchant or the affiliate holds, has a financial interest of 10% or more in, or controls. *Any person who intends to rely on this exemption from the federal aggregation requirements must file a notice with the CFTC by February 14, 2017.*

### **Notice Filing Required**

As noted above, many of these aggregation exemptions require a filing with the CFTC. The filing is effective upon submission and must include a description of the relevant circumstances that warrant disaggregation and a statement of a senior officer of the entity certifying that the conditions set forth in the exemption have been met. If there is a material change to the information provided in a notice filing, an amended notice must be filed with the CFTC promptly. If a person newly acquires an ownership interest of 10% or greater and is eligible for the Owned Entity Exemption, if the person files the notice within 60 days of the acquisition the person may elect that the notice be effective as of the date of the acquisition. A failure to timely file a notice will not constitute a violation of a federal position limit if the notice is filed no later than five business days after the person is aware, or should be aware, that the notice was not filed. Any person who has claimed an aggregation exemption must provide to the CFTC, upon request, information demonstrating that they meet the requirements of the exemption.

### **Exchange-Level Aggregation Rules**

In addition to federal position limits, U.S. (and some non-U.S.) futures exchanges have established position limits on contracts traded on their exchanges, as well as aggregation rules and exemptions that typically are similar to those at the federal level. To rely on an exchange-level exemption, generally a person must submit an application to the exchange for review and approval.

Please contact [Deborah Monson](#) or [Jeremy Liabo](#) or the Ropes & Gray attorney who usually advises you with any questions you may have or if you would like additional information.