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RHODE ISLAND
Narragansett Bay
Survey Area

Rhode Island:
 Bristol
 Newport
 The following cities and towns:
Kent County
 Anthony
 Coventry
 East Greenwich
 Greene
 Warwick
 West Warwick
Providence County
 Ashton
 Burrillville
 Central Falls
 Cranston
 Cumberland
 Cumberland Hill
 East Providence
 Esmond
 Forestdale
 Greenville
 Harrisville
 Johnston
 Lincoln
 Manville
 Mapleville
 North Providence
 North Smithfield
 Oakland
 Pascoag
 Pawtucket
 Providence
 Saylesville
 Slatersville
 Smithfield
 Valley Falls
 Wallum Lake
 Woonsocket
Washington County
 Davisville
 Galilee
 Lafayette
 Narragansett
 North Kingstown
 Point Judith
 Quonset Point
 Saunderstown
 Slocum
 Massachusetts:
 The following cities and towns:
Bristol County
 Attleboro
 Fall River
 North Attleboro
 Rehoboth
 Seekonk
 Somerset
 Swansea
 Westport
Norfolk County
 Caryville
 Plainville
 South Bellingham
Worcester County
 Blackstone
 Millville

Area of Application. Survey area plus:
 Rhode Island:
 The following cities and towns in:
Kent County
 West Greenwich
Providence County
 Foster
 Glocester
 Scituate
Washington County
 Charlestown
 Exeter
 Hopkinton
 New Shoreham
 Richmond
 South Kingstown
 Westerly
 Massachusetts:
 The following cities and towns in:
Bristol County
 Acushnet
 Berkley
 Dartmouth
 Dighton
 Fairhaven
 Freetown
 Mansfield
 New Bedford
 Norton
 Raynham
 Taunton

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 150

RIN 3038-AC40

Concept Release on Whether To Eliminate the Bona Fide Hedge Exemption for Certain Swap Dealers and Create a New Limited Risk Management Exemption From Speculative Position Limits

AGENCY: Commodity Futures Trading Commission.

ACTION: Advance notice of proposed rulemaking; request for public comment.

SUMMARY: In June and July of 2008, the Commodity Futures Trading Commission ("Commission") issued a special call for information from swap dealers and index traders regarding their over-the-counter ("OTC") market activities. In September of 2008, the Commission released a "Staff Report on Commodity Swap Dealers and Index Traders with Commission Recommendations" (the "September 2008 Report") with several preliminary Commission recommendations.

Recommendation five of the September 2008 Report directs the staff to develop an advance notice of proposed rulemaking that would review whether to eliminate the *bona fide* hedge exemption for swap dealers and replace it with a limited risk management exemption that is conditioned upon, among other things, an obligation to report to the CFTC and applicable self-regulatory organizations when certain noncommercial swap clients reach a certain position level and/or a certification that none of a swap dealer's noncommercial swap clients exceed specified position limits in related exchange-regulated commodities.¹

This concept release reviews the underlying statutory and regulatory background, as well as the regulatory history and relevant marketplace developments, as described in the September 2008 Report, which led to the foregoing recommendation. It then poses a number of questions designed to help inform the Commission's decision as to whether to proceed with the recommendation to eliminate the *bona fide* hedge exemption for swap dealers and replace it with a conditional limited risk management exemption; and if so, what form the new limited risk management exemptive rules should take and how they might be implemented most effectively.

DATES: Comments must be received on or before May 26, 2009.

ADDRESSES: Comments should be submitted to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments also may be sent by facsimile to (202) 418-5521, or by electronic mail to secretary@cftc.gov. Reference should be made to "Whether to Eliminate the *Bona Fide* Hedge Exemption for Certain Swap Dealers and Create a New Limited Risk Management Exemption From Speculative Position Limits." Comments may also be submitted by connecting to the Federal eRulemaking Portal at <http://www.regulations.gov> and following comment submission instructions.

