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CFTC Position Limits Rule Became Effective March 15

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On March 15, 2021, the final position limit rule of the Commodity Futures Trading Commission (“CFTC” or “Commission”) became effective providing new and amended federal spot position limits for derivatives contracts associated with twenty-five physical commodities (the “Final Rule”).¹ In short, the Final Rule includes (1) new and amended federal spot-month position limits for twenty-five physical commodity derivatives contracts; (2) amended single-month and all-months-combined limits for most of the nine agricultural contracts previously subject to federal position limits (the “Legacy Contracts”); (3) new and amended definitions of certain key terms, including a revised definition of “bona fide hedging transaction or position,” and a new definition of “economically equivalent swaps;” (4) amended rules governing exchange-set limit levels and exemptions therefrom; (5) a new streamlined process for bona fide hedging recognitions for purposes of federal position limits; (6) new enumerated bona fide hedges; and (7) amendments to certain other regulatory provisions that would eliminate the need to file Form 204 with the CFTC.² On December 22, 2020, the CFTC’s Division of Market Oversight (“DMO”) released a staff workbook to provide guidance to market participants regarding which exchange-traded futures contracts will be subject to the Final Rule.³

As we previously [noted](#), the implementation of the Final Rule completes a nearly decade-long effort to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) requirement that the CFTC establish position limits “necessary” for “diminishing, eliminating, or preventing” excessive speculation that causes “sudden or unreasonable fluctuations or unwarranted changes in . . . price”⁴ However, dissents to the Final Rule by two Commissioners, including Acting Chairman Behnam, may presage more regulatory activity on certain aspects of position limits.

Final Rule

Principally, the Final Rule expands the number of agricultural commodity futures contracts that are subject to position limits from nine to twenty-five, and also applies position limits to futures and options that are directly or indirectly linked to these twenty-five contracts, along with “economically equivalent swaps”—swaps with “identical material” contractual specifications, terms, and conditions to a referenced contract.⁵ Federal limits outside the spot month will apply only to the nine Legacy Contracts subject to existing federal limits. The remaining sixteen referenced contracts will be subject only to exchange-set limits and/or position accountability levels on non-spot months.⁶

The Final Rule also expands the existing list of “enumerated” bona fide hedges to cover additional hedging practices, including adding a bona fide hedge for anticipated merchandising.⁷ Notably, the Final Rule modifies the “temporary substitute test” to require that a bona fide hedging transaction or position in a physical commodity must *always*, and not just *normally*, be connected to the production, sale, or use of a physical cash-market commodity.⁸

Under the Final Rule, market participants seeking to exceed federal position limits for non-enumerated bona fide hedging transactions or positions may choose whether to apply directly to the Commission or, instead, apply indirectly to the Commission through the applicable exchange using a new streamlined process.⁹

The Final Rule went into effect on March 15, 2021, but the general compliance date is (a) January 1, 2022 for (1) the federal speculative position limits for the sixteen non-legacy core referenced futures contracts subject to the federal position limits for the first time under the Final Rule, and (2) exchanges to implement the requirements imposed under the Final Rule, and (b) January 1, 2023 with respect to (1) federal speculative position limits for economically equivalent swaps, and (2) the elimination of previously granted risk management exemptions.¹⁰

The exchanges new position limits and accountability levels also were published by both the CME¹¹ and ICE,¹² which describe each exchange’s interpretation and application of the new rule.

More to Come?

