COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 37, 38, 150

RIN 3038-AD99

Position Limits for Derivatives: Certain Exemptions and Guidance

AGENCY: Commodity Futures Trading Commission.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing revisions and additions to regulations and guidance proposed in 2013 concerning speculative position limits in response to comments received on that proposal. The Commission is proposing new alternative processes for designated contract markets ("DCMs") and swap execution facilities ("SEFs") to recognize certain positions in commodity derivative contracts as non-enumerated bona fide hedges or enumerated anticipatory bona fide hedges, as well as to exempt from federal position limits certain spread positions, in each case subject to Commission review. In this regard, the Commission proposes to amend certain of the regulations proposed in 2013 regarding exemptions from federal position limits and exchange-set position limits to take into account these new alternative processes. In connection with these changes, the Commission proposes to further amend certain relevant definitions, including to clearly define the general definition of bona fide hedging for physical commodities under the standards in CEA section 4a(c). Separately, the Commission proposes to delay for DCMs and SEFs that lack access to sufficient swap position information the requirement to establish and monitor position limits on swaps.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN number 3038-AD99, by any of the following methods:

- Agency website: http://comments.cftc.gov;
- Mail: Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581;
- Hand delivery/courier: Same as mail, above.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to http://www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in CFTC regulations at 17 CFR part 145.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from http://www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be

considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

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SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission has long established and enforced speculative position limits for futures and options contracts on certain agricultural commodities in accordance with the Commodity Exchange Act ("CEA" or "Act").[1] The part 150 federal position limits regime[2] generally includes three components: (1) the level of the limits, which set a threshold that restricts the number of speculative positions that a person may hold in the spot month, an individual month, and all months combined,[3] (2) exemptions for positions

[1] 7 U.S.C. 1 et seq.

[2] See 17 CFR part 150. Part 150 of the Commission's regulations establishes federal position limits (that is, position limits established by the Commission, as opposed to exchange-set limits) on certain enumerated agricultural contracts; the listed commodities are referred to as enumerated agricultural commodities. The position limits on these agricultural contracts are referred to as "legacy" limits because these contracts on agricultural commodities have been subject to federal position limits for decades. See also Position Limits for Derivatives, 78 FR 75680 at 75723, note 370 and accompanying text (Dec. 12, 2013) ("December 2013 position limits proposal").

[3] See 17 CFR 150.2.

that constitute bona fide hedging transactions and certain other types of transactions,[4] and (3) rules to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.[5]

In late 2013, the CFTC proposed to amend its part 150 regulations governing speculative position limits. These proposed amendments were intended to conform to the requirements of part 150 to particular changes to the CEA introduced by the Wall Street Transparency and Accountability Act of 2010 ("Dodd-Frank Act"). [6] The proposed amendments included the adoption of federal position limits for 28 exempt and agricultural commodity futures and option contracts and swaps that are "economically equivalent" to such contracts.[7] In addition, the Commission proposed to require that DCMs and SEFs that are trading facilities (collectively, "exchanges") establish exchange-

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[4] See 17 CFR 150.3.

[5] See 17 CFR 150.4.

[6] The Commission previously had issued proposed and final rules in 2011 to implement the provisions of the Dodd-Frank Act regarding position limits and the bona fide hedge definition. Position Limits for Derivatives, 76 FR 4752 (Jan. 26, 2011); Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011). A September 28, 2012, order of the U.S. District Court for the District of Columbia vacated the November 18, 2011 rule, with the exception of the rule's amendments to 17CFR § 150.2. International Swaps and Derivatives Association v. United States Commodity Futures Trading Commission, 887 F. Supp. 2d 259 (D.D.C. 2012). See generally the materials and links on the Commission's website at http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_26_PosLimits/index.htm. The Commission issued the December 2013 position limits proposal, among other reasons, to respond to the District Court's decision in ISDA v. CFTC. See generally the materials and links on the Commission's website at http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/PositionLimitsforDerivatives/index.htm.

[7] See CEA section 4a(a)(5), 7 U.S.C. 6a(a)(5) (providing that the Commission establish limits on economically equivalent contracts); CEA section 4a(a)(6), 7 U.S.C. 6a(a)(6) (directing the Commission to establish aggregate position limits on futures, options, economically equivalent swaps, and certain foreign board of trade contracts in agricultural and exempt commodities (collectively, "referenced contracts")). See December 2013 position limits proposal 78 FR at 75825. Under the December 2013 position limits proposal, "referenced contracts" would have been defined as futures, options, economically equivalent swaps, and certain foreign board of trade contracts, in physical commodities, and been subject to the proposed federal position limits. The Commission proposed that federal position limits would apply to referenced contracts, whether futures or swaps, regardless of where the futures or swaps positions were established. See December 2013 positions limits proposal at 78 FR 75826 (proposed § 150.2).

set limits on such futures, options and swaps contracts.[8] Further, the Commission proposed to (i) revise the definition of bona fide hedging position (which includes a general definition with requirements applicable to all hedges, as well as an enumerated list of bona fide hedges),[9] (ii) revise the process for market participants to request recognition of certain types of positions as bona fide hedges, including anticipatory hedges and hedges not specifically enumerated in the proposed bona fide hedging definition;[10] and (iii) revise the exemptions from position limits for transactions normally known to the trade as spreads.[11]

II. Proposal to Supplement and Revise the December 2013 Position Limits Proposal

The CFTC is now proposing revisions and additions to regulations and guidance proposed in 2013 concerning speculative position limits in response to comments received on that proposal. The Commission is proposing new alternative processes for DCMs and SEFs to recognize certain positions in commodity derivative contracts as non-enumerated bona fide hedges or enumerated anticipatory bona fide hedges, as well as to exempt from federal position limits certain spread positions, in each case subject to Commission review. In this regard, the Commission proposes to amend certain of the regulations proposed in 2013 regarding exemptions from federal position limits and

[8] See December 2013 position limits proposal 78 FR at 75754-8. Consistent with DCM Core Principle 5 and SEF Core Principle 6, the Commission proposed at § 150.5(a)(1) that, "[f]or any commodity derivative contract that is subject to a speculative position limit under § 150.2, . . . [a DCM] or . . . [SEF] that is a trading facility shall set a speculative position limit no higher than the level specified in § 150.2."

[9] See December 2013 position limits proposal 78 FR at 75706-11, 75713-18.

[10] See December 2013 position limits proposal 78 FR at 75718.

[11] See December 2013 position limits proposal 78 FR at 75735-6. CEA section 4a(a)(1), 7 U.S.C. 6a(a)(1), permits the Commission to exempt "transactions normally known to the trade as 'spreads'" from federal position limits.

exchange-set position limits to take into account these new alternative processes. In connection with these changes, the Commission proposes to further amend certain relevant definitions, including to clearly define the general definition of bona fide hedging for physical commodities under the standards in CEA section 4a(c). Separately, the Commission proposes to delay for DCMs and SEFs that lack access to sufficient swap position information the requirement to establish and monitor position limits on swaps at this time.

Because this proposal supplements the December 2013 position limits proposal, it must be read in conjunction with that notice of proposed rulemaking, such that where this supplemental proposal sets out a proposed rule text in full, as in four definitions which this supplement proposes to amend, the rule text is intended to replace what was proposed in the December 2013 position limits proposal. Where this supplemental proposal reserves a subsection proposed in the December 2013 position limits proposal, the intention is to provide additional time for Commission consideration of that subsection. For the avoidance of doubt, the Commission is still reviewing comments received on such reserved subsections and does not seek further comment on such reserved subsections.

A. Proposed Guidance Regarding Exchange-Set Limitations on Swap Positions

As noted above, in December 2013 the Commission proposed federal position limits on futures and swaps in physical commodities.[12] Since that time, the Commission

[12] CEA section 4a(a)(5) requires federal position limits for swaps that are "economically equivalent" to futures and options that are subject to mandatory position limits under CEA section 4a(a)(2). See December 2013 position limits proposal at 78 FR 75681-5 (providing the Commission's interpretation of the statute as mandating that the Commission impose limits on futures, options, and swaps, in agricultural and exempt commodities).

has worked with industry to improve the quality of swap position reporting to the Commission under part 20.[13] In light of the improved quality of the swap position reporting, the Commission intends to rely on part 20 swap position data, given adjustments for obvious errors (e.g., data reported based on a unit of measure, such as an ounce, rather than a futures equivalent number of contracts), to establish initial levels of federal non-spot month limits on futures and swaps in a final rule. Moreover, the Commission notes that the improved quality allows the Commission to utilize part 20 swap position data when monitoring market participants' compliance with such federal position limits on futures and swaps.

However, the Commission notes that with respect to exchange-set limits on swaps, exchanges, on the other hand, generally do not have access to swap position information. Unlike futures contracts—which are proprietary to a particular DCM and typically cleared at a single DCO affiliated with the DCM—swaps in a particular commodity are not proprietary to any particular trading facility or platform. Market participants may execute swaps involving a particular commodity on or subject to the rules of multiple exchanges or, in some circumstances, over the counter ("OTC"). Further, under the Commission regulations, data with respect to a particular swap transaction may be reported to any swap data repository ("SDR").[14]

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[13] The Commission stated in the December 2013 position limits proposal that it preliminarily had decided not to use the swaps data then reported under part 20 for purposes of setting the initial levels of the proposed single and all-months-combined positions limits due to concerns about the reliability of such data. December 2013 position limits proposal, 78 FR at 75533. The Commission also stated that it might use part 20 swaps data should it determine such data to be reliable, in order to establish higher initial levels in a final rule. Id. at 75734.

[14] See §§ 45.3, 45.4, and 45.10 of the Commission's regulations, 17 CFR 45.3, 45.4, and 45.10. See generally CEA sections 4r (reporting and recordkeeping for uncleared swaps) and 21 (swap data repositories), 7 U.S.C. 6r and 24a.

In addition, it should be noted that although CEA section 2(h)(8) requires that swap transactions required to be cleared under CEA section 2(h)(7) must be traded on either a DCM or a SEF if a DCM or SEF "makes the swap available to trade,"[15] there currently is neither a requirement for mandatory clearing of a swap on a physical commodity,[16] nor has a swap on a physical commodity been made available to trade.[17] Consequently, swaps on physical commodities may use means of execution other than on a DCM or SEF.

Even if an exchange had access to cleared swap data from a particular DCO, an exchange may need access to data from additional DCOs in order to have a sufficient understanding of a market participant's cleared swap position, because a market participant may clear economically equivalent swaps on multiple DCOs. Further, DCO cleared swap data would not provide an exchange with data regarding economically equivalent uncleared swaps. While SDR data would include swap data regarding both cleared and uncleared swaps, such data would need to be converted to a futures-equivalent position in order to measure compliance with an exchange-set limit set at a level no higher than that of the federal position limit. The Commission acknowledges that if an exchange does not have access to sufficient data regarding individual market participants' open swap positions, then it cannot effectively monitor swap position limits.

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[15] CEA section 2(h)(8), 7 U.S.C. 2(h)(8) (the "trading mandate").

[16] See CEA section 2(h) and part 50 of the Commission's regulations. 7 U.S.C. 2(h) and 17 CFR part 50.

[17] For example, under rule 37.10, a swap execution facility may make a swap available to trade, pursuant to CEA section 2(h)(8). See current list of swaps made available to trade at http://www.cftc.gov/idc/groups/public/@otherif/documents/file/swapsmadeavailablechart.pdf.

In light of the above, and based on (i) comments received on the December 2013 position limits proposal:[18] (ii) viewpoints expressed during a Roundtable on Position Limits;[19] (iii) several Commission advisory committee meetings that each provided a focused forum for participants to discuss some aspects of the December 2013 position limits proposal;[20] and (iv) information obtained in the course of ongoing Commission review of SEF registration applications,[21] the Commission has determined to revise and amend certain parts of the December 2013 position limits proposal. The Commission proposes to temporarily delay for exchanges that lack access to sufficient swap position information the requirement to establish and monitor position limits on swaps by: (i) adding Appendix E to Part 150 to provide guidance regarding § 150.5; and (ii) revising guidance on DCM Core Principle 5 and SEF Core Principle 6.[22]

The CEA requires in SEF Core Principle 6(B) that a SEF: (i) set its exchange-set limit on swaps at a level no higher than that of the federal position limit; and (ii) monitor positions established on or through the SEF for compliance with the federal position limit

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[18] Comments on the December 2013 position limits proposal are accessible on the Commission's website at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1436.

[19] A transcript of the June 19, 2014 Roundtable on Position Limits is available on the Commission's website at http://www.cftc.gov/idc/groups/public/@swaps/documents/dfsubmission/dfsubmission_061914-trans.pdf.

[20] Information regarding the December 9, 2014 and September 22, 2015 meetings of the Agricultural Advisory Committee, sponsored by Chairman Massad, is accessible on the Commission's website at http://www.cftc.gov/About/CFTCCommittees/AgriculturalAdvisory/aac_meetings. Information regarding February 26, 2015 and the July 29, 2015 meetings of the Energy & Environmental Markets Advisory Committee ("EEMAC"), sponsored by Commission Giancarlo, is accessible on the Commission's website at http://www.cftc.gov/About/CFTCCommittees/EnergyEnvironmentalMarketsAdvisory/emac_meetings.

[21] Added by the Dodd-Frank Act, section 5h(a) of the CEA, 7 U.S.C. § 7b-3, requires SEFs to register with the Commission. See generally "Core Principles and Other Requirements for Swap Execution Facilities," 78 FR 33476 (Aug. 5, 2013). Information regarding the SEF application process is available on the Commission's website at http://www.cftc.gov/IndustryOversight/TradingOrganizations/SEF2/sefhowto.

[22] DCM Core Principle 5, Position Limitations or Accountability, is contained in CEA section 5(d)(5), 7 U.S.C. 7(d)(5). SEF Core Principle 6, Position Limits or Accountability, is contained in CEA section 5h(f)(6), 7 U.S.C. 7b-3(f)(6).

and any exchange-set limit.[23] Similarly, for any contract subject to a federal position limit, including a swap contract, DCM Core Principle 5(B) requires that DCMs must set a position limit at a level no higher than that of the federal position limit.[24]

The December 2013 position limits proposal specified that federal position limits would apply to referenced contracts,[25] whether futures or swaps, regardless of where the futures or swaps positions are established.[26] Consistent with DCM Core Principle 5 and SEF Core Principle 6, the Commission proposed at § 150.5(a)(1) that, "[f]or any commodity derivative contract that is subject to a speculative position limit under § 150.2, . . . [a DCM] or . . . [SEF] that is a trading facility shall set a speculative position limit no higher than the level specified in § 150.2."[27]

Three commenters on proposed regulation § 150.5 recommended that the Commission not require SEFs to establish position limits.[28] Two noted that because SEF participants may use more than one derivatives clearing organization ("DCO"), a SEF

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[23] CEA section 5h(f)(6)(B), 7 U.S.C. 7b-3(f)(6)(B) (SEF Core Principle 6(B)). The Commission codified SEF Core Principle 6(B), added by the Dodd-Frank Act, in § 37.600 of its regulations, 17 CFR 37.600. See generally Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33533-4 (June 4, 2013).

[24] CEA section 5(d)(5)(B), 7 U.S.C. 7(d)(5)(B) (DCM Core Principle 5(B)). The Commission codified DCM Core Principle 5(B), as amended by the Dodd-Frank Act, in § 38.300 of its regulations, 17 CFR 38.300. See generally Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612, 36639 (June 19, 2012).

[25] Under the December 2013 position limits proposal, "referenced contracts" are defined as futures, options, economically equivalent swaps, and certain foreign board of trade contracts, in physical commodities, and are subject to the proposed federal position limits. See December 2013 position limits proposal 78 FR at 75825.

[26] See December 2013 positions limits proposal at 78 FR 75826 (proposed § 150.2).

[27] See December 2013 position limits proposal at 78 FR 75754-8.

[28] Commodity Markets Council ("CMC"), on February 10, 2014, ("CL-CMC-59634"), at 14-15; Futures Industry Association ("FIA"), on March 30, 2015 ("CL-FIA-60392"), at 10. One commenter stated that SEFs should be exempt from the requirement to set positions limits because SEFs are in the early stages of development and could be harmed by limits that restrict liquidity. International Swaps and Derivatives Association, Inc. ("ISDA") and Securities Industry and Financial Markets Association ("SIFMA"), on February 10, 2014 ("CL-ISDA/SIFMA-59611"), at 35.

may not know when a position has been offset.[29] Further, during the ongoing SEF registration process,[30] a number of persons applying to become registered as SEFs told the Commission that they lack access to information that would enable them to knowledgeably establish position limits or monitor positions.[31] The Commission observes that this information gap would also be a concern for DCMs in respect of swaps, because DCMs lacking access to swap position information also would not be able to reliably establish position limits on swaps or monitor swap positions.

The Commission acknowledges that, if an exchange does not have access to sufficient data regarding individual market participants' open swap positions, then it cannot effectively monitor swap position limits. The Commission believes that most exchanges do not have access to sufficient swap position information to effectively monitor swap position limits.[32] In this regard, the Commission believes that an exchange would have or could have access to sufficient swap position information to effectively

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[29] CL-CMC-59634 at 14-15; CL-FIA-60392 at 10.

[30] Under CEA section 5h(a)(1), no person may operate a facility for trading swaps unless the facility is registered as a SEF or DCM. 7 U.S.C. 7b-3(a)(1).

[31] For example, in a submission to the Commission under part 40 of the Commission's regulations, BGC Derivative Markets, L.P. states that "[t]he information to administer limits or accountability levels cannot be readily ascertained. Position limits or accountability levels apply market-wide to a trader's overall position in a given swap. To monitor this position, a SEF must have access to information about a trader's overall position. However, a SEF only has information about swap transactions that take place on its own Facility and has no way of knowing whether a particular trade on its facility adds to or reduces a trader's position. And because swaps may trade on a number of facilities or, in many cases, over-the-counter, a SEF does not know the size of the trader's overall swap position and thus cannot ascertain whether the trader's position relative to any position limit. Such information would be required to be supplied to a SEF from a variety of independent sources, including SDRs, DCOs, and market participants themselves. Unless coordinated by the Commission operating a centralized reporting system, such a data collection requirement would be duplicative as each separate SEF required reporting by each information sources." BGC Derivative Markets, L.P., Rule Submission 2015-09 (Oct. 6, 2015), available at http://www.cftc.gov/filings/orgrules/rule100615bgcsef001.pdf.

[32] The Commission is aware of one SEF that may have access to sufficient swap position information by virtue of systems integration with affiliates that are CFTC registrants and shared personnel. This SEF requires that all of its listed swaps be cleared on an affiliated DCO, which reports to an affiliated SDR.

monitor swap position limits if, for example: (1) it had access to daily information about its market participants' open swap positions; or (2) it knows that its market participants regularly engage on its exchange in large volumes of speculative trading activity (it may gain that knowledge through surveillance of heavy trading activity), that would cause reasonable surveillance personnel at an exchange to inquire further about a market participant's intentions[33] and total open swap positions.

It is possible that an exchange could obtain an indication of whether a swap position established on or through a particular exchange is increasing a market participant's swap position beyond a federal or exchange-set limit, if that exchange has data about some or all of a market participant's open swap position from the prior day and combines it with the transaction data from the current day, to obtain an indication of the market participant's current open swap position. By way of example, part 20 requires clearing organizations, clearing members and swap dealers to report to the Commission routine position reports for physical commodity swaps; the part 20 swaps data identifies for the Commission a market participant's reported open swap positions from the prior trading day. If part 20 swaps data were made available to an exchange, it could use it to add to any swap positions established on or through that exchange during the current trading day to get an indication of a potential position limit violation.[34] The indication would alert the exchange to contact the market participant to inquire about that participant's total open swap position.

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[33] For instance, heavy trading activity at a particular exchange might cause that exchange to ask whether a market participant is building a large speculative position or whether the heavy trading activity is merely the result of a market participant making a market across several exchanges.

[34] Nonetheless, that market participant may have conducted other swap transactions in the same commodity, away from a particular exchange, that reduced its swap position.

While this indication would not include the market participant's activity transacted away from that particular exchange, the Commission believes that such monitoring would comply with the requirement in CEA section 5h(f)(6)(B)(ii) that the SEF monitor positions established on or through the SEF for compliance with the limits set by the Commission and the SEF. However, the Commission understands that exchanges generally do not currently have access to a data source that identifies a market participant's reported open swap positions from the prior trading day.[35] The Commission does not believe that it would be practicable for an exchange to require that market participants self-report their total open swap positions.[36] And with only the transaction data from a particular exchange, it would be impracticable, if not impossible, for that exchange to monitor and enforce position limits for swaps.

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[35] As noted above, although the Commission receives swaps position data pursuant to Part 20, the Commission has not made this information available to any exchange.

[36] An exchange could theoretically obtain swap position data directly from market participants, for example, by requiring a market participant to report its swap positions, as a condition of trading on the exchange. However, the Commission thinks it is unlikely that a single exchange would unilaterally impose a swaps reporting regime on market participants.

The Commission abandoned the approach of requiring market participants to report futures positions directly to the Commission many years ago. See Reporting Requirements for Contract Markets, Futures Commission Merchants, Members of Exchanges and Large Traders, 46 FR 59960 (Dec. 8, 1981). Instead, the Commission and DCMs rely on a large trader reporting system where futures positions are reported by sources other than the position holder itself, including futures commission merchants, clearing members and foreign brokers. See generally part 19 of the Commission's regulations, 17 CFR part 19. See also, for example, the discussion of an exchange's large trader reporting system in the Division of Market Oversight Rule Enforcement Review of the Chicago Mercantile Exchange and the Chicago Board of Trade, July 26, 2013, at 24-7, available at http://www.cftc.gov/idc/groups/public/@iodcms/documents/file/rercmecbot072613.pdf.

Further, as noted above, exchanges do not have authority to demand swap position data from derivative clearing organizations or swap data repositories; nor do exchanges have general authority to demand market participants' swap position data from clearing members of DCOs or swap dealers (as the Commission does under part 20).

Moreover, the Commission has neither required any DCO[37] or SDR[38] to provide such swap data to exchanges,[39] nor provided any exchange with access to swaps data collected under part 20 of the Commission's regulations.[40]

In light of the foregoing, the Commission is proposing a delay in implementation of exchange-set limits for swaps only, and only for exchanges without sufficient swap position information. After consideration of the circumstances described above, and in an effort to accomplish the policy objectives of the Dodd-Frank Act regulatory regime, including to facilitate trade processing of any swap and to promote the trading of swaps on SEFs,[41] this current proposal amends the guidance in the appendices to parts 37 and 38 of the Commission's regulations regarding SEF core principle 6 and DCM core

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[37] Core principle M for DCOs addresses information sharing only for the purpose of the DCO's carrying out its risk management program as "appropriate and applicable," but does not address information sharing for other purposes, and does not address information sharing with exchanges. CEA section 5b(c)(2)(M), 7 USC 7a-1(c)(2)(M), and § 39.22, 17 CFR 39.22. The Commission has access to DCO information relating to trade and clearing details under § 39.19, 17 CFR 39.19, as is necessary to conduct its oversight of a DCO. However, the Commission has not used its general rulemaking authority under CEA section 8a(5), 7 USC 12a(5), to require DCOs to provide registered entities access to swap information, although the Commission could impose such a requirement by rule. CEA section 5b(c)(2)(A)(i), 7 USC 7a-1(c)(2)(A)(i).

[38] An SDR has a duty to provide direct electronic access to the Commission, or a designee of the Commission who may be a registered entity (such as an exchange). CEA section 21(c)(4), 7 USC 24a(c)(4). See 76 FR 54538 at 54551, note 141 and accompanying text (Sept. 1, 2011). However, the Commission has not designated any exchange as a designee of the Commission for that purpose. Further, the Commission has not used its general rulemaking authority under CEA section 8a(5), 7 USC 12a(5), to require SDRs to provide registered entities (such as exchanges) access to swap information, although the Commission could impose such a requirement by rule. CEA section 21(a)(3)(A)(ii), 7 USC 24a(a)(3)(A)(ii).

[39] Even if such information were to be made available to exchanges, the swaps positions would need to be converted to futures-equivalent positions for purposes of monitoring position limits on a futures-equivalent basis, which would place an additional burden on exchanges. See December 2013 positions limits proposal at 78 FR75825 for the proposed definition of futures-equivalent; see also the discussion, below, regarding this current notice's amendments to that proposed definition. If at some future time, the Commission were to consider requiring DCOs or SDRs to provide swap data to exchanges, or to provide the exchanges with swap data collected under part 20, the Commission would then consider the burden that would be placed on the exchange by the need to convert swap positions into futures equivalents.

[40] The part 20 swaps data is reported in futures equivalents, but does not include data specifying where (e.g., OTC or a particular exchange) reportable positions in swaps were established.

[41] See, e.g., CEA sections 5h(b)(1)(B) and 5h(e), 7 U.S.C. 7b-3(b)(1)(B) and 7b-3(e), respectively.

principle 5, respectively. The revised guidance clarifies that an exchange need not demonstrate compliance with SEF core principle 6 or DCM core principle 5 as applicable to swaps until it has access to sufficient swap position information, after which the guidance would no longer be applicable.[42] For clarity, this current proposal includes the same guidance in a new appendix E to proposed part 150 in the context of the Commission's proposed regulations regarding exchange-set position limits.

Although the Commission is proposing to delay implementing the core principles regarding position limits on swaps, nothing in this current proposal would prevent an exchange from nevertheless establishing position limits on swaps. However, it does seem unlikely that an exchange would implement position limits before acquiring sufficient swap position information because of the ensuing difficulty of enforcing such a limit. The Commission believes that providing the proposed delay for those exchanges that need it both preserves flexibility for subsequent Commission rulemaking and allows for phased implementation of limitations on swaps by exchanges, as practicable.[43]

The Commission observes that courts have upheld relieving regulated entities of their statutory obligations where compliance is impossible or impracticable.[44] The

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[42] Once the guidance was no longer applicable, a DCM or a SEF would be required to file rules with the Commission to implement the relevant position limits and demonstrate compliance with Core Principle 5 or 6, as appropriate. The Commission notes that, for the same reasons regarding swap position data discussed above in respect of CEA section 5h(f)(6)(B), the proposed guidance also would temporarily delay the requirement for SEFs to comply with their statutory obligation under CEA section 5h(f)(6)(A).

[43] Although this current proposal would provide position limits relief to SEFs and to DCMs in regards to swaps, it would not alter the definition of referenced contract (including economically equivalent swaps) as proposed in December 2013. See December 2013 position limits proposal 78 FR at 75825. The Commission continues to review and consider comments received regarding the definition of referenced contract.

[44] See, e.g., Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1031 (D.C. Cir. 2007) (allowing regulated entities to enter into consent agreements with EPA—without notice and comment—that deferred prosecution of statutory violation until such time as compliance would be practicable); Catron v. County Bd. Of Commissioners v. New Mexico Fish & Wildlife Serv., 75 F.3d 1429, 1435 (10th Cir.1966) (stating

Commission believes that it would be impracticable, if not impossible, for an exchange to monitor and enforce position limits for swaps with only the transaction data from that particular exchange. Accordingly, the Commission believes that it is reasonable at this time to delay implementation of this discrete aspect of position limits, only with respect to swaps position limits, and only for exchanges that lack access to sufficient swap position information. The Commission believes that this approach would further the policy objectives of the Dodd-Frank Act regulatory regime, including the facilitation of trade processing of swaps and the promotion of trading swaps on SEFs. While this approach would delay the requirement for certain exchanges to establish and monitor exchange-set limits on swaps at this time, the Commission notes that, under the December 2013 position limits proposal, federal position limits would apply to swaps that are economically equivalent to futures contracts subject to federal position limits.

Request for comment ("RFC") 1. The Commission requests comment on all aspects of the proposed delay in implementing the requirements of SEF core principle 6(B) and DCM core principle 5(B) with respect to the setting and monitoring by exchanges of position limits for swaps. Does any DCM or SEF currently have access to sufficient data regarding individual market participants' open swaps positions to so set and monitor swaps position limits other than by special call? If yes, please describe in

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that "Compliance with [the National Environmental Protection Act] is excused when there is a statutory conflict with the agency's authorizing legislation that prohibits or renders compliance impossible."). Further, it is axiomatic that courts will avoid reading statutes to reach absurd or unreasonable consequences. See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982). To require an exchange to monitor position limits on swaps, when it currently has extremely limited visibility into a market participant's swap position, is arguably absurd and certainly appears unreasonable.

detail how such access could be obtained.[45] If no, how easy or difficult would it be for an exchange to obtain access to sufficient swap position information by means of contract or other arrangements?

B. Proposal to Amend the Definition of Bona Fide Hedging Position

As discussed below, the Commission is now proposing a general definition of bona fide hedging position that incorporates only the standards in CEA section 4a(c)(2), regarding physical commodity derivatives. Conforming the standards of a general definition of bona fide hedging position to those of the statute requires eliminating two components of the general definition of bona fide hedging position in current § 1.3(z)(1): the incidental test and the orderly trading requirement.[46] Thus, the Commission is now proposing to eliminate the incidental test and the orderly trading requirement, as discussed below.

1. December 2013 Proposal

In the December 2013 position limits proposal, the Commission proposed a new definition of "bona fide hedging position" in proposed § 150.1, to replace the current

[45] The Commission expects that any DCM or SEF that has access to sufficient swap position information will report this to the Commission in a comment letter that will be publicly available in the comment file for this current proposal on the Commission's website.

[46] The inclusion of the incidental test and the orderly trading requirement in the definition of bona fide hedging has a long history. As noted in the December 2013 Position Limits proposal, "In response to the 1974 legislation, the Commission's predecessor adopted in 1975 a bona fide hedging definition in § 1.3(z) of its regulations stating, among other requirements, that transactions or positions would not be classified as hedging unless their bona fide purpose was to offset price risks incidental to commercial cash or spot operations, and such positions were established and liquidated in an orderly manner and in accordance with sound commercial practices. Shortly thereafter, the newly formed Commission sought comment on amending that definition. Given the large number of issues raised in comment letters, the Commission adopted the predecessor's definition with minor changes as an interim definition of bona fide hedging transactions or positions, effective October 18, 1975." See December 2013 Position Limits Proposal at 75703. The Commission is also proposing a non-substantive change to subsection (1)(ii)(B) of the bona fide hedging definition by deleting from the definition proposed in the December 2013 position limits proposal the lead in words "such position."

definition in § 1.3(z). The opening paragraph of the proposed definition is a general definition of a bona fide hedging position. As is the case in the current definition in § 1.3(z), that general definition contained two requirements for a bona fide hedging position that are not included in CEA section 4a(c)(2): an incidental test and an orderly trading requirement.[47]

The incidental test is a component of the December 2013 proposed bona fide hedging position definition requiring that the risks offset by a commodity derivative position must be incidental to the position holder's commercial operations.[48] The orderly trading requirement is a component of the December 2013 proposed bona fide hedging position definition requiring that a bona fide hedge position must be established and liquidated in an orderly manner in accordance with sound commercial practices.[49]

2. Comments on the December 2013 Proposed Definition of Bona Fide Hedging Position

Commenters generally objected to the inclusion in the general definition of bona fide hedging position of the incidental test and the orderly trading requirement. For example, one commenter objected to the incidental test, since that test is not included in CEA section 4a(c) with respect to physical commodity hedges.[50]

Commenters urged the Commission to eliminate the orderly trading requirement, because, in the context of the over-the-counter markets, the concept of orderly trading is

[47] See December 2013 Position Limits Proposal at 75706-7 (stating "Bona fide hedging position means any position whose purpose is to offset price risks incidental to commercial cash, spot, or forward operations, and such position is established and liquidated in an orderly manner in accordance with sound commercial practices, . . .").

[48] See December 2013 Position Limits Proposal at 75707.

[49] Id.

[50] See, e.g., CME Group, Inc. ("CME Group"), on February 10, 2014 ("CL-CME-59718") at 47.

not defined, yet the requirement would impose a duty on end users to monitor market activities to ensure they do not cause a significant market impact. [51] Commenters noted the anti-disruptive trading prohibitions and polices would apply regardless of whether there is an orderly trading requirement.[52] Commenters requested that if the Commission were to retain the orderly trading requirement, the Commission interpret such requirement in a manner consistent with the Commission's disruptive trading practices interpretation (i.e., a standard of intentional or reckless conduct); commenters also requested that the Commission not apply a negligence standard.[53]

3. Proposal to Amend the Definition

For the reasons discussed below, and in response to the comments received, the Commission is proposing to eliminate the incidental test and orderly trading requirement from the general definition of bona fide hedging position. For clarity, the Commission is herein publishing, in proposed §150.1, a general definition of bona fide hedging position for physical commodity derivatives that incorporates only the standards of CEA section 4a(c), but notes that the definition is subject to further requirements not inconsistent with those statutory standards and the policy objectives of position limits.

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[51] See Coalition of Physical Energy Companies ("COPE") on February 10, 2014 ("CL-COPE-59662") at 13, Duke Energy Utilities ("DEU") on February 10, 2014 ("CL-DEU-59631") at 5-7, and The Commercial Energy Working Group ("Working Group") CL-Working Group- 59693 at 14.

[52] Section 747 of the Dodd-Frank Act amended the CEA to expressly prohibit certain disruptive trading practices. Specifically, CEA section 4c(a)(5), 7 U.S.C. 6c(a)(5), states that it is unlawful for a person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that "(A) Violates bids or offers; (B) Demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or (C) Is, of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." See also, Antidisruptive Practices Authority, 78 FR 31890 (May 28, 2103) (providing a policy statement and guidance).

[53] See, e.g., FIA on February 7, 2014 ("CL-FIA-59595"), at 5, 33-34, the Edison Electric Institute and the Electric Power Supply Association ("EEI-EPSA") on February 10, 2014 "CL-EEI-EPSA-59602") at 14-15, CL-ISDA/SIFMA-59611 at 4, 39, CL-CME-59718 at 67, and IntercontinentalExchange, Inc. ("ICE") on February 10, 2014 ("CL-ICE-59669") at 11.

i. Incidental Test.

The Commission proposes to eliminate the incidental test. As noted above, the incidental test and the orderly trading requirement have been part of the rule 1.3(z)(1) definition of bona fide hedging since 1975.[54] These provisions were not separately explained in the 1974 notice proposing the adoption of rule 1.3(z)(1) (the notice observed only that the "proposed definition otherwise deviates in only minor ways from the hedging definition presently contained in [CEA section 4a(3)]").[55] The then-current statutory definition of bona fide hedging position in CEA section 4a(3) used the concepts of "good faith" (regarding the amount of a commodity a person expects to raise) and a "reasonable hedge" (regarding hedges of inventory).

The Commission adopted the concept of economically appropriate in 1977, after finding its definition of bona fide hedging inadequate due to changes in commercial practices and the diverse nature of commodities now under regulation, but did not address whether the concept of economically appropriate overlapped with the incidental test.[56] The economically appropriate test requires that a bona fide hedging position be

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[54] 40 FR 11560 (March 12, 1975).

[55] See 39 FR 39731 (Nov. 11, 1974). CEA section 4a(3) then stated "No order issued under paragraph (1) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions as such terms as shall be defined by the Commission within one hundred and eighty days after the effective date of the Commodity Futures Trading Commission Act of 1974 by order consistent with the purposes of this chapter." 7 U.S.C 6a(3) 1974. As noted in the federal register release adopting the definition, the definition was proposed pursuant to section 404 of the Commodity Futures Trading Commission Act of 1974 (P.L. 93-463), which directed the Secretary of Agriculture to promulgate regulations defining "bona fide hedging transactions and positions." 39 FR at 39731 (Nov. 11, 1974).

[56] 42 FR 42748 (August 24, 1977). In the federal register release adopting the amended definition, the Commission stated that it was adopting amendments to its general regulations to "generally broaden the scope of the hedging definition to include current commercial risk shifting practices in the markets now under regulation. The Commission has also recognized the potential for market disruption if certain trading practices are carried out during the delivery period of any future. The definition therefore restricts the classification of certain transactions and positions as bona fide hedging during the last five days of trading. In addition, the Commission has amended its regulations to include reporting requirements for some new types of bona fide hedging which will now be recognized." 42 FR 42718 (Aug. 24, 1977).

economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise.[57] While in the 1977 rulemaking defining bona fide hedging the Commission discussed the concept of economically appropriate as an expansive standard, the incidental test appears to have simply been left in the definition as an historical carryover. In the December 2013 position limits proposal, the Commission noted that it believed the incidental test's concept of commercial cash market activities is embodied in the economically appropriate test for physical commodities in CEA section 4a(c)(2).[58] In light of this connection between the concept of commercial cash market activities and the economically appropriate test, the Commission notes that it included in the December 2013 positions limits proposal the intention to apply the economically appropriate test to hedges in an excluded commodity.[59]

In both the current and December 2013 proposed definitions of bona fide hedging position, the incidental test requires a reduction in price risk. Although the Commission is now proposing to eliminate the incidental test from the first paragraph of its proposed bona fide hedge definition, the Commission notes that it interprets risk, in the economically appropriate test, to mean price risk. Commenters suggested the Commission adopt a broader interpretation of risk (including, for example, execution and logistics risk and credit risk).[60] However, a broader interpretation appears to be inconsistent with the policy objectives of position limits in CEA section 4a(a)(3)(B) regarding physical commodities, particularly: diminishing excessive speculation that

[57] See CEA section 4a(c)(2)(A)(ii).

[58] See December 2013 Proposal at 75707.

[59] Id.

[60] See, e.g., CMC on March 30, 2015, ("CL-CMC-60391") at 2.

causes sudden or unreasonable fluctuations or unwarranted changes in the price of a commodity; deterring manipulation, squeezes, and corners; and ensuring the price discovery function is not disrupted.

ii. Orderly Trading Requirement

The Commission proposes to eliminate the orderly trading requirement. While that provision has been a part of the regulatory definition of bona fide hedge since 1975,[61] and previously was found in the statutory definition of bona fide hedge prior to the 1974 amendment removing the statutory definition from CEA section 4a(3), the Commission is not aware of a denial of recognition of a position as a bona fide hedge as a result of a lack of orderly trading on an exchange. Further, the Commission notes that the meaning of the orderly trading requirement is unclear in the context of the over-the-counter swap market, as well as in the context of permitted off-exchange transactions (e.g., exchange of derivatives for related positions). In addition, the Commission observes that disruptive trading activity by a commercial entity engaged in establishing or liquidating a hedging position would generally appear to be contrary to its economic interests. However, the Commission notes that an exchange may use its own discretion to condition its recognition of a bona fide hedging position on an orderly trading requirement.

