C A D W A L A D E R

Cadwalader, Wickersham & Taft LLP
www.cadwalader.com

Clients&FriendsAlert

MiFID and MiFIR on Position Limits and Position Reporting for Commodities Derivatives and Emissions Trading

24 October 2011

Introduction

This is the first in a series of short briefings on radical changes proposed for the regulation and conduct of investment business set out in the European Commission's revised Markets in Financial Instruments Directive (**MiFID**) and Markets in Financial Instruments Regulation (**MiFIR**). Over the next two weeks, we will be sending you a daily briefing covering, variously, MiFID and MiFIR on circuit breakers, trading OTC derivatives on organised venues, pre-and post-trade transparency, transaction reporting, best execution, client categorisation and transactions with 'eligible counterparties', supervision of products (prohibitions and restrictions), data publication and consolidation and algorithmic and high frequency trading.

Below, we outline the "highlights" of the Commission's proposals for the imposition of position limits and position reporting requirements for commodities derivatives and emissions trading.

A. Position Limits

Key Points

- exchanges to set position limits;
- regulators may impose limits;
- waiting for proposals for uniform regulatory technical standards to harmonise position limits;
- calibration by market, participant and contract is provided for, but the devil is in the (implementing) detail.

Legislative Provisions

1. *MiFID Article 59 (Position limits)*: Regulated markets, operators of MTFs[1] and OTFs[2] that trade in or admit to trading commodity derivatives, emissions allowances and their derivatives must apply "transparent and non-discriminatory" position limits or alternative equivalent methods designed to support liquidity, prevent market abuse or support orderly pricing and settlement conditions. Limits should take account of the nature and composition of market participants and the use they make of the specified contracts.

The European Commission will introduce delegated legislation to determine position limits and the quantitative and qualitative effects of alternative arrangements and regulators in Member States may not impose more restrictive limits except in exceptional cases where there is an objective justification taking into account the liquidity and orderly functioning of that particular market.

2. *MiFID Article 72 (Remedies to be made available to competent authorities)*: Article 72(1)(g) provides that Member State regulators shall have, as part of their panoply of supervisory remedies, powers to limit the ability of any person or class of persons to enter into a commodity derivative, including *via* non-discriminatory position limits or limiting the number of commodity derivative contracts per underlying which any given class of persons may enter into over a specified period of time.

3. *MiFIR Articles 34 and 35 (Coordination and position management powers of ESMA[3])*: ESMA shall act as a coordinator and facilitator in relation to national position limits and equivalent actions taken by regulators in individual Member States in order to ensure consistency. ESMA also has its own "position management" powers to be exercised in the absence of sufficient local regulatory intervention in order to protect the orderly functioning and integrity of financial markets, including in relation to the delivery of physical commodities. These powers include limiting the ability of a person to enter into a commodity derivative.

B. Position Reporting by Categories of Trader

Key Points

- once certain thresholds are exceeded, venues where commodity derivatives and emissions are traded will be required to publish weekly reports setting out aggregate data;

---

1 Multilateral Trading Facilities

2 Organised Trading Facilities

3 European Securities and Markets Authority

- regulators are empowered to request full breakdowns of trading data from trading venues.

Legislative Provisions

1. *MiFID Article 60 (Position reporting by categories of trader)*

Dealers in commodity derivatives and emissions allowances and their derivatives on regulated markets, MTFs or OTFs must report real time trading data to the trading venue. The trading venue in turn will be required to publish a weekly report setting out aggregate position data by category of trader (investment firm, fund, other financial institution, commercial undertaking or emissions dealer), including the number of long and short positions by category of trader, changes to those long and short positions since the last report, percentage of total open interest represented by each category and the number of traders in each category. An aggregate report is only required when both the number of traders and their open positions exceed minimum thresholds – those thresholds will be the subject of delegated legislation.

Trading venues are also required to provide their local regulator with a complete breakdown of positions held "upon request".

* * * *

Please feel free to contact any of the following Cadwalader lawyers if you have any questions about this memorandum.

Doron Ezickson	+44 (0) 20 7170 8525	doron.ezickson@cwt.com
Nick Shiren	+44 (0) 20 7170 8778	nick.shiren@cwt.com
Alix Prentice	+44 (0) 20 7170 8710	alix.prentice@cwt.com
Adam Topping	+44 (0) 20 7170 8529	adam.topping@cwt.com
Ramona Simms	+44 (0) 20 7170 8543	ramona.simms@cwt.com