FOR FURTHER INFORMATION CONTACT: Donald Heitman, Senior Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, telephone (202) 418-5041, facsimile number (202) 418-5507, electronic mail dheitman@cftc.gov.

¹ Staff Report on Commodity Swap Dealers and Index Traders with Commission Recommendations, Commodity Futures Trading Commission, September 2008, at 6.

SUPPLEMENTARY INFORMATION:**I. Background****A. Statutory Framework**

Speculative position limits have been a tool for the regulation of the U.S. futures markets since the adoption of the Commodity Exchange Act of 1936. Section 4a(a) of the Commodity Exchange Act (“Act”), 7 U.S.C. 6a(a), now provides² that excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets or derivatives transaction execution facilities, or on electronic trading facilities with respect to a significant price discovery contract, causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity.

Accordingly, section 4a(a) of the Act provides the Commission with the authority to fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, or on an electronic trading facility with respect to a significant price discovery contract, as the Commission finds are necessary to diminish, eliminate, or prevent such burden.

This longstanding statutory framework providing for Federal speculative position limits was supplemented with the passage of the Futures Trading Act of 1982, which added section 4a(e) to the Act. That provision acknowledged the role of exchanges in setting their own speculative position limits and provided that limits set by exchanges and approved by the Commission would be subject to Commission enforcement.

Finally, the Commodity Futures Modernization Act of 2000 (“CFMA”) established designation criteria and core principles with which a designated contract market (“DCM”) must comply to receive and maintain designation. Among these, Core Principle 5 in section 5(d) of the Act states: Position Limitations or Accountability—To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month,

the board of trade shall adopt position limitations or position accountability for speculators, where necessary and appropriate.

B. Regulatory Framework

The regulatory structure based upon these statutory provisions consists of three elements, the levels of the speculative position limits, certain exemptions from the limits (for hedging, spreading/arbitrage, and other positions), and the policy on aggregating commonly owned or controlled accounts for purposes of applying the limits. This regulatory structure is administered under a two-pronged framework. Under the first prong, the Commission establishes and enforces speculative position limits for futures contracts on a limited group of agricultural commodities. These Federal limits are enumerated in Commission regulation 150.2, and apply to the following futures and option markets: Chicago Board of Trade (“CBOT”) corn, oats, soybeans, wheat, soybean oil, and soybean meal; Minneapolis Grain Exchange (“MGEX”) hard red spring wheat and white wheat; ICE Futures U.S. (formerly the New York Board of Trade) cotton No. 2; and Kansas City Board of Trade (“KCBT”) hard winter wheat.

Under the second prong, individual DCMs establish and enforce their own speculative position limits or position accountability provisions (including exemption and aggregation rules), subject to Commission oversight and separate authority to enforce exchange-set speculative position limits approved by, or certified to, the Commission. Thus, responsibility for enforcement of speculative position limits is shared by the Commission and the DCMs.³

³ Provisions regarding the establishment of exchange-set speculative position limits were originally set forth in CFTC regulation 1.61. In 1999, the Commission simplified and reorganized its rules by relocating the substance of regulation 1.61’s requirements to part 150 of the Commission’s rules, thereby incorporating within part 150 provisions for both Federal speculative position limits and exchange-set speculative position limits (see 64 FR 24038, May 5, 1999). With the passage of the Commodity Futures Modernization Act in 2000 and the Commission’s subsequent adoption of the Part 38 regulations covering DCMs in 2001 (66 FR 42256, August 10, 2001), Part 150’s approach to exchange-set speculative position limits was incorporated as an acceptable practice under DCM Core Principle 5—Position Limitations and Accountability. Section 4a(e) provides that a violation of a speculative position limit set by an exchange rule that has been approved by the Commission, or certified by a registered entity pursuant to § 5c(c)(1) of the Act, is also a violation of the Act. Thus, the Commission can enforce directly violations of exchange-set speculative position limits as well as those provided under Commission rules.