The Commission notes the anti-disruptive trading prohibitions of CEA section 4c(a)(5), as added by the Dodd-Frank Act, apply to trading on registered entities, but not to over-the-counter transactions, regardless of whether the trading is related to hedging activities. Specifically, the anti-disruptive trading prohibitions in CEA section 4c(a)(5)

[61] See 40 FR 11560 (March 12, 1975).

make it unlawful to engage in trading on a registered entity that "demonstrates intentional or reckless disregard for orderly execution of trading during the closing period." In this regard, the Commission notes that it also has the authority, under CEA section 4c(a)(6), to prohibit the intentional or reckless disregard for the orderly execution of transactions on a registered entity outside of the closing period.

C. Proposed Rules Related to Recognition of Bona Fide Hedging Positions and Granting of Spread Exemptions

In sections D, E, and F, below, this current proposal discusses three sets of proposed Commission rules that would enable an exchange to submit to the Commission exchange rules under which the exchange could take action to recognize certain bona fide hedging positions and to grant certain spread exemptions, with regard to both exchange-set and federal position limits. In each case, the proposed Commission rules would establish a formal CFTC review process that would permit the Commission to revoke all such exchange actions.

If the changes in this current proposal are adopted, exchanges would be able to: (i) recognize certain non-enumerated bona fide hedging positions ("NEBFHs"), i.e., positions that are not enumerated by the Commission's rules (pursuant to proposed § 150.9);[62] (ii) grant exemptions to position limits for certain spread positions (pursuant to

[62] See note 75 below.

proposed § 150.10);[63] and (iii) recognize certain enumerated anticipatory bona fide hedging positions (pursuant to proposed § 150.11).[64]

The Commission's authority to permit certain exchanges to recognize positions as bona fide hedging positions is found, in part, in CEA section 4a(c)(1).[65] CEA section 4a(c)(1) provides that no CFTC rule applies to "transaction or positions which are shown to be bona fide hedging transactions or positions," as those terms are defined by Commission rule consistent with the purposes of the CEA. The Commission notes that "shown to be" is passive voice, which could encompass either a position holder or an exchange being able to "show" that a position is entitled to treatment as a bona fide hedge, and does not specify that the Commission must determine in advance whether the position or transaction was shown to be bona fide. The Commission interprets CEA

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[63] The Commission has authority to exempt spread positions under CEA section 4a(a)(1), which provides that the Commission may exempt transactions normally known to the trade as "spreads" from federal position limits. Under this current proposal, applicants may rely on an exchange's grant of a spread exemption absent notice from such exchange or the Commission to the contrary.

[64] Unlike exemptions for spreads, no exemption is needed for bona fide hedging transactions or positions as under CEA section 4a(c)(1), no rule, regulation or order issued under CEA section 4a(a) applies to transactions or positions shown to be bona fide hedging transactions or positions. 7 U.S.C. 6a(c)(1). Accordingly, Commission regulation 1.3(z)((3), for example, provides that upon request, the Commission may recognize (rather than "exempt") certain transactions and positions as bona fide hedges. By notifying the applicant that the Commission, based on the information provided, recognizes that the applicant's position has been shown to be a bona fide hedge, the Commission is basically providing a safe harbor from position limits in connection with that position for the applicant. For ease of administration, the Commission now proposes, with respect to federal position limits, to extend this recognition process to exchanges' "recognition" of positions as NEBFHs or anticipatory enumerated bona fide hedges with respect to federal limits subject to subsequent Commission review. Under this current proposal, positions recognized by exchanges as NEBFHs or anticipatory enumerated bona fide hedges will not be subject to federal limits absent notice from an exchange or the Commission to the contrary. DCMs currently grant non-enumerated exemptions to exchange-set limits that are consistent with current § 1.3(z)(1), 17 CFR 1.3(z)(3). In addition, DCMs currently grant bona fide exemptions to exchange-set limits for sales or purchases for future delivery of unsold anticipated production or unfilled anticipated requirements consistent with, and enumerated in, §§ 1.3(z)(2)(i)(B) or 1.3(z)(2)(ii)(C), 17 CFR 1.3(z)(2) (i)(B) or 1.3(z)(2)(ii)(C).

[65] Further, under CEA section 8a(5), the Commission may make such rules as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

section 4a(c)(1) to authorize the Commission to permit certain SROs (i.e., DCMs and SEFs, meeting certain criteria) to recognize positions as bona fide hedges for purposes of federal limits, subject to Commission review.

When determining whether to recognize positions as bona fide hedges, an exchange would be required to apply the standards in the Commission's general definition of bona fide hedging position, which incorporates the standards in CEA section 4a(c)(2),[66] and the exchange's conclusions would be subject to Commission review and, if necessary, remediation.[67]

In addition, the Commission would permit certain exchanges to exempt positions normally known to the trade as spreads, subject to a consideration of the four policy objectives of position limits found in CEA section 4a(a)(3)(B).[68] The Commission notes that nothing in CEA section 4a(a)(1) prohibits the Commission from exempting such spreads.[69] The Commission interprets this provision as CEA statutory authority to exempt spreads that are consistent with the other policy objectives for position limits,

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[66] CEA section 4a(c)(2), adopted by the Dodd-Frank Act, directs the Commission to define (including to narrow the scope of) what constitutes a bona fide hedging position, for the purpose of implementing federal position limits on physical commodity derivatives. In response to that directive, in the December 2013 position limits proposal, the Commission proposed to add a definition of bona fide hedging position in § 150.1, to replace the definition in current § 1.3(z). See infra notes 104-106 and accompanying text; see also supra preamble Section II.B.3 (describing the Commission's current proposal to further amend its general definition of bona fide hedging position as proposed in the December 2013 position limits proposal).

[67] See infra preamble Section II.D.3 (discussing the proposed requirements that the exchanges: make recognitions pursuant to exchange rules submitted to the Commission; keep related records; make reports to the Commission; and provide transparency to the public). After review, the Commission could, for example, revoke or confirm an exchange-granted exemption. See also proposed § 150.9.

[68] As discussed below, the proposed rules would require the exchanges: to issue exemptions pursuant to exchange rules submitted to the Commission; to keep records; to make reports to the Commission; and to provide transparency to the public. See infra Section II.E; see also proposed § 150.10.

[69] See CEA section 4a(a)(1) (stating that "[n]othing in this section shall be construed to prohibit the Commission from . . . from exempting transactions normally known to the trade as 'spreads'. . .")

such as those in CEA section 4a(a)(3)(B).[70] The Commission finds, pursuant to CEA section 8a(5), that permitting certain exchanges to recognize such spreads, subject to subsequent Commission review of such actions, is reasonably necessary to effectuate the CEA's policy objectives.[71]

Further, the Commission would permit certain exchanges to recognize certain enumerated anticipatory hedging positions under the Commission's definition of bona fide hedging position, essentially as an administrative collection of certain information, but subject to Commission review. Under proposed § 150.11, the exchange would be required to follow defined administrative procedures that require the market participant to file certain information with the exchange, including the information the market participant would be required to file with the Commission under § 150.7 as proposed in the December 2013 position limits proposal; in the alternative, the market participant could choose to file that same information directly with the Commission under proposed § 150.7.[72]

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[70] CEA section 4a(a)(3)(B) provides that the Commission shall set limits "(B) to the maximum extent practicable, in its discretion— (i) to diminish, eliminate, or prevent excessive speculation as described under this section; (ii) to deter and prevent market manipulation, squeezes, and corners; (iii) to ensure sufficient market liquidity for bona fide hedgers; and (iv) to ensure that the price discovery function of the underlying market is not disrupted." In addition, CEA section 4a(a)(7) authorizes the Commission to exempt any class of transaction from any requirement it may establish with respect to position limits.

[71] The Commission notes that the proposed process for exchange exemptions of spread positions, in a similar manner to the proposed process for exchange recognition of a position as bona fide hedge, would require the exchange to apply the standards required under proposed § 150.10(a)((3)(ii)) (requiring the exchange to determine that exempting the spread position would further the purposes of CEA section 4a(3)(B)), and the exchanges conclusions would be subject to Commission review and, if necessary, remediation (after review, the Commission could, for example, revoke or confirm an exchange-granted exemption). See proposed § 150.10.

[72] As discussed below, the proposed rules would require the exchanges: to make administrative recognitions pursuant to exchange rules submitted to the Commission; to keep records; and to make reports to the Commission. There is no need for an exchange to provide transparency to the public in regard to the existence of a type of enumerated bona fide hedging position, as the enumerated bona fide hedge positions are already listed in the Commission's proposed definition of bona fide hedging position. See infra Section II.F; see also proposed § 150.11.

Each of the exchange-administered processes under proposed §§ 150.9,[73] 150.10,[74] and 150.11[75] would be subject to Commission review.[76] The three proposed processes would allow market participants to rely on an exchange's recognition of an NEBFH, spread, or anticipatory exemption until an exchange or the Commission notifies them to the contrary. However, the proposed processes would not protect exchanges or applicants from charges of violations of applicable sections of the CEA or other Commission regulations, other than position limits. For instance, a market participant's compliance with position limits or an exemption does not confer any type of safe harbor or good faith defense to a claim that the market participant had engaged in an attempted manipulation, a perfected manipulation or deceptive conduct, as is the case under both current § 150.6 as well as § 150.6 as proposed in the December 2013 position limits proposal.[77]

The Commission views this current proposal, enabling exchanges to elect to administer these three processes, to be suitable since each process requires that: (i) an

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[73] Specifically, exchanges will be able to: (1) grant exemptions from exchange-set limits for NEBFHs pursuant to proposed §§ 150.9, 150.3(a)(1)(i) and § 150.5(a)(2); and (2) recognize NEBFHs (pursuant to proposed §§ 150.9 and 150.3(a)(1)(i)) that will not be subject to federal limits absent notice from an exchange or the Commission to the contrary.

[74] Specifically, exchanges will be able to: (1) grant exemptions from exchange-set limits for certain spread positions pursuant to proposed §§ 150.10, 150.3(a)(1)(iv) and 150.5(a)(2); and (2) grant exemptions from federal limits for certain spread positions pursuant to proposed §§ 150.10 and 150.3(a)(1)(iv).

[75] Specifically, exchanges will be able to: (1) grant exemptions from exchange-set limits for enumerated anticipatory bona fide hedges pursuant to proposed §§ 150.11, 150.3(a)(1)(i) and § 150.5(a)(2); and (2) recognize enumerated anticipatory bona fide hedges (pursuant to proposed §§ 150.11 and 150.3(a)(1)(i)) that will not be subject to federal limits absent notice from an exchange or the Commission to the contrary.

[76] The three processes are non-exclusive because there are alternative methods to seek recognition of a position as a bona fide hedge or to receive an exemption for a spread position, including requests for no-action letters under § 140.99 or exemptive relief under CEA section 4a(a)(7), per the December 2013 position limits proposal. See December 2013 position limits proposal, 78 FR at 75719-20.

[77] See the discussion of § 150.6 as proposed in the December 2013 position limits proposal, 78 FR at 75746-7.

exchange submit implementing rules subject to Commission review, under the ordinary rule submission procedures of the Commission's part 40 regulations; (ii) the standards for receiving the recognition or exemption be those set out under the statute;[78] (iii) each exchange's actions under these processes be reviewed under the Commission's rule enforcement review program;[79] and (iv) all exchange actions under such implementing rules are subject to Commission review.[80]

The Commission observes that for decades, exchanges have operated as self-regulatory organizations ("SROs").[81] These SROs are charged with carrying out regulatory functions, including, since 2001, complying with core principles, and operate subject to the regulatory oversight of the Commission pursuant to the CEA as a whole, and more specifically, sections 5 and 5h.[82] As SROs, exchanges do not act only as independent, private actors.[83] When the Act is read as a whole, as the Commission noted

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[78] See, e.g., proposed § 150.9(a)(3) (requiring exchanges that elect to process NEBFH applications to solicit sufficient information to allow it to determine why a derivative position satisfies the requirements of section 4a(c) of the Act), and proposed § 150.9(a)(4) (requiring exchanges that elect to process NEBFH applications to determine whether a derivative position for which a complete application has been submitted satisfies the requirements of section 4a(c) of the Act), and proposed § 150.10(a)(4)(vi) (requiring exchanges that elect to process spread exemptions applications to determine that exempting a spread position would further the purposes of CEA section 4a(a)(3)(B)). See also infra discussion in Section II.D.3 and III.E.2 (each providing discussion of the standards for exchange determinations).

[79] See note 126 for further information regarding the Commission's rule enforcement review program.

[80] See proposed §§ 150.9(a)(d), 150.10(a)(d), and 150.11(a)(d). The Commission notes that its de novo review of exchange actions may be upon the Commission's own initiative or in response to a request for an interpretation under § 140.99 by a market participant whose application for recognition of a position as a bona fide hedge was rejected by an exchange.

[81] CFTC regulation 1.3(ee) defines SRO to mean a DCM, SEF, or registered futures association (such as the National Futures Association). Under the Commission's regulations, SROs have certain delineated regulatory responsibilities, which are carried out under Commission oversight and which are subject to Commission review. See also note 126 (describing reviews of DCMs carried out by the Commission).

[82] 7 U.S.C. 7 and 7 U.S.C. 7b-3, respectively. See also note 126 below.

[83] The Commission views as instructive the following examples of case law addressing grants of authority by an agency (the Securities and Exchange Commission, the "SEC") to a self-regulatory organization ("SRO") (in the SEC cases the SRO was NASD, now FINRA), providing insight into the factors addressed by the court regarding oversight of an SRO.

in 1981, "it is apparent that Congress envisioned cooperative efforts between the self-regulatory organizations and the Commission. Thus, the exchanges, as well as the Commission, have a continuing responsibility in this matter under the Act."[84] The Commission's approach to its oversight of its SROs was subsequently ratified by Congress in 1982, when it gave the CFTC authority to enforce exchange set limits.[85] As the Commission observed in 2010, "since 1982, the Act's framework explicitly

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First, in 1952, the Second Circuit reviewed an SEC order that failed to set aside a penalty fixed by NASD suspending the defendant broker-dealer from membership. Citing Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940), the Second Circuit found that, in light of the statutory provisions vesting the SEC with power to approve or disapprove NASD's rules according to reasonably fixed statutory standards, and the fact that NASD disciplinary actions are subject to SEC review, there was "no merit in the contention that the Maloney Act unconstitutionally delegates power to the NASD." R.H. Johnson v. Securities and Exchange Commission, 198 F. 2d 690, 695 (2d Cir. 1952).

In 1977, the Third Circuit, in Todd & Co. v. Securities and Exchange Commission ("Todd"), 557 F.2d 1008 (3rd Cir. 1977), likewise concluded that the Act did not unconstitutionally delegate legislative power to a private institution. The Todd court articulated critical factors that kept the Maloney Act within constitutional bounds. First, the SEC had the power, according to reasonably fixed statutory standards, to approve or disapprove NASD's rules before they could go into effect. Second, all NASD judgments of rule violations or penalty assessments were subject to SEC review. Third, all NASD adjudications were subject to a de novo (non-deferential) standard of review by the SEC, which could be aided by additional evidence, if necessary. Id. at 1012. Based on these factors, the court found that "[NASD's] rules and its disciplinary actions were subject to full review by the SEC, a wholly public body, which must base its decision on its own findings" and thus that the statutory scheme was constitutional. Id., at 1012-13. See also First Jersey Securities v. Bergen, 605 F.2d 690 (1979), applying the same three-part test delineated in Todd, and then upholding a statutory narrowing of the Todd test.

Further, in 1982, the Ninth Circuit considered the constitutionality of Congress' delegation to NASD in Sorrel v. Securities and Exchange Commission, 679 F. 2d 1323 (9th Cir. 1982). Sorrel followed R.H. Johnson, Todd and First Jersey in holding that because the SEC reviews NASD rules according to reasonably fixed standards, and the SEC can review any NASD disciplinary action, the Maloney Act does not impermissibly delegate power to NASD.

[84] Establishment of Speculative Position Limits,46 FR 50938, 50939 (Oct. 16, 1981). As the Commission noted at that time that "[s]ince many exchanges have already implemented their own speculative position limits on certain contracts, the new rule merely effectuates completion of a regulatory philosophy the industry and the Commission appear to share." Id. at 50940. The Commission believes this is true for the current proposal.

[85] See Futures Trading Act of 1982, Pub. L. No. 97–444, 96 Stat. 2299–30 (1983). In 2010, the Commission noted that the 1982 legislation "also gave the Commission, under section 4a(5) of the Act, the authority to directly enforce violations of exchange-set, Commission-approved speculative position limits in addition to position limits established directly by the Commission through orders or regulations." Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations, 75 FR 4144, 4145 (Jan. 36, 2010) ("2010 Position Limits Proposal for Referenced Energy Contracts"). Section 4a(5) has since been redesignated as section 4a(e) of the Act. 7 U.S.C. 4a(e).

anticipates the concurrent application of Commission and exchange-set speculative position limits."[86] The Commission further noted that the "concurrent application of limits is particularly consistent with an exchange's close knowledge of trading activity on that facility and the Commission's greater capacity for monitoring trading and implementing remedial measures across interconnected commodity futures and option markets."[87]

The Commission notes that it retains the power to approve or disapprove the rules of exchanges, under standards set out pursuant to the CEA, and to review an exchange's compliance with those rules. By way of example, the Commission notes that its Division of Market Oversight would conduct "rule enforcement reviews"[88] of each exchange's compliance with the rules it files under this current proposal. Such reviews would include an examination of how effectively an exchange administers these three proposed processes, including review of recognitions and exemptions granted under the rules. Exchanges, as SROs, are also subject to comprehensive Commission regulation.[89]

The Commission—in adopting and administering a regime that permits certain SROs (i.e., DCMs and SEFs that meet certain criteria) to recognize positions as bona fide hedges subject to Commission review, modification, or rejection—proposes building upon the experience and expertise of the DCMs in administering their own processes for

[86] 2010 Position Limits for Referenced Energy Contracts at 4145.

[87] Id.

[88] See note126 for further information regarding the Commission's rule enforcement review program

[89] See, e.g., § 1.52 of the Commission's regulations, 17 CFR 1.52 (Self-regulatory organization adoption and surveillance of minimum financial requirements); part 37, 17 CFR part 37 (Swap Execution Facilities); part 38, 17 CFR part 38 (Designated Contract Markets); and part 40, 17 CFR part 40 (Provisions Common to Registered Entities).

recognition of bona fide hedging positions under current § 1.3(z).[90] Consistent with current market practice, the three proposed exchange-administered processes will accomplish fact gathering regarding large positions for the Commission, without much expense of Commission resources. The information obtained by means of fact gathering during the application processes will be available to the Commission at any time upon request and pursuant to the recordkeeping and recording provisions at proposed §§ 150.9 (b) and (c), 150.10(b) and (c), and 150.11(b) and (c). The Commission believes that the initial disposition of applications through the exchange-administered processes should establish a reasonable basis for a Commission determination that an application should be subsequently approved or denied. The Commission anticipates that exchanges will advise and consult with Commission staff regarding the effectiveness of these programs, once implemented by the exchanges, and their utility in advancing the policy objectives of the Act.

Moreover, the Commission is not diluting its ability to recognize or not recognize bona fide hedging positions[91] or to grant or not grant spread exemptions. The

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[90] See note 116, and accompanying text (pointing to ICE Futures U.S. and CME Group comment letters noting their experience overseeing position limits, position accountability levels, and the recognition of bona fide hedges.)

[91] In connection with recognition of bona fide hedging positions, the Commission notes that the statute is silent or ambiguous with respect to the specific issue—whether the CFTC may authorize SROs to recognize positions as bona fide hedging positions. CEA section 4a(c) provides that no Commission rule establishing federal position limits applies to positions which are shown to be bona fide hedging positions, as such term shall be defined by the CFTC. As noted above, the "shown to be" phrase is passive voice, which could encompass either a position holder or an exchange being able to "show" that a position is entitled to treatment as a bona fide hedge, and does not specify that the Commission must be the party determining in advance whether the position or transaction was shown to be bona fide; the Commission interprets that provision to permit certain SROs (i.e., DCMs and SEFs, meeting certain criteria) to recognize positions as bona fide hedges for purposes of federal limits when done so within a regime where the Commission can review and modify or overturn such determinations. Under the proposal, an SRO's recognition is tentative, because the Commission would reserve the power to review the recognition, subject to the reasonably fixed statutory standards in CEA section 4a(c)(2) (directing the CFTC to define the term bona fide hedging position). An SRO's recognition would also be constrained by the SRO's rules,

Commission has reserved to itself the ability to review any exchange action, and to review any application by a market participant to an exchange, whether prior to or after disposition of such application by an exchange. An exchange may ask the Commission to consider an NEBFH application (proposed § 150.9(a)(8)), spread application (proposed § 150.10(a)(8)), or enumerated anticipatory bona fide hedge application (proposed § 150.11(a)(6)). The Commission may also on its own initiative at any time─ before or after action by an exchange ─review any application submitted to an exchange for recognition of an NEBFH (proposed § 150.9(d)(1)), a spread exemption (proposed § 150.10(d)(1)), or an enumerated anticipatory bona fide hedge (proposed § 150.11(d)(1)).[92] And, as noted above, market participants will still be able to request a staff interpretive letter under § 140.99 from the Commission or seek exemptive relief under CEA section 4a(a)(7) from the Commission, as an alternative to the three proposed exchange-administered processes.[93]

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which would be subject to CFTC review under the proposal. The SROs are parties that are subject to Commission authority, their rules are subject to Commission review and their actions are subject to Commission de novo review under the proposal—SRO rules and actions may be changed by the Commission at any time.

[92] Under the review process set forth in proposed §§ 150.9(d) and 150.10(d), the Commission will give notice to the exchange and the applicable applicant that they have 10 business days to provide any supplemental information to the Commission. The review process set forth in proposed § 150.11(d) is simpler because the Commission does not anticipate that applications for recognition of enumerated anticipatory bona fide hedge positions would be based on novel facts and circumstances; instead the review of such an application would focus on whether the application met the filing requirements contained in proposed § 150.11(a). If the filing was not complete, then proposed §150.11(d) would provide an opportunity to supplement to the applicant and the exchange.

During the review process, when the Commission considers an exchange's disposition of an application, the Commission will consider not only the Act but the Commission's relevant regulations and interpretations. That is, the Commission will apply the same standards during review as the exchange should or would have applied in disposing of an application.

[93] The December 2013 position limits proposal provides that market participants can request a staff interpretive letter under § 140.99 from Commission staff or seek exemptive relief under CEA section 4a(a)(7) from the Commission. See, e.g., 78 FR at 75719-20. As noted above, the process of requesting interpretations under § 140.99 would also be available to market participants whose application for

The Commission notes that CEA section 8a(5) authorizes the Commission to make such rules as, in its judgment, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act.[94] The Commission currently views the proposed processes to be reasonably necessary to implement CEA section 4a(a)(1), including for the purpose of diminishing, eliminating, or preventing the burden of excessive speculation.[95] As pointed out by the Commission in 1981: "Section [4a(a)(1)] represents an express Congressional finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure. Section 8a(5), accordingly would authorize the Commission to develop regulations necessary to effectuate the purposes of the Act, one of which is expressed in section [4a(a)(1)]. Consistent with this approach, the Commission fashioned rule 1.61 [current rule 150.5] to assure that the exchanges would have an opportunity to employ their knowledge of their individual contract markets to propose the position limits they believe most appropriate." [96]

In addition, section 8a(7) of the Act provides the Commission with authority to alter or supplement the rules of a registered entity, including DCMs and SEFs, if the

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recognition of a position as a bona fide hedge was rejected by an exchange. See supra note 76; see also infra note 109 and accompanying text.

[94] 7 U.S.C. 12a(5).

[95] 7 U.S.C. 6a(a)(1). The proposal also is reasonably necessary to accomplish the purposes of the Act delineated in CEA section 3(b): "to deter and prevent price manipulation or any other disruptions to market integrity. 7 U.S.C. 5(b). Further, the proposal is reasonably necessary to accomplish the purposes of the Act delineated in CEA section 4a(c)(1) "to permit producers, purchasers, sellers, middlemen, and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs." 7 U.S.C. 6a(c)(1).

[96] 46 FR 50938, 50940 (Oct. 16, 1981). Commission § 1.61 required all contract markets not subject to federal speculative position limits to adopt and enforce exchange-set speculative position limits; in 1999, as part of the Commission's simplification and reorganization of its position limit rules, the substance of rule 1.61's requirements were relocated to Part 150 of the Commission's rules, "thereby incorporating within that Part all Commission rules relating to speculative position limits." 64 FR 24038, 24040 (May 5, 1999).

Commission determines that such changes are necessary or appropriate.[97] Consequently, as the Commission noted in 1981, "CEA section 8a(7) further underscores the fact that Congress affirmatively contemplated a regulatory system whereby the exchanges would act in the first instance to adopt rules which would protect persons producing, handling, processing or consuming any commodity traded for future delivery. Secondarily, the Commission has express authority to mandate any modifications to an exchange's rules to protect such persons."[98]

D. Exchange Recognition of Positions as Non-Enumerated Bona Fide Hedges

1. Background. DCMs have for some time set their own position limits on numerous physical commodity futures contracts pursuant to DCM Core Principle 5.[99] DCMs have established exchange-set limits for futures contracts, including for futures

[97] CEA section 8a(7) provides the Commission with authority "to alter or supplement the rules of a registered entity insofar as necessary or appropriate by rule or regulation or by order, if after making the appropriate request in writing to a registered entity that such registered entity effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such registered entity has not made the changes so required, and that such changes are necessary or appropriate for the protection of persons producing, handling, processing, or consuming any commodity traded for future delivery on such registered entity, or the product or byproduct thereof, or for the protection of traders or to insure fair dealing in commodities traded for future delivery on such registered entity." 7 U.S.C. 12a(7).

[98] 46 FR 50938, 50940 (Oct. 16, 1981). See also the Commission's statement in 1999, that the Commission and the exchanges "share responsibility for enforcement of speculative position limits," noting that "the Commission can directly take enforcement actions against violations of exchange-set speculative position limits as well as those provided under Commission rules." 64 FR 24038, note 3 and accompanying text (May 5, 1999).

[99] 7 U.S.C. 7(d)(5). As explained in the December 2013 position limits proposal, "the CFMA core principles regime concerning position limitations or accountability for exchanges had the effect of undercutting the mandatory rules promulgated by the Commission in § 150.5. Since the CFMA amended the CEA in 2000, the Commission has retained § 150.5, but only as guidance on, and acceptable practice for, compliance with DCM core principle 5." December 2013 position limits proposal, 78 FR at 75754.

Prior to the Commodity Futures Modernization Act of 2000 ("CFMA"), DCMs set position limits pursuant to the requirements of § 150.5, adopted on May 5, 1999. 17 CFR 150.5; see 64 FR 24038 (May 5, 1999) (codifying various policies related to the requirement that DCMs set speculative position limits); see also 46 FR 50938 (Oct. 16, 1981) (requiring DCMs to set speculative position limits in active futures markets for which no exchange or Commission imposed limits were then in effect). There are only nine commodity futures contracts currently subject to federal position limits pursuant to § 150.2 of the Commission's regulations. 17 CFR 150.5.

contracts currently subject to Commission-set limits under current § 150.2, as well as other futures contracts not subject to federal position limits. Pursuant to the guidance of current § 150.5(d), DCMs may grant exemptions to exchange-set position limits for positions that meet the Commission's general definition of bona fide hedging position in current § 1.3(z)(1).[100] Current § 1.3(z)(2) provides a list of enumerated bona fide hedging positions. In addition, current § 1.3(z)(3) provides a procedure for market participants to seek recognition from the Commission for NEBFHs for contracts subject to federal position limits under current § 150.2. DCMs generally have granted NEBFH exemptions pursuant to exchange rules that incorporate the Commission's general definition of bona fide hedging positions in current § 1.3(z)(1).

In contrast to the longstanding DCM experience monitoring position limits on futures contracts and granting exemptions to those exchange-set limits on futures contracts, exchanges generally do not currently administer speculative position limits on swaps. Previously, facilities operating under CEA section 2(h)(3) as exempt commercial markets ("ECMs") were subject to CFTC regulation under authority granted by Congress in 2008 (although that authority was subsequently superseded by the Dodd-Frank Act).[101] Under that 2008 authority, the Commission issued guidance that an ECM should establish spot month position limits on any swap contract that the Commission

[100] 17 CFR 1.3(z)(1).

[101] The CFTC Reauthorization Act of 2008, H.R. 2419, sec. 13201 (May 22, 2008) (promulgating 7 U.S.C. 2(h)(7(C)(ii)(IV) (Core Principles Applicable to Significant Price Discovery Contracts—Position Limitations or Accountability). The Dodd-Frank Act amended CEA section 2(h), effective July 16, 2011, H.R. 4173, sec. 734(a) (July 21, 2010), replacing the provisions governing ECMs with clearing requirements in regards to swaps.

determined to be a significant price discovery contract ("SPDC").[102] However, since the Dodd-Frank Act, exchanges have "futurized" (or converted into futures contracts) those SPDCs.[103] Thus, the Commission understands that exchanges generally do not currently have speculative position limits applicable to swaps contracts.

CEA section 4a(c) provides generally that federal position limits do not apply to positions that are shown to be bona fide hedging positions.[104] CEA section 4a(c)(2), adopted by the Dodd-Frank Act, directs the Commission to narrow the scope of what constitutes a bona fide hedging position, for the purpose of implementing federal position limits on physical commodity derivatives, within specific parameters.[105] In response to that directive, the Commission proposed to add a definition of bona fide hedging position in § 150.1, to replace the definition in current § 1.3(z).[106]

The December 2013 position limits proposal would replace the process for

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[102] 17 CFR part 36. It should be noted that prior to the Dodd-Frank Act, ECMs could require clearing of swaps at a particular DCO and, thus, could gain access to information on open positions in a particular swap from a single affiliated DCO. The Dodd-Frank Act altered the playing field, providing market participants with a choice as to which DCO they wish to use. CEA section 5h(f)(11)(B) generally does not permit a SEF to impose any material anticompetitive burden on clearing. 7 U.S.C. 7b-3(f)(11)(B).

[103] In 2012, ICE (which listed the only contracts that had been determined by the Commission to be SPDCs) "futurized" the SPDC contracts listed on its ECM by listing them instead on its DCM (as it noted at that time, its plan was to "convert 251 Energy Contracts to futures contracts that would be listed for trading on the Exchange's electronic trading platform," along with a request that the Commission issue an order transferring the swap open interest carried at the DCO for the ICE ECM OTC contracts to futures and options open interest carried at the DCO for ICE, the DCM. ICE Submission No. 12-45, August 15, 2012).

[104] 7 U.S.C. 6a(c)(1).

[105] CEA section 4a(c)(2) generally requires the Commission to define a bona fide hedging position as a position that: (a) meets three tests (a position (1) is a substitute for activity in the physical marketing channel ("temporary substitute test"), (2) is economically appropriate to the reduction of risk, and (3) arises from the potential change in value of current or anticipated assets, liabilities or services); or (b) reduces the risk of a swap that was executed opposite a counterparty for which such swap would meet the three tests ("pass-through swap offset requirement"). 7 U.S.C. 6a(c)(2). In contrast, the definition of a bona fide hedge in current § 1.3(z): does not include the temporary substitute test, but instead includes guidance that a bona fide hedging position should normally represent a substitute for transactions in the physical marketing channel; and does not include the pass-through swap offset requirement. See December 2013 positions limits proposal at 75708-9.

[106] See December 2013 position limits proposal 78 FR at 75706, 75823.

Commission recognition of NEBFHs under current § 1.3(z)(3)[107] and § 1.47[108] of the

[107] 17 CFR 1.3(z)(3) (providing authority for the Commission to recognize bona fide hedge positions other than those enumerated in § 1.3(z)(2)).

[108] 17 CFR 1.47 (providing a process for persons to demonstrate NEBFH falls within the scope of § 1.3(z)(1)). As noted in the December 2103 position limits proposal, "Section 1.47 of the Commission's regulations was removed and reserved by the vacated part 151 Rulemaking. On September 28, 2012, the District Court for the District of Columbia vacated the part 151 Rulemaking with the exception of the amendments to § 150.2. 887 F. Supp. 2d 259 (D.D.C. 2012). Vacating the part 151 Rulemaking, with the exception of the amendments to § 150.2, means that as things stand now, it is as if the Commission had never adopted any part of the part 151 Rulemaking other than the amendments to § 150.2. That is, . . . § 1.47 is still in effect." December 2013 position limits proposal, 78 FR at 75740, note 478.

Current § 1.47 states "Requirements for classification of purchases or sales of contracts for future delivery as bona fide hedging under § 1.3(z)(3) of the regulations. (a) Any person who wishes to avail himself of the provisions of §1.3(z)(3) of the regulations and to make purchases or sales of any commodity for future delivery in any commodity in excess of trading and position limits then in effect pursuant to section 4a of the Act shall file a statement with the Commission in conformity with the requirements of this section. All or a specified portion of the transactions and positions described in these statements shall not be considered as bona fide hedging if such person is so notified by the Commission: (1) Within 30 days after the Commission is furnished the information required under paragraph (b) of this section, or (2) Within 10 days after the Commission is furnished with the information required under paragraph (c) of this section. The Commission may request the person notified to file specific additional information with the Commission to support a determination that all, or the specified portion, of the transactions and positions be considered as bona fide hedging transactions and positions. In such cases, the Commission shall consider all information so filed and, by notice to such person, shall specify the extent to which the Commission has determined that the transactions and positions may be classified as bona fide hedging. In no case shall transactions and positions described be considered as bona fide hedging if they exceed the levels specified in paragraph (d) of this section. (b) Initial statement. Initial statements concerning the classification of transactions and positions as bona fide hedging pursuant to §1.3(z)(3) shall be filed with the Commission at least 30 days in advance of the date that such transactions or positions would be in excess of limits then in effect pursuant to section 4a of the Act. Such statements shall: (1) Describe the transactions and positions for future delivery and the off- setting cash positions; (2) Set forth in detail information which will demonstrate that the purchases and sales are economically appropriate to the reduction of risk exposure attendant to the conduct and management of. a commercial enterprise; (3) Contain, and upon request of the Commission be supplemented by, such other information which is necessary to enable the Commission to make a determination whether the particular purchases and sales for future delivery fall within the scope of those described in section 1.3(z)(1) of the regulations; (4) Include a statement concerning the maximum size of positions for future delivery (both long and short) which will be acquired any time during the next fiscal year or marketing season of the person filing or on whose behalf the filing is made. (5) In addition: statements filed by an agent, concerning a futures position which would offset a cash position which the agent does not own or has not contracted to buy or sell, shall contain information describing all contractual arrangements between the agent filing and the person who owns the commodity or holds the cash market commitment being offset; (6) Statements concerning futures positions to be acquired against unsold anticipated production or unfilled anticipated requirements for manufacturing, processing or feeding shall also include the information required under § 1.48 of the regulations. (c) Supplemental reports. Whenever the purchases or sales which a person wishes to classify as bona fide hedging shall exceed the amount provided in the person's most recent filing pursuant to this section or the amount previously specified by the Commission pursuant to paragraph (a) of this section, such person shall file with the Commission a statement which updates the information provided in the person's most recent filing and provides the reasons for this change at least ten days in advance of the date that person wishes to exceed those amounts. (d) Maximum purchases and sales. Purchases and sales for future delivery considered bona- fide hedging pursuant to §1.3(z)(3) of the regulations shall at no time exceed the lesser of: (1) The value fluctuation

Commission's regulations with proposed § 150.3(e), which would provide guidance for persons seeking non-enumerated hedging exemptions through the filing of a petition under section 4a(a)(7) of the Act or by requesting an interpretation under § 140.99.[109] When discussing non-enumerated hedges in the December 2013 position limits proposal, the Commission noted that "[u]nder the proposal for physical commodities, additional enumerated hedges could only be added to the definition of bona fide hedging position by way of notice and comment rulemaking," and asked whether it should "adopt, as an alternative, an administrative procedure that would allow the Commission to add additional enumerated bona fide hedges without requiring notice and comment rulemaking."[110] The Commission recognized that "there are complexities to analyzing the various price risks applicable to particular commercial circumstances in order to determine whether a hedge exemption is warranted."[111]

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equivalent (in terms of the commodity for future delivery) of the current cash position described in the information most recently filed pursuant to this section, or (2) The maximum level of long or short open positions provided in the information most recently filed pursuant to this section or most recently specified by the Commission pursuant to paragraph (a) of this section. (e) Updated reports. Reports updating the information required pursuant to this section also shall be filed with the Commission upon specific request." 17 CFR 1.47 (2010).

Current § 1.3(z)(3) states "(z) . . . (3) Non-enumerated cases. Upon specific request made in accordance with §1.47 of the regulations, the Commission may recognize transactions and positions other than those enumerated in paragraph (z)(2) of this section as bona fide hedging in such amount and under such terms and conditions as it may specify in accordance with the provisions of §1.47. Such transactions and positions may include, but are not limited to, purchases or sales for future delivery on any contract market by an agent who does not own or who has not contracted to sell or purchase the off- setting cash commodity at a fixed price, provided That the person is responsible for the merchandising of the cash position which is being offset." 17 CFR 1.3(z) (2010).

Current §§ 1.47 and 1.3(z) can be found at

https://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR&searchPath=Title+17%2FChapter+I%2FPart+1%2FSubjgrp&oldPath=Title+17%2FChapter+I%2FPart+1&isCollapsed=true&selectedYearFrom=2010&ycord=594.

[109] 7 U.S.C. 6a(a)(7) and 17 CFR 140.99, respectively.

[110] December 2013 position limits proposal, 78 FR at 75718.

[111] Id. at 75703.

Historically, the Commission has recognized bona fide hedges where a demonstrated physical price risk has been shown.[112] In addition, when summarizing the disposition of the Working Group petition requests in the December 2013 position limits proposal, the Commission observed that "context is essential to determining the nature of any price risk that has been realized and could support the existence of a bona fide hedge," and "the only way to evaluate the nature of any price risk would be for the Commission to be provided with particulars of the transaction."[113]

2. Comments on the December 2013 Process for Recognition of a Position as a Bona Fide Hedge

Some commenters have suggested that the Commission permit exchanges to process applications for non-enumerated bona fide hedges ("NEBFHs").[114] For example,

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[112] Id.

