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May 19, 2009

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

COMMENT

RE: Whether to Eliminate the *Bona Fide* Hedge Exemption for Certain Swaps Dealers and Create a New Limited Risk Management Exemption from Speculative Position Limits

Dear Secretary Stawick:

Cargill is an international provider of food, agricultural, and risk management products and services. As a merchandiser, processor and exporter of commodities, the company relies heavily upon efficient and well-functioning futures markets and over-the-counter markets.

We are pleased to submit public comments as part of the Commodity Futures Trading Commission's (CFTC) Advance Notice for Proposed Rulemaking (ANPR) published in the Federal Register on March 24, 2009. Our response to the questions outlined in the ANPR's request for comment provides the basis for CFTC actions that would:

- Ensure that position limits or accountability limits on exchange-traded markets can be accurately enforced.
- Provide a much greater degree of transparency and reporting for over-the-counter markets.

Cargill encourages policymakers to develop regulatory systems that foster efficient, well-functioning exchange-traded and over-the-counter markets. As an active participant in the markets, we appreciate the CFTC's work on this issue and look forward to working with the agency as this issue develops.

Sincerely,

David Dines

David Dines
President
Cargill Risk Management

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**CFTC Concept Release:**
**Whether to Eliminate the *Bona Fide* Hedge Exemption for Certain Swaps Dealers and Create a New Limited Risk Management Exemption from Speculative Position Limits**
**-Public Comments-**

## 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?

   Swap dealers should be granted an exemption that allows them to facilitate market transactions and serve all customer needs. This does not need to necessarily be the existing hedge definition, but could be a risk management exemption as long as the exemption permits the swap dealer to offset its obligations on swaps.

   - If the dealer is facilitating a customer trade by offsetting the dealer's risk on the trade, the swap dealer should have an exemption.
   - To the extent a swap dealer acts as a speculator for its own account in a market with speculative position limits, the dealer should comply with a speculative position limit.

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)?

   The nature of the client should determine the application of position limits for the client.

   - If the client is a speculator, a position limit should apply to the client, based on the futures equivalent amount of the swap.
   - If the client is a hedger, the hedge exemption should apply to the client.

   Since the swap dealer is facilitating market transactions, the swap dealer should be granted an exemption, limited risk-management or otherwise, that allows the dealer to serve the needs of all customers, whether they are speculators or hedgers, <u>as long as the client is acting within the client's own limits</u>.

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?

- Swap dealers have a contractual liability and obligation on the OTC swap until expiration. Therefore, existing futures positions should be grandfathered in and allowed to remain in place until the corresponding OTC swap expires.

- In addition, parties to the swap have relied on the swap in entering into other related transactions which might not be able to be unwound prior to their maturity.

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

4. 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?

    - The changes should be consistently applied to those commodities that currently have position limits or accountability limits.

    - The changes should not be extended to new commodities that do not have position limits or accountability limits. The Commission and the SROs should retain their existing authority to review these as necessary.

***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?

    The Limited Risk Management Exemption should allow a swap dealer to offset its risks in the futures markets on all swaps for which it acts as dealer, regardless of the nature of the customer.

    Commercial customers should be defined as clients who are hedging physical input or output based on the following definition and who would continue to receive a bona fide hedge exemption:

    - *Bona fide hedging transactions —*

      *General definition:* Bona fide hedging transactions and positions shall mean transactions or positions in a contract for future delivery on any contract market, or in a commodity option, where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel, and where they are economically appropriate to the

reduction of risks in the conduct and management of a commercial enterprise, and where they arise from:

- The potential change in the value of assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising,
- The potential change in the value of liabilities which a person owns or anticipates incurring, or
- The potential change in the value of services which a person provides, purchases, or anticipates providing or purchasing.

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.?

   - Swap dealers could, similar to an FCM, obtain representation in writing from its hedging customers that they are hedging, and the swap dealer is entitled to rely on this unless it has other information to contradict the representation.

   Apart from obtaining such a representation, the swap dealer's responsibility should be to:

   - Verify that a client is an Eligible Swap Participant or Eligible Contract Participant, as applicable.

   The Commission should continue the Special Call Report on a monthly basis to capture position information. For customers whose positions are large enough to be reported, the Commission could follow the model of the Large Trader Reporting Program and require that a form similar to Form 40 be filed by those customers:

   - To state whether the activity is hedging

   - To identify other accounts or swaps under common ownership or control with the reporting trader's swap positions

7. For a swap dealer's noncommercial clients, should the rules distinguish between different classes of non-commercials—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)?

   Yes, this will enhance transparency.

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Category (1) would include traditional speculators (e.g. hedge funds), who would be required to abide by speculative position limits.

Category (2) would include those hedging the potential change in value of liabilities which a person owes or anticipates incurring (e.g., pension funds, index funds) who would be placed in a different category.

- Pension fund participants have commodity exposure in their retirement costs, so it's reasonable for pension funds to want offsetting (long) commodity exposure. To the extent that the hedge is long-only, a pension fund attempting to hedge their inflation adjusted exposure should be defined in this category.

- To keep the positions of index and pension funds from distorting the market, or impacting contract functionality and performance, position limits could be established with discretion given to the SRO or CFTC to ensure overall market performance and functionality.

Category (3) would be swap intermediaries who could receive an exemption if they:

- Subject themselves to record keeping and reporting requirements, as recommended in question # 6.

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 funds be required to identify the fund's largest clients?

    - The fund should provide certification that it is made up of many participants and is passively managed.

    - The dealer should not be required to identify the fund's largest clients. If this information is necessary, it should be acquired directly from the fund.

9. If a swap dealer were allowed an exemption for risk taken on or against another intermediary, how would the dealer satisfy the Commission that its intermediary client does not in turn have non-commercial 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?

    The intermediary swap dealer should be made subject to recordkeeping and reporting rules, including the duty to respond to special calls for information.

- These intermediary swap dealers would be analogous to omnibus accounts of an FCM and could be subject to analogous rules in relation to position limits.
- The swap dealer trading on the exchange can only identify its own clients and should not be asked to 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 months 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.

    The same position levels that trigger inclusion on the Special Call Report should trigger the new limited risk management exemption reporting requirement.

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?

    Yes, the swap dealer can provide certification 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 non-commercial 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."

    Appropriate overall limits are already set since the end user of the swap is compliant with their speculative or bona fide hedge limit. The swap dealer is in a position analogous to an FCM, which does not have an overall limit on its positions as long as its customers are compliant with their limits.

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?

    We believe the elements proposed in these comments and answers in response to the Advance Notice of Proposed Rulemaking will add the necessary transparency, better reporting, and ensure prudent and enforceable position limits.

***D. Other Questions***

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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?

    The Commission should monitor these index traders to ensure that contract performance and functionality in the related exchange-regulated commodities are not impeded, and retain the authority to act if necessary.

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

    If a limited risk management exemption is implemented, the swap dealer should be required to certify that it will:

    - Use its Limited Risk Management Exemption in the futures markets to offset its risks on swaps for which it acts as dealer
    - Acknowledge its obligations to maintain required records
    - Make required reports and certifications
    - Submit to special calls for information from the Commission and exchanges

    The swap dealer can also certify that futures positions will be terminated by first notice day. The swap dealer can apply for hedging authority on its exchange traded contracts in the same manner as it does currently.