

CFTC Adopts New Federal Position Limits and Amendments

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The Commodity Futures Trading Commission, by a 3-2 vote on October 15, 2020, adopted amendments to Part 150 of the CFTC Regulations (Amendments).¹ Part 150 currently imposes federal speculative position limits on nine futures contracts as well as options on such futures contracts (collectively, legacy agricultural contracts), and requires exchange position limits on those and other contracts. The most significant aspects of the Amendments include the establishment of new and amended federal position limits for 25 physical commodity derivatives contracts (which may include swaps) and the overhaul of certain exemptions from the position limits and the process to enable a market participant to rely on such an exemption.

As a result of these changes, and prior to the applicable compliance dates, any market participant – including asset managers – trading for fund, client or proprietary accounts in any of the 25 core referenced futures contracts and/or the other related futures, options and swaps that will now be subject to federal position limits as discussed in this *OnPoint* will need to consider whether the exposure created under those contracts might exceed the new and amended limits. Planning ahead for adjustments to relevant trading strategies may be necessary to ensure compliance with the limits.

Importantly, the Amendments do not impose federal non-spot month position limits for such contracts, other than the nine legacy agricultural contracts that historically have been subject to federal position limits.² As a result, while federal position limits will include swaps for all 25 of the relevant contracts, those limits will apply only outside the spot month for the nine legacy agricultural contracts. Also, the Amendments do not impact the CFTC's aggregation requirements applicable to market participants for purposes of the federal position limits or the related independent account controller exemption, as well as other exemptions from aggregation, currently set forth in Part 150.³

The Amendments represent the culmination of a 10-year period of regulatory process that included a federal district court case vacating one of the CFTC's rulemakings.⁴ The finalization of this rulemaking is a significant event that will provide certainty to relevant futures and swap market participants.

¹ [Position Limits for Derivatives](#) (Adopting Release), RIN 3038-AD99. This *OnPoint* provides a link to the voting draft of the Adopting Release. As of publication, this rulemaking had not been reflected in the Federal Register.

² The nine legacy agricultural contracts are: CBOT Corn (and Mini-Corn) (C); CBOT Oats (O); CBOT Soybeans (and Mini-Soybeans) (S); CBOT Wheat (and Mini-Wheat) (W); CBOT Soybean Oil (SO); CBOT Soybean Meal (SM); MGEX Hard Red Spring Wheat (MWE); CBOT KC Hard Red Winter Wheat (KW); and ICE Cotton No. 2 (CT). The federal position limit levels set the maximum speculative positions in each such contract that a person may hold in the spot month (individual month and all-months-combined). Very generally, the spot month for a futures contract is the month in which delivery of the underlying commodity or instrument can be required to be made under the contract.

³ The CFTC most recently took regulatory action under Part 150 to modify the requirements under CFTC Regulation 150.4 governing aggregation of positions for purposes of compliance with federal position limits. *Aggregation of Positions*, 81 FR 91454 (Dec. 16, 2016).

⁴ The CFTC previously issued final federal position limit rules in 2011 to implement the provisions of the Dodd-Frank Act regarding position limits and the *bona fide* hedge definition. *Position Limits for Derivatives*, 76 FR 4752 (Jan. 26, 2011);

New and Amended Federal Position Limits and Limit Levels

The Amendments: (1) impose new federal spot month position limits for derivatives contracts associated with 16 physical commodities in the agricultural, energy and metals markets (non-legacy contracts);⁵ and (2) amend certain of the spot month, single-month and all-months-combined federal position limits for the nine legacy agricultural contracts that currently are subject to federal position limits (together with the non-legacy contracts, the core referenced futures contracts). Once effective, and after the compliance date, the federal position limits will apply to any “referenced contract,” which term is defined include: (1) the 25 core referenced futures contracts; (2) futures contracts and options on futures contracts directly or indirectly linked to a core referenced futures contract; and (3) “economically equivalent swaps.”⁶

The current and new federal position limits are set forth in the tables in the **Appendix**. The federal position limits apply to referenced contracts on a futures-equivalent basis, based on the size of the unit of trading of the relevant core referenced futures contract.