[113] Id. at 75719-20. As noted above, under the December 2013 position limits proposal, the Commission could consider the facts and circumstances if the party either requested a staff interpretive letter under § 140.99 or exemptive relief under CEA section 4a(a)(7). See also note 76 and accompanying text.

[114] See, e.g., comment of Tom LaSala, CME Group, that "the exchanges would be open to a 1.47-like process" where the exchanges would review requests for recognition of non-enumerated bona fide hedge positions on behalf of the Commission, Transcript, Roundtable on Position Limits, June 19, 2014, p. 125, available at http://www.cftc.gov/PressRoom/Events/opaevent_cftcstaff061914; Futures Industry Association (FIA), on July 31, 2014 ("CL-FIA-59931"), at 8 (recommending exchange review of non-enumerated hedge applications in the first instance); ISDA and SIFMA on July 7, 2014 ("CL-ISDA/SIFMA-59917"), at 4 (suggesting that the Commission include in the final rulemaking a process for market participants to apply to registered exchanges for bona fide hedging exemptions); Natural Gas Supply Association ("NGSA") on Aug. 4, 2014 ("CL-NGSA-59941"), at 9 (requesting the Commission to consider using ICE and CME Group to continue to administer hedge exemptions); Working Group on March 30, 2015 ("CL-Working Group- 60396"), at 6 (recommending that DCMs be able to grant bona fide hedge exemptions in the energy industry either on an enumerated or non-enumerated basis); International Energy Credit Association ("IECreditAssn") on Aug. 4, 2014 ("CL-IECreditAssn-59957"), at 6 (stating that "the [IECreditAssn] is generally supportive of a pre-approval procedure for nonenumerated hedging exemptions, whereby a commercial end-user could first seek and obtain review and approval by a CFTC-regulated Exchange"); ICE on March 30, 2015 ("CL-ICE-60387"), at 8 (noting that "the exchanges should continue to exercise the authority to grant non-enumerated hedge exemption requests pursuant to their rules and procedures"); COPE on March 30, 2015 ("CL-COPE-60388"), at 6-8 (supporting Working Group's suggestion that DCMs administer enumerated and non-enumerated hedge exemptions). See also Plains All-American Pipeline, L.P. ("PAAP") on Aug. 4, 2014 ("CL-PAAP-59951"), at 3-4; BG Group Energy Merchants ("BG Energy") on March 30, 2015 ("CL-BG Energy-60383"), at 7-8; Sempra Energy ("Sempra") on March 30, 2015 ("CL-SEMP-60384"), at 5. Contra Occupy the SEC on Aug. 7, 2014 ("CL-

ICE Futures U.S. ("ICE Futures U.S.") commented that the Commission should not now undertake the daily administration of NEBFHs when its resources are limited,[115] and stated that it has extensive, direct experience overseeing position limits, position accountability levels, and the recognition of bona fide hedges.[116] "The rules and procedures developed and used by . . . [ICE Futures U.S.] to perform this important function were designed to incorporate the specific needs and differing practices of the commercial participants in each of its markets as those needs and practices have developed over time."[117] These commenters generally espoused the view that the Commission should continue in its broad oversight role in the granting of hedge exemptions and should not begin to become involved in the daily administration of hedge exemptions. One academic suggested that permitting the exchanges to process NEBFH applications would be acceptable so long as the Commission surveils the work of the

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OSEC-59972") at 4 (maintaining that permitting exchanges to "self-define" hedging exceptions "would likely create an environment conducive to producing a 'race to the bottom' among exchanges as they would have incentives to attract and retain participants seeking to take advantage of the loosest rules"); Institute for Agriculture and Trade Policy on March 30, 2015 ("CL-IATP-60394") at 3 (arguing that the Commission should not permit the exchanges "to manage position limits"). See also Transcript, Agricultural Advisory Committee Meeting, Sept. 22, 2015, pp. 124-51 available at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/aac_transcript092215.pdf (discussing exchange-administered processes for NEBFHs); Transcript, Energy and Environmental Markets Advisory Committee Meeting, Feb. 26, 2015, pp. 239-44, available at http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/emactranscript022615.pdf (offering a general discussion touching on alternative processes).

[115] ICE Futures U.S., on March 30, 2015 ("CL-ICEUS-60378"), at 3-4. See also CL-CME-60406, at 5 (stating that "CME Group is sympathetic to the fact that the Commission faces resource constraints that would prevent it from administering a workable non-enumerated hedge exemption in real time . . . .").

[116] CL-ICEUS-60378 at 1. See also CL-CME-60406 at 5 (noting that "[E]xchanges have years of experience reviewing requests for hedge exemptions and approving or denying those requests based on a facts-and-circumstances approach."); statement of R. Oppenheimer on behalf of the Working Group, Energy and Environmental Markets Advisory Committee meeting, July 29, 2015 (asserting that "The exchanges have the knowledge, the expertise, and the regulatory incentive to carefully scrutinize the exemption process, and they already engage in a parallel process for their own interest in self-regulating and ensuring convergence and orderly liquidation of futures contracts as they come to expiry.")

[117] CL-ICEUS-60378 at 1.

exchanges.[118]

3. Proposed NEBFH Recognition Process.

In light of DCM experience in granting NEBFH exemptions to exchange-set position limits for futures contracts, and after consideration of comments recommending exchange review of NEBFH requests, the Commission now proposes to permit exchanges to recognize NEBFHs with respect to the proposed federal speculative position limits. Under proposed § 150.9, an exchange, as an SRO[119] that is under Commission oversight and whose rules are subject to Commission review,[120] could establish rules under which the exchange could recognize as NEBFHs positions that meet the general definition of bona fide hedging position in proposed § 150.1, which implements the statutory directive in CEA section 4a(c) for the general definition of bona fide hedging positions in physical commodities.[121] The exchange's recognition would be subject to review by the Commission. Exchange recognition of a position as a NEBFH would allow the market participant to exceed the federal position limit to the extent that it relied upon the

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[118] John Parsons, Transcript, Roundtable on Position Limits, June 19, 2014, at 135-6.

[119] As noted above, under the Commission's regulations, SROs have certain delineated regulatory responsibilities, which are carried out under Commission oversight and which are subject to Commission review. See also, note 126 (describing reviews of DCMs carried out by the Commission).

[120] See CEA section 5c(c), 7 U.S.C. 7a-2(a) (providing Commission with authority to review rules and rule amendments of registered entities, including DCMs).

[121] As previously noted, Congress has required in CEA section 4a(c) that the Commission, within specific parameters, define what constitutes a bona fide hedging position for the purpose of implementing federal position limits on physical commodity derivatives, including, as previously stated, the inclusion in new section 4a(c)(2) of a directive to narrow the bona fide hedging definition for physical commodity positions from that currently in Commission regulation §1.3(z). See supra notes 32 and 105 and accompanying text; see also December 2013 positions limits proposal at 75705. In response to that mandate, the Commission proposed in its December 2013 position limits proposal to add a definition of bona fide hedging position in § 150.1, to replace the definition in current § 1.3(z) See 78 FR at 75706, 75823.

For the avoidance of doubt, the Commission is still reviewing comments received on these provisions. The Commission intends to finalize the general definition of bona fide hedging position based on the standards of CEA section 4a(c), and may further define the bona fide hedging position definition consistent with those standards.

exchange's recognition unless and until such time that the Commission notified the market participant to the contrary.[122] The Commission could issue such a notification in accordance with the proposed review procedures. That is, if a party were to hold positions pursuant to a NEBFH recognition granted by the exchange, such positions would not be subject to federal position limits, unless or until the Commission were to determine that such NEBFH recognition is inconsistent with the CEA or CFTC regulations thereunder. Under this framework, the Commission would continue to exercise its authority in this regard by reviewing an exchange's determination and verifying whether the facts and circumstances in respect of a derivative position satisfy the requirements of the general definition of bona fide hedging position proposed in § 150.1.[123] If the Commission determined that the exchange-granted recognition was inconsistent with section 4a(c) of the Act and the Commission's general definition of bona fide hedging position in § 150.1 and so notified a market participant relying on such recognition, the market participant would be required to reduce the derivative position or otherwise come into compliance with position limits within a commercially reasonable amount of time.

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[122] See generally the discussion of proposed § 150.9(d) and the requirements regarding the review of applications by the Commission, below. The Commission notes that exchange participation is voluntary, not mandatory and that exchanges could elect not to administer the process. Market participants could still request a staff interpretive letter under § 140.99 or seek exemptive relief under CEA section 4a(a)(7), per the December 2013 position limits proposal. The process does not protect exchanges or applicants from charges of violations of applicable sections of the CEA or other Commission regulations. For instance, a market participant's compliance with position limits or an exemption thereto would not confer any type of safe harbor or good faith defense to a claim that he had engaged in an attempted manipulation, a perfected manipulation or deceptive conduct; see the discussion of § 150.6 (Ongoing application of the Act and Commission regulations) as proposed in the December 2013 position limits proposal, 78 FR at 75746-7.

[123] See, e.g. the general discussion of the Commission's review process proposed in § 150.9(d); see also the requirement for a weekly report, proposed in § 151.9(c), which would support the Commission's surveillance program by facilitating the tracking of NEBFHs recognized by exchanges, keeping the Commission informed of the manner in which an exchange is administering its procedures for recognizing such NEBFHs.

The Commission believes that permitting exchanges to so recognize NEBFHs is consistent with its statutory obligation to set and enforce position limits on physical commodity contracts, because the Commission is retaining its authority to determine ultimately whether any NEBFH so recognized is in fact a bona fide hedging position. The Commission's authority to set position limits does not extend to any position that is shown to be a bona fide hedging position.[124] Further, most, if not all, DCMs already have a framework and application process to recognize non-enumerated positions, for purposes of exchange-set limits, as within the meaning of the general bona fide hedging definition in § 1.3(z)(1).[125] The Commission has a long history of overseeing the performance of the DCMs in granting appropriate exemptions under current exchange rules regarding exchange-set position limits[126] and believes that it would be efficient and

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[124] CEA section 4a(c)(1), 7 U.S.C. 6a(c)(1). See also supra note 65.

[125] Rulebooks for some DCMs can be found in the links to their associated documents on the Commission's website at http://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=TradingOrganizations.

[126] The Commission bases this view on its long experience overseeing DCMs and their compliance with the requirements of CEA section 5 and part 38 of the Commission's regulations, 17 CFR part 38. Under part 38, a DCM must comply, on an initial and ongoing basis, with twenty-three Core Principles established in section 5(d) of the CEA, 7 U.S.C. 7(d), and part 38 of the CFTC's regulations and with the implementing regulations under part 38. The Division of Market Oversight's Market Compliance Section conducts regular reviews of each DCM's ongoing compliance with core principles through the self-regulatory programs operated by the exchange in order to enforce its rules, prevent market manipulation and customer and market abuses, and ensure the recording and safe storage of trade information. These reviews are known as rule enforcement reviews ("RERs"). Some periodic RERs examine a DCM's market surveillance program for compliance with Core Principle 4, Monitoring of Trading, and Core Principle 5, Position Limitations or Accountability. On some occasions, these two types of RERs may be combined in a single RER. Market Compliance can also conduct horizontal RERs of the compliance of multiple exchanges in regard to particular core principles. In conducting an RER, the Division of Market Oversight (DMO) staff examines trading and compliance activities at the exchange in question over an extended time period selected by DMO, typically the twelve months immediately preceding the start of the review. Staff conducts extensive review of documents and systems used by the exchange in carrying out its self-regulatory responsibilities; interviews compliance officials and staff of the exchange; and prepares a detailed written report of findings. In nearly all cases, the RER report is made available to the public and posted on CFTC.gov. See materials regarding RERs of DCMs at http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/dcmruleenf on the Commission's website. Recent RERs conducted by DMO covering DCM Core Principle 5 and exemptions from position limits have included the Minneapolis Grain Exchange, Inc. ("MGEX") (June 5, 2015), ICE Futures U.S. (July 22, 2014), the Chicago Mercantile Exchange ("CME") and the Chicago Board of Trade ("CBOT")

in the best interest of the markets, in light of current resource constraints,[127] to rely on the exchanges to initially process applications for recognition of positions as NEBFHs. In addition, because many market participants are familiar with current DCM practices regarding bona fide hedges, permitting DCMs to build on current practice may reduce the burden on market participants. Moreover, the process outlined below should reduce duplicative efforts because market participants seeking recognition of an NEBFH would be able to file one application for relief, only to an exchange, rather than to both an exchange with respect to exchange-set limits and to the Commission with respect to federal limits.[128]

(July 26, 2013), and the New York Mercantile Exchange (May 19, 2008). While DMO may sometimes identify deficiencies or make recommendations for improvements, it is the Commission's view that it should be permissible for DCMs to process applications for exchange recognition of positions as NEBFHs. Consistent with the fifteen SEF core principles established in section 5h(f) of the CEA, 7 U.S.C. 7b-3(f), and with the implementing regulations under part 37, 17 CFR part 37, the Commission will perform similar RERs for SEFs. The Commission's preliminary view is that it should be permissible for SEFs to process applications as well, after obtaining the requisite experience administering exchange-set position limits discussed below.

[127] Since the enactment of the Dodd-Frank Act, Commissioners, CFTC staff, and public officials have expressed repeatedly and publicly that Commission resources have not kept pace with the CFTC's expanded jurisdiction and increased responsibilities. The Commission anticipates there may be hundreds of applications for NEBFHs. This is based on the number of exemptions currently processed by DCMs. For example, under the existing process, during the period from June 15, 2011 to June 15, 2012, the Market Surveillance Department of ICE Futures U.S. received 142 exemption applications, 121 of which related to bona fide hedging requests, while 21 related to arbitrage or cash-and-carry requests; 92 new exemptions were granted. Rule Enforcement review of ICE Futures U.S., July 22, 2014, p. 40. Also under the existing process, during the period from November 1, 2010 to October 31, 2011, the Market Surveillance Group from the CME Market Regulation Department took action on and approved 420 exemption applications for products traded on CME and CBOT, including 114 new exemptive applications, 295 applications for renewal, 10 applications for increased levels, and one temporary exemption on an inter-commodity spread. Rule Enforcement Review of the Chicago Mercantile Exchange and the Chicago Board of Trade, July 26, 2013, p. 54. These statistics are now a few years old, and it is possible that the number of applications under the processes outlined in this proposal will increase relative to the number of applications described in the RERs. The CFTC would need to shift substantial resources, to the detriment of other oversight activities, to process so many requests and applications and has determined, as described below, to permit exchanges to process applications initially. The Commission anticipates it will regularly, as practicable, check a sample of the exemptions granted, including in cases where the facts warrant special attention, retrospectively as described below, including through RERs.

[128] One commenter specifically requested that the Commission streamline duplicative processes. American Gas Association ("AGA") on March 30, 2015 ("CL-AGA-60382") at 12 (stating that "AGA . . . urges the Commission to ensure that hedge exemption requests and any hedge reporting do not require duplicative

i. Proposed § 150.9(a) – Requirements For Exchange Application Process

a. Submission of Exchange Rules Under Part 40

The Commission contemplates in proposed § 150.9(a)(1) that exchanges may voluntarily elect to process NEBFH applications by filing new rules or rule amendments with the Commission pursuant to part 40 of the Commission's regulations. The Commission anticipates that, consistent with current practice, most exchanges will self-certify such new rules or rule amendments pursuant to § 40.6. The self-certification process should be a low burden for exchanges, especially for those that already recognize non-enumerated positions meeting the general definition of bona fide hedging position in § 1.3(z)(1).[129] In the Commission's view, allowing DCMs to continue to follow current practice, and extend that practice to exchange recognition of NEBFHs for purposes of the federal position limits, will permit the Commission to more effectively allocate its limited

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filings at both the exchanges and the Commission, and therefore recommends revising the rules to streamline the process by providing that an applicant need only apply to and report to the exchanges, while the Commission could receive any necessary data and applications by coordinating data flow between the exchanges and the Commission."). See also CL-Working Group-60396 (explaining that "To avoid employing duplicative efforts, the Commission should simply rely on DCMs to administer bona fide hedge exemptions from federal speculative position limits as they carry out their core duties to ensure orderly markets.")

[129] DCMs currently process applications for exemptions from exchange-set position limits for certain NEBFHs and enumerated anticipatory bona fide hedges, as well as for exemptions from exchange-set position limits for certain spread positions, pursuant to CFMA-era regulatory guidance. See note 102, above, and accompanying text. This practice continues because, among other things, the Commission has not finalized the rules proposed in the December 2013 position limits proposal.

As noted above and as explained in the December 2013 position limits proposal, while current § 150.5 regarding exchange-set position limits pre-dates the CFMA "the CFMA core principles regime concerning position limitations or accountability for exchanges had the effect of undercutting the mandatory rules promulgated by the Commission in § 150.5. Since the CFMA amended the CEA in 2000, the Commission has retained § 150.5, but only as guidance on, and acceptable practice for, compliance with DCM core principle 5." December 2013 position limits proposal 78 FR at 75754.

The DCM application processes for bona fide hedge exemptions from exchange-set position limits generally reference or incorporate the general definition of bona fide hedging position contained in current § 1.3(z)(1), and the Commission believes the exchange processes for approving non-enumerated bona fide hedge applications are at least to some degree informed by the Commission process outlined in current § 1.47.

resources to oversight of the exchanges' actions.[130]

RFC 2. Are there any facts and circumstances specific to DCMs that, for purposes of exchange limits, currently recognize non-enumerated positions meeting the general definition of bona fide hedging position in § 1.3(z)(1), that the Commission should accommodate in any final regulations regarding the processing of NEBFH applications?

RFC 3. Are there any concerns regarding an exchange that elects to stop processing NEBFH applications? For example, what should be the status of a previously recognized NEBFH, if the exchange that recognized a NEBFH no longer provides for an annual review?

b. Requirements for an Exchange to Process Applications

Proposed § 150.9(a)(1) provides that exchange rules must incorporate the general definition of bona fide hedging position in § 150.1. It also provides that, with respect to a commodity derivative position for which an exchange elects to process NEBFH applications, (i) the position must be in a commodity derivative contract that is a referenced contract; (ii) the exchange must list such commodity derivative contract for trading; (iii) such commodity derivative contract must be actively traded on such exchange; (iv) such exchange must have established position limits for such commodity derivative contract; and (v) such exchange must have at least one year of experience administering exchange-set position limits for such commodity derivative contract. The

[130] If the Commission becomes concerned about an exchange's general processing of NEBFH applications, the Commission may review such processes pursuant to a periodic rule enforcement review or a request for information pursuant to Commission regulation § 37.5. Separately, under proposed § 150.9(d), the proposal provides that the Commission may review a DCM's determinations in the case of any specific NEBFH application.

requirement for one year of experience is intended as a proxy for a minimum level of expertise gained in monitoring futures or swaps trading in a particular physical commodity.

The Commission believes that the exchange NEBFH process should be limited only to those exchanges that have at least one year of experience overseeing exchange-set position limits in an actively traded referenced contract in a particular commodity because an individual exchange may not be familiar enough with the specific needs and differing practices of the commercial participants in those markets for which the exchange does not list any actively traded referenced contract in a particular commodity. Thus, if a referenced contract is not actively traded on an exchange that elects to process NEBFH applications for positions in such referenced contract, that exchange might not be incentivized to protect or manage the relevant commodity market, and its interests might not be aligned with the policy objectives of the Commission as expressed in CEA section 4a. The Commission expects that an individual exchange will describe how it will determine whether a particular listed referenced contract is actively traded in its rule submission, based on its familiarity with the specific needs and differing practices of the commercial participants in the relevant market.[131]

The Commission is also mindful that some market participants, such as commercial end users in some circumstances, may not be required to trade on an

[131] For example, a DCM ("DCM A") may list a commodity derivative contract ("KX," where "K" refers to contract and "X" refers to the commodity) that is a referenced contract, actively traded, and DCM A has the requisite experience and expertise in administering position limits in that one contract KX. DCM A can therefore recognize NEBFHs in contract KX. But DCM A is not limited to recognition of just that one contract KX—DCM A can also recognize any other contract that falls within the meaning of referenced contract for commodity X. So a market participant could, for example, apply to DCM A for recognition of a position in any contract that falls within the meaning of referenced contract for commodity X. However, that market participant would still need to seek separate recognition from each exchange where it seeks an exemption from that other exchange's limit for a commodity derivative contract in the same commodity X.

exchange, but may nevertheless desire to have a particular derivative position recognized as a NEBFH. The Commission believes that commercial end users should be able to avail themselves of an exchange's NEBFH application process in lieu of requesting a staff interpretive letter under § 140.99 or seeking CEA section 4a(a)(7) exemptive relief. This is because the Commission believes that exchanges that list particular referenced contracts will have enough information about the markets in which such contracts trade and will be sufficiently familiar with the specific needs and differing practices of the commercial participants in such markets in order to knowledgeably recognize NEBFHs for derivatives positions in commodity derivative contracts included within a particular referenced contract. The Commission also views this to be consistent with the efficient allocation of Commission resources.

RFC 4. Are there circumstances in which the Commission should permit an exchange to process an NEBFH application for a position in a commodity derivative contract where that contract is a referenced contract that is not actively traded on such exchange or for which the exchange has less than one year of experience administering position limits?

RFC 5. Should the Commission define "actively traded" in terms of a minimum monthly volume of trading, such as an average monthly trading volume of 1,000 futures-equivalent contracts over a twelve month period?

RFC 6. Are there any concerns if a market participant applies for recognition of a NEBFH on one exchange, intending to execute the trades comprising the recognized position away from that exchange (e.g., over the counter)?

RFC 7. Are there concerns regarding the applicability of NEBFH positions in the spot month? Should the Commission, parallel to the requirements of current regulation 1.3(z)(2) (i.e., the "five-day rule"), provide that such positions not be recognized as NEBFH positions during the lesser of the last five days of trading or the time period for the spot month?[132]

RFC 8. If the Commission permits NEBFH positions to be held into the spot month, should recognition of NEBFH positions be conditioned upon additional filings to the exchange—similar to the proposed Form 504 filings required for the proposed conditional spot month limit exemption?[133] As proposed, Form 504 would require additional information on the market participant's cash market holdings for each day of the spot month period. Under this alternative, market participants would submit daily cash position information to the exchanges in a format determined by the exchange, which would then be required to forward that information to the Commission in a process similar to that proposed under § 150.9(c)(2).

RFC 9. Alternatively, if the Commission permits NEBFH positions to be held into the spot month, should the Commission require market participants to file the Form 504 with the Commission? Under this alternative, the relevant cash market information would be submitted directly to the Commission, eliminating the need for the exchange to

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[132] 17 CFR § 1.3(z)(2). See also, e.g., the "bona fide hedging position" definition proposed in the December 2013 position limits proposal, 78 FR at 75823-24.

[133] The conditional spot month limit exemption and the related Form 504 were discussed in the December 2013 position limits proposal (78 FR 75680 at 75736-8). A copy of the proposed form was submitted to the Federal Register (id. at 75803-8) to ensure the public has the opportunity to comment on the information required by the proposed form. The Commission estimated the number of market participants that would be required to file the form in the December 2013 position limits proposal (id. at 75783). Commenters are encouraged to review and comment on the proposed Form 504 under the context of this current proposal.

intermediate, although the Commission could share such a filing with the exchanges. The Commission would adjust the title of the Form 504 to clarify that the form would be used for all daily spot month cash position reporting purposes, not just the proposed requirements of the conditional spot month limit exemption in proposed § 150.3(c).

Consistent with the restrictions regarding the offset of risks arising from a swap position in CEA section 4a(c)(2)(B), proposed § 150.9(a)(1) would not permit an exchange to recognize an NEBFH involving a commodity index contract and one or more referenced contracts. That is, an exchange may not recognize an NEBFH where a bona fide hedge position could not be recognized for a pass through swap offset of a commodity index contract.[134]

c. Exchanges May Establish a Dual-Track Application Process

Proposed § 150.9(a)(2) permits an exchange to establish a less expansive application process for NEBFHs previously recognized and published on such exchange's website than for NEBFHs based on novel facts and circumstances. This is because the Commission believes that some lesser degree of scrutiny may be adequate for applications involving recurring fact patterns, so long as the applicants are similarly situated. However, the Commission understands that DCMs currently use a single-track application process to recognize non-enumerated positions, for purposes of exchange

[134] This is consistent with the Commission's interpretation in the December 2013 position limits proposal that CEA section 4a(c)(2)(b) is a direction from Congress to narrow the scope of what constitutes a bona fide hedge in the context of index trading activities. "Financial products are not substitutes for positions taken or to be taken in a physical marketing channel. Thus, the offset of financial risks from financial products is inconsistent with the proposed definition of bona fide hedging for physical commodities." December 2013 position limits proposal, 78 FR at 75740. See also the discussion of the temporary substitute test in the December 2013 position limits proposal, 78 FR at 75708-9.

limits, as within the meaning of the general bona fide hedging definition in § 1.3(z)(1).[135] The Commission does not know whether any exchange will elect to establish a separate application process for NEBFHs based on novel versus non-novel facts and circumstances, or what the salient differences between the two processes might be, or whether a dual-track application process might be more likely to produce inaccurate results, e.g., inappropriate recognition of positions that are not bona fide hedges within the parameters set forth by Congress in CEA section 4a(c).[136] In proposing to permit separate application processes for novel and non-novel NEBFHs, the Commission seeks to provide flexibility for exchanges, but will insist on fair and open access for market participants to seek recognition of compliant positions as NEBFHs.

RFC 10. Would separate application processes for novel and non-novel NEBFHs be more likely to produce inaccurate results, e.g., inappropriate recognition of positions that are not bona fide hedges within the parameters set forth by Congress in section 4a(c) of the Act?

d. Market Participant's Facts and Circumstances

The Commission believes that there is a core set of information and materials necessary to enable an exchange to determine, and the Commission to verify, whether the facts and circumstances attendant to a position satisfy the requirements of CEA section 4a(c). Accordingly, the Commission proposes to require in § 150.9(a)(3)(i), (iii) and (iv) that all applicants submit certain factual statements and representations. Proposed §

[135] 17 CFR § 1.3(z)(1).

[136] 7 U.S.C. § 6a(c). The Commission notes that it could, under the proposal, review determinations made by a particular exchange, for example, that recognizes an unusually large number of bona fide hedges, relative to those of other exchanges.

150.9(a)(3)(i) requires a description of the position in the commodity derivative contract for which the application is submitted and the offsetting cash positions.[137] Proposed § 150.9(a)(3)(iii) requires a statement concerning the maximum size of all gross positions in derivative contracts to be acquired during the year after the application is submitted.[138] Proposed § 150.9(a)(3)(iv) requires detailed information regarding the applicant's activity in the cash markets for the commodity underlying the position for which the application is submitted during the past three years.[139] These proposed application requirements are similar to existing requirements for recognition under current § 1.48 of a NEBFH.

The Commission also proposes to require in § 150.9(a)(3)(ii) and (v) that all applicants submit detailed information to demonstrate why the position satisfies the requirements of CEA section 4a(c)[140] and any other information necessary to enable the exchange to determine, and the Commission to verify, whether it is appropriate to

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[137] See § 1.47(b)(1), 17 CFR 1.47(b)(1), requiring a description of the futures positions and the offsetting cash positions.

[138] See § 1.47(b)(4), 17 CFR 1.47(b)(4), requiring the maximum size of gross futures positions which will be acquired during the following year.

[139] See §§ 1.47(b)(6), 1.48(b)(1)(i) and (2)(i), 17 CFR 1.47(b)(6), 1.48(b)(1)(i) and 2(i), requiring three years of history of production or usage.

[140] Although many commenters have requested that the Commission retain the pre-Dodd Frank Act standard contained in current § 1.3(z), 17 CFR 1.3(z), there is explicit and implicit support in the comments on the December 2013 position limits proposal for pegging what applicants must demonstrate to the current statutory provision as amended by the Dodd-Frank Act. One commenter requested that the Commission "publicly clarify that hedge positions are bona fide when they satisfy the hedge definition codified by Congress in section 4a(c)(2) of the Act, as added by the Dodd-Frank Act." CME Group, on Feb. 10, 2014 ("CL-CME-59718"), at 46. Another commenter supported a "process for Commission approval of a 'non-enumerated' hedge that . . . complies with the statutory definition of the term 'bona fide hedge.'" NGSA on Feb. 10, 2014 ("CL-NGSA- 59673"), at 2.

CEA section 4a(c)(2) contains standards for positions that constitute bona fide hedges. The Commission expects that exchanges will consider the Commission's relevant regulations and interpretations, when determining whether a position satisfies the requirements of CEA section 4a(c)(2). However, exchanges may confront novel facts and circumstances with respect to a particular applicant's position, dissimilar to facts and circumstances previously considered by the Commission. In these cases, an exchange may request assistance from the Commission; see the discussion of proposed § 150.9(a)(8), below.

recognize such a position as an NEBFH.[141] The Commission anticipates that such detailed information may include both a factual and legal analysis indicating why recognition is justified for such applicant's position. The Commission expects that if the materials submitted in response to proposed § 150.9(a)(3)(ii) are relatively comprehensive, requests for additional information pursuant to proposed § 150.9(a)(3)(v) will be relatively infrequent. Nevertheless, the Commission believes that it is important to include the requirement in proposed § 150.9(a)(3)(v) that applicants submit any other information necessary to enable the exchange to determine, and the Commission to verify, that it is appropriate to recognize a position as a non-enumerated bona fide hedge so that DCMs can protect and manage their markets.

Under the proposal, the Commission would permit an exchange to recognize a smaller than requested position for purposes of exchange-set limits. For instance, an exchange might recognize a smaller than requested position that otherwise satisfies the requirements of CEA section 4a(c) if the exchange determines that recognizing a larger position would be disruptive to the exchange's markets. This is consistent with current exchange practice. This is also consistent with DCM and SEF core principles. DCM core principle 5(A) provides that, "[t]o reduce the potential threat of market manipulation or congestion (especially during trading during the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position

[141] See § 1.47(b)(2), 17 CFR 1.47(b)(2), requiring detailed information to demonstrate that the futures positions are economically appropriate to the reduction of risk in the conduct and management of a commercial enterprise. See also § 1.47(b)(3), 17 CFR 1.47(b)(3), requiring, upon request, such other information necessary to enable the Commission to determine whether a particular futures position meets the requirements of the general definition of bona fide hedging. Under current application processes, market participants provide similar information to DCMs, make various representations required by DCMs and agree to certain terms imposed by DCMs with respect to exemptions granted. The Commission has recognized that DCMs already consider any information they deem relevant to requests for exemptions from position limits. See, e.g., Rule Enforcement Review of ICE Futures U.S., July 22, 2014, p. 41.

limitations or position accountability for speculators."[142] SEF core principle 6(A) contains a similar provision.[143]

By requiring in proposed § 150.9(a)(3) that all applicants submit a core set of information and materials, the Commission anticipates that all exchanges will develop similar NEBFH application processes. However, the Commission intends that exchanges have sufficient discretion to accommodate the needs of their market participants. The Commission also intends to promote fair and open access for market participants to obtain recognition of compliant derivative positions as NEBFHs.

RFC 11. Is the proposed core set of information required of market participants adequate for an exchange to review applications for NEBFHs?

e. Application Process Timeline

Proposed § 150.9(a)(4) sets forth certain timing requirements that an exchange must include in its rules for the NEBFH application process. A person intending to rely on an exchange's recognition of a position as a NEBFH would be required to submit an application in advance and to reapply at least on an annual basis. This is consistent with commenters' views and DCMs' current annual exemption review process.[144] Proposed § 150.9(a)(4) would require an exchange to notify an applicant in a timely manner whether

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[142] CEA § 5(d)(5)(A), 7 U.S.C. 7(d)(5)(A); § 38.300, 17 CFR 38.300. The Commission proposed, consistent with previous Commission determinations, a preliminary finding that speculative position limits are necessary in the December 2013 position limits proposal. December 2013 position limits proposal, 78 FR at 75685.

[143] CEA § 5h(f)(6)(A), 7 U.S.C. 7b-3(f)(6)(A); § 38.300, 17 C.F.R. 38.300.

[144] See, e.g., statement of Ron Oppenheimer on behalf of the Working Group (supporting an annual NEBFH application), statement of Erik Haas, Director, Market Regulation, ICE Futures U.S., (describing the DCM's annual exemption review process), and statement of Tom LaSala, Chief Regulatory Officer, CME Group, (envisioning market participants applying for NEBFHs on a yearly basis), transcript of the EEMAC open meeting, July 29, 2015, at 40, 53, and 58, available at http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/emactranscript072915.pdf.

the position was recognized as a NEBFH or rejected, including the reasons for any rejection.[145] On the other hand, and consistent with the status quo, proposed § 150.9(a)(4) would allow the exchange to revoke, at any time, any recognition previously issued pursuant to proposed § 150.9 if the exchange determines the recognition is no longer in accord with section 4a(c) of the Act.[146]

The Commission does not propose to prescribe time-limited periods (e.g., a specific number of days) for submission or review of NEBFH applications. The Commission proposes only to require that an applicant must have received recognition for a NEBFH position before such applicant exceeds any limit then in effect, and that the exchange administer the process, and the various steps in the process, in a timely manner. This means that an exchange must, in a timely manner, notify an applicant if a submission is incomplete, determine whether a position is an NEBFH, and notify an applicant whether a position will be recognized, or the application rejected. The Commission anticipates that rules of an exchange may nevertheless set deadlines for various parts of the application process. The Commission does not believe that reasonable deadlines or minimum review periods are inconsistent with the general principle of timely administration of the application process. An exchange could also establish different deadlines for a dual-track application process. The Commission believes that the individual exchanges themselves are in the best position to evaluate how

[145] See, e.g., statement of Ron Oppenheimer on behalf of the Working Group (noting that exchanges retain the ability to revoke an exemption if market circumstances warrant), transcript of the EEMAC open meeting, July 29, 2015, at 57, available at http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/emactranscript072915.pdf.

[146] As noted above, the current proposal does not impair the ability of any market participant to request an interpretation under § 140.99 for recognition of a position as a bona fide hedge if an exchange rejects their recognition application or revokes recognition previously issued. See supra note 78 and accompanying text.

quickly each can administer the application process, in order best to accommodate the needs of market participants. In addition to review of an exchange's timeline when it submits its rules for its application process under part 40, the Commission would review the exchange's timeliness in the context of a rule enforcement review.

RFC 12. The Commission invites comment regarding the discretion proposed for exchanges to process NEBFH applications in a timely manner.

f. NEBFH Deemed Recognized upon Exchange Recognition

Proposed § 150.9(a)(5) makes it clear that the position will be deemed to be recognized as a NEBFH when an exchange recognizes it; proposed § 150.9(d) provides the process through which the exchange's recognition would be subject to review by the Commission.[147] As noted above, DCMs currently exercise discretion with regard to exchange-set limits to approve exemptions meeting the general definition of bona fide hedge. The Commission works cooperatively with DCMs to enforce compliance with exchange-set speculative position limits. The Commission believes a continuation of this cooperative process, and an extension to the proposed federal position limits, would be consistent with the policy objectives in CEA section 4a(3)(B).[148]

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[147] See supra notes 121-123 and accompanying text; see also the discussion of proposed § 150.9(d), review of applications by the Commission, below. Exchange recognition of a position as a NEBFH would allow the market participant to exceed the federal position limit until such time that the Commission notified the market participant to the contrary, pursuant to the proposed review procedure that the exchange action was dismissed. That is, if a party were to hold positions pursuant to a NEBFH recognition granted by the exchange, such positions would not be subject to federal position limits, unless or until the Commission were to determine that such NEBFH recognition is inconsistent with the CEA or CFTC regulations thereunder. Under this framework, the Commission would continue to exercise its authority in this regard by reviewing an exchange's determination and verifying whether the facts and circumstances in respect of a derivative position satisfy the requirements of the Commission's general definition of bona fide hedging position in § 150.1. If the Commission determines that the exchange-granted recognition is inconsistent with section 4a(c) of the Act and the Commission's general definition of bona fide hedging position in § 150.1, a market participant would be required to reduce the derivative position or otherwise come into compliance with position limits within a commercially reasonable amount of time.

[148] 7 U.S.C. § 6a(3)(B).

g. Market Participant Reporting Requirements

Proposed § 150.9(a)(6) requires exchanges that elect to process NEBFH applications to promulgate reporting rules for applicants who own, hold or control positions recognized as NEBFHs. The Commission expects that the exchanges will promulgate enhanced reporting rules in order to obtain sufficient information to conduct an adequate surveillance program to detect and potentially deter excessively large positions that may disrupt the price discovery process. At a minimum, these rules should require applicants to report when an NEBFH position has been established, and to update and maintain the accuracy of such reports. These rules should also elicit information from applicants that will assist exchanges in complying with proposed § 150.9(c) regarding exchange reports to the Commission.

RFC 13. Should the Commission provide further guidance regarding the types of information that exchanges should seek to elicit from reporting rules with respect to NEBFH positions?

h. Transparency to Market Participants

Proposed § 150.9(a)(7) requires an exchange to publish on its website, no less frequently than quarterly, a description of each new type of derivative position that it recognizes as a NEBFH. The Commission envisions that each description would be an executive summary. The description must include a summary describing the type of derivative position and an explanation of why it qualifies as a NEBFH. The Commission believes that the exchanges are in the best position when quickly crafting these descriptions to accommodate an applicant's desire for trading anonymity while promoting fair and open access for market participants to information regarding which

positions might be recognized as NEBFHs. As discussed below, the Commission proposes to spot check these summaries pursuant to proposed § 150.9(e).

RFC 14. Should the Commission prescribe that exchanges publish any specific information regarding recognized NEBFHs based on novel facts and circumstances?

RFC 15. Should the Commission require exchanges to publish summary statistics, such as the number of recognized NEBFHs based on non-novel facts and circumstances?

i. Requests for Commission Consideration

An exchange may elect to request the Commission review an NEBFH application that raises novel or complex issues under proposed § 150.9(a)(8), using the process set forth in proposed § 150.9(d), discussed below.[149] If an exchange makes a request pursuant to proposed § 150.9(a)(8), the Commission, as would be the case for an exchange, would not be bound by a time limitation. This is because the Commission proposes only that NEBFH applications be processed in a timely manner.[150] Essentially, this proposed provision largely preserves the Commission's review process under current § 1.47,[151] except that a market participant first seeks recognition of a NEBFH from an exchange.