Commission regulation 150.3, “Exemptions,” lists certain types of positions that may exceed the Federal speculative position limits. In particular, under § 150.3(a)(1), *bona fide* hedging transactions, as defined in § 1.3(z) of the Commission’s regulations, may exceed the limits.⁴ The Commission has periodically amended the exemptive rules applicable to Federal speculative position limits in response to changing conditions and practices in futures markets. These amendments have included an exemption from speculative position limits for the positions of multi-advisor commodity pools and other similar entities that use independent account controllers,⁵ and an amendment to extend the exemption for positions that have a common owner but are independently controlled to include certain commodity trading advisors.⁶ In 1987, the Commission also issued an agency interpretation clarifying certain aspects of the hedging definition.⁷ The Commission has also issued guidance with respect to exchange speculative limits, including guidelines regarding the exemption of risk-management positions from exchange-set speculative position limits in financial futures contracts.⁸ However, the last significant amendment to the Commission’s exemptive rules was implemented in 1991.

C. Regulatory History and Marketplace Developments

The intervening 18 years have seen significant changes in trading patterns and practices in derivatives markets. As noted in the September 2008 Report, there has been an influx of new traders into the market, particularly commodity index traders (including pension and endowment funds, as well as individual investors participating in commodity index-based funds or trading programs). These investors are seeking exposure to commodities as an asset class, through passive, long term investment in commodity indexes, as a way of diversifying portfolios that might otherwise be limited to stocks and interest rate instruments.⁹ New market participants also include swap dealers seeking to hedge price risk from OTC

⁴ Section 4a(c) of the Act specifically provides that speculative position limit rules issued by the Commission shall not apply to *bona fide* hedging transactions or positions as such terms shall be defined by the Commission.

⁵ 53 FR 41563 (October 24, 1988).

⁶ 56 FR 14308 (April 9, 1991).

⁷ 52 FR 27195 (July 20, 1987).

⁸ 52 FR 34633 (September 14, 1987).

⁹ The argument has also been made that commodities act as a general hedge of liability obligations that are linked to inflation.

² References in § 4a(a) to “electronic trading facility(ies) with respect to a significant price discovery contract” were added to the CEA by Public Law 110–246, May 22, 2008 (the 2008 Farm Bill).

trading activity (frequently opposite the same commodity index traders described in the preceding sentences).

As described in the September 2008 Report, the development of the OTC swap industry is related to the exchange-traded futures and options industry in that a swap agreement¹⁰ can either compete with or complement futures and option contracts.¹¹ Market participants often use swaps because they can offer the ability to customize contracts to match particular hedging or price exposure needs. In contrast, futures markets typically involve standardized contracts that, while traded in a highly liquid market, may not precisely meet the needs of a particular hedger or speculator.

Swap dealers, often affiliated with a bank or other large financial institution, act as swap counterparties to both commercial firms seeking to hedge price risks and speculators seeking to gain price exposure. The swap dealer, in turn, utilizes the more standardized futures markets to manage the net risk resulting from its OTC market activities.¹² In addition, some swap dealers also deal directly in the merchandising of physical commodities.

Beginning in 1991, the Commission staff granted *bona fide* hedge exemptions, in various agricultural futures markets subject to Federal speculative position limits, to a number of swap dealers who were seeking to manage price risk on their books as a result of their serving as market makers to their OTC clients. The first such hedge exemption involved a large commodity merchandising firm that engaged in commodity related swaps as a part of a commercial line of business. The firm, through an affiliate, wished to enter into an OTC swap transaction with a qualified counterparty (a large pension fund) involving an index based on the returns afforded by investments in exchange-traded futures contracts on certain non-financial commodities¹³

¹⁰ A swap is a privately negotiated exchange of one asset or cash flow for another asset or cash flow. In a commodity swap, at least one of the assets or cash flows is related to the price of one or more commodities.

