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## Court Vacates New CFTC Position Limit Regulations

*By Charles R. Mills and Lawrence B. Patent*

In a widely reported decision, on September 28, 2012 the federal District Court for the District of Columbia vacated the Commodity Futures Trading Commission's ("CFTC") regulations imposing position limits on speculative positions in futures, exchange-traded commodity options, and swaps related to twenty-eight physical commodities. The court remanded those regulations to the CFTC for proceedings consistent with its opinion. The CFTC's position limit regulations had been challenged by the International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association. Prior to the court's decision, those regulations had been scheduled to take effect on October 12.<sup>1</sup>

In adopting its position limit regulations, the CFTC interpreted Section 4a(a)(1) of the Commodity Exchange Act ("CEA") as authorizing the CFTC to impose position limits without making a specific finding that such limits are necessary. The court rejected the CFTC's interpretation, holding that CEA Section 4a(a)(1) "clearly and unambiguously requires the Commission to make a finding of necessity prior to imposing position limits."

The court decision does not affect the CFTC's currently existing position limit regulations for commodity futures and exchange-traded commodity options on grains and cotton set forth in Part 150 of its regulations, nor the speculative position limits set forth in the rules of the futures exchanges. Those previously-adopted rules were not challenged in the court proceeding and remain in full force and effect.

In light of the court's decision, ICE Futures US, the Chicago Mercantile Exchange, the Chicago Board of Trade and the New York Mercantile Exchange have withdrawn their respective position limit rule submissions to the CFTC that were designed to conform their rules with the CFTC's new position limit regulations.

At this point, the CFTC may appeal the district court's decision to the United States Court of Appeals for the District of Columbia Circuit and seek a stay of the decision pending appeal. It also may renew rulemaking proceedings regarding position limits in accordance with the terms of the court's opinion. The CFTC also could request that Congress amend the CEA regarding the authority to impose position limits. A stay of the district court's order presumably would permit the CFTC's position limit regulations to go into effect pending the appeal. The standards for the grant of a stay, however, require showing a likelihood of success on the merits, clear harm in the absence of a stay, and a clear public interest for a stay. The CFTC would bear an especially heavy burden to satisfy the standards because, among other reasons, it never found in the first instance or developed a record that the position limits are a necessity, thereby possibly compromising, and potentially precluding, any basis for a court to find any likely or clear harm.

<sup>1</sup> The CFTC's final position limit regulations were analyzed in our Derivatives Alert "CFTC Adopts Speculative Position Limits on Physical Commodities," dated December 8, 2011, please click [here](#) to view this alert.

## Authors:

### **Charles R. Mills**

charles.mills@klgates.com

+1.202.778.9096

### **Lawrence B. Patent**

lawrence.patent@klgates.com

+1.202.778.9219

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