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[149] If the exchange determines to request under proposed § 150.9(a)(8) that the Commission consider the application, the exchange must, under proposed § 150.9(a)(4)(v)(C), notify an applicant in a timely manner that the exchange has requested that the Commission review the application. This provision provides the exchanges with the ability to request Commission review early in the review process, rather than requiring the exchanges to process the request, make a determination and only then begin the process of Commission review provided for under proposed § 150.9(d). The Commission notes that although most of its reviews would occur after the exchange makes its determination, the Commission could, as provided for in proposed § 150.9(d)(1), initiate its review, in its discretion, at any time.

[150] Novel facts and circumstances may present particularly complex issues that could benefit from extended consideration, given the Commission's current resource constraints.

[151] 17 CFR § 1.47.

RFC 16. Does the proposed flexibility for exchanges to request Commission review provide market participants with a sufficient process for review of a potential NEBFH?

ii. Proposed § 150.9(b) - Recordkeeping Requirements

Proposed § 150.9(b) outlines recordkeeping requirements for exchanges that elect to process non-enumerated bona fide hedge applications under proposed § 150.9(a). Exchanges must maintain complete books and records of all activities relating to the processing and disposition of applications in a manner consistent with the Commission's existing general regulations regarding recordkeeping,[152] with certain minor conforming changes. In consideration of the fact that DCMs currently recognize NEBFHs for periods of up to a year and that the proposal would require annual updates, the Commission proposes that exchanges keep books and records until the termination, maturity, or expiration date of any recognition of a NEBFH and for a period of five years after such date. Five years should provide an adequate time period for Commission reviews, whether that be a review of an exchange's rule enforcement or a review of a market participant's representations.

Exchanges would be required to store and produce records pursuant to current § 1.31 of the Commission's regulations, and would be subject to requests for information pursuant to other applicable Commission regulations including, for example, § 38.5.

[152] Requirements regarding the keeping and inspection of all books and records required to be kept by the Act or the Commission's regulations are found at § 1.31, 17 CFR § 1.31. DCMs and SEFs are already required to maintain records of their business activities in accordance with the requirements of § 1.31 and 17 CFR § 38.951.

Consistent with current § 1.31,[153] the Commission expects that these records would be readily accessible until the termination, maturity, or expiration date of the recognition and during the first two years of the subsequent five year period.[154] The Commission does not intend in proposed § 150.9(b)(1) to create any new obligation for an exchange to record conversations with applicants, which includes their representatives; however, the Commission does expect that an exchange would preserve any written or electronic notes of verbal interactions with such parties.

Finally, the Commission emphasizes that parties who avail themselves of exemptions under proposed § 150.3(a), as revised herein, are subject to the recordkeeping requirements of § 150.3(g), as well as requests from the Commission for additional information under § 150.3(h), each as proposed in the December 2013 position limits proposal. The Commission may request additional information, for example, in connection with review of an application.[155]

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[153] Proposed § 150.9(b) is analogous to the requirement in § 1.31 for records to be kept regarding any swap or related cash forward transaction until the termination, maturity, expiration, transfer, assignment, or novation date of such transaction and for a period of five years after such date. 17 CFR § 1.31(a)(1). Other Commission requirements for swap record retention take a similar approach: DCMs must retain required records with respect to each swap throughout the life of the swap and for a period of at least five years following the final termination of the swap, 17 CFR § 45.2(c), and the records that exchanges are required to retain shall be readily accessible throughout the life of the swap and for two years following the final termination of the swap, 17 CFR § 45.2(e)(1).

[154] In addition, the Commission expects that records required to be maintained by an exchange pursuant to this section would be readily accessible during the pendency of any application, and for two years following any disposition that did not recognize a derivative position as a bona fide hedge.

[155] In the December 2013 position limits proposal, persons claiming exemptions under proposed § 150.3 must still "maintain complete books and records concerning all details of their related cash, forward, futures, options and swap positions and transactions. Furthermore, such persons must make such books and records available to the Commission upon request under proposed § 150.3(h), which would preserve the 'special call' rule set forth in current 17 CFR 150.3(b)." 78 FR 75741 (footnote omitted).

iii. Proposed § 150.9(c) - Exchange Reporting

The Commission proposes, in § 150.9(c)(1), to require an exchange that elects to process NEBFH applications to submit a weekly report to the Commission. The proposed report would provide information regarding each commodity derivative position recognized by the exchange as an NEBFH during the course of the week. Information provided in the report would include the identity of the applicant seeking such recognition, the maximum size of the derivative position that is recognized by the exchange as an NEBFH,[156] and, to the extent that the exchange determines to limit the size of such bona fide hedge position under the exchange's own speculative position limits program, the size of any limit established by the exchange.[157] The Commission envisions that the proposed report would specify the maximum size and/or size limitations by contract month and/or type of limit (e.g. spot month, single month, or all-months-combined), as applicable.[158] The proposed report would also provide information regarding any revocation of, or modification to the terms and conditions of, a prior determination by the exchange to recognize a commodity derivative position as an NEBFH. In addition, the report would include any summary of a type of recognized

[156] An exchange could determine to recognize all, or a portion, of the commodity derivative position in respect of which an application for recognition has been submitted, as an NEBFH, provided that such determination is made in accordance with the requirements of proposed § 150.9 and is consistent with the Act and the Commission's regulations.

[157] As proposed in the December 2013 position limits proposal, § 150.5(a)(2)(iii) provides, inter alia, that for any commodity derivative contract that is subject to a speculative position limit under § 150.2, an exchange may limit bona fide hedging positions which the exchange determines are not in accord with sound commercial practices, or which exceed an amount that may be established and liquidated in an orderly fashion. Such proposal largely mirrors the second half of current § 150.5(d), although updated to specify DCMs instead of "contract markets" as well as to include SEFs.

[158] An exchange could determine to recognize all, or a portion, of the commodity derivative position in respect of which an application for recognition has been submitted, as an NEBFH, for different contract months or different types of limits (e.g., a separate limit level for the spot month).

NEBFH that was, during the course of the week, published or revised on the exchange's website pursuant to proposed § 150.9(a)(7).

The proposed weekly report would support the Commission's surveillance program by facilitating the tracking of NEBFHs recognized by exchanges,[159] keeping the Commission informed of the manner in which an exchange is administering its procedures for recognizing such NEBFHs. For example, the report would make available to the Commission, on a regular basis, the summaries of types of recognized NEBFHs that an exchange posts to its website pursuant to proposed § 150.9(a)(7). This would facilitate any review by the Commission of such summaries, pursuant to proposed § 150.9(e), and would help to ensure, if the Commission determines that revisions to a summary are necessary, that such revisions are carried out in a timely manner by the exchange.

In certain instances, information included in the proposed weekly report may prompt the Commission to request records required to be maintained by an exchange pursuant to proposed § 150.9(b). For example, it is proposed that, for each derivative position recognized by the exchange as an NEBFH, or any revocation or modification of such recognition, the report would include a concise summary of the applicant's activity in the cash markets for the commodity underlying the position. It is the Commission's expectation that this summary would focus on the facts and circumstances upon which an

[159] The Commission believes that the exchange's assignment of a unique identifier to each of the non-enumerated bona fide hedge applications that the exchange receives, and, separately, the exchange's assignment of a unique identifier to each type of commodity derivative position that the exchange recognizes as an NEBFH, would assist the Commission's tracking process. Accordingly, the Commission suggests that, as a "best practice," the exchange's procedures for processing NEBFH applications contemplate the assignment of such unique identifiers. Pursuant to proposed § 150.9(c)(1)(i), an exchange that assigns such unique identifiers would be required to include the identifiers in the exchange's weekly report to the Commission.

exchange based its determination to recognize a commodity derivative position as an NEBFH, or to revoke or modify such recognition. In light of the information provided in the summary, or any other information included in the proposed weekly report regarding the position, the Commission may decide that it is appropriate to request the exchange's complete record of the application for recognition of the position as an NEBFH – in order to determine, for example, whether the application presents novel or complex issues that merit additional analysis pursuant to proposed § 150.9(d)(2), or to evaluate whether the disposition of the application by the exchange was consistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.

Proposed § 150.9(c)(2) would require an exchange to submit to the Commission any report made to the exchange by an applicant, pursuant to proposed § 150.9(a)(6), notifying the exchange that the applicant owns or controls a commodity derivative position that the exchange has recognized as an NEBFH.[160] Unless the Commission instructs otherwise,[161] the exchange would be required to submit such applicant reports to the Commission no less frequently than monthly.[162] The exchange's submission of these

[160] Proposed § 150.9(a)(6) would require an exchange to have in place rules requiring an applicant to report to the exchange when the applicant owns, holds or controls a commodity derivative position that the exchange has recognized as an NEBFH, and for the applicant to report its offsetting cash positions. Pursuant to proposed § 150.9(a)(6), such rules must require an applicant to update and maintain the accuracy of any such report to the exchange. Accordingly, a exchange's submission to the Commission pursuant to proposed § 150.9(c)(2) would be expected to include any updates, corrections or other modifications made by an applicant to a report previously submitted to the exchange.

[161] The Commission proposes, in § 150.9(f)(1)(ii), to delegate to the Director of the Commission's Division of Market Oversight, or such other employee or employees as the Director may designate from time to time, the authority to provide instructions regarding the submission to the Commission of information required to be reported by an exchange pursuant to proposed § 150.9(c).

[162] Proposed § 150.9(c)(2) addresses the submission by the exchange of applicant reports to the Commission. The timeframe within which an applicant would be required to report to the exchange that the applicant owns or controls a commodity derivative position that the exchange has recognized as an NEBFH, would be established by the exchange in its rules, as appropriate and in accordance with proposed

reports would provide the Commission with notice that an applicant has taken a commodity derivative position that the exchange has recognized as an NEBFH, and would also show the applicant's offsetting positions in the cash markets. Requiring an exchange to submit these applicant reports to the Commission would therefore support the Commission's surveillance program, by facilitating the tracking of NEBFHs recognized by the exchange, and helping the Commission to ensure that an applicant's activities conform to the terms of recognition that the exchange has established.

Proposed § 150.9(c)(3)(i) and (ii) would require an exchange, unless instructed otherwise by the Commission,[163] to submit weekly reports under proposed § 150.9(c)(1), and applicant reports under proposed § 150.9(c)(2). Proposed § 150.9(c)(3)(i) and (ii) contemplate that, in order to facilitate the processing of such reports, and the analysis of the information contained therein, the Commission will establish reporting and transmission standards, and may require reports to be submitted to the Commission using an electronic data format, coding structure and electronic data transmission procedures approved in writing by the Commission, as specified on the Forms and Submissions page at www.cftc.gov.[164] Proposed § 150.9(c)(3)(iii) would require such reports to be submitted to the Commission no later than 9:00 a.m. Eastern time on the third business

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§ 150.9(a)(6). An exchange could decide to require such a report from an applicant more frequently than monthly.

[163] The Commission proposes to delegate to the Director of the Commission's Division of Market Oversight, or such other employee or employees as the Director may designate from time to time, the authority to provide instructions for such submissions in proposed § 150.9(f)(1)(ii).

[164] The Commission proposes, in § 150.9(f)(1)(ii), to delegate to the Director of the Commission's Division of Market Oversight, or such other employee or employees as the Director may designate from time to time, the authority to specify on the Forms and Submissions page at www.cftc.gov the manner for submitting to the Commission information required to be reported by an exchange pursuant to proposed § 150.9(c), and to determine the format, coding structure and electronic data transmission procedures for submitting such information.

day following the report date, unless the exchange is otherwise instructed by the Commission.[165]

RFC 17. The Commission requests comment on all aspects of the proposed reporting requirements.

iv. Proposed § 150.9(d) - Review of Applications by the Commission

One participant at the June 19, 2014 Roundtable on Position Limits commented that if the Commission were to permit exchanges to administer a process for NEBFHs, the Commission should continue to do "a certain amount of de novo analysis and review."[166] The Commission agrees. Proposed § 150.9(d) provides for Commission review of applications to ensure that the processes administered by the exchange, as well as the results of such processes, are consistent with the requirements of CEA section 4a(c) of the Act and the Commission's regulations thereunder.[167] The Commission proposes to review records required to be maintained by an exchange pursuant to proposed § 150.9(b); however, the Commission may request additional information under

[165] Proposed § 150.9(c)(2) would require reports submitted to an exchange pursuant to proposed § 150.9(a)(6), from applicants owning or controlling commodity derivative positions that the exchange has recognized as NEBFHs, to be submitted to the Commission no less frequently than monthly. For purposes of proposed § 150.9(c)(2), the timeframe set forth in proposed § 150.9(c)(3)(iii) would be calculated from the date of a exchange's submission to the Commission, and not from the date of an applicant's report to the exchange.

[166] John Parsons, Roundtable on Position Limits, June 19, 2014, transcript at p. 135.

[167] See supra note 66 and accompanying text. As noted above, under the proposal, the SRO's recognition is tentative, because the Commission would reserve the power to review the recognition, subject to the reasonably fixed statutory standards in CEA section 4a(c)(2) (directing the CFTC to define the term bona fide hedging position) that are incorporated into the Commission's proposed general definition of bona fide hedging position in § 150.1. The SRO's recognition would also be constrained by the SRO's rules, which would be subject to CFTC review under the proposal. The SROs are parties subject to Commission authority, their rules are subject to Commission review and their actions are subject to Commission de novo review under the proposal—SRO rules and actions may be changed by the Commission at any time. In addition, it should be noted that the exchange is required to make its determination consistent with both CEA section 4a(c) and the Commission's general definition of bona fide hedging position in § 150.1. Further, the Commission notes that CEA section 4a(c)(1) requires a position to be shown to be bona fide as defined by the Commission.

proposed § 150.9(d)(1)(ii) if, for example, the Commission finds additional information is needed for its own review.

The Commission could decide to review a pending application prior to disposition by an exchange, but anticipates that it will most likely review applications after some action has already been taken by an exchange. The Commission's proposal in § 150.9(d)(2) and (3) requires the Commission to notify the exchange and the applicable applicant that they have 10 business days to provide any supplemental information. This approach provides the exchanges and the particular market participant with an opportunity to respond to any issues raised by the Commission.

During the period of any Commission review of an application, an applicant could continue to rely upon any recognition previously granted by the exchange. If the Commission determines that remediation is necessary, the Commission would provide for a commercially reasonable amount of time for the market participant to comply with limits after announcement of the Commission's decision under proposed § 150.9(d)(4). In determining a commercially reasonable amount of time, the Commission may consider factors such as current market conditions and the protection of price discovery in the market.[168] .

RFC 18. The Commission requests comments on all aspects of the proposed review process.

[168] In the December 2013 position limits proposal, when discussing the provision of a commercially reasonable time period as necessary to exit the market in an orderly manner, the Commission stated that, generally, it "believes such time period would be less than one business day." 78 FR 75680 at 75713.

v. Proposed § 150.9(e) - Commission review of summaries

While the Commission proposes to rely on the expertise of the exchanges to summarize and post executive summaries of NEBFHs to their respective websites under proposed § 150.9(a)(7), it also proposes, in § 150.9(e), to review such executive summaries to ensure they provide adequate disclosure to market participants of the potential availability of relief from speculative position limits. The Commission believes that an adequate disclosure would include generic facts and circumstances sufficient to alert similarly situated market participants to the possibility of receiving recognition of a NEBFH. Such market participants may use this information to help evaluate whether to apply for recognition of a NEBFH. Thus, adequate disclosure should help ensure fair and open access to the application process. Due to resource constraints, the Commission may not be able to pre-clear each summary, so the Commission proposes to spot check executive summaries after the fact.

E. Process for Exemption from Position Limits for Certain Spread Positions.

1. Background

The Commission proposes to permit exchanges, by rule, to exempt from federal position limits certain spread transactions, as authorized by CEA section 4a(a)(1),[169] and in light of the provisions of CEA section 4a(a)(3)(B) and CEA section 4a(c)(2)(B).[170] In

[169] 7 U.S.C. 6a(a)(1) (authorizing the Commission to exempt transactions normally known to the trade as "spreads"). DCMs currently process applications for exemptions from exchange-set position limits for certain spread positions pursuant to CFMA-era regulatory parameters. See note 101 for further background.

It should be noted that, in current § 150.3(a)(3), the Commission exempts spread positions "between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spread month, in the same crop year," subject to certain limitations. 17 CFR 150.3(a)(3).

[170] 7 U.S.C. 6a(a)(3)(B) and 7 U.S.C. 6a(c)(2)(B), respectively.

particular, CEA section 4a(a)(1) provides the Commission with authority to exempt from position limits transactions normally known to the trade as "spreads" or "straddles" or "arbitrage" or to fix limits for such transactions or positions different from limits fixed for other transactions or positions. The Dodd-Frank Act amended the CEA by adding section 4a(a)(3)(B), which now directs the Commission, in establishing position limits, to ensure, to the maximum extent practicable and in its discretion, "sufficient market liquidity for bona fide hedgers."[171] In addition, the Dodd-Frank Act amendments to the CEA in section 4a(c)(2)(B) limited the definition of a bona fide hedge to only those positions (in addition to those included under CEA section 4a(c)(2)(A))[172] resulting from a swap that was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction, in the event the party to the swap is not itself using the swap as a bona fide hedging transaction. In this regard, the Commission interprets this statutory definition to preclude spread exemptions for a swap position that was executed opposite a counterparty for which the transaction would not qualify as a bona fide hedging transaction.

Prior to the passage of the Dodd-Frank Act, the Commission exercised its exemptive authority pertaining to spread transactions in promulgating current § 150.3. Current § 150.3 provides that the position limits set in § 150.2 may be exceeded to the

[171] CEA section 4a(a)(3)(B) also directs the Commission, in establishing position limits, to diminish, eliminate, or prevent excessive speculation; to deter and prevent market manipulation, squeezes, and corners; and to ensure that the price discovery function of the underlying market is not disrupted.

[172] 7 U.S.C. 6a(c)(2)(A). As explained above in note 66, CEA section 4a(c)(2) generally requires the Commission to define a bona fide hedging position as a position that in CEA section 4a(c)(2)(A): meets three tests (a position (1) is a substitute for activity in the physical marketing channel, (2) is economically appropriate to the reduction of risk, and (3) arises from the potential change in value of current or anticipated assets, liabilities or services); or, in CEA section 4a(c)(2)(B), reduces the risk of a swap that was executed opposite a counterparty for which such swap would meet the three tests.

extent such positions are spread or arbitrage positions between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spot month, in the same crop year; provided, however, that such spread or arbitrage positions, when combined with any other net positions in the single month, do not exceed the all-months limit set forth in § 150.2. In addition, the Commission has permitted DCMs, in setting their own position limits under the terms of current §150.5(a), to exempt spread, straddle or arbitrage positions or to fix limits that apply to such positions which are different from limits fixed for other positions.[173]

The December 2013 position limits proposal deleted the exemption in current § 150.3(a)(3) for spread or arbitrage positions between single months of a futures contract or options thereon, outside the spot month; the Commission instead proposed to maintain the current practice in § 150.2 of setting single-month limits at the same levels as all-months limits, rendering the "spread" exemption unnecessary.[174] In particular, the spread exemption set forth in current § 150.3(a)(3) permits a spread trader to exceed single month limits only to the extent of the all months limit. Since § 150.2 as proposed in the December 2013 position limits proposal sets single month limits at the same level as all months limits, the existing spread exemption no longer provides useful relief.

Further, the December 2013 position limits proposal would codify guidance in proposed §150.5(a)(2)(ii) to allow an exchange to grant exemptions from exchange-set position limits for intramarket and intermarket spread positions (as those terms are defined in § 150.1 as proposed in the December 2013 position limits proposal) involving

[173] Current § 150.5 applies as non-exclusive guidance and acceptable practices for compliance with DCM core principle 5. See December 2013 position limits proposal, 78 FR at 75750-2.

[174] December 2013 position limits proposal, 78 FR at 75736.

commodity derivative contracts subject to the federal limits. To be eligible for exemption under § 150.5(a)(2)(ii) as proposed in the December 2013 position limits proposal, intermarket and intramarket spread positions would have to be outside of the spot month for physical delivery contracts, and intramarket spread positions could not exceed the federal all-months limit when combined with any other net positions in the single month. As proposed in the December 2013 position limits proposal, § 150.5(a)(2)(iii) would require traders to apply to the exchange for any exemption, including spread exemptions, from its speculative position limit rules.

Several commenters have requested that the Commission provide a spread exemption to federal position limits.[175] Of these commenters, most urged the Commission to recognize spread exemptions in the spot month as well as non-spot months.[176] Several of these commenters noted that the Commission's proposal would permit exchanges to grant spread exemptions for exchange-set limits in commodity derivative contracts subject to Federal limits, and recommended that the Commission establish a process for granting such spread exemptions for purposes of Federal limits.[177]

In response to these comments, the Commission now proposes to permit exchanges to process and grant applications for spread exemptions from federal position limits. Most, if not all, DCMs already have rules in place to process and grant applications for spread exemptions from exchange-set position limits pursuant to Part 38

[175] See, e.g., CL-CMC-59634 at 15; Olam International Ltd. on February 10, 2014 ("CL-Olam-59658") at 7; CME Group on February 10, 2014 ("CL-CME –59718") at 69-71; Citadel LLC on February 10, 2014 ("CL-Citadel-59717") at 8, 9; Armajaro Asset Management ("Amajaro") on February 10, 2014 ("CL-Armajaro-59729") at 2; ICE Futures U.S. on February 10, 2014 ("CL-ICEUS-59645") at 8-10.

[176] See CL-CMC-59634 at 15; CL-Olam-59658 at 7; CL-CME-59718 at 71; CL-Armajaro-59729 at 2; CL-ICEUS-59645 at 8-10.

[177] See CL-Olam-59658 at 7; CL-CME-59718 at 71; CL-ICEUS-59645 at 10.

of the Commission's regulations (in particular, current § 38.300 and§ 38.301) and current § 150.5. As noted above, the Commission has a long history of overseeing the performance of the DCMs in granting appropriate spread exemptions under current exchange rules regarding exchange-set position limits and believes that it would be efficient, and in the best interest of the markets, in light of current resource constraints, to rely on the exchanges to process applications for spread exemptions from federal position limits. In addition, the Commission observes because many market participants may be familiar with current DCM practices regarding spread exemptions, permitting DCMs to build on current practice may lower the burden on market participants and reduce duplicative filings at the exchanges and the Commission. As noted, this plan would permit exchanges to provide market participants with spread exemptions, pursuant to exchange rules submitted to the Commission; however, the Commission would retain the authority to review--and, if necessary, reverse--the exchanges' actions.

RFC 19. Would permitting exchanges to process applications for spread exemptions from federal limits, subject to Commission review, provide for an efficient implementation of the Commission's statutory authority to exempt such spread positions?

2. Spread Exemption Proposal

i. Proposed § 150.10(a) - Requirements for Application Process

The Commission contemplates in proposed § 150.10(a)(1) that exchanges may voluntarily elect to process spread exemption applications, by filing new rules or rule amendments with the Commission pursuant to part 40 of the Commission's

regulations.[178] The proposed process under § 150.10(a) is substantially similar to that described above for proposed § 150.9(a). For example, proposed § 150.10(a)(1) provides that, with respect to a commodity derivative position for which an exchange elects to process spread exemption applications, (i) the exchange must list for trading at least one component of the spread or must list for trading at least one contract that is a referenced contract included in at least one component of the spread; and (ii) any such exchange contract must be actively traded and subject to position limits for at least one year on that exchange. As noted with respect to the process outlined above for proposed § 150.9(a), the Commission believes it is appropriate that an exchange may process spread exemptions only if it has at least one year of experience overseeing exchange-set position limits in an actively traded referenced contract that is in the same commodity as that of at least one component of the spread. The Commission believes that an exchange may not be familiar enough with the specific needs and differing practices of the participants in those markets for which an individual exchange does not list any actively traded referenced contract in a particular commodity. If a component of a spread is not actively traded on an exchange that elects to process spread exemption applications, such exchange might not be incentivized to protect or manage the relevant commodity market, and the interests of such exchange might not be aligned with the policy objectives of the Commission as expressed in CEA section 4a(a)(3)(B). The Commission expects that an individual exchange will describe how it will determine whether a particular component

[178] See note 64, regarding Commission authority to recognize spreads under CEA section 4a(a)(1). Any action of the exchange to recognize a spread, pursuant to rules filed with the Commission, would be subject to review and revocation by the Commission.

of a spread is actively traded in its rule submission, based on its familiarity with the specific needs and differing practices of the participants in the relevant market.

Consistent with the restrictions regarding the offset of risks arising from a swap position in CEA section 4a(c)(2)(B), proposed § 150.10(a)(1) would not permit an exchange to recognize a spread between a commodity index contract and one or more referenced contracts. That is, an exchange may not grant a spread exemption where a bona fide hedge position could not be recognized for a pass through swap offset of a commodity index contract.[179]

The Commission notes that for inter-commodity spreads in which different components of the spread are traded on different exchanges, the exemption granted by one exchange would be recognized by the Commission as an exemption from federal limits for the applicable referenced contract(s), but would not bind the exchange(s) that list the other components of the spread to recognize the exemption for purposes of that other exchange(s)' position limits. In such cases, a trader seeking such inter-commodity spread exemptions would need to apply separately for a spread exemption from each exchange-set position limit.

Proposed § 150.10(a)(2) specifies the type of spreads that an exchange may exempt from position limits, including calendar spreads; quality differential spreads; processing spreads (such as energy "crack" or soybean "crush" spreads); and product or

[179] This proposal is consistent with the Commission's interpretation in the December 2013 position limits proposal that CEA section 4a(c)(2)(b) is a mandate from Congress to narrow the scope of what constitutes a bona fide hedge in the context of index trading activities. "Financial products are not substitutes for positions taken or to be taken in a physical marketing channel. Thus, the offset of financial risks from financial products is inconsistent with the proposed definition of bona fide hedging for physical commodities." December 2013 position limits proposal, 78 FR at 75740. See also the discussion of the temporary substitute test, id. at 75708-9.

by-product differential spreads. This list is not exhaustive, but reflects common types of spread activity that may enhance liquidity in commodity derivative markets, thereby facilitating the ability of bona-fide hedgers to put on and offset positions in those markets. For example, trading activity in many commodity derivative markets is concentrated in the nearby contract month, but a hedger may need to offset risk in deferred months where derivative trading activity may be less active. A calendar spread trader could provide such liquidity without exposing himself or herself to the price risk inherent in an outright position in a deferred month. Processing spreads can serve a similar function. For example, a soybean processor may seek to hedge his or her processing costs by entering into a "crush" spread, i.e., going long soybeans and short soybean meal and oil. A speculator could facilitate the hedger's ability to do such a transaction by entering into a "reverse crush" spread (i.e., going short soybeans and long soybean meal and oil). Quality differential spreads, and product or by-product differential spreads, may serve similar liquidity-enhancing functions when spreading a position in an actively traded commodity derivatives market such as CBOT Wheat against a position in another actively traded market, such as MGEX Wheat.

The Commission anticipates that a spread exemption request might include spreads that are "legged in," that is, carried out in two steps, or alternatively are "combination trades," that is, all components of the spread are executed simultaneously.

This proposal would not limit the granting of spread exemptions to positions outside the spot month, unlike the existing spread exemption provisions in current § 150.3(a)(3), or in § 150.5(a)(2)(ii) as proposed in the December 2013 position limits proposal. The proposal herein responds to specific requests of commenters to permit

spread exemptions in the spot month. For example, the CME recommended "the Commission reaffirm in DCMs the discretion to apply their knowledge of individual commodity markets and their judgement, as to whether allowing intermarket spread exemptions in the spot month for physical-delivery contracts is appropriate."[180]

The Commission proposes to revise the December 2013 position limits proposal in the manner described above because, as noted in the examples above, permitting spread exemptions in the spot month would further one of the four policy objectives set forth in section 4a(a)(3)(b) of the Act: to ensure sufficient market liquidity for bona fide hedgers.[181] This policy objective is incorporated into the proposal in its requirements that: (i) the applicant provide detailed information demonstrating why the spread position should be exempted from position limits, including how the exemption would further the purposes of CEA section 4a(a)(3)(B);[182] and (ii) the exchange determines whether the spread position (for which a market participant was seeking an exemption) would further the purposes of CEA section 4a(a)(3)(B).[183] Moreover, the Commission retains the ability to review the exchange rules as well as to review how an exchange enforces those rules.[184]

The Commission, however, remains concerned, among other things, about protecting the price discovery process in the core referenced futures contracts, particularly as those contracts approach expiration. Accordingly, as an alternative, the

[180] See CL-CME-59718 at 71.

[181] CEA section 4a(a)(3)(B)(iii); 7 USC 6a(a)(3)(B)(iii). See also the discussion of proposed § 150.10(a)(3)(ii), below.

[182] See proposed § 150.10(a)(3)(ii).

[183] See proposed § 150.10(a)(4)(vi).

[184] The Commission could, for example, revoke or confirm exchange-granted exemptions.

Commission is also considering whether to prohibit an exchange from granting spread exemptions that would be applicable during the lesser of the last five days of trading or the time period for the spot month.

RFC 20: Are there concerns regarding the applicability of spread exemptions in the spot month that the Commission should consider? Should the Commission, parallel to the requirements of current § 1.3(z)(2), provide that such spread positions not be exempted during the lesser of the last five days of trading or the time period for the spot month?[185]

RFC 21: If the Commission permits exchanges to grant spread positions applicable in the spot month, should recognition of NEBFH positions be conditioned upon additional filings similar to the proposed Form 504 that is required for the proposed conditional spot month limit exemption?[186] Proposed Form 504 would require additional information on the market participant's cash market holdings for each day of the spot month period. Under this alternative, market participants would submit daily cash position information to an exchange in a format determined by the exchange, which would then be required to forward that information to the Commission in a process similar to that proposed under § 150.10(c)(2).

RFC 22: Alternatively, if the Commission permits exchanges to grant spread exemptions applicable in the spot month, should the Commission require market

[185] See also supra notes 56 and 132 and accompanying text.

[186] The conditional spot month limit exemption and the related Form 504 were discussed in the December 2013 position limits proposal (78 FR 75680 at 75736-8). A copy of the proposed form was submitted to the Federal Register (id. at 75803-8) to ensure the public had the opportunity to comment on the information required by the proposed form. The Commission estimated the number of market participants that would be required to file the form in the December 2013 position limits proposal (id. at 75783). Commenters are encouraged to review and comment on proposed Form 504 in the context of this current proposal.

participants to file proposed Form 504 with the Commission? Under this alternative, the relevant cash market information would be submitted directly to the Commission, eliminating the need for the exchange to intermediate. The Commission would adjust the title of proposed Form 504 to clarify that the form would be used for all daily spot month cash position reporting purposes, not just the proposed requirements of the conditional spot month limit exemption in proposed § 150.3(c).

Proposed 150.10(a)(3) sets forth a core set of information and materials that all applicants must submit to enable an exchange to determine, and the Commission to verify, whether the facts and circumstances attendant to a position further the policy objectives of CEA section 4a(a)(3)(B). In particular, the applicant must demonstrate, and the exchange must determine, that exempting the spread position from position limits would, to the maximum extent practicable, ensure sufficient market liquidity for bona fide hedgers, but not unduly reduce the effectiveness of position limits to diminish, eliminate or prevent excessive speculation; deter and prevent market manipulation, squeezes, and corners; and ensure that the price discovery function of the underlying market is not disrupted.[187]

One DCM, ICE Futures U.S., currently grants certain types of spread exemptions that the Commission is concerned may not be consistent with these policy objectives.[188] ICE Futures U.S. allows "cash-and-carry" spread exemptions to exchange-set limits, which permit a market participant to hold a long position greater than the speculative limit in the spot month and an equivalent short position in the following month in order to

[187] See also infra note 145 and accompanying text (describing the DCM's responsibility under its application process to make this determination in a timely manner).

[188] See ICE Futures U.S. Rule 6.29(e).

guarantee a return that, at minimum, covers its carrying charges, i.e., the cost of financing, insuring, and storing the physical inventory until the next expiration.[189] Market participants are able to take physical delivery in the nearby month and redeliver the same product in a deferred month, often at a profit. The Commission notes that while market participants are permitted to re-deliver the physical commodity, they are under no obligation to do so.

ICE Futures U.S.'s rules condition the cash-and-carry spread exemption upon the applicant's agreement that "before the price of the nearby contract month rises to a premium to the second (2nd) contract month, it will liquidate all long positions in the nearby contract month."[190] The Commission understands that ICE Futures U.S. requires traders to provide information about their expected cost of carry, which is used by the exchange to determine the levels by which the trader has to reduce the position. Those exit points are then communicated to the applicant when the exchange responds to the trader's hedge exemption request.

The Commission is considering whether to impose on the exchange a requirement to ensure exit points in cash-and-carry spread exemptions are appropriate to facilitate an orderly liquidation in the expiring futures contract. The Commission is concerned that a

[189] Carrying charges include insurance, storage fees, and financing costs, as well as other costs such as aging discounts that are specific to individual commodities. The ICE Futures U.S. rules require an applicant to provide: (i) its cost of carry; (ii) the minimum spread at which the applicant will enter into a straddle position and which would result in an profit for the applicant; and (iii) the quantity of stocks in exchange-licensed warehouses that it already owns. The applicant's entire long position carried into the notice period must have been put on as a spread at a differential that covers the applicant's cost of carry. See Rule Enforcement Review of ICE Futures U.S., July 22, 2014 ("ICE Futures U.S. Rule Enforcement Review"), at 44-45, available at http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/dcmruleenf.

[190] ICE Futures U.S. Rule 6.29(e) (at the time of the target period of the ICE Futures U.S. Rule Enforcement Review (June 15, 2011 to June 15, 2012), the cash-and-carry provision currently found in ICE Futures U.S. Rule 6.29(e) was found in ICE Futures U.S. Rule 6.27(e)). Further, under the exchange's rules, additional conditions may also apply.

large demand for delivery on cash and carry positions may distort the price of the expiring futures price upwards. This may particularly be a concern in those commodity markets where the cash spot price is discovered in the expiring futures contract.

In a recent Rule Enforcement Review, ICE Futures U.S. opined that such exemptions are "beneficial for the market, particularly when there are plentiful warehouse stocks, which typically is the only time when the opportunity exists to utilize the exemption," maintaining that the exchange's rules and procedures are effective in ensuring orderly liquidations.[191] The Commission remains concerned, however, about these exemptions and their impact on the spot month price. The Commission is still reviewing the effectiveness of the exchange's cash-and-carry spread exemptions and the procedure by which they are granted.

As an alternative to providing exchanges with discretion to consider granting cash-and-carry spread exemptions, the Commission is considering prohibiting cash-and-carry spread exemptions to position limits. In this regard, the Commission does not grant such exemptions to current federal position limits. As another alternative, the Commission is considering permitting exchanges to grant cash-and-carry spread exemptions, but would require suitable safeguards be placed on such exemptions. For example, the Commission could require cash-and-carry spread exemptions be conditioned on a market participant reducing positions below speculative limit levels in a timely manner once current market prices no longer permit entry into a full carry transaction, rather than the less stringent condition of ICE Futures U.S. that a trader

[191] ICE Futures U.S. Rule Enforcement Review, at 45

reduce positions "before the price of the nearby contract month rises to a premium to the second (2nd) contract month."

RFC 23: Do cash-and-carry spread exemptions further the policy objectives of the Act, as outlined in proposed § 150.10(a)(3)? Why or why not? Do cash and carry spread exemptions facilitate an orderly liquidation? Do these exemptions impede convergence or distort the price of the expiring futures contract?

RFC 24: If cash-and-carry spread exemptions are allowed, what conditions should be placed on the exemptions? For example, on what basis should a trader be required to exit futures positions above position limit levels? Should such exemptions be conditioned, for example, to require a market participant to reduce the positions below speculative limit levels in a timely manner once current market prices no longer permit entry into a full carry transaction? Are there other types of spread exemptions that may not further the policy objectives of CEA section 4a and, thus, should be prohibited or conditioned?

RFC 25: With cash-and-carry spread exemptions still under review by the Commission, should the proposed rules allow such exemptions to be granted under proposed § 150.10? Why or why not?

RFC 26: If the proposed rules do not prohibit such exemptions, an exchange could determine that cash-and-carry spread exemptions—or another type of spread exemption—further the policy objectives in proposed § 150.10(a)(3) and so begin to grant such exemptions from federal position limits. If, after finishing its review, the Commission disagrees with the exchange's determination, is the proposed process in § 150.10(d) for reviewing exemptions sufficient to address any concerns raised?

Under the proposal, an exchange's rules would require an applicant to submit to the exchange a core set of information and materials that would include, at a minimum: (i) a description of the spread position for which the application is submitted, including details on all components of the spread; (ii) detailed information to demonstrate why the spread position should be exempted from position limits, including how the exemption would further the purposes of CEA section 4a(a)(3)(B); and (iii) a statement concerning the maximum size of all gross positions in derivative contracts to be acquired by the applicant during the year after the application is submitted. Further, an exchange would not be permitted to grant a spread exemption request that would be contrary to the requirements for a pass-through swap offset position in CEA section 4a(c)(2)(B), which the Commission interprets to preclude spread exemptions for a swap position that was executed opposite a counterparty for which the transaction would not qualify as a bona fide hedging transaction. The requirement that an applicant specify a maximum size of all gross positions to be acquired will enable an exchange to more effectively set a cap on a market participant's spread position. Such a cap could reasonably take into account the specific liquidity needs of the marketplace and the ability of the spread position to be put on and offset in an orderly fashion and without causing market disruptions. The Commission expects that an exchange would be particularly attentive to the size of any component of a spread position it permits to be held in the spot month in light of its obligation to consider, in granting such spread exemptions, the goals of deterring and preventing market manipulation, squeezes, and corners.

RFC 27. Does the application process solicit sufficient information for an exchange to consider whether a spread exemption would, to the maximum extent

practicable, further the policy objectives of CEA section 4a(a)(3)(B)? For example, how would an exchange determine whether an applicant for a spread exemption may provide liquidity, such that the goal of ensuring sufficient market liquidity for bona-fide hedgers would be furthered by the spread exemption?