¹¹ The bilateral contracts that swap dealers create can vary widely, from terms tailored to meet the needs of a specific customer, to relatively standardized contracts.

¹² Because swap agreements can be highly customized, and the liquidity for a particular swap contract can be low, swap dealers may also use other swaps and physical market positions, in addition to futures, to offset the residual risks of their swap books.

¹³ The commodities comprising such indexes typically may include energy commodities, metals, world agricultural commodities (coffee, sugar, cocoa) and domestic agricultural commodities subject to Federal speculative position limits.

meeting specified criteria. The commodities making up the index included wheat, corn and soybeans, all of which were (and still are) subject to Federal speculative position limits. As a result of the swap, the swap dealing firm would, in effect, be going short of the index. In other words, it would be required to make payments to the pension fund counterparty if the value of the index was higher at the end of the swap payment period than at the beginning. In order to protect itself against this risk, the swap dealer planned to establish a portfolio of long futures positions in the commodities making up the index, in such amounts as would replicate its exposure under the swap transaction. By design, the index did not include contract months that had entered the delivery period and the swap dealer, in replicating the index, stated that it would not maintain futures positions based on index-related swap activity into the spot month (when physical commodity markets are most vulnerable to manipulation and attendant unreasonable price fluctuations). With this risk mitigation strategy, the swap dealer's composite return on its futures portfolio would offset the net payments that the dealer would be required to make to the pension fund counterparty.

The futures positions the swap dealer would have to establish to cover its exposure on the swap transaction's domestic agricultural component would be in excess of the speculative position limits on wheat, corn and soybeans. Accordingly, the swap dealer requested, and was granted, a hedge exemption for those futures positions, which offset risks directly related to the OTC swap transaction. The swap transaction allowed the pension fund to add commodities exposure to its portfolio without resorting to exchange-based futures contracts (and their applicable position limits) through the OTC trade with the swap dealer. The pension fund could have gained exposure to commodities directly through exchange-based futures contracts, but would, of course, have been subject to applicable position limits.¹⁴

Similar hedge exemptions were subsequently granted in other cases where the futures positions clearly offset risks related to swaps or similar OTC positions involving both

¹⁴ The pension fund would have been limited in its ability to take on this commodities exposure directly, by putting on the long futures position itself, because the pension fund—having no offsetting price risk incidental to commercial cash or spot operations—would not have qualified for a hedge exemption with respect to the position. (See § 1.3(z) of the Commission's regulations.)

individual commodities and commodity indexes. These non-traditional hedges (*i.e.*, hedges not associated with dealings in the physical commodity) were all subject to specific limitations to protect the marketplace from potential ill effects. The limitations included: (1) The futures positions must offset specific price risk; (2) the dollar value of the futures positions would be no greater than the dollar value of the underlying risk; and (3) the futures positions would not be carried into the spot month.¹⁵

Separately, an issue had arisen regarding the classification of trading activity for purposes of the Commission's Commitments of Traders ("COT") reports.¹⁶ The COT reports, from their inception in 1924 (as an annual report by the USDA Grain Futures Administration), classified positions, based on trading activity, as "hedging" or "speculative." After it was established in 1974, the Commission continued to publish these reports. However, in 1982, due to a change in CFTC large trader reporting requirements,¹⁷ the COT reports began

¹⁵ More recently, Commission staff issued two no-action letters involving another type of index-based trading. (CFTC Letter 06-09, April 19, 2006, and CFTC Letter 06-19, September 6, 2006). Both cases involved trading that offered investors the opportunity to participate in a broadly diversified commodity index-based fund or program ("index fund"). The futures positions of these index funds differed from the futures positions taken by the swap dealers who had earlier received hedge exemptions. The swap dealer positions were taken to offset OTC swaps exposure that was directly linked to the price of an index. For that reason, Commission staff granted hedge exemptions to these swap dealer positions. On the other hand, in the index fund positions described in the no-action letters, the price exposure results from a promise or obligation to track an index, rather than from holding an OTC swap position whose value is directly linked to the price of the index. Commission staff believed that this difference was significant enough that the index fund positions would not qualify for a hedge exemption. Nevertheless, because the index fund positions represented a legitimate and potentially useful investment strategy, Commission staff granted the index funds no-action relief, subject to certain conditions intended to protect the futures markets from potential ill effects. These conditions included: (1) The positions must be passively managed; (2) they must be unleveraged (so that financial conditions should not trigger rapid liquidations); and (3) the positions must not be carried into the delivery month (when physical delivery markets are most vulnerable to manipulation or congestion).

