

U.S. Futures Exchanges Liberalize Exceptions to Position Limit Aggregation Rules

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Effective March 18, 2016 and April 4, 2016^[1] respectively, the major U.S. futures exchanges, ICE Futures U.S., Inc. (“ICE”) and the CME Group exchanges (“CME Group”),^[2] have amended their rules regarding aggregation of positions for purposes of determining compliance with applicable position limits and accountability levels. ICE amended Rule 6.12—Aggregation of Positions^[3] and CME Group has amended Rule 559.E—Limited Exceptions to Aggregation for Independently Controlled Accounts.^[4] As a result of the amendments, aggregation standards will be more straightforward and will better track energy industry structure (particularly as to regulated utilities and their affiliates). In fact, according to both ICE and CME Group, certain energy market participants had requested a change to the aggregation rules because certain requirements of the exchange rules conflicted with Federal Energy Regulatory Commission (“FERC”) regulations requiring non-disclosure of utility trading information between affiliates and other state laws.^[5] Further, the change to the exchange rules on aggregation is a step towards harmonizing the exchanges’ rules with Commodity Futures Trading Commission (“CFTC”) proposed rules on aggregation of positions for purposes of the CFTC’s proposed pending rule on position limits for derivatives.^[6]

Specifically, ICE Rule 6.12, which sets forth the exchange rule regarding the aggregation of positions for purposes of determining compliance with applicable position limits and accountability levels, now includes exceptions from the aggregation requirements of 6.12(a) when:

- 1) “With respect to the positions or accounts of a separately organized entity (an “owned entity”): if the sharing of **information associated with such aggregation creates a reasonable risk that such sharing would cause any Person to violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder**, provided that a written officer’s certification to that effect accompanies the request, and provided further that such Person does not have actual knowledge of information associated with such aggregation,” or
- 2) “With respect to the positions or accounts of an owned entity in which a Person holds an ownership or equity interest equal to or greater than 10% (except for positions which are subject to Federal position limits): if the **individuals controlling the trading decisions of the relevant accounts do not have knowledge of the trading decisions** made by each other, the **accounts trade pursuant to separately developed and independent trading strategies**, there are **written procedures designed to preclude access to information** regarding the trades, positions and strategies of each account, and there is **no sharing of personnel controlling the respective trading decisions.**”^[7]

The second exception will not be available for contracts currently subject to federal position limits.^[8] In order to qualify for either exception, an entity must submit a written application and have that application be granted by ICE.^[9]

CME Group's amendments to Rule 559.E similarly allow exceptions to aggregation for position limits and hedge exemption purposes.^[10] With the change, Rule 559.E now notes that exceptions to the aggregation of products "with position limits established in accordance with CFTC Regulation 150.2," referring to certain agriculture contracts with existing federal position limits, "must comply with CFTC Regulation 150.3"^[11] For all other products, i.e. those not subject to federal limits, as amended Rule 559.E provides that for "positions carried in the separate account(s) of independent account controllers," positions shall not be aggregated for position limit purposes provided that the entities:

- 1) "Do not have knowledge of one another's trading decisions;"
- 2) "Trade pursuant to separately developed and independent trading strategies;" and
- 3) "Have and enforce written procedures which preclude each from having knowledge of, gaining access to, or receiving data concerning, the trades of the other. Such procedures must include document routing and other procedures or security arrangements which would maintain the independence of their activities."^[12]
- 4) "Do not share personnel in control of the respective trading decisions."^[13]

Like the ICE exceptions to aggregation, in order to qualify for the CME Group exception an entity must submit a request and be approved by the exchange.^[14]

While the CME Group and ICE amendments are similar, they are not identical. CME Group does not explicitly exempt entities from aggregation where doing so would likely cause a violation of state or federal law, but acknowledged in its submission to the CFTC that in such situations an entity could apply for the exception discussed above.^[15] Additionally, while both rules require written procedures designed to preclude the sharing of information, with respect to item 3 in Rule 559.E, CME Group goes one step beyond ICE and details more specifically what types of procedures would meet this requirement.^[16]

Prior to these amendments, the standards for aggregation used by the exchanges were oriented towards concepts more applicable to futures traders than commercial firms. We view these changes to reflect an increasingly reasoned approach to the manner in which CFTC-related requirements are applied to commercial end-users (and energy end-users in particular). The approval by the CFTC^[17] of these common sense rules, as well as the CFTC's recent final rule on trade options and elimination of Form TO reporting,^[18] seem to convey an increasing sensitivity to end-users' concerns.