RFC 28. How would exchanges oversee or monitor exemptions that have been granted, and, if the exchange determines it necessary, revoke the exemption?

Proposed § 150.10(a)(4) sets forth certain timing requirements that an exchange must include in its rules for the spread application process. While these timing requirements are similar to those under proposed § 150.9(a)(4),[192] the exchange under proposed § 150.10(a)(4) must also determine in a timely manner whether the facts and circumstances attendant to a position further the policy objectives of CEA section 4a(a)(3)(B).[193] Finally, the spread exemption application processes proposed in § 150.10(a)(5), (6), (7), and (8) are all substantially similar to those proposed under § 150.9(a)(5), (6), (7), and (8),

ii. Recordkeeping and Reporting Requirements, and Review of Applications and Summaries by Commission.

The proposed processes under § 150.10(b) Recordkeeping, §150.10(c) Reports to the Commission; §150.10(d) Review of Applications by the Commission; § 150.10(e) Review of Summaries by the Commission; and § 150.10(f) Delegation of Authority to the

[192] For example, proposed 150.9(a)(4) provides that: (i) a person intending to rely on a exchange's exemption from position limits of their spread position would be required to submit an application in advance and to reapply at least on an annual basis; (ii) the exchange would be required to notify an applicant in a timely manner whether the spread position was exempted, and reasons for any rejection; and (iii) the exchange would be able to revoke, at any time, any recognition previously issued pursuant to proposed § 150.9 if the exchange determined the recognition was no longer in accord with section 4a(c) of the Act.

[193] See supra note 172 and accompanying text.

Director of the Division of Market Oversight are substantially similar to the corresponding provisions in § 150.9(b) through (f), as described above.[194] Hence, the Commission does not repeat the discussion here.

RFC 29. Is it appropriate to have the same processes under § 150.10(b) through (f) for spread exemptions as proposed for NEBFHs outlined under § 150.09 (b) through (f)? If no, explain why and how those processes should differ.

F. Recognition of Positions as Enumerated Anticipatory Bona Fide Hedges

1. Background

In the December 2013 position limits proposal, the Commission proposed §150.7, requirements for anticipatory bona fide hedging position exemptions,[195] to replace current § 1.48,[196] which provides requirements for classification of certain anticipatory bona fide hedge positions under current § 1.3(z)(2) (i)(B) or (ii)(C) of the Commission's regulations. As proposed in the December 2013 position limits proposal, § 150.7 would

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[194] See the discussion of the NEBFH application process in Sections II(C)(3)(ii)-(v) of the Supplementary Information above.

[195] As proposed in the December 2013 position limits proposal, § 150.7 provides a process for recognition as bona fide hedge positions for: unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, or anticipatory cross-commodity hedges under the provisions of paragraphs (3)(iii), (4)(i), (4)(iii), 4(iv) or (5), respectively, of the definition of bona fide hedging position in §150.1. These types of anticipatory positions do not implicate commodity index contracts, in contrast to the positions discussed in notes 134 and 180 and the accompanying text.

[196] 17 CFR 1.48 (providing a process for persons to demonstrate NEBFH falls within the scope of § 1.3(z)(1)). As noted in the December 2013 position limits proposal, "On September 28, 2012, the District Court for the District of Columbia vacated the part 151 Rulemaking with the exception of the amendments to § 150.2. 887 F. Supp. 2d 259 (D.D.C. 2012). Vacating the part 151 Rulemaking, with the exception of the amendments to § 150.2, means that as things stand now, it is as if the Commission had never adopted any part of the part 151 Rulemaking other than the amendments to § 150.2." December 2013 position limits proposal, 78 FR at 75740, note 478.

Current § 1.48 can be found at

https://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR&searchPath=Title+17%2FChapter+I%2FPart+1%2FSubjgrp&oldPath=Title+17%2FChapter+I%2FPart+1&isCollapsed=true&selectedYearFrom=2010&ycord=594. ""

require market participants to file statements with the Commission regarding certain anticipatory hedges, which would become effective absent Commission action or inquiry ten days after submission.[197] The Commission now proposes to supplement the process proposed in the December 2013 position limits proposal by allowing exchanges, as an alternative, to review requests for recognition of such enumerated anticipatory bona fide hedging exemptions pursuant to exchange rules submitted to the Commission.

In response to the December 2013 position limits proposal, the Commission has received comments that suggested that the exchanges would be better equipped to recognize non-enumerated hedge positions and anticipatory hedging positions.

For example, one commenter noted that the exchanges have a long history of enforcing position limits and are in a much better position than the Commission to judge the applicant's hedging needs and to set an appropriate level for the hedge.[198] According to another commenter, providing the exchanges with the ability to grant hedge exemptions for federal limits in conjunction with the grant of an exchange hedge exemption would create consistency and efficiency, and take advantage of the expertise gained by exchanges in granting hedge exemptions from position limits over many years.[199] A third asserted that the proposed requirement to file Form 704 is "unduly burdensome and commercially impracticable," and requests that the Commission "allow the exchanges to continue to grant annual hedge exemptions, which do not include onerous reporting requirements."[200] A fourth commenter requested that the Commission

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[197] See December 2013 position limits proposal, 78 FR at 75746.

[198] CL-AGA-60382 at 13.

[199] PAAP on February 10, 2014 ("CL-PAAP-59664") at 3.

[200] BG Energy on February 10, 2014 ("CL-BG Energy-59656") at 11.

consider incorporating the proposed position limits regime into the existing framework managed by the exchanges, stating that market participants and exchanges alike are comfortable and have a unique familiarity with the current futures-exchange-set position limits and aggregation processes, and have developed an effective working relationship.[201] This commenter also stated its belief that the current framework regarding hedge exemptions provides commercial market participants with the efficacy and the timeliness needed to ensure they are able to hedge their risks.[202]

2. Enumerated Anticipatory Bona Fide Hedge Exemption Proposal

While the Commission continues to consider comments regarding proposed § 150.7, it is expected that a number of anticipatory bona fide hedging positions will be enumerated in the final rule, as proposed.[203] In this current proposal, the Commission proposes that exchanges, pursuant to exchange rules submitted to the Commission, could review requests for recognition of such enumerated anticipatory bona fide hedging exemptions, as an alternative to the process set forth in the December 2013 position limits proposal that required market participants to file a statement with the Commission.[204] Similar to the current DCM rule framework and application process noted above for the recognition of NEBFH positions for purposes of exchange limits, most, if not all, DCMs already have some sort of framework and application process

[201] EDF Trading on March 30, 2015 ("CL-EDF-60398") at 3-4.

[202] CL-EDF-60398 at 5.

[203] As noted above, the December 2013 position limits proposal provided a process, under § 150.7, for recognition as bona fide hedging positions for unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, or anticipatory cross-commodity hedges under the provisions of paragraphs (3)(iii), (4)(i), (4)(iii), 4(iv) or (5), respectively, of the definition of bona fide hedging position in §150.1. See supra note 196 and accompanying text.

[204] See December 2013 position limits proposal, 78 FR at 75746.

allowing market participants to request exemptions from exchange position limits for anticipatory bona fide hedge positions.

Proposed § 150.11 would permit exchanges to recognize certain anticipatory bona fide hedge positions, such as unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, or anticipatory cross-commodity hedges. Under proposed §150.11, market participants could continue to work with exchanges to request the exemption. In addition, proposed §150.11 would allow exchanges to adopt a shorter timeline for processing the exemption applications than under § 150.7 as proposed in the December 2013 position limits proposal. Under proposed § 150.11, an exchange could potentially recognize a position as a bona fide hedge in fewer than ten days after filing. In contrast, § 150.7 as proposed in the December 2013 position limits proposal, would provide the Commission with a full ten days after receipt of a filing to reject the position as a bona fide hedge before a filing would become effective.

The process under proposed § 150.11(a) is like the process under proposed § 150.9(a) described above. For example, an exchange with at least one year of experience and expertise administering position limits could elect to adopt rules to recognize commodity derivative positions as enumerated anticipatory bona fide hedges. However, it is different from the process under proposed § 150.9(a) in that the Commission does not propose to permit separate processes for applications based on novel versus non-novel facts and circumstances. The Commission determined to define certain anticipatory positions as enumerated bona fide hedges when it adopted current § 1.3(z)(2). The December 2013 position limits proposal does not change this determination.

Consequently, the Commission does not anticipate that applications for recognition of enumerated anticipatory bona fide hedge positions would be based on novel facts and circumstances. For the same reason, proposed §150.11(a) does not require exchanges to post summaries of any enumerated anticipatory bona fide hedge positions. Other simplifications follow from this difference.

In addition, the application process established by exchanges under proposed § 150.11(a) addresses the information exchanges should elicit in the application process by citing to the information required under § 150.7(d) as proposed in the December 2013 position limits proposal. Moreover, the reporting requirements for applicants under proposed § 150.11(a)(5) differ from the reporting requirements under proposed § 150.9(a)(6). Under proposed § 150.11(a)(5), applicants would be required to file a report with the Commission pursuant to §150.7 as proposed in the December 2013 position limits proposal and a copy with the exchange. Proposed § 150.9(a)(6), on the other hand, requires the applicant to file reports with the exchange recognizing the position, and additionally requires under proposed § 150.9(c)(2) that the exchange would provide such information to the Commission on a monthly basis.

RFC 30. The Commission requests comments on all aspects of proposed §150.11, including whether the Commission should consider any other factors in addition to those listed in proposed § 150.11(a)(1)(i), (ii), (iii), (iv) and (v).

Finally, in order to correct some errors, the Commission is proposing technical edits to §150.7 as it was proposed in the December 2013 position limits proposal. The reference to paragraph (f) in the last sentence in §150.7(b) as proposed in the December 2013 position limits proposal should instead be a reference to paragraph (h). And the

introductory language to §150.7(h) as proposed in the December 2013 position limits proposal, "Sales or purchases of commodity derivative contracts considered to be bona fide hedging positions under paragraphs 3(iii)(A) or 4(i) of the bona fide hedging position definition in §150.1 . . ." should instead read as ". . . under paragraphs 3(iii)(A), 4(i), 4(iii) or 4(iv) of the bona fide hedging position definition in §150.1, or any cross-commodity hedges thereof, ..."

G. Delegation of Authority

The Commission proposes to delegate certain of its authorities under proposed § 150.9, § 150.10 and § 150.11 to the Director of the Commission's Division of Market Oversight, or such other employee or employees as the Director may designate from time to time. Proposed § 150.9(f)(1)(ii), § 150.10(f)(1)(ii) and § 150.11(e)(1)(ii) would delegate the Commission's authority to the Division of Market Oversight ("DMO") to provide instructions regarding the submission of information required to be reported to the Commission by an exchange, and to specify the manner and determine the format, coding structure, and electronic data transmission procedures for submitting such information. Proposed § 150.9(f)(1)(v) and § 150.10(f)(1)(v) would delegate the Commission's review authority under proposed § 150.9(e) and § 150.10(e), respectively, to DMO with respect to summaries of types of recognized non-enumerated bona fide hedges, and types of spread exemptions, that are required to be posted on an exchange's website pursuant to proposed § 150.9(a)(7) and § 150.10(a)(7), respectively.

Proposed § 150.9(f)(1)(i), § 150.10(f)(1)(i) and § 150.11(e)(1)(i) would delegate the Commission's authority to DMO to agree to or reject a request by an exchange to consider an application for recognition of an NEBFH or enumerated anticipatory bona

fide hedge, or an application for a spread exemption. Proposed § 150.9(f)(1)(iii), § 150.10(f)(1)(iii) and § 150.11(e)(1)(iii) would delegate the Commission's authority to review any application for recognition of an NEBFH or enumerated anticipatory bona fide hedge, or application for a spread exemption, and all records required to be maintained by an exchange in connection with such application. Proposed § 150.9(f)(1)(iii), § 150.10(f)(1)(iii) and § 150.11(e)(1)(iii) would also delegate the Commission's authority to request such records, and to request additional information in connection with such application from the exchange or from the applicant.

Proposed § 150.9(f)(1)(iv) and § 150.10(f)(1)(iv) would delegate the Commission's authority, under proposed § 150.9(d)(2) and § 150.10(d)(2), respectively, to determine that an application for recognition of an NEBFH, or an application for a spread exemption, requires additional analysis or review, and to provide notice to the exchange and the particular applicant that they have 10 days to supplement such application .

The Commission does not propose to delegate its authority under proposed § 150.9(d)(3) or § 150.10(d)(3) to make a final determination as to the exchange's disposition. The Commission believes that if an exchange's disposition raises concerns regarding consistency with the Act or presents novel or complex issues, then the Commission should make the final determination, after taking into consideration any supplemental information provided by the exchange or the applicant.

However, the Commission proposes, in § 150.11(e)(iv), to delegate its authority to determine, under proposed § 150.11(d)(2), that it is not appropriate to recognize a commodity derivative position as an enumerated anticipatory bona fide hedge, or that the

disposition by an exchange of an application for such recognition is inconsistent with the filing requirements of proposed § 150.11(a)(2). The delegation would also provide DMO with the authority, after any such determination was made, to grant the applicant a reasonable amount of time to liquidate its commodity derivative position or otherwise come into compliance. This proposed combined delegation takes into account that applications processed by an exchange under proposed § 150.11 would be for positions that should satisfy the requirements for enumerated hedges set forth in the Commission's rules, and should therefore be less likely to raise novel issues of interpretation, or novel issues with respect to consistency with the filing requirements of proposed § 150.11(a)(2), than applications processed under proposed § 150.9 or § 150.10. Such delegation is consistent with the Commission's longstanding delegation to DMO of its authority to review applications for recognition of enumerated bona fide hedges under current § 1.48, as well as consistent with the more streamlined approach to Commission review of enumerated anticipatory bona fide hedge applications in proposed § 150.7.

RFC 31. The Commission invites comments on its proposed delegation of authority in § 150.11(e)(iv), and on all other aspects of its proposed delegation of authority in § 150.9(f), § 150.10(f) and § 150.11(e).

H. Related Changes to § 150.3 and §150.5 – Exemptions and Exchange-Set Speculative Position Limits

In the December 2013 position limits proposal, the Commission proposed to replace both current § 150.3, which establishes exemptions from federal position limits, and current § 150.5(a), which provides guidance to DCMs for exchange-set position limits. The changes to § 150.3 as proposed in the December 2013 position limits

proposal would have provided for recognition of enumerated bona fide hedge positions, but would not have exempted any spread positions from federal limits. For any commodity derivative contracts subject to federal position limits, § 150.5(a)(2) as proposed in the December 2013 position limits proposal would have established requirements under which exchanges could recognize exemptions from exchange-set position limits, including hedge exemptions and spread exemptions. Because the Commission is now proposing to permit exchanges to recognize NEBFH positions under proposed § 150.9, to grant spread exemptions from federal limits under proposed § 150.10, and to recognize certain enumerated anticipatory bona fide hedge positions under proposed § 150.11, the Commission proposes corresponding changes to § 150.3[205] and § 150.5(a)(2).

Further, in the December 2013 position limits proposal, the Commission proposed § 150.5(b) to establish requirements and acceptable practices for commodity derivative contracts not subject to federal position limits. The Commission now proposes to revise § 150.5(b)(5) as proposed in the December 2013 position limits proposal to permit exchanges to recognize NEBFHs, as well as spreads, to conform to the instant proposal. The Commission notes that it is no longer proposing to prohibit recognizing spreads during the spot month, although such exemptions would not have been permitted under §§ 150.5(a)(2) or (b)(5) as proposed in the December 2013 position limits proposal. Instead, this current proposal would, in part, maintain the status quo: exchanges that

[205] As noted above, in the regulatory text below where the CFTC sets out the proposed changes to the CFR, the Commission has designated certain appendices and subsections, such as appendices (A) through (D), § 150.3(a)(ii),§ 150.3(a)(iii), and § 150.5(a)(3) through (6), among others, as "[Reserved]." For the avoidance of doubt, the Commission is still reviewing comments received on such reserved provisions and does not seek further comment on such reserved provisions. See supra preamble Section II.

currently recognize spreads in the spot month under current § 150.5(a) will be able to continue to do so.[206] However, exchanges would be responsible for determining whether recognizing spreads, including spreads in the spot month, would further the policy objectives in section 4a(3) of the Act.

I. Changes to the Definitions of Futures-Equivalent, Intermarket Spread Position, and Intramarket Spread Position.

1. Changes to the definition of "futures-equivalent"

In the December 2013 position limits proposal, the Commission proposed to broaden the definition of the term "futures-equivalent" found in current § 150.1(f) of the Commission's regulations,[207] and to expand upon clarifications included in the current definition relating to adjustments and computation times.[208] The Dodd-Frank Act amendments to CEA section 4a,[209] in part, direct the Commission to apply aggregate federal position limits to physical commodity futures contracts and to swaps contracts that are economically equivalent to such physical commodity futures contracts on which the Commission has established limits. In order to aggregate positions in futures, options

[206] Under current § 150.5(a), a DCM may exempt from exchange-set speculative position limits any position normally known to the trade as a spread, straddle, or arbitrage position.

[207] 17 CFR 150.1(f) currently defines "futures-equivalent" only for an option contract, adjusting the open position in options by the previous day's risk factor, as calculated at the close of trading by the exchange.

[208] The December 2013 position limits proposal defines "futures-equivalent" for: (1) an option contact, adjusting the position size by an economically reasonable and analytically supported risk factor, computed as of the previous day's close or the current day's close or contemporaneously during the trading day; and (2) a swap, converting the position size to an economically equivalent amount of an open position in a core referenced futures contract. See December 2013 position limits proposal, 78 FR at 75698-9.

[209] Amendments to CEA section 4a(1) authorize the Commission to extend position limits beyond futures and option contracts to swaps traded on an exchange and swaps not traded on an exchange that perform or affect a significant price discovery function with respect to regulated entities. 7 U.S.C. 6a(a)(1). In addition, under new CEA sections 4a(a)(2) and 4a(a)(5), speculative position limits apply to agricultural and exempt commodity swaps that are "economically equivalent" to DCM futures and option contracts. 7 U.S.C. 6a(a)(2) and (5).

and swaps contracts, it is necessary to adjust the position sizes, since such contracts may have varying units of trading (e.g., the amount of a commodity underlying a particular swap contract could be larger than the amount of a commodity underlying a core referenced futures contract). The Commission proposed to adjust position sizes to an equivalent position based on the size of the unit of trading of the core referenced futures contract. The December 2013 position limits proposal would extend the current definition of "futures equivalent" in current § 150.1(f), that is applicable only to an option contract, to both options and swaps.

The Commission now proposes two further clarifications to the definition of the term "futures-equivalent." First, the Commission proposes to address circumstances in which a referenced contract for which futures equivalents must be calculated is itself a futures contract. This may occur, for example, when the referenced contract is a futures contract that is a mini-sized version of the core referenced futures contract (e.g., the mini-corn and the corn futures contracts).[210] The Commission proposes to clarify in proposed § 150.1 that the term "futures-equivalent" includes a futures contract which has been converted to an economically equivalent amount of an open position in a core referenced futures contract. This clarification mirrors the expanded definition of "futures-equivalent" in the December 2013 position limits proposal, as it would pertain to swaps.

[210] Under current § 150.2, for purposes of compliance with federal position limits, positions in regular sized and mini-sized contracts are aggregated. The Commission's practice of aggregating futures contracts, when a DCM lists for trading two or more futures contracts with substantially identical terms, is to scale down a position in the mini-sized contract, by multiplying the position in the mini-sized contract by the ratio of the unit of trading in the mini-sized contract to that of the regular sized contract. See paragraph (b)(2)(D) of app. C to part 38 of the Commission's regulations for guidance regarding the contract size or trading unit for a futures or futures option contract.

Second, the Commission proposes to clarify the definition of the term "futures-equivalent" to provide that, for purposes of calculating futures equivalents, an option contract must also be converted to an economically equivalent amount of an open position in a core referenced futures contract. This clarification addresses situations, for example, where the unit of trading underlying an option contract (that is, the notional quantity underlying an option contract) may differ from the unit of trading underlying a core referenced futures contract.[211]

These clarifications are consistent with the methodology the Commission used to provide its analysis of unique persons over percentages of the proposed position limit levels in the December 2013 position limits proposal.[212]

2. Changes to the definitions of "intermarket spread position" and "intramarket spread position"

In the December 2013 position limits proposal, the Commission proposed to add to current § 150.1 new definitions of the terms "intermarket spread position" and "intramarket spread position."[213] In connection with its proposal to permit exchanges to process applications for exemptions from federal position limits for certain spread

[211] For an example of a futures-equivalent conversion of a swaption, see example 6, WTI swaptions, app. A to part 20 of the Commission's regulations.

[212] See Table 11 in the December 2013 position limits proposal, 78 FR at 75731-3.

[213] In the December 2013 position limits proposal, the Commission proposed to define an "intermarket spread position" as "a long position in a commodity derivative contract in a particular commodity at a particular designated contract market or swap execution facility and a short position in another commodity derivative contract in that same commodity away from that particular designated contract market or swap execution facility." The Commission also proposed to define an "intramarket spread position" as "a long position in a commodity derivative contract in a particular commodity and a short position in another commodity contract in the same commodity on the same designated contract market or swap execution facility." See December 2013 position limits proposal, 78 FR at 75699-700.

positions, the Commission now proposes to expand the definitions of these terms as proposed in the December 2013 position limits proposal.

The Commission now proposes to define an "intermarket spread position" to mean "a long (short) position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, at a particular designated contract market, and a short (long) position in one or more commodity derivative contracts in that same, or similar, commodity, or its products or its by-products, away from that particular designated contract market." Similarly, the Commission now proposes to define an "intramarket spread position" to mean "a long position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, and a short position in one or more commodity derivative contracts in the same, or similar, commodity, or its products or its by-products, on the same designated contract market."

The expanded definitions that the Commission now proposes would take into account that a market participant may take positions in multiple commodity derivative contracts to establish an intermarket spread position or an intramarket spread position. The expanded definitions would also take into account that such spread positions may be established by taking positions in derivative contracts in the same commodity, in similar commodities, or in the products or by-products of the same or similar commodities. By way of example, the expanded definitions would include a short position in a crude oil derivative contract and long positions in a gasoline derivative contract and a diesel fuel derivative contract (collectively, a reverse crack spread).

RFC 32. The Commission invites comment on all aspects of its proposed expanded definitions of "intermarket spread position" and "intramarket spread position."

III. Related Matters

A. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors.

In December 2013, the Commission proposed, among other things, to establish speculative position limits for 28 contracts, to revise the process recognizing certain market participant positions as bona fide hedges, and to revise exemptions for spreads.[214] The December 2013 position limits proposal invited the public to comment on the Commission's consideration of the costs and benefits of the proposals, identify and assess any costs and benefits not discussed therein, as well as, provide possible alternative proposals.

As discussed in Sections I and II of this release, the Commission now proposes: (a) to delay implementing the requirements of SEF core principle 6(B) and DCM core principle 5(B) with respect to the setting and monitoring of position limits for swaps; (b)

[214] 78 FR 75680-842.

to revise the process for recognizing certain positions as non-enumerated bona fide hedges; (c) to revise the process for exempting spreads, as well as expanding the types of spreads that may be exempted from position limits; and (d) to add a recognition process for enumerated anticipatory bona fide hedges. This release, in large part, is a response to comments to the December 2013 position limits proposal. As discussed earlier, commenters urged the Commission to rely on the exchanges' long-standing experience in overseeing position limits, recognizing bona fide hedges, and reviewing spreads.

This supplemental proposal adds new provisions to and otherwise modifies some of the proposed rules identified and discussed in the December 2013 position limits proposal. The baseline against which the Commission considers the benefits and costs of this supplemental proposal is the same as that employed in the December 2013 position limits proposal: the statutory requirements of the CEA and the Commission regulations now in effect—in particular the Commission's Part 150 regulations and rules 1.47 and 1.48.[215]

1. Guidance for DCM Core Principle 5(B), SEF Core Principle 6(B), and Part 150

As explained in Section IIA above, the Commission received comments in response to the December 2013 position limits proposal that most exchanges do not have the ability to effectively monitor all swap positions held by a market participant across exchanges. The Commission now proposes to amend its guidance regarding DCM core principle 5(B) and SEF core principle 6(B), and add Appendix E to Part 150. The proposed amendments would have the effect of delaying the implementation of

[215] See chart listing current regulations, December 2013 position limits proposal at 75712.

exchanges' obligation to adopt swap position limits until there is sufficient access to swap position information regarding market participants' swap positions.

ii. Baseline

The baselines for these changes are DCM Core Principle 5, SEF Core Principle 6, and Part 150.

iii. Benefits and Costs

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its discretionary actions with respect to rules and orders. Though guidance, the Commission is also considering the costs and benefits of changes to the proposed amendments to the appendices to parts 37, 38, and 150 of the Commission's regulations. As discussed in Section IIA, the Commission appreciates that the proposed amendments to guidance will delay implementation of exchanges' obligation to monitor and enforce federal position limits for swaps. As a result, this delay will likely confer benefits and will likely reduce costs. For instance, exchanges and market participants will benefit from not investing in technology and personnel to assess position limits. Instead, both exchanges and market participants will be able to allocate such resources to other functions, like surveillance and product innovation, within the businesses. In terms of costs, the Commission believes that there might be a cost to the market associated with this delay because excessive positions cannot be monitored in real-time by exchanges.[216]

[216] As stated in Section IIA, the Commission foresees various possibilities in remediating this current inability to monitor position limits in real-time in the future.

iv. Request for Comment

RFC 33. The Commission requests comment on its consideration of the benefits and costs associated with the proposed amendments to guidance. Are there additional costs and benefits that the Commission should consider? Has the Commission misidentified any costs or benefits? Commenters are encouraged to include both quantitative and qualitative assessments of benefits as well as data, or other information of support for such assessments. Are there additional alternatives that the Commission has not identified? If so, please describe these additional alternatives and provide a discussion of the associated qualitative and quantitative costs and benefits.

2. Section 150.1—Definitions

a. Bona Fide Hedging Position

i. Summary of Changes

As discussed earlier, the Commission proposed in December 2013 a new definition of bona fide hedging position in proposed § 150.1, to replace the current definition in § 1.3(z). The December 2013 position limits proposal proposed a general definition of bona fide hedging position that contained two requirements for a bona fide hedging position: an incidental test and an orderly trading requirement.[217] The Commission is now proposing the following changes to proposed § 150.1. First, the Commission is proposing to strike the opening paragraph to the definition of bona fide hedging position in proposed § 150.1. By removing the opening paragraph, the Commission has eliminated the incidental test and orderly trading requirement from the general definition of bona fide hedging position. Second, the Commission is proposing

[217] See December 2013 Position Limits Proposal at 75706-7.

to add sub-part 150.1(2)(i)(D)(2) to the definition of bona fide hedging position. The proposed addition reiterates the Commission's authority to permit exchanges to recognize bona fide positions and those positions are subject to CEA section 4a(c) standards as well as Commission review.

ii. Baseline

The baseline for this change is the definition for "bona fide hedging transactions and positions for excluded commodities," set forth in current § 1.3(z).[218]

iii. Benefits and Costs

In the December 2013 position limits proposal, the Commission discussed the benefits and costs associated with the proposed amendments to the definition of bona fide hedging position.[219] In this proposal, the Commission proposes changes that were not discussed in the December 2013 position limits proposal. The changes to the definition of bona fide hedging position discussed herein provide substantive benefits and costs.

In terms of benefits, the Commission has made the definition of bona fide hedging position conform more closely to the CEA's statutory language by eliminating the incidental test. As explained in Section IIB3(ii), the Commission considers the incidental test superfluous because the idea of commercial cash market activities is covered in the economically appropriate test. Therefore, by discarding the incidental test, market participants benefit from greater regulatory certainty and less redundancy.

By deleting the orderly trading requirement from the definition of bona fide hedging position, the Commission seeks to eliminate a source of potential confusion for

[218] 17 C.F.R. § 1.3(z).

[219] December 2013 position limits proposal at 75761-64.

exchanges and market participants. The Commission sets forth a definition that is consistent with the CEA. More directly, CEA 4c(a)(5) separately states that intentional or reckless disregard for orderly trading execution is unlawful. Thus, market participants benefit from having a definition that lessens or eliminates the confusion between having two different standards, that is, an orderly-trading requirement and an intentional or reckless disregard standard.

The addition of proposed sub-part 150.1(2)(i)(D)(2) to the definition of bona fide hedging position represents a non-substantive modification. The actual benefits and costs associated with this proposed sub-part arise from recognitions under proposed § 150.9(a).

iv. Request for Comment

RFC 34. The Commission requests comment on its consideration of the benefits and costs associated with the proposed revisions to the definition of "bona fide hedging position." Are there additional costs and benefits that the Commission should consider? Has the Commission misidentified any costs or benefits? Commenters are encouraged to include both quantitative and qualitative assessments of benefits as well as data and other information of support for such assessments.

RFC 35. Futures contracts function to hedge price risk because they lock-in prices and quantities at designated points in time. Futures contracts, thereby, create price certainty for market participants.[220] Thus, the Commission believes that bona fide hedging positions need to ultimately result in hedging against some form of price risk as discussed in Section IIB3(i), above. Is the Commission reasonable in concluding that by

[220] Futures contracts and futures equivalents are tools by which market participants can lock-in price risk. They are limited in that regard. Other derivatives contracts, however, enable market participants to hedge other types of risk, beyond price risks, because contract terms and conditions can be tailored to the specific risks.

eliminating the incidental test market participants will benefit from regulatory certainty and reduced compliance costs because they need only focus on price risk or other risks that can be transformed into price risk?

RFC 36. It is challenging to interpret the orderly-trading requirement in the context of the over-the-counter swaps market and permitted off-exchange transactions as discussed in Section IIB3(ii), above. Given this challenge, is it reasonable for the Commission to conclude that by eliminating the orderly-trading requirement, market participants benefit from avoiding the compliances costs of an unclear requirement?

RFC 37. The Commission recognizes that there exist alternatives to the proposed definition of "bona fide hedging position." These alternatives include: (i) maintaining the status quo in current § 1.3(z), or (ii) pursuing the changes in the December 2013 position limits proposal.[221] Are there additional alternatives that the Commission has not identified? If so, please describe these additional alternatives and provide a discussion of the associated qualitative and quantitative costs and benefits.

b. Futures Equivalent

i. Summary of Changes

In the December 2013 position limits proposal, the Commission proposed to expand the definition of "futures-equivalent" from the narrow scope of an option contract. The term "futures-equivalent," as proposed in the December 2013 position limits proposal, would include certain options contracts and swaps, converted to economically equivalent amounts. The Commission now proposes two further revisions

[221] The costs and benefits of these alternatives were discussed in the December 2013 position limits proposal at 75761-64.

to the definition of "futures-equivalent." First, the Commission proposes to clarify that the term "futures-equivalent" includes a futures contract which has been converted to an economically equivalent amount of an open position in a core referenced futures contract. Second, the Commission proposes to clarify that, for purposes of calculating futures equivalents, an option contract must also be converted into an economically-equivalent amount of an open position in a core referenced futures contract.

ii. Baseline

The baseline for this change to the definition of "futures equivalent" is the current § 150.1(f) definition of "futures-equivalent".

iii. Benefits and Costs

As explained in the December 2013 position limits proposal, the Commission's view is that non-substantive changes to the definitional provisions of § 150.1 do not have any benefit or cost implications. With the exception of the term "bona fide hedging position," any benefits or costs attributable to substantive definitional changes and additions to § 150.1 as proposed in the December 2013 position limits proposal were considered in the discussion of the rule in which such new or amended term was proposed to be operational.[222]

The Commission also explained in 2013 that the definition of "futures-equivalent" in current § 150.1(f) was too narrow in light of the Dodd-Frank Act amendments to CEA section 4a. To conform to the statutory changes and to fit within the broader position limits regime, the Commission proposed a more descriptive definition of "futures-equivalent" in the December 2013 position limits proposal. Upon further review, the

[222] December 2013 position limits proposal at 75761

Commission is now proposing to add more explanatory text to the "futures-equivalent" definition so that it comports better with the statutory changes. The proposed revisions reflect more clearly the Commission's intent as discussed in the December 2013 position limits proposal. Thus, the Commission believes that there are no cost or benefit implications to these further clarifications.

iv. Request for Comment

RFC 38. Are there any benefits or costs associated with the proposed revisions to the definition of "futures equivalent"? If yes, commenters are encouraged to include both quantitative and qualitative assessments of these costs and benefits, as well as data or other information to support such assessments.

RFC 39. The Commission recognizes that one possible alternative to the clarifications made to the "futures-equivalent" definition is to retain the definition of "futures-equivalent" as proposed in the December 2013 position limits proposal. Additional alternatives may exist as well. The Commission requests comment on whether an alternative to what is proposed would result in a superior cost-benefit profile, with support for any such position provided.

c. Intermarket Spread Position and Intramarket Spread Position

i. Summary of Changes

Current part 150 does not contain definitions for the terms "intermarket spread position" or "intramarket spread position." In the December 2013 position limits proposal, the Commission proposed definitions for both terms. The Commission now proposes to expand the scope of these two definitions. The expanded definitions would now include positions in multiple commodity derivative contracts so that market

participants can establish an intermarket spread position or an intramarket spread position that would be taken into account under the proposed position limits regime and exemption processes. The expanded definitions also would cover spread positions established by taking positions in derivative contracts in the same commodity, in similar commodities, or in the products or by-products of the same or similar commodities.

ii. Baseline

Current § 150.1 does not include definitions for the terms "intermarket spread position" and "intramarket spread position." Therefore, the baseline is a market where "intermarket" and "intramarket" spread positions are not explicitly exempted from federal position limits.

iii. Benefits and Costs

The proposed changes to "intermarket spread position" and "intermarket spread positions" broaden the scope of the two terms in comparison to the definitions proposed in the December 2013 position limits proposal. In the Commission's view, the proposed changes are only operative in proposed §§ 150.3, 150.5 and 150.10, which address exemptions from position limits for certain spread positions. The two definitions operate in conjunction with proposed § 150.10, which sets forth a proposed process for exchanges to administer spread exemptions, because the proposed definitions and proposed § 150.10, together, will enable market participants to obtain relief from position limits for these types of spreads, among others.

iv. Request for Comment

RFC 40. Are there benefits or costs associated with the definitions of "intermarket spread position" and "intramarket spread position"? If yes, commenters are specifically

encouraged to include both quantitative and qualitative assessments of these costs and benefits, as well as data or other information to support such assessments.

RFC 41. The Commission recognizes that one possible alternative to the proposed definitions of "intermarket spread position" and "intramarket spread position" is to retain the definitions proposed in the December 2013 position limits proposal. Additional alternatives may exist as well. The Commission requests comment on whether an alternative to what is proposed would result in a superior cost-benefit profile, with support for any such alternative provided.

3. Section 150.3—Exemptions

a. Rule Summary

CEA Section 4a(a)(7) authorizes the Commission to exempt, conditionally or unconditionally, any person, swap, futures contract, or option—as well as any class of the same—from the position limits requirements that the Commission establishes. In the December 2013 position limits proposal, the Commission proposed revisions to current § 150.3(a)[223] The 2013 revisions would have provided for Commission recognition of enumerated bona fide hedge positions, and provided guidance about seeking relief from the Commission for non-enumerated positions, but would not have exempted any spread positions from federal limits. In this supplemental proposal, the Commission is proposing in § 150.3(a)(1) that commodity derivative positions recognized by exchanges as NEBFHs under proposed § 150.9 or enumerated anticipatory bona fide hedge positions under proposed § 150.11, and certain exempt spread positions under § 150.10, may exceed federal position limits established under § 150.2 as proposed in the December

[223] See 17 C.F.R. § 150.3 (list of exemptions that may exceed position limits set forth in § 150.2).

2013 position limits proposal. Proposed § 150.3(a)(1) should not be read alone but in conjunction with proposed §§ 150.9, 150.10, and 150.11.

As discussed above in more detail, the Commission has proposed to delay the requirement that exchanges set position limits on swaps because, among other reasons, of the impracticability of exchanges being able to enforce swap position limits. As a result, the Commission believes that it would be unlikely that exchanges would establish exchange-set limits and, thus, market participants would not have a need for exemptions to exchange-set limits for swaps.

b. Baseline

The baseline is the same as it was in the December 2013 position limits proposal: current § 150.3 of the Commission's regulations.

c. Benefits and Costs

The costs and benefits associated with the changes to proposed § 150.3 will be considered in the sections that discuss proposed §§ 150.9, 150.10, and 150.11.

4. Section 150.5—Exemptions from Exchange-Set Limits

a. Rule Summary

In the December 2013 position limits proposal, the Commission proposed to replace current § 150.5(a), which provides guidance to exchanges for exchange-set limits. For any commodity derivative contracts subject to federal position limits, § 150.5(a)(2) as proposed in the December 2013 position limits proposal, would have established requirements under which exchanges could recognize exemptions from exchange-set position limits, including hedge exemptions and spread exemptions. Because the Commission is now proposing to permit exchanges to recognize NEBFH positions under

proposed § 150.9, to grant spread exemptions from federal limits under proposed § 150.10, and to recognize certain enumerated anticipatory bona fide hedge positions under proposed § 150.11, the Commission proposes related changes to § 150.5(a)(2). For commodity derivative contracts not subject to federal position limits, the Commission now proposes to revise § 150.5(b)(5), as proposed in the December 2013 position limits proposal, to permit exchanges to recognize NEBFHs, as well as spreads. The Commission notes that it is no longer proposing to prohibit recognizing spreads during the spot month, although such exemptions would not have been permitted under §§ 150.5(a)(2) or (b)(5), as proposed in the December 2013 position limits proposal.

b. Baseline

The baseline is the same as it was in the December 2013 position limits proposal: the current reasonable discretion afforded to exchanges to exempt market participant from their exchange-set position limits.

c. Benefits and Costs

The costs and benefits associated with the changes to proposed § 150.5 will be discussed in the sections that discuss proposed §§ 150.9, 150.10, and 150.11.