The Adopting Release states that each spot month position limit is set at or below 25 percent of deliverable supply in the relevant market. During the spot month, federal position limits apply “separately” to physically-settled and cash-settled referenced contracts. The spot month position limit levels apply in the aggregate across all exchanges and the over-the-counter (OTC) market for all contracts other than the position limit level for NYMEX Henry Hub Natural Gas

Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011) (2011 Final Rulemaking). The U.S. District Court for the District of Columbia vacated the 2011 Final Rulemaking, with certain exceptions, in September 2012. *Int'l Swaps & Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n*, 887 F. Supp. 2d 259 (D.D.C. 2012). The CFTC issued proposed position limits regulations in 2013, June 2016 and December 2016. Position Limits for Derivatives, 78 FR 75680 (Dec. 12, 2013); Position Limits for Derivatives: Certain Exemptions and Guidance, 81 FR 38458 (June 13, 2016); and Position Limits for Derivatives, 81 FR 96704 (Dec. 30, 2016). In early 2020, the CFTC approved a new position limits proposal that withdrew from further consideration the 2013 and 2016 proposals. Position Limits for Derivatives, 85 FR 11596 (Feb. 27, 2020).

⁵ The additional agricultural contracts that are subject to federal spot month limits are: CME Live Cattle (LC); CBOT Rough Rice (RR); ICE Cocoa (CC); ICE Coffee C (KC); ICE FCOJ-A (OJ); ICE U.S. Sugar No. 11 (SB); and ICE U.S. Sugar No. 16 (SF). The energy contracts that are subject to federal spot month limits are: NYMEX Light Sweet Crude Oil (CL); NYMEX New York Harbor ULSD Heating Oil (HO); NYMEX New York Harbor RBOB Gasoline (RB); and NYMEX Henry Hub Natural Gas (NG). The metals contracts that are subject to federal spot month limits are: COMEX Gold (GC); COMEX Silver (SI); COMEX Copper (HG); NYMEX Palladium (PA); and NYMEX Platinum (PL).

⁶ This term is defined as any swap that has identical material contractual specifications, terms and conditions to a referenced contract, with certain exceptions and clarifications stated in the text of CFTC Regulation 150.1.

The Wall Street Transparency and Accountability Act of 2010 (Dodd-Frank Act) amended the Commodity Exchange Act (CEA) position limits provisions, which since 1936 have authorized the CFTC (and its predecessor) to impose limits on speculative positions to prevent the harms caused by excessive speculation. The Adopting Release states that “the Commission interprets these amendments as, among other things, tasking the Commission with establishing such position limits as it finds are ‘necessary’ for the purpose of ‘diminishing, eliminating, or preventing’ ‘[e]xcessive speculation ... causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity ...’ The Commission also interprets these amendments as tasking [it] with establishing position limits on any ‘economically equivalent’ swaps.” The Adopting Release states that the CFTC found that the new and amended limits were necessary for the 25 contracts based on “the importance of the 25 core referenced futures contracts to their respective underlying cash markets, including that they require physical delivery of the underlying commodity,” as well as “the particular importance to the national economy of the commodities underlying the 25 contracts.”

(NG). Spot month position limits apply to cash-settled look-alike NYMEX NG referenced contracts on a per-exchange basis as well as on an OTC basis.

Importantly, as noted above, the federal non-spot month position limits were not extended to the 16 non-legacy contracts. For asset managers, the importance of limiting federal position limits to the spot month (except for the nine legacy agricultural contracts) is that asset managers rarely trade futures and options on futures in the spot month, and generally prefer to maintain their market exposure by “rolling” their positions forward before the spot month commences rather than facing delivery. However, the 16 non-legacy contracts will be subject to exchange-set limits and/or accountability levels outside of the spot month. The Adopting Release states that federal non-spot month limits for the nine legacy contracts are set at 10 percent of open interest for the first 50,000 contracts, with an incremental increase of 2.5 percent of open interest thereafter.

For contracts on physical commodities that are not subject to federal position limits, the Amendments generally require each exchange to set spot month position limit levels at no greater than 25% of deliverable supply. Exchanges have flexibility to set either position limits or position accountability levels for such physical commodity contracts outside of the spot month.

Amended and New Exemptions from Federal Position Limits

The Amendments include a revised definition of “bona fide hedging transaction or position” that includes an expanded list of enumerated bona fide hedges. A bona fide hedging transaction or position may exceed the applicable federal position limits, if the transaction or position satisfies all three elements of the new definition. These elements require that the transaction or position: (1) represents a substitute for transactions or positions made or to be made at a later time in a physical marketing channel; (2) is economically appropriate to the reduction of price risks in the conduct and management of a commercial enterprise; and (3) arises from the potential change in value of (A) assets which a person owns, produces, manufactures, processes or merchandises, or anticipates owning, producing, manufacturing, processing or merchandising; (B) liabilities which a person owes or anticipates incurring; or (C) services that a person provides or purchases, or anticipates providing or purchasing. In addition, the definition includes a related concept that also allows certain pass-through swaps and pass-through swap offset transactions also to qualify as bona fide hedging transactions or positions.