In his dissent to the Commission’s approval of the Final Rule, now Acting Chairman Behnam asserted that the new rule fails to address known “deficiencies” and actually makes many of those deficiencies “worse.”¹³ He argued that the Final Rule improperly defers regulatory authority to the exchanges, in contravention of “Congressional mandate and clear statutory intent.”¹⁴ Commissioner Behnam also stated that the CFTC has failed to provide a rational basis for its decision to only establish federal limits outside of the spot month for the Legacy Contracts and not for the sixteen newly-referenced commodity contracts.¹⁵

Commissioner Berkovitz also dissented and reiterated his previous objection that the Final Rule “demoted the Commission from head coach to Monday-morning quarterback,” and noted that the Final Rule exacerbates that issue by making “the players on the field” the “referees.”¹⁶ Commissioner Berkovitz argued that the Final Rule, among other issues, improperly allows private actors to establish new bona fide hedging exemptions and misinterprets Dodd-Frank.¹⁷

Commissioner Berkovitz recently expanded on his prior comments in a March 15 statement calling out the exchanges for failing in their regulatory filings “to remediate a well-known vulnerability in these contract markets’ Trading at Settlement (TAS) rule, namely the absence of any numerical limits on speculative use of TAS contracts during the spot month on the contract.”¹⁸ Noting that “TAS contracts have been and can be used to manipulate the price of WTI,”¹⁹ and in fact were traded in “extraordinary amounts during the historic collapse of WTI futures on April 20, 2020,” Commissioner Berkovitz called on the exchanges to address this vulnerability. The Commissioner concluded that “the Commission must be prepared to impose such limits unilaterally when an exchange does not act in a timely manner.”²⁰

It remains to be seen how the Commission will address any remaining open issues, and whether there will be additional action on position limits.

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¹ Press Release, CFTC, CFTC Finalizes Position Limits Rule at October 15 Open Meeting (Oct. 15, 2010), <https://www.cftc.gov/PressRoom/PressReleases/8287-20>.

² Position Limits for Derivatives, 17 C.F.R. §§ 1, 15, 17, 19, 40, 140, 150, 151 (2021).

³ Press Release, CFTC, CFTC Staff Releases Position Limits Workbook to Provide Clarity to Market Participants (Dec. 22, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8342-20>. The workbook “provides a list of the core referenced futures contracts, along with a non-exhaustive list of linked referenced contracts (i.e., cash-settled futures contracts and options on futures contracts that are linked to a core referenced futures contract), that would be subject to federal position limits” in connection with the Final Rule. *Id.*

⁴ 7 U.S.C. § 6a(a)(1).

⁵ Final Rule at 13.

⁶ *Id.* at 20.

⁷ *Id.* at 25.

⁸ *Id.* at 27.

⁹ *Id.* at 30.

¹⁰ See Final Rule at 2.

¹¹ *CME, CBOT, COMEX and NYMEX Position Limits*, <https://www.cmegroup.com/market-regulation/position-limits.html>; *CME Regulatory Advisory Notice and FAQs*, <https://www.cmegroup.com/rulebook/files/cme-group-Rule-562.pdf>.

¹² *ICE Guidance on Position Limits*, https://www.theice.com/publicdocs/futures_us/ICE_Futures_US_PositionLimit_Guidance.pdf.

¹³ CFTC, Statement of Dissent of Commissioner Rostin Behnam Regarding Position Limits for Derivatives (Oct. 15, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement101520c?utm_source=govdelivery.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ CFTC, Dissenting Statement of Commissioner Dan M. Berkovitz Regarding Final Rule on Position Limits for Derivatives (Oct. 15, 2020). https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatementb101520b?utm_source=govdelivery.

¹⁷ *Id.*

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¹⁸ CFTC, Statement of Commissioner Dan M. Berkovitz on Exchange Rules and Product Terms and Conditions that Fail to Impose Limits on Crude Oil “Trading at Settlement” Transactions (Mar. 15, 2021) [hereinafter, “Berkovitz March 15 Statement”]. https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement031521?utm_source=govdelivery.

¹⁹ See *In re Optiver US LLC*, CFTC No. 08-Civ-6560, 2012 WL 1632613 (Apr. 19, 2012); *In re Shak*, CFTC No. 14-03, 2013 WL 11069360 (Nov. 25, 2013) (consent order).

²⁰ Berkovitz March 15 Statement at 1.