5. Section 150.9—Exchange Recognition of NEBFHs

In response to comments to the December 2013 position limits proposal, the Commission now proposes to permit exchanges to elect to administer a process to recognize certain commodity derivative positions as NEBFHs under proposed § 150.9. Subject to certain conditions set forth in proposed § 150.3(a)(1), positions recognized as NEBFHs by exchanges pursuant to the proposed § 150.9 application process would be

exempt from federal position limits. Proposed § 150.9 works in concert with the following three proposed rules:

• proposed § 150.3(a)(1)(i), with the effect that recognized NEBFH positions may exceed federal position limits;

• proposed § 150.5(a)(2), with the effect that recognized NEBFH positions may exceed exchange-set position limits for contracts subject to federal position limits; and

• proposed § 150.5(b)(5), with the effect that recognized NEBFH positions may exceed exchange-set position limits for contracts not subject to federal position limits.

a. Rule Summary

The proposed NEBFH process has six sub-parts: (a) through (f). The first three sub-parts—§ 150.9(a), (b), and (c)—require exchanges that elect to have an NEBFH process and market participants that seek relief under the NEBFH process to carry out certain duties and obligations. The latter three sub-parts—§ 150.9(d), (e), and (f)—delineate the Commission's role and obligations in reviewing NEBFH recognition requests.

i. § 150.9(a)—Exchange-Administered NEBFH Application Process

In sub-part (a) of proposed § 150.9, the Commission identifies the process and information required for an exchange to assess whether it should grant a market participant's request that its derivative position(s) be recognized as an NEBFH. As an initial step under proposed § 150.9(a)(1), exchanges that voluntarily elect to process NEBFH applications are required to notify the Commission of their intention to do so by filing new rules or rule amendments with the Commission under part 40 of the Commission's regulations. In proposed § 150.9(a)(2), the Commission offers guidelines

for exchanges to establish adaptable application processes by permitting different processes for "novel" versus "substantially similar" applications for NEBFH recognitions. Proposed § 150.9(a)(3) describes in general terms the type of information that exchanges should collect from applicants. Proposed § 150.9(a)(4) obliges applicants and exchanges to act timely in their submissions and notifications, respectively, and that exchanges retain revocation authority. Proposed § 150.9(a)(5) provides that the position will be deemed recognized as an NEBFH when an exchange recognizes it. Proposed § 150.9(a)(6) instructs exchanges to have rules requiring applicants that receive NEBFH recognitions to report those positions and offsetting cash positions. Proposed § 150.9(a)(7) requires an exchange to publish on their website descriptions of unique types of derivative positions recognized as NEBFHs based on novel facts and circumstances.

ii. § 150.9(b)—NEBFH Recordkeeping Requirements

Under proposed § 150.9(b), exchanges would be required to maintain complete books and records of all activities relating to the processing and disposition of NEBFH applications. As explained in proposed § 150.9(b)(1) through (b)(2), the Commission instructs exchanges to retain applicant-submission materials, exchange notes, and determination documents. Moreover, consistent with current § 1.31, the Commission expects that these records would be readily accessible until the termination, maturity, or expiration date of the bona fide hedge recognition and during the first two years of the subsequent, five-year retention period.

iii. § 150.9(c)—NEBFH Reporting Requirements

The Commission proposes weekly and monthly reporting obligations by exchanges for positions recognized as NEBFHs. Both reports also will be subject to the

Commission's proposed formatting requirements as explained in proposed § 150.9(c)(3). In addition to submitting reports to the Commission, proposed § 150.9(c)(1)(ii) provides that exchanges post NEBFH summaries on their websites.

iv. § 150.9(d) and (e)— Commission Review

The Commission proposes that under certain circumstances market participants and exchanges must respond to Commission requests.

b. Baseline

For the NEBFH process, the baseline for NEBFH subject to federal position limits is current § 1.47. For NEBFH exemptions to exchange-set position limits, the baseline is the current exchange regulations and practices as well as the Commission's guidance to exchanges in current § 150.5(d), which provides, generally, that an exchange may recognize bona fide hedging positions in accordance with the general definition of bona fide hedging position in current § 1.3(z)(1).

c. Benefits

The Commission recognizes that there are positions that reduce price risks incidental to commercial operations. For that reason, among others, such positions that are considered to be bona fide hedging positions under CEA Section 4a(c) are not subject to position limits. Market participants have several options regarding bona fide hedging positions. A market participant could conclude that a commodity derivative position comports with the definition of bona fide hedging position under § 150.1, as proposed in the December 2013 position limits proposal. Also as discussed in the December 2013 position limits proposal, market participants may request a staff interpretive letter under § 140.99 or seek exemptive relief under CEA section 4(a)(7). The Commission proposes in

this supplemental proposal another option for participants to hold commodity derivative positions that exceed speculative limits: they may file an application with an exchange for recognition of an NEBFH under proposed § 150.9.

While all of the aforementioned options are viable, proposed § 150.9 in this supplemental proposal outlines a framework similar to existing exchange practices that recognize non-enumerated bona fide hedge exemptions to exchange-set limits. These practices are familiar to many market participants. As a consequence, there are sizeable benefits to the proposed § 150.9 process that are not easily quantifiable. The benefits are heavily dependent on the individual characteristics of the applicant, its use of commodity derivatives, its commercial needs, and market idiosyncrasies. Because of these varying characteristics, a qualitative discussion is more appropriate, and therefore, discussed herein.

Under proposed § 150.9, the Commission will be able to leverage exchanges' existing practices and expertise in administering exemptions. Thus, proposed § 150.9 should reduce the need to invent new procedures to recognize NEBFHs. For example, many exchanges already evaluate hedging strategies in connection with setting and enforcing exchange-set position limits; thus, many exchanges should be able readily to identify bona fide hedges.[224] Exchanges also may be familiar with the applicant-market participant's needs and practices so there would be an advanced understanding for why certain trading strategies are pursued. Furthermore, by having the availability of the exchange's analysis and a macro-view of the markets, which includes the Commission's

[224] See note 108 (for text of 17 CFR 1.47 and discussion). For a discussion on the history of exemptions, see December 2013 position limits proposal at 75703-06.

access to regulatory swap data, the Commission would likely be better informed should it become necessary for the Commission to review a determination under proposed § 150.9(d), and determine whether a commodity derivative position should be recognized as an NEBFH. This may benefit market participants, in the form of administrative efficiency, because the Commission would be able to initiate its review based on materials already submitted by the applicant under proposed § 150.9, as well as the analysis by the exchanges.

For applicants seeking recognition of an NEBFH, proposed § 150.9 should reduce duplicative efforts because applicants would be saved the expense of applying to both an exchange for relief from exchange-set position limits and to the Commission for relief from federal limits. Because many exchanges already possess similar application processes and market participants are probably somewhat accustomed to the exchanges' existing application processes, administrative certainty should be increased in the form of reduced application-production time by market participants and reduced response time by exchanges.

Another probable benefit of proposed § 150.9 is the creation and retention of records that may be used as reference material in the future for similar bona fide hedge recognition requests either by relevant exchanges or the Commission. Over time, retained records will help the Commission to ensure that an exchange's determinations are internally consistent and consistent with the Act and the Commission's regulations thereunder. There is also the additional benefit that records would be accessible if they are needed for a potential enforcement action.

An exchange's submission of reports under proposed § 150.9(c) would provide the Commission with notice that an applicant has taken a commodity derivative position that the exchange has recognized as an NEBFH, and also would show the applicant's offsetting positions in the cash markets. This is beneficial to the public because such reports would support the Commission's surveillance program. Reports would facilitate the tracking of NEBFHs recognized by the exchanges, and would assist the Commission in ensuring that a market participant's activities conform to the exchange's terms of recognition and to the Act. The web-posting of summaries also would benefit market participants in general by providing transparency and open access to the NEBFH recognition process. In addition, reporting and posting gives market participants seeking recognition of an NEBFH an understanding of the types of commodity derivative positions an exchange may recognize as an NEBFH, thereby providing greater administrative and legal certainty.

d. Costs

To a large extent, exchanges and market participants have incurred already many of the compliance costs associated with proposed § 150.9 because most, if not all, exchanges currently administer similar processes for recognizing NEBFHs. Nevertheless, the Commission has detailed a number of the readily-quantifiable costs for exchanges and market participants associated with processing NEBFH recognitions under proposed § 150.9 in Tables A1 to G1, below. The Commission estimates that six entities would elect to process NEBFH applications and file new rules or rule amendments pursuant to part 40 of the Commission's regulations. Even though the number of applicants and associated applications will likely vary based on the referenced contract,

the Commission forecasts the number of applicants based on the Commission's past experience. The costs are broken down in the tables below. In short, most of the quantified costs are related to the time, effort, and materials that will be spent on producing, processing, reviewing, granting, and retaining applications for NEBFH recognitions.

There are, however, other costs that are not easily quantified. These are qualitative costs that are related to the specific attributes and needs of individual market participants that are hedging. Given that qualitative costs are highly-specific, the Commission believes that market participants would choose to incur § 150.9-related costs only if doing so is less costly than complying with position limits and not executing the desired hedge position. Thus, by providing market participants with an option to apply for relief from speculative position limits under proposed § 150.9, the Commission believes it is offering market participants a way to ease overall compliance costs because it is reasonable to assume that entities would seek recognition of NEBFHs only if the outcome of doing so justifies the costs. The Commission also believes that market participants would consider how the costs of applying for recognition of an NEBFH under proposed § 150.9 would compare to the costs of requesting a staff interpretive letter under § 140.99, or seeking exemptive relief under CEA section 4a(a)(7). Likewise, exchanges must consider qualitative costs in their decision to create an NEBFH application process or revise an existing program.

The Commission acknowledges that there may also be other costs to market participants if the Commission disagrees with an exchange's decision to recognize an NEBFH under proposed § 150.9 or under an independent Commission request or review

under proposed § 150.9(d) or (e). These costs would include time and effort spent by market participants associated with a Commission review. In addition, market participants would lose amounts that the Commission can neither predict nor quantify if it became necessary to unwind trades or reduce positions were the Commission to conclude that an exchange's disposition of an NEBFH application is inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.

The Commission recognizes that costs may result if the Commission disagrees with an exchange's disposition of an NEBFH application under proposed § 150.9, the Commission, however, believes such situations would be limited based on the history of exchanges approving similar applications for exemptions to exchange-set limits. Exchanges have strong incentives to protect market participants from the harms that position limits are intended to prevent, such as manipulation, corners, and squeezes. In addition, an exchange that recognizes a market participant's NEBFH that enables the participant to exceed position limits must then deter the same market participant from trading in a manner that causes adverse price impacts on the market. For example, this might mean that as part of recognizing a NEBFH, the exchange directs the market participant to execute no more than ten contracts per day over a five-day period rather than executing 50 contracts in one trading day. This approach may be necessary for the exchange to ensure sufficient market liquidity because the exchange believes that the particular contract market cannot absorb the execution of 50 contracts by one market participant in one day without an inordinately large price impact. If the exchange fails to deter (or instruct), other market participants will likely face greater costs in the form of transactions fees and other trading-implementation costs, which includes foregone trading

opportunities because market prices moved against the trader and prevented the trader from executing at the desired prices. In other words, the exchange's mismanagement of the market participant that took advantage of the NEBFH would cause the other market participants' costs to implement trades to increase. Such an outcome would likely discredit the exchange and the proposed § 150.9 program, as well as reduce the exchange's overall trading commissions. The Commission believes that the exchanges have little incentive to engage in such behavior because of reputational risk and economic incentives.

i. Costs to Create or Amend Exchange Rules for NEBFH Application Programs

The Commission believes that exchanges electing to process NEBFH applications under proposed § 150.9(a) are likely to already administer similar processes and would need to file with the Commission amendments to existing exchange rules rather than create new rules. The exchanges would only have to file amendments once. As discussed in the Paperwork Reduction Act discussion below, the Commission forecasts an average annual filing cost of $610 per exchange that files new rules or modifications per proposed process that an exchange adopts.

Table A1.

Proposed Regulation/ File or Amend Rules	Total Average Labor Hours	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Exchange
§150.9(a)(1)	5	$122	$610 [5 x $122]

ii. Costs to Review Applications Under Proposed Processes

An exchange that elects to process applications also will incur costs related to the review and disposition of such applications pursuant to proposed § 150.9(a). For example, exchanges will need to expend resources on reviewing and analyzing the facts

and circumstances of each application to determine whether the application meets the standards established by the Commission. Exchanges also will need to expend effort in notifying applicants of the exchanges' disposition of recognition or exemption requests. The Commission believes that exchanges electing to process NEBFH applications under proposed § 150.9(a) are likely to have processes for the review and disposition of such applications currently in place. As such, an e3.xchange's cost to comply with the proposed rules are likely to be incrementally less costly than having to create process from inception because the exchange would already have staff, policies, and procedures established to accomplish its duties under the proposed rules. Thus, the Commission has forecast that the average annual cost for each exchange to process applications for NEBFH recognitions is $122,850.

Table B1.

Proposed Regulation/ Review Applications	Total Average Applications Processed Per Exchange	Total Average Labor Hours Per application	Average Total Hours For Total Applications Reviewed Per Exchange	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Exchange
§150.9(a)(2)	185	5	925 [185 x 5]	$122	$112,850 [$122 x 925]

iii. Costs to Post Summaries for NEBFH Recognitions

Exchanges that elect to process the applications under proposed § 150.9 will incur costs to publish on their websites summaries of the unique types of NEBFH positions. The Commission has estimated an average annual cost of $18,300 for the web-posting of NEBFH summaries.

Table C1.

Proposed Regulation/ Web-Posting	Total Average Summaries Per Exchange	Total Average Labor Hours Per application	Average Total Hours for Total Applications Reviewed Per Exchange	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Exchange
§150.9(a)	30	5	150 [30 x 5]	$122	18,300 [150 x $122]

iv. Costs to Market Participants Who Would Seek NEBFH Relief from Position Limits

Under proposed § 150.9(a)(3), market participants must submit applications that provide sufficient information to allow the exchanges to determine, and the Commission to verify, whether it is appropriate to recognize such position as an NEBFH. These applications would be updated annually. Proposed § 150.9(a)(6) would require applicants to file a report with the exchanges when an applicant owns, holds, or controls a derivative position that has been recognized as an NEBFH. The Commission estimates that each market participant seeking relief from position limits under proposed § 150.9 would likely incur approximately $2,440 annually in application costs.[225]

[225] Assuming that exchanges administer exemptions to exchange-set limits, these costs are incrementally higher.

Table D1.

Proposed Regulation/ Market Participants Seeking Relief from Position Limits	Number of Market Participants	Total Average Applications Per Market Participant	Total Average Labor Hours Per Application	Average Total Hours For Each Application Filed Per Exchange	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Market Participant
§150.9(a)(3), (6)	222	5	4	20 [4x5]	$122	$2,440 [20 x $122]

v. Costs for NEBFH Recordkeeping

The Commission believes that exchanges that currently process applications for spread exemptions and bona fide hedging positions maintain records of such applications as required pursuant to other Commission regulations, including § 1.31. The Commission, however, also believes that the proposed rules may confer additional recordkeeping obligations on exchanges that elect to process applications for NEBFHs. The Commission estimates that each exchange electing to administer the proposed NEBFH process would likely incur approximately $3,660 annually to retain records for each proposed process.

Table E1.

Proposed Regulation/ Recordkeeping	Number Of DCMs	Total Average Labor Hours For Recordkeeping	Total Average Labor Costs Per Hour	Total Average Annual Recordkeeping Cost Per Exchange
§ 150.9(b)	6	30	$122	$3,660 [30 x $122]

vi. Costs for Weekly and Monthly NEBFH Reporting to the Commission

The Commission anticipates that exchanges that elect to process NEBFH applications will be required to file two types of reports. The Commission is aware that five exchanges currently submit reports each month, on a voluntary basis, which provide

information regarding exchange-processed exemptions of all types. The Commission believes that the content of such reports is similar to the information required of the reports in proposed rule § 150.9(c), but the frequency of such required reports would increase under the proposed rule. The Commission estimates an average cost of approximately $19,032 per exchange for weekly reports under proposed § 150.9(c).

Table F1.

Proposed Regulation/ Weekly Reporting	Estimated Number Of DCMs	Estimated Number of Hours Per Response	Average Reports Annually By Each Exchange	Total Average Labor Costs Per Hour	Total Average Annual Reporting Cost Per Exchange
§150.9(c)	6	3	52	$122	$19,032 [3 x 52$122]

For the monthly report, the Commission anticipates a minor cost for exchanges because the proposed rules would require exchanges essentially to forward to the Commission notices received from applicants who own, hold, or control the positions that have been recognized or exempted. The Commission estimates an average cost of approximately $2,928 per exchange for monthly reports under proposed § 150.9(c).

Table G1.

Proposed Regulation/ Monthly Reporting	Estimated Number Of DCMs	Estimated Number Of Hours Per Response	Average Reports Annually By Each Exchange	Total Average Labor Costs Per Hour	Total Average Annual Reporting Average Cost Per Exchange
§150.9(c)	6	2	72	$122	$2,928 [3 x 12x $122]

vii. Costs Related to Subsequent Monitoring

Exchanges would have additional surveillance costs and duties with respect to NEBFH that the Commission believes would be integrated with their existing self-regulatory organization surveillance activities as an exchange.

e. Request for Comment

RFC 42. The Commission requests comment on its considerations of the benefits of proposed § 150.9. Are there additional benefits that the Commission should consider? Has the Commission misidentified any benefits? Commenters are encouraged to include both quantitative and qualitative assessments of these benefits, as well as data or other information to support such assessments.

RFC 43. The Commission requests comment on its considerations of the costs of proposed § 150.9. Are there additional costs that the Commission should consider? Has the Commission misidentified any costs? What other relevant cost information or data, including alternative cost estimates, should the Commission consider and why? Commenters are encouraged to include both quantitative and qualitative assessments of these benefits, as well as data or other information to support such assessments.

RFC 44. The Commission requests comment on whether a Commission administered process promotes more consistent and efficient decision-making. Commenters are encouraged to include both quantitative and qualitative assessments, as well as data or other information to support such assessments.

RFC 45. The Commission recognizes there exist alternatives to proposed § 150.9. These include such alternatives as: (1) not permitting exchanges to administer any process to recognize NEBFHs; or (2) maintaining the status quo. The Commission

requests comment on whether an alternative to what is proposed would result in a superior cost-benefit profile, with support for any such position provided.

RFC 46. The Commission requests comment on whether the options for recognizing NEBFHs outlined in the December 2013 position limits proposal are superior from a cost-benefit perspective to proposed § 150.9.[226] If yes, please explain why.

6. Section 150.10—Spread Exemptions

As discussed in Section IID above, the Commission has the authority under CEA section 4a(a)(1) to exempt certain spreads from position limits. Before the Dodd-Frank Act, the Commission exempted certain spreads from position limits under current § 150.3. In the December 2013 position limits proposal, the Commission proposed changing current § 150.3 to eliminate exemptions for spreads outside the spot month, and placed limitations on inter- and intramarket spreads.[227] After reviewing comments, the Commission has refined its spread exemption proposal to permit spread exemptions from federal position limits, and, combined with changes to the definitions of "intermarket spread position" and "intramarket spread position," authorized such spreads to exceed position limits during spot and non-spot months.

a. Rule Summary

The Commission proposes to authorize exchanges to exempt spread positions from federal position limits. The proposed § 150.10 process lists four types of spreads as defined and proposed in § 150.1 of the December 2013 positions limits proposal and

[226] 78 FR at 75711-73.

[227] For cost-benefit discussion on spread exemptions, see December 2013 position limits proposal at 75774-76.

modified in this supplemental proposal. Proposed § 150.10 works in concert with the following three proposed rules:

• proposed § 150.3(a)(1)(iv), with the effect that exempt spread positions may exceed federal position limits;

• proposed § 150.5(a)(2), with the effect that exempt spread positions may exceed exchange-set position limits for contracts subject to federal position limits; and

• proposed § 150.5(b)(5)(ii)(C), with the effect that exempt spread positions may exceed exchange-set position limits for contracts not subject to federal position limits.

The proposed § 150.10 process is analogous to the application process for recognition of NEBFHs under proposed § 150.9. The proposed spread exemption process has six sub-parts: (a) through (f). The first three sub-parts—§ 150.10(a), (b), and (c)—require exchanges that elect to have a spread exemption process, and market participants that seek relief under the spread exemption process, to carry out certain duties and obligations. The latter four sub-parts—§ 150.10(d), (e), and (f)—delineate the Commission's role and obligations in reviewing requests for spread exemptions.

i. Section 150.10(a)—Exchange-Administered Spread Exemption

In sub-part (a) of proposed § 150.10, the Commission identifies the process and information required for an exchange to grant a market participant's request that its derivative position(s) be recognized as an exempt spread position. As an initial step under proposed § 150.10(a)(1), exchanges that voluntarily elect to process spread exemption applications are required to notify the Commission of their intention to do so by filing new rules or rule amendments with the Commission under part 40 of the Commission's regulations. In proposed § 150.10(a)(2), the Commission identifies four

types of spreads that an exchange may approve. Proposed § 150.10(a)(3) describes in general terms the type of information that exchanges should collect from applicants. Proposed § 150.10(a)(4) obliges applicants and exchanges to act timely in their submissions and notifications, respectively, and require exchanges to retain revocation authority. Proposed § 150.10(a)(6) instructs exchanges to have rules requiring applicants who receive spread exemptions to report those positions, including each component of the spread. Proposed § 150.10(a)(7) requires exchanges to publish on its website a summary describing the type of spread position and explaining why it was exempted.

ii. Section 150.10(b)—Spread Exemption Recordkeeping Requirements

Exchanges must maintain complete books and records of all activities relating to the processing and disposition of spread exemption applications under proposed § 150.10(b). This is similar to the record retention obligations of exchanges for positions recognized as NEBFHs.

iii. Section 150.10(c)—Spread Exemption Reporting Requirements

Exchanges would have weekly and monthly reporting obligations for spread exemptions under proposed § 150.10(c). This is similar to the reporting obligations of exchanges for positions recognized as NEBFHs.

b. Baseline

For the proposed spread exemption process for positions subject to federal limits, the baseline is CEA section 4a(a)(1). In that statutory section, the Commission is authorized to recognize certain spread positions. That statutory provision is currently implemented in a limited calendar-month spread exemption in § 150.3(a)(3). For exchange-set position limits, the baseline for spreads is the guidance in current §

150.5(a), which provides generally that exchanges may recognize exemptions for positions that are normally known to the trade as spreads.

c. Benefits

CEA section 4a(a)(1) authorizes the Commission to exempt certain spreads from speculative position limits. In exercising this authority, the Commission recognizes that spreads can have considerable benefits for market participants and markets. The Commission now proposes a spread exemption framework that utilizes existing exchanges-resources and exchanges-expertise so that fair access and liquidity are promoted at the same time market manipulations, squeezes, corners, and any other conduct that would disrupt markets are deterred and prevented. Building on existing exchange processes preserves the ability of the Commission and exchanges to monitor markets and trading strategies while reducing burdens on exchanges that will administer the process, and market participants, who will utilize the process.

In addition to these benefits, there are other benefits related to proposed § 150.10 that would inure to markets and market participant. Yet, there is difficulty in quantifying these benefits because benefits are dependent on the characteristics, such as operation size and needs, of the market participants that would seek spread exemptions, and the markets in which the participants trade. Accordingly, the Commission considers the qualitative benefits of proposed § 150.10.

For both exchanges and market participants, proposed § 150.10 would likely alleviate compliance burdens to the status quo. Exchanges would be able to build on established procedures and infrastructure. As stated earlier, many exchanges already have rules in place to process and grant applications for spread exemptions from

exchange-set position limits pursuant to Part 38 of the Commission's regulations (in particular, current § 38.300 and§ 38.301) and current § 150.5. In addition, exchanges may be able to use the same staff and electronic resources that would be used for proposed § 150.9 and § 150.11. Market participants also may benefit from spread-exemption reviews by exchanges that are familiar with the commercial needs and practices of market participants seeking exemptions. Market participants also might gain legal and regulatory clarity and consistency that would help in developing trading strategies.

Proposed § 150.10 would authorize exchanges to approve spread exemptions that permit market participants to continue to enhance liquidity, rather than being restricted by a position limit. For example, by allowing speculators to execute intermarket and intramarket spreads in accordance with proposed § 150.3(a)(1)(iv) and § 150.10, speculators would be able to hold a greater amount of open interest in underlying contract(s), and, therefore, bona fide hedgers may benefit from any increase in market liquidity. Spread exemptions might lead to better price continuity and price discovery if market participants who seek to provide liquidity (for example, through entry of resting orders for spread trades between different contracts) receive a spread exemption and, thus, would not otherwise be constrained by a position limit.

Here are two examples of positions that could benefit from the spread exemption in proposed § 150.10:

• Reverse crush spread in soybeans on the CBOT subject to an intermarket spread exemption. In the case where soybeans are processed into two different products, soybean meal and soybean oil, the crush spread is the difference between the combined

value of the products and the value of soybeans. There are two actors in this scenario: the speculator and the soybean processor. The spread's value approximates the profit margin from actually crushing (or mashing) soybeans into meal and oil. The soybean processor may want to lock in the spread value as part of its hedging strategy, establishing a long position in soybean futures and short positions in soybean oil futures and soybean meal futures, as substitutes for the processor's expected cash market transactions (purchase of the anticipated inputs for processing and sale of the anticipated products). On the other side of the processor's crush spread, a speculator takes a short position in soybean futures against long positions in soybean meal futures and soybean oil futures. The soybean processor may be able to lock in a higher crush spread, because of liquidity provided by such a speculator who may need to rely upon a spread exemption. It is important to understand that the speculator is accepting basis risk represented by the crush spread, and the speculator is providing liquidity to the soybean processor. The crush spread positions may result in greater correlation between the futures prices of soybeans and those of soybean oil and soybean meal, which means that prices for all three products may move up or down together in a closer manner.

•Wheat spread subject to intermarket spread exemptions. There are two actors in this scenario: the speculator and the wheat farmer. In this example, a farmer growing hard wheat would like to reduce the price risk of her crop by shorting a MGEX wheat futures. There, however, may be no hedger, such as a mill, that is immediately available to trade at a desirable price for the farmer. There may be a speculator willing to offer liquidity to the hedger; the speculator may wish to reduce the risk of an outright long position in MGEX wheat futures through establishing a short position in CBOT wheat

futures (soft wheat). Such a speculator, who otherwise would have been constrained by a position limit at MGEX or CBOT, may seek exemptions from MGEX and CBOT for an intermarket spread, that is, for a long position in MGEX wheat futures and a short position in CBOT wheat futures of the same maturity. As a result of the exchanges granting an intermarket spread exemption to such a speculator, who otherwise may be constrained by limits, the farmer might be able to transact at a higher price for hard wheat than might have existed absent the intermarket spread exemptions. Under this example, the speculator is accepting basis risk between hard wheat and soft wheat, reducing the risk of a position on one exchange by establishing a position on another exchange, and potentially providing liquidity to a hedger. Further, spread transactions may aid in price discovery regarding the relative protein content for each of the hard and soft wheat contracts.

Finally, the Commission is no longer proposing to prohibit recognizing and exempting spreads during the spot and non-spot month as explained in the preamble. There may be considerable benefits that evolve from spreads exempted during the spot month, in particular. Besides enhancing the opportunity for market participants to use strategies involving spread trades into the spot month, this proposed relief may improve price discovery in the spot month for market participants. And, as in the intermarket wheat example above, the proposed spread relief in the spot month may better link prices between two markets, e.g., the price of MGEX wheat futures and the price of CBOT wheat futures. Put another way, the prices in two different but related markets for substitute goods may be more highly correlated, which benefits market participants with

a price exposure to the underlying protein content in wheat generally, rather than that of a particular commodity.

d. Costs

Similar to proposed § 150.9, exchanges and market participants may have made already many of the financial outlays for administering the application process and applying for spread exemptions, respectively. Because of that history, the Commission is able to quantify some of the costs that will arise from proposed § 150.10 in Tables A3 through E3, below. Like the costs for proposed § 150.9, the Commission estimates that six entities would elect to process spread-exemption applications and file new rules or rule amendments pursuant to part 40 of the Commission's regulations, and the number of spread exemption applicants and applications will likely vary based on the referenced contract. Relying on its past experience, the Commission forecasts the number of applicants and breaks down the annual costs in the tables below. Most of the monetary costs are related to the time, effort, and materials spent for administering and retaining records for spread exemptions.

Although the Commission is able to quantify some costs, other costs related to proposed § 150.10 are not easily quantifiable. As previously stated, other costs are more dependent on individual markets and market participants seeking a spread exemption, and are more readily considered qualitatively. Because costs, quantitative or qualitative, can be particular, the Commission believes that market participants will determine whether costs associated with seeking a proposed § 150.10 spread exemption are worth the benefits. If the costs are too high, then market participants may choose not to apply for a spread exemption and not to execute a spread transaction that would exceed position

limits. For instance, speculators that execute exempted spreads would bear the risk of adverse price changes in the spread, but a speculator who does not receive an exemption may be unwilling to bear the higher risk of an outright position, if a position limit would restrict her ability to establish a risk reducing position in another contract. In general, the Commission believes that proposed § 150.10 should provide exchanges and market participants greater regulatory and administrative certainty and that costs will be small relative to the benefits of having an additional trading tool under proposed § 150.10.

Note: The activities that are priced in the following Tables A2 to G2 are similar, if not the same types of activities discussed in the section affiliated with Tables A1 through G1, for proposed § 150.9. Unless there is a significant difference in the anticipated acts to implement proposed § 150.10, the Commission will not re-describe the activities valued in Tables A2 through G2.

Table A2.—Costs to Create or Amend Exchange Rules for Spread-Exemption Application Reviews

Proposed Regulation/ File or Amend Rules	Total Average Labor Hours	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Exchange
§150.10(a)(1)	5	$122	$610 [5 x $122]

Table B2.—Costs to Review Spread-Exemption Applications

Proposed Regulation/ Review Applications	Total Average Applications Processed Per Exchange	Total Average Labor Hours Per application	Average Total Hours for Total Applications Reviewed Per Exchange	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Exchange
§150.10(a)(2)	50	5	250 [50 x 5]	$122	$30,500 [$122 x 250]

Table C2.—Cost to Post Spread-Exemption Summaries

Proposed Regulation/ Web-Posting	Total Average Summaries Per Exchange	Total Average Labor Hours Per application	Average Total Hours For Total Applications Reviewed Per Exchange	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Exchange
§150.10(a)	10	5	50 [10 x 5]	$122	$6,100 [50 x $122]

Regarding the following Table D2, note that reports are also required to be sent to the Commission in the case of exempt spread positions under § 150.10(a)(5).

Table D2.— Costs to Market Participants Who Would Seek Spread-Exemption Relief from Position Limits

Proposed Regulation/ Market Participants Seeking Relief from Position Limits	Number of Market Participants	Total Average Applications Per Market Participant	Total Average Labor Hours Per application	Average Total Hours For Each Application Filed Per Exchange	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Market Participant
§150.10(a)(3), (6)	25	2	3	6 [2 x 3]	$122	$732 [6 x $122]

Table E2.—Costs for Spread-Exempt Recordkeeping

Proposed Regulation/ Recordkeeping	Number Of DCMs	Total Average Labor Hours For recordkeeping	Total Average Labor Costs Per Hour	Total Average Annual Recordkeeping Cost Per Exchange
§150.10(b)	6	30	$122	$3,660 [30 x $122]

Table F2.—Costs for Weekly Spread-Exemption Reporting

Proposed Regulation/ Reporting	Estimated Number Of DCMs	Estimated Number Of Hours Per Response	Average Reports Annually By Each Exchange	Total Average Labor Costs Per Hour	Total Average Annual Reporting Cost Per Exchange
§150.10(c) [weekly]	6	3	52	$122	$19,032 [3 x 52$122]

Table G2. — Costs for Monthly Spread-Exemption Reporting

Proposed Regulation/ Monthly Reporting	Estimated Number Of DCMs	Estimated Number Of Hours Per Response	Average Reports Annually By Each Exchange	Total Average Labor Costs Per Hour	Total Average Annual Reporting Average Cost Per Exchange
§150.10(c)	6	2	72	$122	$2,928 [3 x 12x $122]

Exchanges would have additional surveillance costs and duties that the Commission believes would be integrated with their existing self-regulatory organization surveillance activities as an exchange. For example, exchanges that elect to grant spread exemptions will have to adapt and develop procedures to determine whether a particular spread exemption furthers the goals of CEA section 4a(a)(3)(B) as well as monitor whether applicant speculators are, in fact, providing liquidity to other market participants.

Other costs could arise from proposed § 150.11 if the Commission disagrees with an exchanges' disposition of a spread application, or costs from a Commission request or review under proposed § 150.11(d) or (e). These costs are not easily quantified because they depend on the specifics of the Commission's request or review.

e. Request for Comment

RFC 47. The Commission requests comment on its considerations of the benefits of proposed § 150.10. Are there additional benefits that the Commission should consider? Has the Commission misidentified any benefits? Commenters are encouraged to include both quantitative and qualitative assessments of benefits as well as data or other information of support such assessments.

RFC 48. The Commission requests comment on its considerations of the costs of proposed § 150.10. Are there additional costs that the Commission should consider? Has

the Commission misidentified any costs? What other relevant cost information or data, including alternative cost estimates, should the Commission consider and why? Commenters are encouraged to include both quantitative and qualitative assessments of costs as well as data or other information of support such assessments.

RFC 49. The Commission recognizes that there exist alternatives to proposed § 150.10. These alternatives include: (i) maintaining the status quo, or (ii) pursuing the changes in the December 2013 position limits proposal. The Commission requests comment on whether retaining the framework for spread exemptions as proposed in the December 2013 position limits proposal is superior from a cost-benefit perspective to proposed § 150.10. If yes, please explain why. The Commission requests comment on whether any alternatives to proposed § 150.10 would result in a superior cost-benefit profile, with support for any such alternative provided.

7. Section 150.11—Enumerated Anticipatory Bona Fide Hedges

After reviewing comments in response to the December 2013 position limits proposal, the Commission is now proposing another method by which market participants may have enumerated anticipatory bona fide hedge positions recognized. As proposed in the December 2013 position limits proposal, § 150.7 would require market participants to file statements with the Commission regarding certain anticipatory hedges which would become effective absent Commission action or inquiry ten days after submission. The second method in proposed § 150.11 is an exchange-administered process to determine whether certain enumerated anticipatory bona fide hedge positions, such as unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, or anticipatory cross-commodity hedges should be

recognized as bona fide hedge positions. Proposed § 150.11 works in concert with the following three proposed rules:

• proposed § 150.3(a)(1)(i), with the effect that recognized anticipatory enumerated bona fide hedge positions may exceed federal position limits;

• proposed § 150.5(a)(2), with the effect that recognized anticipatory enumerated bona fide hedge positions may exceed exchange-set position limits for contracts subject to federal position limits; and

• proposed § 150.5(b)(5), with the effect that recognized anticipatory enumerated bona fide hedge positions may exceed exchange-set position limits for contracts not subject to federal position limits.

a. Rule Summary

The proposed § 150.11 process is somewhat analogous to the application process for recognition of NEBFHs under proposed § 150.9. The proposed § 150.11 recognition process for enumerated anticipatory bona fide hedge positions has five sub-parts: (a) through (e). The first three sub-parts—§ 150.11(a), (b), and (c)—require exchanges that elect to have a process for recognizing enumerated anticipatory bona fide hedge positions, and market participants that seek position-limit relief for such positions, to carry out certain duties and obligations. The fourth and fifth sub-parts—§ 150.11(d), and (e)—delineate the Commission's role and obligations in reviewing requests for recognition of enumerated anticipatory bona fide hedge positions.

i. Section 150.11(a)—Exchange-Administered Enumerated Anticipatory Bona Fide Hedge Process

Under proposed § 150.11(a)(1), exchanges that voluntarily elect to process enumerated anticipatory bona-fide hedge applications are required to notify the Commission of their intention to do so by filing new rules or rule amendments with the Commission under part 40 of the Commission's regulations. In proposed § 150.11(a)(2), the Commission identifies certain types of information necessary for the application, including information required under proposed § 150.7(d). In proposed § 150.11(a)(3), the Commission states that applications must be updated annually and that the exchanges have ten days in which to recognize an enumerated anticipatory bona fide hedge. In addition, exchanges must retain authority to revoke recognitions. Proposed § 150.11(a)(4) states that once an enumerated anticipatory bona fide hedge has been recognized by an exchange, the position will be deemed to be recognized. Proposed § 150.11(a)(5) discusses reports that must be filed by applicants holding exempted an enumerated anticipatory bona fide hedge positions. Proposed 150.11(a)(6) explains that exchanges may choose to seek Commission review of an application and the Commission has ten days in which to respond.

ii. Section 150.11(b)—Enumerated Anticipatory Bona Fide Hedge Recordkeeping Requirements

Exchanges must maintain complete books and records of all activities relating to the processing and disposition of spread-exemption applications under proposed § 150.11(b). This is similar to the record-retention obligations of exchanges for positions

recognized as NEBFHs under proposed § 150.9, and exempted as spreads under proposed § 150.10.

iii. Section 150.11(c)—Enumerated anticipatory Bona Fide Hedge Reporting Requirements

Exchanges would have weekly reporting obligations under proposed § 150.11(c). Unlike NEBFHs and spreads, exchanges would have no monthly reporting or web-posting obligations for enumerated anticipatory bona fide hedges.

b. Baseline

The baseline is the same as it was in the December 2013 position limits proposal: the current filing process detailed in current § 1.48.

c. Benefits

There are significant benefits that would likely accrue should proposed § 150.11 be adopted. Similar to the benefits for recognizing positions as NEBFH positions under § 150.9, recognizing anticipatory positions as bona fide hedges under § 150.11 would provide market participants with potentially a more expeditious recognition process than the Commission proposal for a 10-day Commission recognition process under proposed 150.7. The benefit of prompter recognitions, though, is not readily quantifiable, and, in most circumstances, is subject to the characteristics and needs of markets as well as market participants. So while it is challenging to quantify the benefits that would likely be associated with proposed § 150.11, there are qualitative benefits that the Commission can discuss.

For example, exchanges would be able to use existing resources and knowledge in the administration and assessment of enumerated anticipatory bona fide hedge positions.