A new appendix to Part 150 sets forth a list of enumerated bona fide hedges for which a market participant is not required to request prior approval from the CFTC, in order to hold a bona fide hedge position above the federal position limit. However, a market participant holding an enumerated bona fide hedge position still would need to request an exemption from the relevant exchange for exchange-set limits. For non-enumerated bona fide hedge positions, the Amendments provide a process for requesting CFTC approval. The CFTC’s approval must be applied for, and granted, prior to exceeding the applicable federal position limit, except where there are “demonstrated sudden or unforeseen increases” in bona fide hedging needs (in which case the application must be submitted within five business days after the market participant exceeds the applicable limit).

The Amendments also include: a spread exemption; a financial distress position exemption; and a conditional spot month limit exemption for certain positions in natural gas cash-settled reference contracts.

Effective Date and Later Compliance Dates

All aspects of the Amendments will be effective 60 days after publication in the Federal Register, which had not yet occurred as of the date of this *OnPoint*.

The Amendments set forth later compliance dates for certain requirements as follows:

- The compliance date will be January 1, 2022 for the federal speculative position limits for the 16 non-legacy contracts subject to federal position limits for the first time under the Amendments, as well as for associated referenced contracts other than economically equivalent swaps.
- The compliance date will be January 1, 2022 for the requirements that exchanges establish position limits and other exchange rules.
- The compliance date will be January 1, 2023 for the federal speculative position limits for economically equivalent swaps.
- The compliance date will be January 1, 2023 for the elimination of previously-granted risk management exemptions.

Appendix⁷

Federal Spot Month Position Limits Summary

Core Referenced Futures Contract	2020 Final Federal Spot Month Limit Level	2020 Proposed Federal Spot Month Limit Level	Existing Federal Spot Month Limit Level	Existing Exchange-Set Spot Month Limit Level
Legacy Agricultural Contracts				
CBOT Corn (C)	1,200	1,200	600	600
CBOT Oats (O)	600	600	600	600
CBOT Soybeans (S)	1,200	1,200	600	600
CBOT Soybean Meal (SM)	1,500	1,500	720	720
CBOT Soybean Oil (SO)	1,100	1,100	540	540
CBOT Wheat (W)	1,200	1,200	600	600/500/400/ 300/220
CBOT KC Hard Red Winter Wheat (KW)	1,200	1,200	600	600
MGEX Hard Red Spring Wheat (MWE)	1,200	1,200	600	600
ICE Cotton No. 2 (CT)	900	1,800	300	300
Other Agricultural Contracts				
CME Live Cattle (LC)	600/300/200 ⁸	600/300/200	n/a	450/300/200
CBOT Rough Rice (RR)	800	800	n/a	600/200/250
ICE Cocoa (CC)	4,900	4,900	n/a	1,000
ICE Coffee C (KC)	1,700	1,700	n/a	500

⁷ The tables in this Appendix were published in the Adopting Release.

⁸ The federal spot month limit for Live Cattle features a step-down limit, as follows: (1) 600 at the close of trading on the first business day following the first Friday of the contract month; (2) 300 at the close of trading on the business day prior to the last five trading days of the contract month; and (3) 200 at the close of trading on the business day prior to the last two trading days of the contract month.

Core Referenced Futures Contract	2020 Final Federal Spot Month Limit Level	2020 Proposed Federal Spot Month Limit Level	Existing Federal Spot Month Limit Level	Existing Exchange-Set Spot Month Limit Level
ICE FCOJ-A (OJ)	2,200	2,200	n/a	300
ICE U.S. Sugar No. 11 (SB)	25,800	25,800	n/a	5,000
ICE U.S. Sugar No. 16 (SF)	6,400	6,400	n/a	n/a ⁹
Metals Contracts				
COMEX Gold (GC)	6,000	6,000	n/a	3,000
COMEX Silver (SI)	3,000	3,000	n/a	1,500
COMEX Copper (HG)	1,000	1,000	n/a	1,000 ¹⁰
NYMEX Platinum (PL)	500	500	n/a	500
NYMEX Palladium (PA)	50	50	n/a	50
Energy Contracts				
NYMEX Henry Hub Natural Gas (NG)	2,000 ¹¹	2,000	n/a	1,000 ¹²

⁹ The Adopting Release highlights that ICE technically does not have an exchange-set spot month position limit level for ICE U.S. Sugar No. 16 (SF). However, ICE does have a single-month position limit level of 1,000 contracts, which effectively operates as a spot month position limit.

