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Court Vacates CFTC Position Limits Rules

Last Friday, September 28th, the U.S. Federal District Court in Washington, D.C. (“Court”) struck down the commodity speculative position limit rulemaking that the U.S. Commodity Futures Trading Commission (“CFTC”) had adopted on October 18, 2011, which was scheduled to become effective on October 12, 2012.¹ Significantly for the first time, the final position limit rules applied to over-the-counter swaps and other derivatives (also referred to as economically equivalent or look-alike contracts). The plaintiffs in the action were the International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association (“Plaintiffs”). Below is a brief summary of the Court’s decision.²

- The Court stated that the heart of the case was whether the defendant CFTC had misinterpreted its Congressional statutory authority to set position limits.
- Finding in favor of the Plaintiffs (on motion for summary judgment), the Court struck down the rules that had set position limits on futures, options, and swaps on 28 types of commodities.
- The Plaintiffs argued that the Dodd-Frank Act amendments to the Commodity Exchange Act (“CEA”) required the CFTC to determine whether position limits were necessary and appropriate to prevent excessive speculation in the commodity markets. The CFTC argued that the Dodd-Frank Act amendments mandated the CFTC to set position limits without regard to whether the limits are “necessary” or “appropriate.”
 1. The Court noted that the CFTC’s interpretation of the statute was internally inconsistent, by determining that the setting of position limits was mandatory but only imposing limits for contracts related to certain (and not all) commodities.
 2. The Court noted that the language of the CEA had not changed substantially since it was adopted and that, in other instances of position limit rulemaking, the CFTC had historically studied and made a determination that limits were “necessary.”
 3. The Court declined to side with the CFTC where the CFTC argued that the Dodd-Frank Act converted the CFTC’s discretion to set position limits into a mandate.
 4. Both parties agreed that the language “as appropriate” in the statute granted the CFTC discretion. However, the CFTC argued “as appropriate” went to actual levels of position limits, whereas the Plaintiffs argued that it went to whether the CFTC must set limits at any particular time at all. The Court did not take sides on this issue, but remanded the issue to the CFTC to resolve the ambiguity.
- The Court determined that the CEA, as amended by the Dodd-Frank Act, was ambiguous. But that, since the CFTC did not recognize this ambiguity when adopting the rules, its interpretation of the statute was not entitled to the Court’s deference.
- The Court declined to determine whether the CFTC’s “aggregation” portion of the position limit rules were arbitrary and capricious or in violation of the cost-benefit analysis required of CFTC rulemaking. The Court was also unwilling to determine if the aggregation portion of the rules should stand alone and be severed from the rest of the rules, and did not want to interfere with the CFTC’s current rulemaking on this issue. The Court therefore decided to remand the entirety of the rules to the CFTC, leaving it to the CFTC to decide whether or not to amend the aggregation portion on any re-adoption.
- The Court vacated the rules (meaning that they will not go into effect while on remand), remanding the rules to the CFTC to resolve the ambiguities identified in the Court’s decision and to determine if the position limits set in the rules are necessary to prevent excessive speculation.

Footnotes

1 Position Limits for Futures and Swaps, 76 Fed. Reg. 71626 (Nov. 18, 2011); see also [CFTC Finalizes Futures and Swaps Position Limit Rules, DechertOnPoint \(Nov. 2011\)](#), available here (PDF).

2 A copy of the Court's decision is available [here](#) (PDF) .

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