The Commission and exchanges have evaluated these types of positions for years (as discussed in the December position limits proposal). Utilizing this experience and familiarity would likely produce such benefits as prompt but reasoned decision making and streamlined procedures. In addition, proposed § 150.11 permits exchanges to act in less than ten days—a timeframe that would be less than the Commission's process under current § 1.48, or under § 150.7 as proposed in the December 2013 position limits proposal.[228] This could potentially enable commercial market participants to pursue trading strategies in a more timely fashion to advance their commercial and hedging needs to reduce risk.

Proposed § 150.11, similar to proposed § 150.9 and § 150.10, also would provide the benefit of enhanced record-retention and reporting of positions recognized as enumerated anticipatory bona fide hedges. As previously discussed, records retained for specified periods would enable exchanges to develop consistent practices and afford the Commission accessible information for review, surveillance, and enforcement efforts. Likewise, weekly reporting under § 150.11 would facilitate the tracking of positions, provide transparency to the enumerated anticipatory bona fide hedge process to the public, and improve open access and administrative and legal certainty.

d. Costs

The costs for proposed § 150.11 are similar to the costs for proposed §§ 150.9 and 150.10, with many of the cost considerations not changing. The costs that can be quantified are in Tables A3 through G3. Other costs associated with proposed § 150.11, like those for proposed §§ 150.9 and 150.10, are more qualitative in nature and hinge on

[228] See discussion in December 2013 position limits proposal at 75745-46.

specific market and participant attributes. With this in mind, the Commission believes that exchanges and market participants will incur the costs related to § 150.11 if they believe that administering the process under proposed § 150.11, or applying for recognition under proposed § 150.11 and establishing a recognized position, respectively, are less costly than not administering the process under proposed § 150.11 recognitions, or not executing such trades, respectively.

Other costs could arise from proposed § 150.11 if the Commission disagrees with an exchange' disposition of an enumerated anticipatory bona fide hedge position application, or costs from a Commission request or review under proposed § 150.11(d) These costs would include time and effort spent by market participants associated with a Commission review. In addition, market participants would lose amounts that the Commission can neither predict nor quantify if it became necessary to unwind trades or reduce positions were the Commission to conclude that an exchange's disposition of an enumerated anticipatory bona fide hedge application is not appropriate or is inconsistent with the Act. The Commission believes that such disagreements will be rare based on the Commission's past experience and review of exchanges' efforts. Nevertheless, the Commission notes that assessing whether a position is for the reduction of risk arising from anticipatory needs or excessive speculation is complicated.

Note: For a general description of proposed rules identified in the following Tables A3 to E3, see Section IIIA5, above.

Table A3.— Costs to Create or Amend Exchange Rules for Enumerated Anticipatory Bona Fide Hedge Applications

Proposed Regulation/ File or Amend Rules	Total Average Labor Hours	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Exchange
§150.11(a)(1)	5	$122	$610 [5 x $122]

Table B3.—Costs to Review Enumerated Anticipatory Bona Fide Hedge Applications

Proposed Regulation/ Review Applications	Total Average Applications Processed Per Exchange	Total Average Labor Hours Per application	Average Total Hours For Total Applications Reviewed Per Exchange	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Exchange
§150.11(a)(2)	50	5	250	$122	$30,500 [$122 x 250]

Table C3.—Costs to Market Participants Who Would Seek Enumerated Anticipatory Bona Fide Hedge Relief from Position Limits

Proposed Regulation/ Market Participants Seeking Relief from Position Limits	Number Of Market Participants	Total Average Applications Per Market Participant	Total Average Labor Hours Per Application	Average Total Hours For Each Application Filed Per Exchange	Total Average Labor Costs Per Hour	Total Average Annual Cost Per Market Participant
§150.11 (a)(2), (6)	25	2	3	6 [2 x 3]	$122	$732 [6 x $122]

Table D3.—Costs for Enumerated Anticipatory Bona Fide Hedge Recordkeeping

Proposed Regulation/ Recordkeeping	Number OfDCMs	Total Average Labor Hours For Recordkeeping	Total Average Labor Costs Per Hour	Total Average Annual Recordkeeping Cost Per Exchange
§150.11(b)	6	30	$122	$3,660 [30 x $122]

Table E3.—Costs for Enumerated Anticipatory Bona Fide Hedge Weekly Reporting

Proposed Regulation/ Weekly Reporting	Estimated Number of DCMs	Estimated Number of Hours Per Response	Average Reports Annually By Each Exchange	Total Average Labor Costs Per Hour	Total Average Annual Reporting Cost Per Exchange
§150.11(c)	6	3	52	$122	$19,032 [3 x 52$122]

Exchanges would have additional surveillance costs and duties that the Commission believes would be integrated with their existing self-regulatory organization surveillance activities as an exchange.

f. Request for Comment

RFC 50. The Commission requests comment on its considerations of the benefits of proposed § 150.11. Are there additional benefits that the Commission should consider? Has the Commission misidentified any benefits? Commenters are encouraged to include both quantitative and qualitative assessments of these benefits, as well as data or other information to support such assessments.

RFC 51. The Commission requests comment on its considerations of the costs of proposed § 150.11. Are there additional costs that the Commission should consider? Has the Commission misidentified any costs? What other relevant cost information or data, including alternative cost estimates, should the Commission consider and why? Commenters are encouraged to include both quantitative and qualitative assessments of these costs, as well as data or other information to support such assessments.

RFC 52. The Commission recognizes that there may exist alternatives to proposed § 150.11, such as maintaining the status quo, or adopting only § 150.7 as

proposed in the December 2013 position limits proposal.[229] The Commission requests comment on whether alternatives to proposed § 150.11 would result in a superior cost-benefit profile, with support for any such alternative provided. The Commission requests comment on whether the framework for recognizing enumerated anticipatory bona fide hedging positions as proposed in the December 2013 position limits proposal would be superior from a cost-benefit perspective to proposed § 150.11. If yes, please explain why.

8. CEA Section 15(a) Factors

CEA section 15(a) requires the Commission to consider the costs and benefits of its actions in light of five factors, which it proposes to do below. The Commission welcomes comments on its discussion of the proposed rules in this supplemental proposal and the CEA 15(a) factors.

i. Protection of market participants and the public

The imposition of position limits is intended to protect the markets and market participants from manipulation and excessive speculation. Yet, there are circumstances where position limits may be exceeded by bona fide hedge positions or spread positions, as provided in the CEA. By proposing the rules in this supplemental proposal, the Commission is offering market participants several reasonable alternatives by which they may establish bona fide hedge positions or spread positions that exceed position limits. The proposed alternatives require, among other things, exchanges to document and record their decisions to recognize bona fide hedge positions or to exempt spread positions. The Commission believes that the discipline of having exchanges review and

[229] See December 2013 position limits proposal at 75776-77

document such decisions protects hedgers, speculators, and markets from abuse of recognitions and exemptions. In general, exchanges have strong incentives, such as preserving the revenue from trading, maintaining credibility, and protecting markets and market participants from excessive speculation, manipulation, corners, and squeezes. In addition, the proposed rules would enable the Commission to protect markets and market participants because the Commission would be able to perform second-level reviews of exchange–administered processes regarding exemptions from speculative position limits, if necessary, and have available documentation for surveillance and enforcement actions.

RFC 53. Does permitting the exchanges to administer application processes for NEBFHs, spread exemptions, and enumerated anticipatory bona fide hedges further the goals of CEA section 4a(a)(3)(B) and properly protect market participants and the public? Please explain.

RFC 54. Does permitting the exchanges to administer application processes for NEBFHs, spread exemptions, and enumerated anticipatory bona fide hedges affect excess speculation? Please explain.

RFC 55. Will the ability to assume larger positions by way of exemptions under this supplemental proposal facilitate effective market manipulation by market participants availing themselves of such exemptions? Are existing safeguards and deterrents to market manipulation sufficient to prevent manipulation or does the Commission need to impose position limits without exchange-granted exemptions to prevent manipulation, prophylactically? Please explain.

ii. Efficiency, competitiveness, and financial integrity of futures markets

Market manipulation and excessive speculation harm the efficiency, competitiveness, and financial integrity of markets. Position limits are intended to prevent market manipulation and excessive speculation. There are, however, positions that may exceed position limits, such as those permitted by proposed §§ 150.9, 150.10, and 150.11, that promote market efficiency and competitiveness. For example, the proposed rules require an exchange to consider the policy objectives of position limits, prior to granting a spread exemption. If a market participant exerts market power, it might adversely affect market integrity because other market participants might perceive the underlying pricing process to be unfair. The proposed rules are designed, in part, to give exchanges the ability and information to guard against accumulation and exercise of market power that may result from excessive speculation, and, therefore, promote financial integrity and confidence in the markets.

RFC 56. Is market integrity adversely affected by the proposed rules in this supplemental proposal? If so, how might the Commission mitigate any harmful impact?

RFC 57. Should the Commission provide more guidance to exchanges on how to assess recognitions under this supplemental proposal, for example, guidance on cash-and-carry spreads, or any other spreads involving the spot-month contract?

RFC 58. What costs and benefits would accrue to exchanges and market participants should the Commission provide additional guidance to exchanges on how to assess recognitions under this supplemental proposal? Please explain.

RFC 59. Are there any anti-competitive effects between exchanges, or exchanges and SEFs, because the rules proposed in this supplemental proposal have the practical

effect of allowing exchanges to recognize and grant exemptions from position limits? If so, what are they? Please explain.

iii. Price discovery

The Commission believes that the recognition and exemption processes proposed to be administered by exchanges in this supplemental proposal will foster liquidity and potentially improve price discovery. Because exchanges possess knowledge about the commercial needs of market participants and the needs of markets, the proposed rules will enable exchanges to recognize and exempt positions in a timely and reasonable manner to help facilitate more stable prices. With more stable prices, market participants will have the ability to trade in and out of derivative positions more easily and with lower costs of execution.

RFC 60. How might the rules proposed in this supplemental proposal affect price discovery? Please explain.

RFC 61. How might the rules proposed in this supplement proposal affect liquidity?

RFC 62. Will price discovery be improved on exchanges because of the exemptions outlined in this supplemental proposal?

RFC 63. How might spread exemptions that go into the spot month affect price discovery?

RFC 64. What price-discovery costs and benefits would accrue for spread exemptions that go into the spot month? Please explain.

iv. Sound risk management practices

Under the proposed rules, market participants must explain and document the methods behind their hedging strategies to exchanges, and exchanges would have to evaluate them. As a result, the Commission believes that the exchange-administered processes discussed in this supplemental proposal should help market participants, exchanges, the Commission, and the public to understand better the risk management techniques and objectives of various market participants.

RFC 65. How might the rules proposed in this supplemental proposal affect sound risk management practices?

v. Other public interest considerations

Except as discussed above, the Commission has not identified any other public interest considerations.

RFC 66. Are there any other public interest considerations that the Commission should consider?

RFC 67. The Commission seeks comments on all aspects of its cost and benefit considerations. To the extent that any of the proposed rules in this supplemental proposal have an impact on activities outside the United States, the Commission requests comment on whether the associated costs and benefits are likely to be different from those associated with their impact on activities within the United States; and, if so, in what particular ways and to what extent. While at this point in time the Commission does not foresee any other costs or benefits that might be associated with the cross-border implications of this proposal, it seeks further any comment on this topic. For instance, would price discovery move to a foreign board of trade because of this proposed

rulemaking? On all issues, commenters are encouraged to supply data and quantify where practical.

RFC 68. The Commission requests comment on whether there will be any lost benefits related to position limits because of the recognitions and exemptions in the proposed rules in this supplemental proposal.

9. CEA Section 15(b) Considerations.

Section 15(b) of the CEA requires the Commission to consider the public interest to be protected by the antitrust laws and to endeavor to take the least anticompetitive means of achieving the objectives, policies and purposes of the CEA, before promulgating a regulation under the CEA or issuing certain orders. The Commission preliminarily believes that the rules and guidance proposed in this supplemental notice of proposed rulemaking are consistent with the public interest protected by the antitrust laws.

The Commission acknowledges that, with respect to exchange qualifications to recognize or grant NEBFHs, spread exemptions, and anticipatory bona fide hedges for federal position limit purposes, the threshold experience requirements that it proposes will advantage certain more-established incumbent DCMs ("incumbent DCMs") over smaller DCMs seeking to expand or future entrant DCMs (collectively "entrant DCMs") or SEFs.[230] Specifically, incumbent DCMs—based on their past track records of listing actively traded reference contracts and setting and administering exchange-set limits applicable to those contracts for at least a year—will be immediately eligible to submit rules to the Commission under part 40 to process trader applications for recognition of

[230] Proposed rules §§150.9(a)(1), 150.10(a)(1), and 150.11(a)(1).

NEBFHs, spread exemptions,[231] and anticipatory bona fide hedges; in contrast, entrant DCMs and SEFs will be foreclosed until such time as they have met the eligibility criteria to do so. However, subject to consideration of any comments supporting a contrary view, the Commission does not perceive that an ability to process applications for NEBFHs, spread exemptions and/or anticipatory bona fide hedges is a necessary function for a DCM or SEF to compete effectively as a trading facility. In the event an incumbent DCM declines to process a trader's request for hedging recognition or a spread exemption,[232] the trader may seek the recognition or exemption directly from the Commission in order to trade on an entrant DCM or SEF. Accordingly, the Commission does not view the proposed threshold experience requirements as establishing a barrier to entry or competitive restraint likely to facilitate anticompetitive effects in any relevant antitrust market for contract trading.[233]

The Commission requests comment on any considerations related to the public interest to be protected by the antitrust laws and potential anticompetitive effects of the proposal, as well as data or other information to support such considerations. Is the Commission correct that the proposed threshold criteria for an exchange to qualify to

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[231] In the case of qualifications to exempt certain spread positions, the contract may be either a referenced contract or a component of the spread. See proposed rule §150.10(a)(1)(i).

[232] The Commission recognizes that in certain circumstances it might be in an exchange's economic interest to deny processing a particular trader's application for hedge recognition or a spread exemption. For example, this might occur in a circumstance in which a trader has reached the exchange-set limit and the exchange determines that liquidity is insufficient to maintain a fair and orderly contract market if the trader's position increases.

[233] See, e.g., Brown Shoe Co. v. U.S., 370 U.S. 294, 324-25 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it"); U.S. v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957)("Determination of the relevant market is a necessary predicate to finding a violation"); Rebel Oil v. Atl. Richfield Co., 51 F. 3d 1421, 1434 (9th Cir. 1995)("A 'market' is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel would have market power in dealing with any group of buyers," quoting Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶518.1b, at 534 (Supp. 1993)).

process applications for recognition of NEBFHs, spread exemptions, and enumerated anticipatory bona fide hedges is unlikely to create a competitive barrier to entry or expansion that will insulate incumbent DCMs from competition for contract trading or otherwise contribute to anticompetitive effects in any relevant antitrust market(s) for contract trading?

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact. A regulatory flexibility analysis or certification typically is required for "any rule for which the agency publishes a general notice of proposed rulemaking pursuant to" the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b). The requirements related to the proposed amendments fall mainly on registered entities, exchanges, FCMs, swap dealers, clearing members, foreign brokers, and large traders. The Commission has previously determined that registered DCMs, FCMs, swap dealers, major swap participants, eligible contract participants, SEFs, clearing members, foreign brokers and large traders are not small entities for purposes of the RFA. While the requirements under the proposed rulemaking may impact non-financial end users, the Commission notes that position limits levels apply only to large traders. Accordingly, the Chairman, on behalf of the Commission, hereby certifies, on behalf of the Commission, pursuant to 5 U.S.C. 605(b), that the actions proposed to be taken herein would not have a significant economic impact on a substantial number of small entities. The Chairman made the same certification in the 2013 Position Limits Proposal.

C. Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501 et seq., imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget ("OMB"). Certain provisions of the proposed rules would result in amendments to previously-approved collection of information requirements within the meaning of the PRA. Therefore, the Commission is submitting to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11 the information collection requirements proposed in this rulemaking proposal as an amendment to the previously-approved collection associated with OMB control number 3038-0013.

If adopted, responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, titled "Commission Records and Information." In addition, the Commission emphasizes that section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974.

On December 12, 2013, the Commission published in the Federal Register a notice of proposed modifications to parts 1, 15, 17, 19, 32, 37, 38, 140, and 150 of the Commission's regulations (as defined above, the "December 2013 position limits proposal"). The modifications addressed, among other things, speculative position limits for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are "economically equivalent" to such contracts. The Commission is now proposing revisions to the December 2013 position limits proposal.

Specifically, the Commission is now proposing that the position limits set forth in § 150.2 may be exceeded to the extent that a commodity derivative position is recognized, as an NEBFH, exempt spread position, or enumerated anticipatory bona fide hedge, by a derivatives contract market or swap execution facility. A designated contract market or swap execution facility that elects to process applications pursuant to the proposed rules must file new rules or rule amendments with the Commission pursuant to Part 40. Such new rules or rule amendments must comply with certain conditions set forth in proposed §§ 150.9(a), 150.10(a), and/or 150.11(a), as applicable. Further, such rules must state that in order to apply for an exemption with a particular designated contract market or swap execution facility, a person would need to meet certain criteria and file an application with the relevant derivatives contract market or swap execution facility in accordance with proposed §§ 150.9(a), 150.10(a), or 150.11(a), as applicable.

2. Methodology and Assumptions

It is not possible at this time to accurately determine the number of respondents affected by the proposed revisions to the December 2013 position limits proposal. This current proposal permits designated contract markets and swap execution facilities to

elect to process applications for recognition of NEBFHs, exempt spread positions, or enumerated anticipatory bona fide hedges. Accordingly, the Commission does not know which, or how many, designated contract markets and swap execution facilities may elect to offer such recognition processes, or which, or how many market participants may submit applications. Further, the Commission is unsure of how many designated contract markets, swap execution facilities, and market participants not currently active in the market may elect to incur the estimated burdens in the future.

These limitations notwithstanding, the Commission has made best-effort estimations regarding the likely number of affected entities for the purposes of calculating burdens under the PRA. The Commission used data currently provided by designated contract markets to estimate the number of respondents for each of the proposed obligations subject to the PRA. The Commission estimated the number of exchanges that may elect to process applications for recognition of NEBFHs, exempt spread positions, or enumerated anticipatory bona fide hedges, and the number of market participants who may file for relief from position limit requirements under the proposed processes. The Commission also used information from testimony given at Commission advisory committee meetings. Further, the Commission asked several questions of the five exchanges that, in the Commission's knowledge, currently process applications for exemptions to exchange-set position limits, to ascertain the burdens on the exchanges that may arise should such exchanges elect to process applications under proposed §§ 150.9, 150.10, and/or 150.11. The Commission received responses to its questions regarding the administration of current exchange processes for approving exemptions from position limits from representatives of four exchanges. The Commission preliminarily believes

that the burden estimates provided by these four exchanges are sufficiently representative of all potentially affected entities, and is providing average estimates in order to estimate the potential impact on all entities, particularly those which do not currently process exemption applications. Thus, the Commission proposes to use these estimates, as well as figures provided in testimony from the Energy and Environmental Markets Advisory Committee and Agricultural Advisory Committee meetings, to calculate burdens for the purposes of the Paperwork Reduction Act. The Commission welcomes comment on its estimates and the methodology described above.

The Commission's estimates concerning wage rates are based on 2013 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association ("SIFMA"). The Commission is using a figure of $122 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year, adjusted to account for the average rate of inflation in 2013. This figure was then multiplied by 1.33 to account for benefits, and further by 1.5 to account for overhead and administrative expenses. The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their relative weight); "programmer (average of senior and non-senior)" (15% weight), "senior accountant" (15%) "compliance manager" (30%), and "assistant/associate general counsel" (40%). All monetary estimates below have been rounded to the dollar.

The Commission welcomes comment on its assumptions and estimates.

3. Collections of Information – Information Provided by Reporting Entities and Recordkeeping Duties

(a) Requirements for Designated Contract Markets and Swaps Execution Facilities

Filing New or Amended Rules Pursuant to Part 40

Proposed §§ 150.9(a), 150.10(a), and 150.11(a) require that designated contract markets and swap execution facilities file new rules or rule amendments pursuant to Part 40 of this chapter, establishing or amending its application process for recognition of NEBFHs, exempt spread positions, or enumerated anticipatory bona fide hedges, respectively, consistent with the requirements of proposed §§ 150.9, 150.10, and 150.11. Further, proposed §§ 150.9(a), 150.10(a), and 150.11(a) require that designated contract markets and swap execution facilities post to their websites a summary describing the type of derivative positions that are recognized as exempt non-enumerated hedge positions.

The Commission estimates that, at most, 6 entities will file new rules or rule amendments pursuant to Part 40 to elect to process NEBFH applications. The Commission determined this estimate by analyzing how many exchanges currently list actively traded contracts for the 28 commodities for which federal position limits will be set, because proposed §§ 150.9(a), 150.10(a), and 150.11(a) require a referenced contract to be listed by and actively traded on any exchange that elects to process NEBHF applications for recognition of positions in such referenced contract. The Commission anticipates that the exchanges that elect to process NEBFH applications under proposed §

150.9(a) are likely to have processes for recognizing such exemptions currently, and so would need to file amendments to existing exchange rules rather than adopt new rules. This filing would be required only once. Thus, the Commission approximates an average per entity burden of 5 labor hours. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $610 per entity for filings under proposed § 150.9(a).

Similarly, the Commission anticipates that the exchanges that elect to process spread exemption applications under proposed § 150.10(a) are likely to have processes for recognizing such exemptions currently, and so would need to file amendments to existing exchange rules rather than adopt new rules. This filing would be required only once. Thus, the Commission approximates an average per entity burden of 5 labor hours. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $610 per entity for filings under proposed § 150.10(a).

In addition, the Commission anticipates that the exchanges that elect to process enumerated anticipatory bona fide hedge applications under proposed § 150.11(a) are likely to have processes for recognizing such exemptions currently, and so would need to file amendments to existing exchange rules rather than adopt new rules. This filing would be required only once. Thus, the Commission approximates an average per entity burden of 5 labor hours. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $610 per entity for filings under proposed § 150.11(a).

Review and Disposition of Applications

An exchange that elects to process applications may incur a burden related to the review and disposition of such applications pursuant to proposed §§ 150.9(a), 150.10(a),

and 150.11(a). The review of an application is required to include analysis of the facts and circumstances of such application to determine whether the application meets the standards established by the Commission. Exchanges are required to notify the applicant regarding the disposition of the application, including whether the application was approved, denied, referred to the Commission, or requires additional information.

The Commission anticipates that the exchanges that elect to process NEBFH applications under proposed § 150.9(a) are likely to have processes for the review and disposition of such applications currently in place. The Commission preliminarily believes that in such cases, complying with the proposed rules is likely to be less burdensome because the exchange would already have staff, policies, and procedures established to accomplish its duties under the proposed rules. Thus, the Commission estimates that each exchange would process an average of 185 NEBFH applications per year and that each application would require 5 hours to process, for an average per entity burden of 925 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $112,850 per entity under proposed § 150.9(a).

The Commission anticipates that the exchanges that elect to process spread exemption applications under proposed § 150.10(a) are likely to have processes for the review and disposition of such applications currently in place. The Commission preliminarily believes that in such cases, complying with the proposed rules is likely to be less burdensome because the exchange would already have staff, policies, and procedures established to accomplish its duties under the proposed rules. Thus, the Commission estimates that each exchange would process about 50 spread exemption

applications per year and that each application would require 5 hours to process, for an average per entity burden of 250 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $30,500 per entity under proposed § 150.10(a).

The Commission anticipates that the exchanges that elect to process enumerated anticipatory bona fide hedge applications under proposed § 150.11(a) are likely to have processes for the review and disposition of such applications currently in place. The Commission preliminarily believes that in such cases, complying with the proposed rules is likely to be less burdensome because the exchange would already have staff, policies, and procedures established to accomplish its duties under the proposed rules. Thus, the Commission estimates that each entity would process about 50 anticipatory hedging applications per year and that each application would require 5 hours to process, for an average per entity burden of 250 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $30,500 per entity under proposed § 150.11(a).

Publication of Summaries

Further, exchanges that elect to process the applications under proposed §§ 150.9 and 150.10 may incur burdens to publish on their Web sites summaries of the unique types of NEBFH positions and spread positions, respectively. Although this requirement is new even for exchanges that already have a similar process under exchange-set limits, the Commission preliminarily believes that the proposed summaries will not be overly burdensome in part because they are anticipated to be concise.

The Commission preliminarily believes that complying with the requirements under proposed § 150.9(a) for summaries of recognized NEBFHs would require the work of an analyst to write and a supervisor to approve a summary. The summary would also need to be published on the exchange's Web site. The Commission estimates that a single summary would require 5 hours to write, approve, and post. The Commission notes that exchanges likely would need to post more summaries in the first year of the process, as over time the applications may become more routine. The Commission thus estimates that each exchange would post approximately 30 summaries per year, for an average per entity burden of 5 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $18,300 per entity under proposed §150.9(a).

The Commission preliminarily believes that complying with the requirements under proposed §150.10(a) for summaries of recognized spread exemptions would require the work of an analyst to write and a supervisor to approve the summary. The summary would also need to be published on the exchange's Web site. The Commission estimates that a single summary would require 5 hours to write, approve, and post. The Commission notes that exchanges likely would need to post more summaries in the first year of the process, as over time the applications may become more routine. The Commission thus estimates that each entity would post approximately10 summaries per year, for an average per entity burden of 50 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $6,100 per entity under proposed § 150.10(a).

(b) Requirements for Market Participants

Proposed §§150.9(a)(3), 150.10(a)(3), and 150.11(a)(2), would require electing designated contract markets and swap execution facilities to establish an application process that elicits sufficient information to allow the designated contract market or swap execution facility to determine, and the Commission to verify, whether it is appropriate to recognize a commodity derivative position as an NEBFH, exempt spread position or enumerated anticipatory bona fide hedge. Pursuant to §§ 150.9(a)(4(i), 150.10(a)(4), and 150.11(a)(3), an applicant would be required to update an application at least on an annual basis. Further, §§ 150.9(a)(6), 150.10(a)(6), and 150.11(a)(5) require that any such applicant file a report with the designated contract market or swap execution facility (and with the Commission in the case of 150.10(a)(5)) when such applicant owns or controls a derivative position that such has been recognized as an NEBFH, exempt spread, or enumerated anticipatory bona fide hedge, respectively.

The Commission anticipates that market participants would be mostly familiar with the NEBFH application provided by exchanges that currently process such applications, and thus preliminarily believes that the burden for applying to an exchange would be minimal. Information included in the application is required to be sufficient to allow the exchange to determine, and the Commission to verify, whether the position meets the requirements of CEA section 4a(c), but specific data fields are left to the exchanges to determine. The Commission believes that there would be a slight additional burden for market participants to submit the notice that must be filed when such participant owns or controls the position that has been recognized as a NEBFH.

The Commission estimates that 222 entities will file an average of 5 applications each year to obtain recognition of certain positions as NEBFHs and that each application, including the notice filing when the participant owns or controls such positions, would require approximately 4 burden hours to complete and file. Thus, the Commission estimates an average per entity burden of 20 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $2,440 per entity for applications under proposed § 150.9(a)(3).

The Commission anticipates that market participants would be mostly familiar with the spread exemption application provided by exchanges that currently process such applications, and thus preliminarily believes that the burden for applying to an exchange would be minimal. Information included in the application is required to be sufficient to allow the exchange to determine, and the Commission to verify, whether the position fulfills the objectives of CEA section 4a(a)(3)(B), but specific data fields are left to the exchanges to determine. The Commission believes that there would be a slight additional burden for market participants to submit the notice that must be filed when such participant owns or controls the spread position that has been exempted from position limits. The Commission estimates that 25 entities will file an average of 2 applications each year to obtain an exemption for certain spread positions and that each application, including the notice filing when the participant owns or controls such positions, would require approximately 3 burden hours to complete and file. Thus, the Commission approximates an average per entity burden of 6 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $732 per entity for applications under proposed § 150.10(a)(2).

The Commission anticipates that market participants would be mostly familiar with the enumerated anticipatory bona fide hedge application provided by exchanges that currently process such applications, and thus preliminarily believes that the burden for applying to an exchange would be minimal. The application is required to include, at minimum, the information required under proposed § 150.7(d). The Commission estimates that 25 entities will file an average of 2 applications each year to obtain recognition that certain positions are enumerated anticipatory bona fide hedges and that each application would require approximately 3 burden hours to complete and file. Thus, the Commission estimates an average per entity burden of 6 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $732 per entity for applications under proposed § 150.11(a)(2).

(c) Recordkeeping and Reporting

Proposed §§ 150.9(b), 150.10(b), and 150.11(b), would require electing designated contract markets and swap execution facilities to keep full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing and disposition of applications for recognition of NEBFHs, exempt spread positions, and enumerated anticipatory bona fide hedges. Further, proposed §§ 150.9(c), 150.10(c), and 150.11(c), would require designated contract markets and swap execution facilities that elect to process NEBFH applications to submit to the Commission a report for each week as of the close of business on Friday showing various information concerning the derivative positions that have been recognized by the designated contract market or swap execution facility as an NEBFH, exempt spread position, or enumerated anticipatory bona fide hedge position, and for any revocation,

modification or rejection of such recognition. Finally, proposed §§ 150.9(c) and 150.10(c) also require a designated contract market or swap execution facility that elects to process applications for NEBFHs and exempt spread positions to submit to the Commission (i) a summary of any NEBFH and exempt spread position newly published on the designated contract market or swap execution facility's website; and (ii) no less frequently than monthly, any report submitted by an applicant to such designated contract market or swap execution facility pursuant to rules required under proposed §§ 150.9(a)(6)and 150.10(a)(6), respectively.

The Commission preliminarily believes that exchanges that currently process applications for recognition of NEBFHs, exempt spread positions, and enumerated anticipatory bona fide hedges maintain records of such applications as required pursuant to other Commission regulations, including § 1.31. However, the Commission also believes that the proposed rules may confer additional recordkeeping obligations on exchanges that elect to process applications for recognition of NEBFHs, exempt spread positions, and enumerated anticipatory bona fide hedges. The Commission estimates that 6 entities will have recordkeeping obligations pursuant to proposed § 150.9. Thus, the Commission approximates an average per entity burden of 30 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $3,660 per entity for records and filings under proposed § 150.9.

The Commission estimates that 6 entities will have recordkeeping obligations pursuant to proposed § 150.10. Thus, the Commission estimates an average per entity burden of 30 labor hours annually. At an estimated labor cost of $122, the Commission

estimates an average cost of approximately $3,660 per entity for records and filings under proposed § 150.10.

The Commission estimates that 6 entities will have recordkeeping obligations pursuant to proposed § 150.11. Thus, the Commission estimates an average per entity burden of 30 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $3,660 per entity for records and filings under proposed § 150.11.

Finally, the Commission anticipates that exchanges that elect to process applications for recognition of NEBFHs, spread exemptions, and enumerated anticipatory bona fide hedges will be required to file two types of reports, as stated above. The Commission understands that 5 exchanges currently submit reports, on a voluntary basis each month, which provide information regarding exchange-recognized exemptions of all types. The Commission preliminarily believes that the content of such reports is similar to the information required of the reports in proposed §§ 150.9(c), 150.10(c), and 150.11(c), but the frequency of such reports would increase under the proposed rules.

The Commission estimates that 6 entities will have weekly reporting obligations pursuant to proposed § 150.9(c). The Commission also estimates that the weekly report will require a burden of approximately 3 hours to complete and submit. Thus, the Commission estimates an average per entity burden of 312 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $19,032 per entity for weekly reports under proposed rules 150.9(c).

The Commission estimates that 6 entities will have weekly reporting obligations pursuant to proposed § 150.10(c). The Commission also estimates that the weekly report

will require a burden of approximately 3 hours to complete and submit. Thus, the Commission estimates an average per entity burden of 312 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $19,032 per entity for weekly reports under proposed § 150.10(c).

The Commission estimates that 6 entities will have weekly reporting obligations pursuant to proposed § 150.11(c). The Commission also estimates that the weekly report will require a burden of approximately 3 hours to complete and submit. Thus, the Commission approximates an average per entity burden of 312 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $19,032 per entity for weekly reports under proposed § 150.11(c).

For the monthly report, the Commission anticipates a minor burden for exchanges because the proposed rules require exchanges essentially to forward to the Commission notices received from applicants who own or control the positions that have been recognized or exempted.

The Commission estimates that 6 entities will have monthly reporting obligations pursuant to proposed § 150.9(c). The Commission also estimates that the monthly report will require a burden of approximately 2 hours to complete and submit. Thus, the Commission approximates an average per entity burden of 72 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $2,928 per entity for monthly reports under proposed § 150.9(c).

The Commission estimates that 6 entities will have monthly reporting obligations pursuant to proposed § 150.10(c). The Commission also estimates that the monthly report will require a burden of approximately 2 hours to complete and submit. Thus, the

Commission approximates an average per entity burden of 72 labor hours annually. At an estimated labor cost of $122, the Commission estimates an average cost of approximately $2,928 per entity for monthly reports under proposed § 150.10(c). The above estimates are summarized in the following table:

a	b	c	d	e[234]	f	g[235]
Type of Respondent	**Estimated Number of Respondents**	**Report or Record**	**Average Reports Annually by Each Respondent**	**Total Annual Responses**	**Estimated Number of Hours Per Response**	**Annual Burden in Fiscal Year**
Exchanges	6	§ 150.9(a) Rule Filing	1	6	5	30
	6	§ 150.10(a) Rule Filing	1	6	5	30
	6	§ 150.11(a) Rule Filing	1	6	5	30
	6	§ 150.9(a) Review	185	1,110	5	5,550
	6	§ 150.10(a) Review	50	300	5	1,500
	6	§ 150.11(a) Review	50	300	5	1,500
	6	§ 150.9(a) Summaries	30	180	5	900
	6	§ 150.10(a) Summaries	10	60	5	300
	6	§ 150.9(a) Recordkeeping	1	6	30	180
	6	§ 150.10(a) Recordkeeping	1	6	30	180
	6	§ 150.11(a) Recordkeeping	1	6	30	180
	6	§ 150.9(a) Weekly Report	52	312	3	936
	6	§ 150.10(a) Weekly Report	52	312	3	936
	6	§ 150.11(a) Weekly Report	52	312	3	936
	6	§ 150.9(a) Monthly Report	12	72	2	144
	6	§ 150.10(a) Monthly Report	12	72	2	144
Market Participants	222	§ 150.9(a)(3) Application & Notice	5	1,110	4	4,440
	25	§ 150.10(a)(3) Application & Notice	2	50	3	150
	25	§ 150.11(a)(2) Application & Notice	2	50	3	150

[234] Column b times column d.

[235] Column e times column f. Burdens have been rounded to the nearest whole number where appropriate.

Total	278 (distinct entities or persons)			5,486	6.95 (average number of hours per response)	17,636

4. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by e-mail at OIRA-submissions@omb.eop.gov. Please provide the Commission with a copy of comments submitted so that all comments can be summarized and addressed in the final regulation preamble. Refer to the Addresses section of this notice for comment submission instructions to the Commission. A copy of the supporting statements for the collection of information discussed above may be obtained by visiting RegInfo.gov. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully considered if

received by OMB (and the Commission) within 30 days after the publication of this notice of proposed rulemaking.

List of Subjects

17 CFR Part 37

Registered entities, Registration application, Reporting and recordkeeping requirements, Swaps, Swap execution facilities.

17 CFR Part 38

Block transaction, Commodity futures, Designated contract markets, Reporting and recordkeeping requirements, Transactions off the centralized market.

17 CFR Part 150

Bona fide hedging, Commodity futures, Cotton, Grains, Position limits, Referenced Contracts, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as follows:

PART 37—SWAP EXECUTION FACILITIES

1. The authority citation for part 37 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a–2, 7b–3, and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

2. In Appendix B to part 37, under the heading Core Principle 6 of Section 5h of the Act—Position Limits or Accountability, revise to read as follows:

APPENDIX B TO PART 37—GUIDANCE ON, AND ACCEPTABLE PRACTICES IN, COMPLIANCE WITH CORE PRINCIPLES

* * * * *

Core Principle 6 of Section 5h of the Act—Position Limits or Accountability

—(A) IN GENERAL.—To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) POSITION LIMITS.—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the swap execution facility shall— (1) set its position limitation at a level not higher than the Commission limitation; and (2) monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

(a) Guidance. (1) Until a swap execution facility has access to sufficient swap position information, a swap execution facility that is a trading facility need not demonstrate compliance with Core Principle 6(B). A swap execution facility has access to sufficient swap position information if, for example: (1) it has access to daily information about its market participants' open swap positions; or (2) it knows, including through knowledge gained in surveillance of heavy trading activity occurring on or pursuant to the rules of the swap execution facility, that its market participants regularly engage in large volumes of speculative trading activity that would cause reasonable surveillance personnel at a swap execution facility to inquire further about a market participant's intentions or open swap positions.

(2) When a swap execution facility has access to sufficient swap position information, this guidance is no longer applicable. At such time, a swap execution facility is required to demonstrate compliance with Core Principle 6(B).

(b) Acceptable Practices. [Reserved]

* * * * *

PART 38—DESIGNATED CONTRACT MARKETS

3. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a–2, 7b, 7b–1, 7b–3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

4. In Appendix B to part 38, under the heading Core Principle 5 of Section 5 of the Act─Position Limitations or Accountability, revise to read as follows:

APPENDIX B TO PART 38—GUIDANCE ON, AND ACCEPTABLE PRACTICES IN, COMPLIANCE WITH CORE PRINCIPLES

* * * * *

Core Principle 5 of Section 5(d) of the Act: POSITION LIMITATIONS OR ACCOUNTABILITY

—(A) IN GENERAL.—To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) MAXIMUM ALLOWABLE POSITION LIMITATION.—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

(a) Guidance. (1) Until a board of trade has access to sufficient swap position information, a board of trade need not demonstrate compliance with Core Principle 5(B) with respect to swaps. A board of trade has access to sufficient swap position information if, for example: (1) it has access to daily information about its market participants' open swap positions; or (2) it knows, including through knowledge gained in surveillance of heavy trading activity occurring on or pursuant to the rules of the designated contract market, that its market participants regularly engage in large volumes of speculative trading activity that would cause reasonable surveillance personnel at a board of trade to inquire further about a market participant's intentions or open swap positions.

(2) When a board of trade has access to sufficient swap position information, this guidance is no longer applicable. At such time, a board of trade is required to demonstrate compliance with Core Principle 5(B) with respect to swaps.