¹⁰ The Adopting Release highlights that, in a certification submission dated July 30, 2020, COMEX updated its exchange-set spot month position limit level for COMEX Copper (HG) to match the proposed federal spot month position limit level.

¹¹ As discussed above, the NYMEX Henry Hub Natural Gas (NG) federal spot month limit for cash-settled look-alike referenced contracts will apply on a per-exchange basis rather than on an aggregate basis across exchanges.

¹² The Adopting Release highlights that currently: the cash-settled natural gas contracts are subject to an exchange-set spot month position limit level of 1,000 equivalent-sized contracts *per exchange*; and there are three exchanges that list cash-settled natural gas contracts: NYMEX, ICE and Nodal. As a result, a market participant may hold up to 3,000 equivalent-sized cash-settled natural gas contracts under existing exchange-set limits.

The Adopting Release also highlights that the exchanges have a conditional position limit framework for NYMEX NG. This exchange-set conditional spot month position limit permits up to 5,000 cash-settled NYMEX NG equivalent-sized referenced contracts *per exchange* that lists such contracts, provided that the market participant does not hold positions in the physically-settled NYMEX NG referenced contract.

Core Referenced Futures Contract	2020 Final Federal Spot Month Limit Level	2020 Proposed Federal Spot Month Limit Level	Existing Federal Spot Month Limit Level	Existing Exchange-Set Spot Month Limit Level
NYMEX Light Sweet Crude Oil (CL)	6,000/5,000/4,000 ¹³	6,000/5,000/4,000	n/a	3,000
NYMEX New York Harbor ULSD Heating Oil (HO)	2,000	2,000	n/a	1,000
NYMEX New York Harbor RBOB Gasoline (RB)	2,000	2,000	n/a	1,000

Federal Position Limits Summary for Periods other than the Spot Month

Core Referenced Futures Contract	2020 Final Federal Single Month ¹⁴ and All-Months-Combined Limit Levels	2020 Proposed Federal Single Month and All-Months-Combined Limit Levels	Existing Federal Single Month and All-Months-Combined Limit Levels	Existing Exchange-Set Single Month and All-Months-Combined Limit Levels
CBOT Corn (C)	57,800	57,800	33,000	33,000
CBOT Oats (O)	2,000	2,000	2,000	2,000
CBOT Soybean (S)	27,300	27,300	15,000	15,000
CBOT Soybean Meal (SM)	16,900	16,900	6,500	6,500
CBOT Soybean Oil (SO)	17,400	17,400	8,000	8,000
CBOT Wheat (W)	19,300	19,300	12,000	12,000
CBOT KC HRW Wheat (KW)	12,000	12,000	12,000	12,000

¹³ The federal spot month limit for Light Sweet Crude Oil features the following step-down limit: (1) 6,000 contracts as of the close of trading three business days prior to the last trading day of the contract; (2) 5,000 contracts as of the close of trading two business days prior to the last trading day of the contract; and (3) 4,000 contracts as of the close of trading one business day prior to the last trading day of the contract.

¹⁴ The Adopting Release highlights that, with the exception of the ICE Cotton No. 2 contract, for each of the legacy agricultural contracts, the single month limit is equal to the all-months-combined limit under the Amendments.

Core Referenced Futures Contract	2020 Final Federal Single Month ¹⁴ and All-Months-Combined Limit Levels	2020 Proposed Federal Single Month and All-Months-Combined Limit Levels	Existing Federal Single Month and All-Months-Combined Limit Levels	Existing Exchange-Set Single Month and All-Months-Combined Limit Levels
MGEX HRS Wheat (MWE)	12,000	12,000	12,000	12,000
ICE Cotton No. 2 (CT)	11,900 (all-months-combined) ¹⁵ 5,950 (single month)	11,900	5,000	5,000

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¹⁵ The single month limit for ICE Cotton No. 2 is set at 50% of the all-months- combined limit, or 5,950 contracts.