¹⁶ The COT reports are weekly reports, published by the Commission showing aggregate trader positions in certain futures and options markets. For a comprehensive history of the COT reports, see 71 FR 35627, June 21, 2006.

¹⁷ The Series '03 large trader reports, in which individual traders had reported their futures positions to the CFTC and classified their trading activity as "hedging" or "speculation," were suspended in 1981. Thereafter, position data was drawn from reports filed by futures commission merchants, which did not include such

classifying positions by reference to the trading entity as “commercial” or “noncommercial.” By 2006, trading practices had evolved to such an extent that the positions of non-traditional hedgers, including swap dealers who had been granted hedge exemptions and were included in the “commercial” category, represented a significant portion of the long side open interest in a number of major physical commodity futures contracts. This raised questions as to whether the COT reports could reliably be used to assess overall futures activity by traditional hedgers, *i.e.*, persons directly involved in the underlying physical commodity markets.

In January 2007, the Commission attempted to address this issue by initiating publication of a supplemental COT report, breaking out in a separate category the positions of “index traders” in certain physical commodity markets.¹⁸ These index traders included managed funds, pension funds and other institutional investors seeking exposure to commodities as an asset class in an unleveraged and passively-managed manner using a standardized commodity index, as well as swap dealers holding long futures positions to hedge short OTC commodity index exposure opposite institutional traders such as pension funds (including those swap dealers described above who had received *bona fide* hedging exemptions). Nevertheless, substantial questions remained regarding the proper classification of trading activity by swap dealers and index traders. As noted in the September 2008 Report, “futures market trades by swap dealers are essentially an amalgam of hedging and speculation by their clients. Thus, any particular trade that a swap dealer brings to the futures market may reflect information that originated with a hedger, a speculator, or some combination of both.”¹⁹

In the spring of 2008, the Commission took note of ongoing concerns about the proper classification of swap dealer trading, along with a number of factors. In addition to an influx of new traders into the market, including non-traditional hedgers, such as index traders and swap dealers, futures

markets had experienced other significant changes. Volume growth had increased fivefold over the preceding decade, and in the preceding year, the volatility and the price of oil and other commodities had reached unprecedented levels. Numerous Congressional hearings were held relating to these issues, and significant concern was expressed by members of Congress, academics, and market participants relating to commodity price volatility and the influx of non-traditional speculative activity in these markets. The Commission responded to these factors by issuing a special call for information from commodity swap dealers and index traders.

II. The Commission’s Special Call to Swap Dealers and Index Traders

A. Substance of the Special Call

As noted in the September 2008 Report, in May and June of 2008, as part of certain initiatives relating to the energy and agricultural markets, the Commission announced it would gather more information regarding the off-exchange commodity trading activity of swap dealers and would revisit whether swap dealers’ futures trading is being properly classified.²⁰ Thereafter, pursuant to its authority under regulation 18.05, the Commission issued a special call to swap dealers and index traders to gather pertinent information regarding these entities.²¹

The special call involved staff issuing 43 written requests to 32 entities and their sub-entities compelling these futures traders to produce data relating to their OTC market activities. Of the 43 requests, 16 were directed to swap dealers known to have significant commodity index swap business; 13 were directed to traders identified as swap dealers (but not known to engage in significant commodity index swap business) and who, at the time of the call, held futures positions that were large relative to Commission or exchange-set speculative position limits or accountability levels; and 14 were directed to commodity index funds (including asset managers and sponsors of exchange traded funds (ETFs) and exchange-traded notes (ETNs) whose returns are based upon a commodity

index). The special call required the subject entities to provide data for month-end dates beginning December 31, 2007, and continuing through June 30, 2008.

