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COMMENT

BY ELECTRONIC TRANSMISSION

June 16, 2009

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

Re: 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

Dear Mr. Stawick:

ICE Futures U.S., Inc. ("ICE Futures" or "Exchange") submits this letter in response to the Commission's Request for Comments appearing in 74 Fed. Reg. 12282, concerning whether the bona fide hedge exemption for certain swap dealers should be eliminated and a new limited risk management exemption from speculative position limits be created.

ICE Futures is a designated contract market ("DCM") under the Commodity Exchange Act which provides a marketplace for trading in agricultural, equity index and currency contracts. The agricultural contracts traded at ICE Futures include cotton No. 2, which is subject to speculative position limits established by the Commission, and other contracts such as Sugar No. 11, Cocoa and Coffee "C", which are subject to Exchange-set speculative position limits and position accountability provisions. The Exchange rules establishing these limits and position accountability procedures are subject to Commission approval and enforcement.

The Exchange's comments on the questions posed in the Concept Release are provided below.

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?

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The Exchange believes the Commission should create a risk management exemption specifically for swap dealers using criteria related to the swaps business. The existing bona fide hedge definition in Regulation 1.3(z) should either be expanded to accommodate swap dealers or a new definition should be created by the Commission.

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 Exchange believes the Commission should create a risk management exemption for swap dealers based on the swap dealer's risk management needs, not those of its clients. Swap dealers play an important liquidity provider role in the markets and need an exemption that allows them to hedge their swap book at any point in time. The entitlement to an exemption should not depend on the nature of the swap dealer's customers. Separately, we believe that the nature of each swap dealer's customer/counterparty should determine the size of the exposure that such customer/counterparty is permitted to have. For instance, a passive index fund would have an exemption to have an OTC position matching its level of risk. To the extent that this process introduces an OTC surveillance function, it would be appropriate for a swap dealer to identify to the Commission those of its customers/counterparties with which it has entered into swaps when a specified threshold has been reached, in the same way as futures commission merchants identify to the Commission and SROs their customer accounts when they first reach reportable levels. Once the swap dealer has identified to the Commission and/or relevant SRO the "OTC large trader", the role of the swap dealer as an information intermediary should be limited and dealings should be directly with the large trader where possible.

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?

If a risk management exemption was created for swap dealers and futures and options positions exist that no longer qualify for the exemption, maintaining orderly markets must be taken into consideration when determining how such positions should be reduced. The Exchange believes that such positions should be grandfathered for the greater of: (i) twelve (12) months; (ii) until the futures and option contract in which they are placed expires; or (iii) the OTC swap which is being hedged expires or is terminated.

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?

As noted above, the Exchange's rules establishing speculative position limits and position accountability provisions are subject to Commission approval. In light of the Commission's authority to enforce exchange-set position limits there is no need for a reinterpretation of bona fide hedging or any new risk management exemption to be extended to physical commodities beyond those enumerated in Commission regulation 150.2. If the Commission does establish a new risk management exemption, ICE Futures would expect to create a rule that would establish a similar exemption for its contracts. The Exchange exemption would be granted using the Commission's exemption process as a guideline in the same manner as Regulation 1.3(z) is currently utilized. Any exemption granted would be considered the position limit for the requesting entity.

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 Exchange strongly believes that the risk management exemption for swap dealers should not be limited to taking on risk on behalf of "commercial clients", however that term is defined. Rather, the Exchange believes that position management should be measured at the large trader level, as described in response to question 2.

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.?

As indicated in our response to question 5, the Exchange does not believe that swap dealers should be limited to transacting only with "commercial clients", however that term is defined. To the extent that there is a need to verify the commercial nature of a client, we do not see the purpose of requiring a specific certification by the swap dealer. Rather, we advocate a process in which a swap dealer would be required to provide detailed information about the size and nature of the swap transactions that it is hedging, including basic information identifying its clients. Any further, specific information regarding the status of the client should be requested by the Commission or SRO from the client, while further information about the swap dealer, its positions and exemption requests should be pursued with the swap dealer. In this connection, the swap dealer should be required to agree to promptly submit a supplemental statement explaining any

material change in the information it previously furnished in connection with its exemption request.

7. For a swap dealer's noncommercial clients, should the rules distinguish between different classes of noncommercials—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, the Exchange believes there are important distinctions between these categories, particularly index funds which trade passively on behalf of many participants and are an important source of liquidity for the markets.

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 by required to identify the fund's largest clients?

We believe that certification by the Fund would be the appropriate course of action in this case, and that the Commission or relevant SRO should have the ability to request further substantiating information as to the fund participants by communicating a request to the swap dealer. This would be analogous to the current practice of requiring clearing members, upon request of the SRO, to furnish information regarding the identities of traders carried in an omnibus account cleared by that clearing member. The responsive information could be furnished directly by the Fund.

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?

In the case posited, certification by the intermediary would seem to be preferable to asking the swap dealer for such a certification, because the dealer would have to rely on information provided to it by the intermediary. Prescribing down to the last detail how OTC reporting should work in every circumstance, particularly when there are counterparty chains, is difficult or impossible to do. A swap dealer applying for an exemption can be expected to be motivated to ensure that the CFTC and SRO are comfortable with the level of detail that it is providing so that the required exemption is granted. In the example posed here, the burden of providing information about the positions of the end customers might have to fall on the swap dealer, however, the Commission should endeavor to establish other means of obtaining information in complicated circumstances directly from the end customer, or at a minimum, from the intermediary client.

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.

Although a full breakdown of all of a swap dealer's clients may not be necessary, the Exchange does recognize the value of collecting information about clients with large exposure. The criterion used for the Commission's on-going special call to swap dealers and index funds seems appropriate for this reporting requirement. The Exchange believes that the reference in question 10 to "spot month limit" was intended to refer to "single month limit". This information will bring greater transparency and will permit the Commission to continue to assess the impact of these positions on the marketplace.

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?

A swap dealer should not have to report when triggering events have NOT been reached. Currently, if a futures commission merchant is carrying accounts that do not hold positions that reach reportable levels, the FCM does not have to file a report or certification to that effect. We question why a swap dealer should have to submit filings attesting to the absence of reportable events.

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 Sec. 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."

No. However, the CFTC or SRO should administer the exemption in a manner that requires the swap dealer to maintain a position that can and will be managed in an orderly manner and that will not be initiated, liquidated or rolled in a manner that causes unreasonable price fluctuations or unwarranted price changes.

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?

When reviewing any exemption request, the size of the requested position in relation to the market and the requesting party, as well as the historical activity of the requesting party should be considered along with any other specific information that is pertinent in light of unique circumstances that may be presented by a particular case.

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?

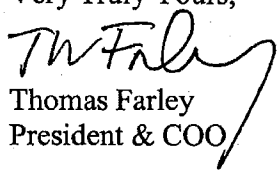
The Exchange strongly recommends the no-action relief be extended, provided that the traders continue to comply with the requirements previously stated by the Commission, including that the positions be passively managed, unleveraged and are not carried into the delivery month. The Exchange believes these participants are a positive influence in the markets in terms of liquidity and price discovery.

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

We refer you to our response to question 6.

ICE Futures appreciates the opportunity to comment on the concept release and would be happy to discuss any of the views presented with Commission staff as they consider the proper way to proceed with this important process.. If you have any questions regarding this letter, please contact me at Thomas.Farley@theice.com or Susan Gallant at Susan.Gallant@theice.com.

Very Truly Yours,



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