These rule changes can be seen as an attempt to move the exchange rules towards harmonization with the aggressive exceptions the CFTC has proposed for federal position limits purposes. Even so, the exchange rule changes are not identical to the proposed CFTC aggregation requirements for the pending proposed federal position limits rule. For example, the CFTC proposal appears to be more stringent in that it would permit disaggregation for affiliates only if they trade pursuant to separately developed and independent trading **systems**, as opposed to separate **strategies**, as provided in the revised exchange rules. The CFTC

proposal is also more stringent in that it includes a requirement that a company seeking to rely on the exception to aggregation based on federal or state law information sharing restrictions must file a memorandum of law with the CFTC explaining the legal basis for determining that information sharing creates a reasonable risk of a legal violation.^[19]

^[1]By revised Market Regulation Advisory Notice RA1603-5R on March 31, 2016, CME Group indicated that certain clarifications were being made to its rule amendments after discussions with the staff of the CFTC. The revised notice further stated that the amendments as revised would be effective April 4, 2016, pending all relevant CFTC regulatory review periods. CME Group, Market Regulation Advisory Notice RA1603-5R (Mar. 31, 2016).

^[2]The CME Group includes the Chicago Mercantile Exchange Inc. (“CME”), the New York Mercantile Exchange, Inc. (“NYMEX”), the Board of Trade of the City of Chicago, Inc. (“CBOT”), and the Commodity Exchange, Inc. (“COMEX”).

^[3]ICE Futures U.S., Inc., Regulatory Requirements, Rule 6.12 (Mar. 18, 2016), *available at* https://www.theice.com/publicdocs/rulebooks/futures_us/6_Regulatory.pdf (hereinafter “ICE Rule 6.12”).

^[4]The amendment will apply to Rule 559.E across the rulebooks of CME, CBOT, NYMEX, and COMEX. See *New York Mercantile Exchange, Inc.*, Submission No. 16-121 to the Commodity Futures Trading Commission (Mar. 18, 2016), *available at* <http://www.cftc.gov/filings/orgrules/orgrules/rule032116nymexdcm001.pdf> (hereinafter “Submission No. 16-121”).

^[5]ICE Futures U.S., Inc., Submission No. 16-27 to the Commodity Futures Trading Commission (Mar. 3, 2016), *available at* https://www.theice.com/publicdocs/regulatory_filings/16-27-Amdts_to_Rule%206.12_Aggregation.pdf (hereinafter “Submission No. 16-27”); Submission No. 16-121.

^[6]*Aggregation of Positions*, 78 Fed. Reg. 68946 (Nov. 15, 2013) (“CFTC Aggregation NOPR”).

^[7]ICE Rule 6.12(c)(i)-(ii) (emphasis added).

^[8]Submission No. 16-27.

^[9]ICE Rule 6.12(c).

^[10]Submission No. 16-121.

^[11]*Id.*

^[12]*Id.*

^[13]This requirement was added in a March 31, 2016 Market Regulation Advisory Notice after discussion with the staff of the CFTC. CME Group, Market Regulation Advisory Notice RA1603-5 (Mar. 31, 2016). The March 31 Advisory Notice also eliminated language in item three that the procedures for maintaining independence of activities include “separate physical locations.” *Id.*

[\[14\]](#) *Id.*

[\[15\]](#) *Id.*

[\[16\]](#) *Id.*

[\[17\]](#) See n.1, *supra*.

[\[18\]](#) Commodity Futures Trading Commission, Release PR7343-16 (Mar. 16, 2016), available at <http://www.cftc.gov/PressRoom/PressReleases/pr7343-16>.

[\[19\]](#) 80 Fed. Reg. 58365 at 58380 (Proposed 17 CFR § 150.4(b)(8)).