While the September 2008 Report is based on this initial data, the special call remains ongoing, with the subject entities under a continuing obligation to provide data for each month-end date. The information requested by the special call, the data received, and the Commission’s findings and recommendations based on that data are laid out in detail in the September 2008 Report, including its eight appendices and glossary.

B. Recommendation Five of the September 2008 Report

For purposes of this Concept Release, the Commission is concerned primarily with the Report’s fifth recommendation, which provides as follows:

Review Whether to Eliminate *Bona Fide* Hedge Exemptions for Swap Dealers and Create New Limited Risk Management Exemptions: The Commission has instructed staff to develop an advance notice of proposed rulemaking that would review whether to eliminate the *bona fide* hedge exemption for swap dealers and replace it with a limited risk management exemption that is conditioned upon, among other things: (1) An obligation to report to the CFTC and applicable self-regulatory organizations when certain noncommercial²² swap clients reach a certain position level and/or (2) a certification that none of a swap dealer’s noncommercial swap clients exceed specified position limits in related exchange-regulated commodities.

As noted in the body of the September 2008 Report, by eliminating the existing *bona fide* hedge exemption for swap dealers and replacing it with a limited risk management exemption that would essentially look through the swap dealer to its counterparty traders, Recommendation Five has the potential to bring greater transparency and accountability to the marketplace and to guard against possible manipulation.

While more information is needed to fully evaluate this recommendation, requiring swap dealers to monitor and restrict the position sizes of their counterparty traders, subject to CFTC reporting and audits, as a condition of obtaining and maintaining such an exemption, is a practicable way of ensuring that noncommercial counterparties are not purposefully evading the oversight and limits of the CFTC and exchanges, and

classifications. Therefore, the Commission was required to classify positions based on trader identification provided on each reportable trader’s Form 40, Statement of Reporting Trader. In those reports, traders identify themselves as “commercial” or “noncommercial” traders. See *id.* at 35629–10 for more details.

¹⁸ See Commission Actions in Response to the “Comprehensive Review of the Commitment of Traders Reporting Program,” Commodity Futures Trading Commission, December 5, 2006.

¹⁹ September 2008 Report, at 1.

²⁰ See Commission press releases: <http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5503-08.html> and <http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5504-08.html>.

²¹ Commission Regulation 18.05 provides that traders with reportable positions in any futures contract must, upon request, furnish to the Commission any pertinent information concerning the traders’ positions, transactions, or activities involving the cash market as well as other derivatives markets, including their OTC business.

²² In this context, a “noncommercial” counterparty would include any entity other than a traditional commercial hedger involved in the production, processing or marketing of a commodity.

that manipulation is not occurring outside of regulatory view.²³

This Concept Release is intended to provide the Commission with information and comment that will help to inform the Commission's decision as to: (1) Whether to proceed with the recommendation to eliminate the *bona fide* hedge exemption for swap dealers and replace it with a conditional limited risk management exemption; and (2) if so, what form the new limited risk management exemptive rules should take and how they might be implemented most effectively.

III. Request for Comments

Commenters responding to this Concept Release are encouraged to provide their general views and comments regarding the appropriate regulatory treatment of swap dealers with respect to the existing *bona fide* hedge exemptions and a potential conditional, limited risk management exemption. In addition, commenters are requested to provide their views in response to the following specific questions.

A. General Advisability of Eliminating the Existing Bona Fide Hedge Exemption for Swap Dealers in Favor of a Limited Risk Management Exemption

1. Should swap dealers no longer be allowed to qualify for exemption under the existing *bona fide* hedge definition?

2. If so, should the Commission create a limited risk-management exemption for swap dealers based upon the nature of their clients (*e.g.*, being allowed an exemption to the extent a client is a traditional commercial hedger)?

