Securities Regulation Daily Wrap Up, CFTC NEWS AND SPEECHES—CFTC proposed rule on position limits approved on a 3-2 vote along party lines, (Jan. 31, 2020)

Securities Regulation Daily Wrap Up

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By Brad Rosen, J.D.

The Commissioners unanimously passed a proposed rule amending certain SEF and real-time reporting requirements by codifying relief previously granted in no-action letters as well.

At its recent open meeting, the CFTC approved a proposed rule on speculative position limits to conform with the Dodd-Frank amendments of the Commodity Exchange Act (CEA), as well as a proposed rule amending certain swap execution facility (SEF) and real-time reporting requirements. The long awaited and controversial proposed position limit rule passed on 3-2 vote along party lines. This proposal represents the fourth attempt over the past 10 years that the Commission has addressed this thorny issue. Meanwhile, the noncontroversial proposed rule for SEFs and related reporting requirements passed unanimously.

The battle over position limits continues. Speculative position limits have long been the source of political fights and court battles. This time around is no different. Chairman Heath Tarbert, together with Republican Commissioners Brian Quintenz and Dawn Stump are strong proponents for the proposal, while Democratic Commissioners Dan Berkovitz and Rostin Behnam have dissented and stand in opposition to its adoption.

According to Chairman Tarbert, the proposal will help ensure that futures markets in agricultural, energy, and metals commodities work for American households and businesses. He claimed that the proposal will protect Americans from some of the most nefarious machinations in our derivatives markets by capping speculative positions in the covered derivatives, which will thereby help prevent cornering and squeezing.

Meanwhile in his dissent, Commissioner Berkovitz asserted that the proposal would create an uncertain and unwieldy process "with the Commission demoted from head coach over the hedge exemption process to Monday-morning quarterback for exchange determinations." He also noted the proposal would abruptly increase position limits in many physical delivery agricultural, metals, and energy commodities, in some instances to multiples of their current levels.

Summary of the proposed position limit rule. Some of the main features of the proposed rule include the following:

- The 2020 proposal applies federal position limits to a universe of 25 physically-settled futures contracts and their linked cash-settled futures, options on futures, and "economically equivalent" swaps. Nine of these contracts are currently subject to federal position limits. The other 16 contracts would be newly subject to federal position limits and include seven additional agricultural contracts, four energy contracts, and five metals contracts.
- The 2020 proposal applies federal position limits on certain swaps. Specifically, swaps that meet the definition of an "economically equivalent swap" would be subject to federal limits as a referenced contract.
- Federal spot month limits would apply to referenced contracts on all 25 core referenced futures contracts. The proposed spot month limit levels are set at or below 25 percent of deliverable supply, as estimated using recent data provided by the DCM listing the core referenced futures contract, and verified by the CFTC.

- The 2020 proposal would generally include exemptions for (1) bona fide hedging transactions and positions; (2) spread positions; (3) certain financial distress positions; (4) certain natural gas positions held during the spot month; and (5) pre-enactment and transition period swaps, also as those terms are defined in the proposal.

The proposal also includes an expanded list of enumerated bona fide hedges to cover additional hedging practices. In addition, the proposal establishes a new process that would streamline requests for bona fide hedge exemptions for both exchange-set and federal position limit requirements.

A 90-day comment period for the proposed rule will end on April 29, 2020. Ordinarily, the comment period commences once a rule is published in the *Federal Register*. In this case, the open meeting itself apparently triggered the comment period commencement.

Summary of the proposed rule on SEF and real-time reporting requirements. The Commission also unanimously approved a proposed rule to amend certain rules in Parts 36, 37, and 43 of CFTC regulations relating to the execution of package transactions on SEFs; the execution of block trades on SEFs; and the resolution of error trades on SEFs. These matters are currently the subject of relief in certain no-action letters from Commission staff. As a result of the proposed rule, these no-action letters will in effect be codified.

In support of the proposed rule, Chairman Tarbert stated, "I expect the proposal, if finalized, will provide certainty and clarity to SEFs and their participants. CFTC staff has provided important relief over the last six years. There is great value in memorializing their no-action positions in a Commission rule." Commissioners Behnam, Berkovitz, and Quintenz also issued statements in support of the proposed rule.

This proposed rule has a 60-day comment period following publication in the *Federal Register*.

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