3. If the *bona fide* hedge exemption were eliminated for swap dealers, and replaced with a new, limited risk management exemption, how should the new rules be applied to existing futures positions that no longer qualify for the new risk-management exemption? For example, should existing futures positions in excess of current Federal speculative position limits be grandfathered until the futures and option contract in which they are placed expire? Should swap dealers holding such position be given a time limit within which to bring their futures position into compliance with Federal speculative limits? Should swap dealers holding such positions be required to bring their futures positions into compliance with the Federal limits as of the effective date of the new rules?

B. Scope of a Potential New Limited Risk Management Exemption for Swap Dealers

4. The existing *bona fide* hedge exemptions granted by the Commission extend only to those agricultural commodities subject to Federal speculative position limits. Should the reinterpretation of *bona fide* hedging and any new limited risk management exemption extend to other physical commodities, such as energy and metals, which are subject to exchange position limits or position accountability rules?

C. Terms of a Potential New Limited Risk Management Exemption for Swap Dealers

5. If a new limited risk management exemption were to be permitted to the extent a swap dealer is taking on risk on behalf of commercial clients, how should the rules define what constitutes a commercial client?

6. How should the Commission (and, if applicable, the responsible industry self-regulatory organization (SRO)) and the swap dealer itself verify that a dealer's clients are commercial? Is certification by the dealer sufficient or would something more be required from either the dealer or the client? If so, what should be reported and how often—weekly, monthly, etc.?

7. For a swap dealer's noncommercial clients, should the rules distinguish between different classes of noncommercial—for example: (1) Clients who are speculators (*e.g.*, a hedge fund); (2) clients who are index funds trading passively on behalf of many participants; and (3) clients who are intermediaries (*e.g.*, another swap dealer trading on behalf of undisclosed clients, some of whom may be commercials)?

8. If a swap dealer were allowed an exemption for risk taken on against index-fund clients, how would the dealer satisfy the Commission that the fund is made up of many participants and is passively managed? Is certification by the dealer or fund sufficient or should the dealer or fund be required to identify the fund's largest clients?

9. If a swap dealer were allowed an exemption for risk taken on against another intermediary, how would the dealer satisfy the Commission that its intermediary client does not in turn have noncommercial clients that are in excess of position limits? Is certification by the dealer or second intermediary sufficient or should the dealer or intermediary be required to separately identify the intermediary's largest clients?

10. What futures equivalent position level should trigger the new limited risk management exemption reporting requirement? For example, under the rules of the on-going special call to swap dealers and index funds described earlier, a swap dealer must report any client in any individual month that exceeds 25% of the spot month limit, or the net long or short position of a client that in all months combined exceeds 25% of the all-months-combined limit.

11. If none of a swap dealer's clients exceed required reporting levels in a given commodity, or none of such clients exceed reporting levels in any commodity, what type of report should be filed with the Commission—*e.g.*, a certification by the swap dealer to the Commission to that effect?

12. Should there be an overall limit on a swap dealer's futures and option positions in any one market regardless of the commercial or noncommercial nature of their clients? For example, "A swap dealer may not hold an individual month or all-months-combined position in an agricultural commodity named in § 150.2 in excess of 10% of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year."

13. If a new limited risk-management exemption for swap dealers is created, what additional elements, other than those listed here, should be considered by the Commission in developing such an exemption?

D. Other Questions

14. How should the two index traders who have received no-action relief from Federal speculative position limits (*see* footnote 15) be treated under any new regulatory scheme as discussed herein?

15. What information should be required in a swap dealer's application for a limited risk management exemption?

Issued by the Commission this 17th day of March, 2009, in Washington, DC.

David Stawick,

Secretary of the Commission.

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²³ September 2008 Report, at 34.