(b) Acceptable Practices. [Reserved]

PART 150—LIMITS ON POSITIONS

5. The authority citation for part 150 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6c, 6f, 6g, 6t, 12a, 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

6. In § 150.1, revise to read as follows:

§150.1 Definitions.

As used in this part—

Bona fide hedging position means

(1) Hedges of an excluded commodity. For a position in commodity derivative contracts in an excluded commodity, as that term is defined in section 1a(19) of the Act:

(i) Such position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; and

(ii)(A) Is enumerated in paragraph (3), (4) or (5) of this definition; or

(B) Is recognized as a bona fide hedging position by the designated contract market or swap execution facility that is a trading facility, pursuant to such market's rules submitted to the Commission, which rules may include risk management exemptions consistent with Appendix A of this part; and

(2) Hedges of a physical commodity. For a position in commodity derivative contracts in a physical commodity:

(i) Such position:

(A) Represents a substitute for transactions made or to be made, or positions taken or to be taken, at a later time in a physical marketing channel;

(B) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise;

(C) Arises from the potential change in the value of—

(1) Assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(2) Liabilities which a person owes or anticipates incurring; or

(3) Services that a person provides, purchases, or anticipates providing or purchasing; and

(D) Is—

(1) Enumerated in paragraph (3), (4) or (5) of this definition; or

(2) Recognized as shown to be a non-enumerated bona fide hedges by either a designated contract market or swap execution facility, each in accordance with § 150.9(a); or by the Commission; or

(ii) (A) Pass-through swap offsets. Such position reduces risks attendant to a position resulting from a swap in the same physical commodity that was executed opposite a counterparty for which the position at the time of the transaction would qualify as a bona fide hedging position pursuant to paragraph (2)(i) of this definition (a pass-through swap counterparty), provided that no such risk-reducing position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery commodity derivative contract; and

(B) Pass-through swaps. Such swap position was executed opposite a pass-through swap counterparty and to the extent such swap position has been offset pursuant to paragraph (2)(ii)(A) of this definition.

(3) Enumerated hedging positions. A bona fide hedging position includes any of the following specific positions:

(i) Hedges of inventory and cash commodity purchase contracts. Short positions in commodity derivative contracts that do not exceed in quantity ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

(ii) Hedges of cash commodity sales contracts. Long positions in commodity derivative contracts that do not exceed in quantity the fixed-price sales contracts in the contract's underlying cash commodity by the same person and the quantity equivalent of

fixed-price sales contracts of the cash products and by-products of such commodity by the same person.

(iii) Hedges of unfilled anticipated requirements. Provided that such positions in a physical-delivery commodity derivative contract, during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract, do not exceed the person's unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month:

(A) Long positions in commodity derivative contracts that do not exceed in quantity unfilled anticipated requirements of the same cash commodity, and that do not exceed twelve months for an agricultural commodity, for processing, manufacturing, or use by the same person; and

(B) Long positions in commodity derivative contracts that do not exceed in quantity unfilled anticipated requirements of the same cash commodity for resale by a utility that is required or encouraged to hedge by its public utility commission on behalf of its customers' anticipated use.

(iv) Hedges by agents. Long or short positions in commodity derivative contracts by an agent who does not own or has not contracted to sell or purchase the offsetting cash commodity at a fixed price, provided that the agent is responsible for merchandising the cash positions that are being offset in commodity derivative contracts and the agent has a contractual arrangement with the person who owns the commodity or holds the cash market commitment being offset.

(4) Other enumerated hedging positions. A bona fide hedging position also includes the following specific positions, provided that no such position is maintained in

any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract:

(i) Hedges of unsold anticipated production. Short positions in commodity derivative contracts that do not exceed in quantity unsold anticipated production of the same commodity, and that do not exceed twelve months of production for an agricultural commodity, by the same person.

(ii) Hedges of offsetting unfixed-price cash commodity sales and purchases. Short and long positions in commodity derivative contracts that do not exceed in quantity that amount of the same cash commodity that has been bought and sold by the same person at unfixed prices:

(A) Basis different delivery months in the same commodity derivative contract; or

(B) Basis different commodity derivative contracts in the same commodity, regardless of whether the commodity derivative contracts are in the same calendar month.

(iii) Hedges of anticipated royalties. Short positions in commodity derivative contracts offset by the anticipated change in value of mineral royalty rights that are owned by the same person, provided that the royalty rights arise out of the production of the commodity underlying the commodity derivative contract.

(iv) Hedges of services. Short or long positions in commodity derivative contracts offset by the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services held by the same person, provided that the contract for services arises out of the production, manufacturing, processing, use, or transportation of the commodity underlying the commodity derivative contract, and which may not exceed one year for agricultural commodities.

(5) Cross-commodity hedges. Positions in commodity derivative contracts described in paragraph (2)(ii), paragraphs (3)(i) through (iv) and paragraphs (4)(i) through (iv) of this definition may also be used to offset the risks arising from a commodity other than the same cash commodity underlying a commodity derivative contract, provided that the fluctuations in value of the position in the commodity derivative contract, or the commodity underlying the commodity derivative contract, are substantially related to the fluctuations in value of the actual or anticipated cash position or pass-through swap and no such position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract.

Futures-equivalent means

(1) An option contract, whether an option on a future or an option that is a swap, which has been adjusted by an economically reasonable and analytically supported risk factor, or delta coefficient, for that option computed as of the previous day's close or the current day's close or contemporaneously during the trading day, and converted to an economically equivalent amount of an open position in a core referenced futures contract;

(2) A futures contract which has been converted to an economically equivalent amount of an open position in a core referenced futures contract; and

(3) A swap which has been converted to an economically equivalent amount of an open position in a core referenced futures contract.

Intermarket spread position means a long (short) position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, at a particular designated contract market or swap execution facility, and a short

(long) position in one or more commodity derivative contracts in that same, or similar, commodity, or its products or its by-products, away from that particular designated contract market or swap execution facility.

Intramarket spread position means a long position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, and a short position in one or more commodity derivative contracts in the same, or similar, commodity, or its products or its by-products, on the same designated contract market or swap execution facility.

7. In § 150.3, revise to read as follows:

§ 150.3 Exemptions

(a) Positions which may exceed limits. The position limits set forth in § 150.2 may be exceeded to the extent that:

(1) Such positions are:

(i) Bona fide hedging positions that either:

(A) comply with the definition in § 150.1; or

(B) are recognized by a designated contract market or swap execution facility as:

(1) non-enumerated bona fide hedges in accordance with the general definition in § 150.1 and the process in § 150.9(a), *provided that* the person has not otherwise been notified by the Commission under § 150.9(d)(4) or by the designated contract market or swap execution facility under rules adopted pursuant to § 150.9(a)(4)(iv)(B); or

(2) anticipatory bona fide hedge positions under paragraphs (3)(iii), (4)(i), (4)(iii), (4)(iv) and (5) of the bona fide hedging position definition in § 150.1 of this chapter, *provided that* for anticipatory bona fide hedge positions under (B)(2) of this paragraph the person complies with the filing requirements found in § 150.7 or the filing

requirements adopted by a designated contract market or swap execution facility in accordance with § 150.11(a)(3), as applicable;

(ii) [Reserved];

(iii) [Reserved];

(iv) Spread positions recognized by a designated contract market or swap execution facility in accordance with § 150.10(a), *provided that* the person has not otherwise been notified by the Commission under § 150.10(d)(4) or by the designated contract market or swap execution facility under rules adopted pursuant to § 150.10(a)(4)(iv)(B); or

(v) Other positions exempted under paragraph (e) of this section; and that

(2) [Reserved]

(3) [Reserved]

(b) [Reserved]

(c) [Reserved]

(d) [Reserved]

(e) [Reserved]

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) [Reserved]

(j) [Reserved]

8. Revise § 150.5 to read as follows:

§150.5 Exchange-set speculative position limits.

(a) Requirements and acceptable practices for futures and futures option contracts subject to federal position limits. (1) For any commodity derivative contract that is subject to a speculative position limit under § 150.2, a designated contract market or swap execution facility that is a trading facility shall set a speculative position limit that is no higher than the level specified in § 150.2.

(2) Exemptions under § 150.3. (i) Grant of exemption. Any designated contract market or swap execution facility that is a trading facility may grant exemptions from any speculative position limits it sets under paragraph (a)(1) of this section, provided that such exemptions conform to the requirements specified in § 150.3.

(ii) Application for exemption. Any designated contract market or swap execution facility that grants exemptions under paragraph (a)(2)(i) of this section:

(A) must require traders to file an application requesting such exemption;

(B) must require, for any exemption granted, that the trader reapply for the exemption at least on an annual basis; and

(C) may deny any such application, or limit, condition, or revoke any such exemption, at any time, including if it determines such positions would not be in accord with sound commercial practices, or would exceed an amount that may be established and liquidated in an orderly fashion.

(3) [Reserved]

(4) [Reserved]

(5) [Reserved]

(6) [Reserved]

(b) Requirements and acceptable practices for futures and future option contracts that are not subject to the limits set forth in § 150.2, including derivative contracts in a physical commodity as defined in § 150.1 and in an excluded commodity as defined in section 1a(19) of the Act—

(1) [Reserved]

(2) [Reserved]

(3) [Reserved]

(4) [Reserved]

(5) Exemptions—(i) Hedge exemption. Any hedge exemption rules adopted by a designated contract market or swap execution facility that is a trading facility must conform to the definition of bona fide hedging position in § 150.1 or provide for recognition as a non-enumerated bona fide hedge in a manner consistent with the process described in § 150.9(a).

(ii) Other exemptions. A designated contract market or swap execution facility may grant exemptions for:

(A) [Reserved];

(B) [Reserved].

(C) Intramarket spread positions and intermarket spread positions, each as defined in § 150.1, *provided that* the designated contract market or swap execution facility, in considering whether to grant an application for such exemption, should take into account whether exempting the spread position from position limits would, to the maximum

extent practicable, ensure sufficient market liquidity for bona fide hedgers, and not unreasonably reduce the effectiveness of position limits to:

(1) Diminish, eliminate, or prevent excessive speculation;

(2) Deter and prevent market manipulation, squeezes, and corners; and

(3) Ensure that the price discovery function of the underlying market is not disrupted.

(D) For excluded commodities, a designated contract market or swap execution facility may grant, in addition to the exemptions under paragraphs (b)(5)(i), (b)(5)(ii)(A), (b)(5)(ii)(B), and (b)(5)(ii)(C) of this section, a limited risk management exemption pursuant to rules submitted to the Commission, consistent with the guidance in Appendix A of this part.

(iii) [Reserved]

(6) [Reserved]

(7) [Reserved]

(8) [Reserved]

(9) [Reserved]

(c) [Reserved]

9. Add §150.9 to read as follows:

§ 150.9 Process for Recognition of Positions as Non-Enumerated Bona Fide Hedges

(a) Requirements for a designated contract market or swap execution facility to recognize non-enumerated bona fide hedge positions. (1) A designated contract market or swap execution facility that elects to process non-enumerated bona fide hedge applications to demonstrate why a derivative position satisfies the requirements of section

4a(c) of the Act shall maintain rules, submitted to the Commission pursuant to part 40 of this chapter, establishing an application process for recognition of non-enumerated bona fide hedges consistent with the requirements of this section and the general definition of bona fide hedging position in § 150.1. A designated contract market or swap execution facility may elect to process non-enumerated bona fide hedge applications for positions in commodity derivative contracts only if, in each case:

(i) the commodity derivative contract is a referenced contract;

(ii) such designated contract market or swap execution facility lists such commodity derivative contract for trading;

(iii) such commodity derivative contract is actively traded on such designated contract market or swap execution facility;

(iv) such designated contract market or swap execution facility has established position limits for such commodity derivative contract; and

(v) such designated contract market or swap execution facility has at least one year of experience and expertise administering position limits for such commodity derivative contract. A designated contract market or swap execution facility shall not recognize a non-enumerated bona fide hedge involving a commodity index contract and one or more referenced contracts.

(2) A designated contract market or swap execution facility may establish different application processes for persons to demonstrate why a derivative position constitutes a non-enumerated bona fide hedge under novel facts and circumstances and under facts and circumstances substantially similar to a position for which a summary has

been published on such designated contract market's or swap execution facility's website, pursuant to paragraph (a)(7) of this section.

(3) Any application process that is established by a designated contract market or swap execution facility shall elicit sufficient information to allow the designated contract market or swap execution facility to determine, and the Commission to verify, whether the facts and circumstances in respect of a derivative position satisfy the requirements of section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, and whether it is appropriate to recognize such position as a non-enumerated bona fide hedge, including at a minimum:

(i) A description of the position in the commodity derivative contract for which the application is submitted and the offsetting cash positions;

(ii) Detailed information to demonstrate why the position satisfies the requirements of section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1;

(iii) A statement concerning the maximum size of all gross positions in derivative contracts to be acquired by the applicant during the year after the application is submitted;

(iv) Detailed information regarding the applicant's activity in the cash markets for the commodity underlying the position for which the application is submitted during the past three years; and

(v) Any other information necessary to enable the designated contract market or swap execution facility to determine, and the Commission to verify, whether it is appropriate to recognize such position as a non-enumerated bona fide hedge.

(4) Under any application process established under this section, a designated contract market or swap execution facility shall:

(i) Require each person intending to exceed position limits to submit an application, to reapply at least on an annual basis by updating that application, and to receive notice of recognition from the designated contract market or swap execution facility of a position as a non-enumerated bona fide hedge in advance of the date that such position would be in excess of the limits then in effect pursuant to section 4a of the Act;

(ii) Notify an applicant in a timely manner if a submitted application is not complete. If an applicant does not amend or resubmit such application within a reasonable amount of time after such notice, a designated contract market or swap execution facility may reject the application;

(iii) Determine in a timely manner whether a derivative position for which a complete application has been submitted satisfies the requirements of section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, and whether it is appropriate to recognize such position as a non-enumerated bona fide hedge;

(iv) Have the authority to revoke, at any time, any recognition issued pursuant to this section if it determines the recognition is no longer in accord with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1; and

(v) Notify an applicant in a timely manner:

(A) That the derivative position for which a complete application has been submitted has been recognized by the designated contract market or swap execution

facility as a non-enumerated bona fide hedge under this section, and the details and all conditions of such recognition;

(B) That its application is rejected, including the reasons for such rejection; or

(C) That the designated contract market or swap execution facility has asked the Commission to consider the application under paragraph (8) of this section.

(5) An applicant's derivatives position shall be deemed to be recognized as a non-enumerated bona fide hedge exempt from federal position limits at the time that a designated contract market or swap execution facility notifies an applicant that such designated contract market or swap execution facility will recognize such position as a non-enumerated bona fide hedge.

(6) A designated contract market or swap execution facility that elects to process non-enumerated bona fide hedge applications shall file new rules or rule amendments pursuant to part 40 of this chapter, establishing or amending requirements for an applicant to file a report with such designated contract market or swap execution facility when such applicant owns or controls a derivative position that such designated contract market or swap execution facility has recognized as a non-enumerated bona fide hedge, and for such applicant to report the offsetting cash positions. Such rules shall require an applicant to update and maintain the accuracy of any such report.

(7) After recognition of each unique type of derivative position as a non-enumerated bona fide hedge, based on novel facts and circumstances, a designated contract market or swap execution facility shall publish on its website, on at least a quarterly basis, a summary describing the type of derivative position and explaining why it was recognized as a non-enumerated bona fide hedge.

(8) If a non-enumerated bona fide hedge application presents novel or complex issues or is potentially inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, a designated contract market or swap execution facility may ask the Commission to consider the application under the process set forth in paragraph (d) of this section. The Commission may, in its discretion, agree to or reject any such request by a designated contract market or swap execution facility.

(b) Recordkeeping. (1) A designated contract market or swap execution facility that elects to process non-enumerated bona fide hedge applications shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof, including the recognition by the designated contract market or swap execution facility of any derivative position as a non-enumerated bona fide hedge, the revocation or modification of any such recognition, the rejection by the designated contract market or swap execution facility of an application, or the withdrawal, supplementation or updating of an application by the applicant. Included among such records shall be:

(i) All information and documents submitted by an applicant in connection with its application;

(ii) Records of oral and written communications between such designated contract market or swap execution facility and such applicant in connection with such application; and

(iii) All information and documents in connection with such designated contract market's or swap execution facility's analysis of and action on such application.

(2) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(c) Reports to the Commission. (1) A designated contract market or swap execution facility that elects to process non-enumerated bona fide hedge applications shall submit to the Commission a report for each week as of the close of business on Friday showing the following information:

(i) For each commodity derivative position that has been recognized by the designated contract market or swap execution facility as a non-enumerated bona fide hedge, and for any revocation or modification of such a recognition:

(A) the date of disposition,

(B) the effective date of the disposition,

(C) the expiration date of any recognition,

(D) any unique identifier assigned by the designated contract market or swap execution facility to track the application,

(E) any unique identifier assigned by the designated contract market or swap execution facility to a type of recognized non-enumerated bona fide hedge,

(F) the identity of the applicant,

(G) the listed commodity derivative contract to which the application pertains,

(H) the underlying cash commodity,

(I) the maximum size of the commodity derivative position that is recognized by the designated contract market or swap execution facility as a non-enumerated bona fide hedge,

(J) any size limitation established for such commodity derivative position on the designated contract market or swap execution facility, and

(K) a concise summary of the applicant's activity in the cash markets for the commodity underlying the commodity derivative position; and

(ii) The summary of any non-enumerated bona fide hedge published pursuant to paragraph (a)(7) of this section, or revised, since the last summary submitted to the Commission.

(2) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process non-enumerated bona fide hedge applications shall submit to the Commission, no less frequently than monthly, any report submitted by an applicant to such designated contract market or swap execution facility pursuant to rules required under paragraph (a)(6) of this section.

(3) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process non-enumerated bona fide hedge applications shall submit to the Commission the information required by paragraphs (1) and (2) of this section, as follows:

(i) As specified by the Commission on the Forms and Submissions page at www.cftc.gov;

(ii) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission; and

(iii) Not later than 9:00 a.m. Eastern time on the third business day following the date of the report.

(d) Review of applications by the Commission. (1) The Commission may in its discretion at any time review any non-enumerated bona fide hedge application submitted to a designated contract market or swap execution facility, and all records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application, for any purpose, including to evaluate whether the disposition of the application is consistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.

(i) The Commission may request from such designated contract market or swap execution facility records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application.

(ii) The Commission may request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant.

(2) If the Commission preliminarily determines that any non-enumerated bona fide hedge application or the disposition thereof by a designated contract market or swap execution facility presents novel or complex issues that require additional time to analyze, or that an application or the disposition thereof by such designated contract market or swap execution facility is potentially inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, the Commission shall:

(i) Notify such designated contract market or swap execution facility and the applicable applicant of the issues identified by the Commission; and

(ii) Provide them with 10 business days in which to provide the Commission with any supplemental information.

(3) The Commission shall determine whether it is appropriate to recognize the derivative position for which such application has been submitted as a non-enumerated bona fide hedge, or whether the disposition of such application by such designated contract market or swap execution facility is consistent with section 4a(c) the Act and the general definition of bona fide hedging position in § 150.1.

(4) If the Commission determines that the disposition of such application is inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, the Commission shall notify the applicant and grant the applicant a commercially reasonable amount of time to liquidate the derivative position or otherwise come into compliance. This notification will briefly specify the nature of the issues raised and the specific provisions of the Act or the Commission's regulations with which the application is, or appears to be, inconsistent.

(e) Review of summaries by the Commission. The Commission may in its discretion at any time review any summary of a type of non-enumerated bona fide hedge required to be published on a designated contract market's or swap execution facility's website pursuant to paragraph (a)(7) of this section for any purpose, including to evaluate whether the summary promotes transparency and fair and open access by all market participants to information regarding bona fide hedges. If the Commission determines that a summary is deficient in any way, the Commission shall notify such designated contract market or swap execution facility, and grant to the designated contract market or swap execution facility a reasonable amount of time to revise the summary.

(f) Delegation of authority to the Director of the Division of Market Oversight. (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (a)(8) of this section to agree to or reject a request by a designated contract market or swap execution facility to consider a non-enumerated bona fide hedge application;

(ii) In paragraph (c) of this section to provide instructions regarding the submission to the Commission of information required to be reported by a designated contract market or swap execution facility, to specify the manner for submitting such information on the Forms and Submissions page at www.cftc.gov, and to determine the format, coding structure, and electronic data transmission procedures for submitting such information;

(iii) In paragraph (d)(1) of this section to review any non-enumerated bona fide hedge application and all records required to be kept by a designated contract market or swap execution facility in connection with such application, to request such records from such designated contract market or swap execution facility, and to request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant;

(iv) In paragraph (d)(2) of this section to preliminarily determine that a non-enumerated bona fide hedge application or the disposition thereof by a designated contract market or swap execution facility presents novel or complex issues that require additional time to analyze, or that such application or the disposition thereof is potentially

inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, to notify the designated contract market or swap execution facility and the applicable applicant of the issues identified, and to provide them with 10 business days in which to file supplemental information; and

(v) In paragraph (e) of this section to review any summary of a type of non-enumerated bona fide hedge required to be published on a designated contract market's or swap execution facility's website, to determine that any such summary is deficient, to notify a designated contract market or swap execution facility of a deficient summary, and to grant such designated contract market or swap execution facility a reasonable amount of time to revise such summary.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

10. Add §150.10 to read as follows:

§ 150.10 Process for Designated Contract Market or Swap Execution Facility Exemption from Position Limits for Certain Spread Positions.

(a) Requirements for a designated contract market or swap execution facility to exempt from position limits certain positions normally known to the trade as spreads. (1) A designated contract market or swap execution facility that elects to process applications for exemptions from position limits for certain positions normally known to the trade as spreads shall maintain rules, submitted to the Commission pursuant to part 40 of this chapter, establishing an application process for exempting positions normally known to

the trade as spreads consistent with the requirements of this section. A designated contract market or swap execution facility may elect to process applications for such spread exemptions only if, in each case:

(i) such designated contract market or swap execution facility lists for trading at least one contract that is either a component of the spread or a referenced contract that is a component of the spread; and

(ii) the contract in paragraph (a)(1)(i) of this section is actively traded and has been subject to position limits of the designated contract market or swap execution facility for at least one year. A designated contract market or swap execution facility shall not approve a spread exemption involving a commodity index contract and one or more referenced contracts.

(2) Spreads that a designated contract market or swap execution facility may approve under this section include:

(i) Calendar spreads;

(ii) Quality differential spreads;

(iii) Processing spreads; and

(iv) Product or by-product differential spreads.

(3) Any application process that is established by a designated contract market or swap execution facility under this section shall elicit sufficient information to allow the designated contract market or swap execution facility to determine, and the Commission to verify, whether the facts and circumstances demonstrate that it is appropriate to exempt a spread position from position limits, including at a minimum:

(i) A description of the spread position for which the application is submitted;

(ii) Detailed information to demonstrate why the spread position should be exempted from position limits, including how the exemption would further the purposes of section 4a(a)(3)(B) of the Act;

(iii) A statement concerning the maximum size of all gross positions in derivative contracts to be acquired by the applicant during the year after the application is submitted; and

(iv) Any other information necessary to enable the designated contract market or swap execution facility to determine, and the Commission to verify, whether it is appropriate to exempt such spread position from position limits.

(4) Under any application process established under this section, a designated contract market or swap execution facility shall:

(i) Require each person requesting an exemption from position limits for its spread position to submit an application, to reapply at least on an annual basis by updating that application, and to receive approval in advance of the date that such position would be in excess of the limits then in effect pursuant to section 4a of the Act;

(ii) Notify an applicant in a timely manner if a submitted application is not complete. If an applicant does not amend or resubmit such application within a reasonable amount of time after such notice, a designated contract market or swap execution facility may reject the application;

(iii) Determine in a timely manner whether a spread position for which a complete application has been submitted satisfies the requirements of paragraph (4)(vi) of this section, and whether it is appropriate to exempt such spread position from position limits;

(iv) Have the authority to revoke, at any time, any spread exemption issued pursuant to this section if it determines the spread exemption no longer satisfies the requirements of paragraph (4)(vi) of this section and it is no longer appropriate to exempt the spread from position limits;

(v) Notify an applicant in a timely manner:

(A) That a spread position for which a complete application has been submitted has been exempted by the designated contract market or swap execution facility from position limits, and the details and all conditions of such exemption;

(B) That its application is rejected, including the reasons for such rejection; or

(C) That the designated contract market or swap execution facility has asked the Commission to consider the application under paragraph (a)(8) of this section; and

(vi) Determine whether exempting the spread position from position limits would, to the maximum extent practicable, ensure sufficient market liquidity for bona fide hedgers, and not unreasonably reduce the effectiveness of position limits to:

(A) Diminish, eliminate or prevent excessive speculation;

(B) Deter and prevent market manipulation, squeezes, and corners; and

(C) Ensure that the price discovery function of the underlying market is not disrupted.

(5) An applicant’s derivatives position shall be deemed to be recognized as a spread position exempt from federal position limits at the time that a designated contract market or swap execution facility notifies an applicant that such designated contract market or swap execution facility will exempt such spread position.

(6) A designated contract market or swap execution facility that elects to process applications to exempt spread positions from position limits shall file new rules or rule amendments pursuant to part 40 of this chapter, establishing or amending requirements for an applicant to file a report with such designated contract market or swap execution facility when such applicant owns, holds, or controls a spread position that such designated contract market or swap execution facility has exempted from position limits, including for such applicant to report each component of the spread. Such rules shall require such applicant to update and maintain the accuracy of any such report.

(7) After exemption of each unique type of spread position, a designated contract market or swap execution facility shall publish on its website, on at least a quarterly basis, a summary describing the type of spread position and explaining why it was exempted.

(8) If a spread exemption application presents complex issues or is potentially inconsistent with the purposes of section 4a(a)(3)(B) of the Act, a designated contract market or swap execution facility may ask the Commission to consider the application under the process set forth in paragraph (d) of this section. The Commission may, in its discretion, agree to or reject any such request by a designated contract market or swap execution facility.

(b) Recordkeeping. (1) A designated contract market or swap execution facility that elects to process spread exemption applications shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof, including the exemption of any spread position, the revocation or modification of any exemption, the

rejection by the designated contract market or swap execution facility of an application, or the withdrawal, supplementation or updating of an application by the applicant. Included among such records shall be:

(i) All information and documents submitted by an applicant in connection with its application:

(ii) Records of oral and written communications between such designated contract market or swap execution facility and such applicant in connection with such application; and

(iii) All information and documents in connection with such designated contract market's or swap execution facility's analysis of and action on such application.

(2) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(c) Reports to the Commission. (1) A designated contract market or swap execution facility that elects to process spread exemption applications shall submit to the Commission a report for each week as of the close of business on Friday showing the following information:

(i) The disposition of any spread exemption application, including the exemption of any spread position, the revocation or modification of any exemption, or the rejection of any application, as well as the following details:

(A) the date of disposition,

(B) the effective date of the disposition,

(C) the expiration date of any exemption,

(D) any unique identifier assigned by the designated contract market or swap execution facility to track the application,

(E) any unique identifier assigned by the designated contract market or swap execution facility to a type of exempt spread position,

(F) the identity of the applicant,

(G) the listed commodity derivative contract to which the application pertains,

(H) the underlying cash commodity,

(I) the size limitations on any exempt spread position, specified by contract month if applicable, and

(J) any conditions on the exemption; and

(ii) The summary of any exempt spread position newly published pursuant to paragraph (a)(7) of this section, or revised, since the last summary submitted to the Commission.

(2) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process applications to exempt spread positions from position limits shall submit to the Commission, no less frequently than monthly, any report submitted by an applicant to such designated contract market or swap execution facility pursuant to rules required by paragraph (a)(6) of this section.

(3) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process applications to exempt spread positions from position limits shall submit to the Commission the information required by paragraphs (1) and (2) of this section, as follows:

(i) As specified by the Commission on the Forms and Submissions page at www.cftc.gov;

(ii) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission; and

(iii) Not later than 9:00 a.m. Eastern time on the third business day following the date of the report.

(d) Review of applications by the Commission. (1) The Commission may in its discretion at any time review any spread exemption application submitted to a designated contract market or swap execution facility, and all records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application, for any purpose, including to evaluate whether the disposition of the application is consistent with the purposes of section 4a(a)(3)(B) of the Act.

(i) The Commission may request from such designated contract market or swap execution facility records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application.

(ii) The Commission may request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant.

(2) If the Commission preliminarily determines that any application to exempt a spread position from position limits, or the disposition thereof by a designated contract market or swap execution facility, presents novel or complex issues that require

additional time to analyze, or that an application or the disposition thereof by such designated contract market or swap execution facility is potentially inconsistent with the Act, the Commission shall:

(i) Notify such designated contract market or swap execution facility and the applicable applicant of the issues identified by the Commission; and

(ii) Provide them with 10 business days in which to provide the Commission with any supplemental information.

(3) The Commission shall determine whether it is appropriate to exempt the spread position for which such application has been submitted from position limits, or whether the disposition of such application by such designated contract market or swap execution facility is consistent with the purposes of section 4a(a)(3)(B) of the Act. (4) If the Commission determines that it is not appropriate to exempt the spread position for which such application has been submitted from position limits, or that the disposition of such application is inconsistent with the Act, the Commission shall notify the applicant and grant the applicant a commercially reasonable amount of time to liquidate the spread position or otherwise come into compliance. This notification will briefly specify the nature of the issues raised and the specific provisions of the Act or the Commission's regulations with which the application is, or appears to be, inconsistent.

(e) Review of summaries by the Commission. The Commission may in its discretion at any time review any summary of a type of spread position required to be published on a designated contract market's or swap execution facility's website pursuant to paragraph (a)(7) of this section for any purpose, including to evaluate whether the summary promotes transparency and fair and open access by all market participants to

information regarding spread exemptions. If the Commission determines that a summary is deficient in any way, the Commission shall notify such designated contract market or swap execution facility, and grant to the designated contract market or swap execution facility a reasonable amount of time to revise the summary.

(f) Delegation of authority to the Director of the Division of Market Oversight. (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (a)(8) of this section to agree to or reject a request by a designated contract market or swap execution facility to consider a spread exemption application;

(ii) In paragraph (c) of this section to provide instructions regarding the submission to the Commission of information required to be reported by a designated contract market or swap execution facility, to specify the manner for submitting such information on the Forms and Submissions page at www.cftc.gov, and to determine the format, coding structure, and electronic data transmission procedures for submitting such information;

(iii) In paragraph (d)(1) of this section to review any spread exemption application and all records required to be kept by a designated contract market or swap execution facility in connection with such application, to request such records from such designated contract market or swap execution facility, and to request additional information in connection with such application from such designated contract market or swap execution facility, or from the applicant;

(iv) In paragraph (d)(2) of this section to preliminarily determine that a spread exemption application or the disposition thereof by a designated contract market or swap execution facility presents complex issues that require additional time to analyze, or that such application or the disposition thereof is potentially inconsistent with the Act, to notify the designated contract market or swap execution facility and the applicable applicant of the issues identified, and to provide them with 10 business days in which to file supplemental information; and

(v) In paragraph (e) of this section to review any summary of a type of spread exemption required to be published on a designated contract market's or swap execution facility's website, to determine that any such summary is deficient, to notify a designated contract market or swap execution facility of a deficient summary, and to grant such designated contract market or swap execution facility a reasonable amount of time to revise such summary.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

11. Add §150.11 to read as follows:

§ 150.11 Process for Recognition of Positions as Bona Fide Hedges for Unfilled Anticipated Requirements, Unsold Anticipated Production, Anticipated Royalties, Anticipated Service Contract Payments or Receipts, or Anticipatory Cross-Commodity Hedge Positions

(a) Requirements for a designated contract market or swap execution facility to recognize certain enumerated anticipatory bona fide hedge positions. (1) A designated contract market or swap execution facility that elects to process applications for recognition of positions as hedges of unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, or anticipatory cross-commodity hedges under the provisions of paragraphs (3)(iii), (4)(i), (4)(iii), (4)(iv), or (5), respectively, of the definition of bona fide hedging position in § 150.1 shall maintain rules, submitted to the Commission pursuant to part 40 of this chapter, establishing an application process for such anticipatory bona fide hedges consistent with the requirements of this section. A designated contract market or swap execution facility may elect to process such anticipatory hedge applications for positions in commodity derivative contracts only if, in each case:

(i) the commodity derivative contract is a referenced contract;

(ii) such designated contract market or swap execution facility lists such commodity derivative contract for trading;

(iii) such commodity derivative contract is actively traded on such derivative contract market;

(iv) such designated contract market or swap execution facility has established position limits for such commodity derivative contract; and

(v) such designated contract market or swap execution facility has at least one year of experience and expertise administering position limits for such commodity derivative contract.

(2) Any application process that is established by a designated contract market or swap execution facility shall require, at a minimum, the information required under §150.7(d).

(3) Under any application process established under this section, a designated contract market or swap execution facility shall:

(i) Require each person intending to exceed position limits to submit an application, and to reapply at least on an annual basis by updating that application, to file the supplemental reports required under § 150.7(e), and to receive notice of recognition from the designated contract market or swap execution facility of a position as a bona fide hedge in advance of the date that such position would be in excess of the limits then in effect pursuant to section 4a of the Act;

(ii) Notify an applicant in a timely manner if a submitted application is not complete. If the applicant does not amend or resubmit such application within a reasonable amount of time after notification from the designated contract market or swap execution facility, the designated contract market or swap execution facility may reject the application;

(iii) Inform an applicant within ten days of receipt of such application by the designated contract market or swap execution facility that:

(A) The derivative position for which a complete application has been submitted has been recognized by the designated contract market or swap execution facility as a bona fide hedge, and the details and all conditions of such recognition;

(B) The application is rejected, including the reasons for such rejection; or

(C) The designated contract market or swap execution facility has asked the Commission to consider the application under paragraph (6) of this section; and

(iv) Have the authority to revoke, at any time, any recognition issued pursuant to this section if it determines the position no longer complies the filing requirements under paragraph (2) of this section.

(4) An applicant's derivatives position shall be deemed to be recognized as a bona fide hedge at the time that a designated contract market or swap execution facility notifies an applicant that such designated contract market or swap execution facility will recognize such position as a bona fide hedge.

(5) A designated contract market or swap execution facility that elects to process bona fide hedge applications shall file new rules or rule amendments pursuant to part 40 of this chapter, establishing or amending requirements for an applicant to file a report with the Commission pursuant to §150.7, and file a copy of such report with such designated contract market or swap execution facility when such applicant owns or controls a derivative position that such designated contract market or swap execution facility has recognized as a bona fide hedge, and for such applicant to report the offsetting cash positions. Such rules shall require an applicant to update and maintain the accuracy of any such report.

(6) A designated contract market or swap execution facility may ask the Commission to consider any application made under this section. The Commission may, in its discretion, agree to or reject any such request by a designated contract market or swap execution facility; provided that, if the Commission agrees to the request, it will have 10 business days from the time of the request to carry out its review.

(b) Recordkeeping. (1) A designated contract market or swap execution facility that elects to process bona fide hedge applications under this section shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof, including the recognition of any derivative position as a bona fide hedge, the revocation or modification of any recognition, the rejection by the designated contract market or swap execution facility of an application, or withdrawal, supplementation or updating of an application. Included among such records shall be:

(i) All information and documents submitted by an applicant in connection with its application;

(ii) Records of oral and written communications between such designated contract market or swap execution facility and such applicant in connection with such application; and

(iii) All information and documents in connection with such designated contract market's or swap execution facility's analysis of and action on such application.

(2) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(c) Reports to the Commission. (1) A designated contract market or swap execution facility that elects to process bona fide hedge applications under this section shall submit to the Commission a report for each week as of the close of business on Friday showing the following information:

(i) The disposition of any application, including the recognition of any position as a bona fide hedge, the revocation or modification of any recognition, as well as the following details:

(A) the date of disposition,

(B) the effective date of the disposition,

(C) the expiration date of any recognition,

(D) any unique identifier assigned by the designated contract market or swap execution facility to track the application,

(E) any unique identifier assigned by the designated contract market or swap execution facility to a bona fide hedge recognized under this section;

(F) the identity of the applicant,

(G) the listed commodity derivative contract to which the application pertains,

(H) the underlying cash commodity,

(I) the maximum size of the commodity derivative position that is recognized by the designated contract market or swap execution facility as a bona fide hedge,

(J) any size limitation established for such commodity derivative position on the designated contract market or swap execution facility, and

(K) a concise summary of the applicant's activity in the cash market for the commodity underlying the position for which the application was submitted.

(2) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process bona fide hedge applications shall submit to the Commission the information required by paragraph (1) of this section, as follows:

(i) As specified by the Commission on the Forms and Submissions page at www.cftc.gov;

(ii) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission; and

(iii) Not later than 9:00 a.m. Eastern time on the third business day following the date of the report.

(d) Review of applications by the Commission. (1) The Commission may in its discretion at any time review any bona fide hedge application submitted to a designated contract market or swap execution facility under this section, and all records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application, for any purpose, including to evaluate whether the disposition of the application is consistent with the Act.

(i) The Commission may request from such designated contract market or swap execution facility records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application.

(ii) The Commission may request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant.

(2) If the Commission preliminarily determines that any anticipatory hedge application is inconsistent with the filing requirements of § 150.11(a)(2), the Commission shall:

(i) Notify such designated contract market or swap execution facility and the applicable applicant of the deficiencies identified by the Commission; and

(ii) Provide them with 10 business days in which to provide the Commission with any supplemental information.

(3) If the Commission determines that the anticipatory hedge application is inconsistent with the filing requirements of § 150.11(a)(2), , the Commission shall notify the applicant and grant the applicant a commercially reasonable amount of time to liquidate the derivative position or otherwise come into compliance. This notification will briefly specify the specific provisions of the filing requirements of § 150.11(a)(2), with which the application is, or appears to be, inconsistent.

(e) Delegation of authority to the Director of the Division of Market Oversight. (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (a)(6) of this section to agree to or reject a request by a designated contract market or swap execution facility to consider a bona fide hedge application;

(ii) In paragraph (c) of this section to provide instructions regarding the submission to the Commission of information required to be reported by a designated contract market or swap execution facility, to specify the manner for submitting such information on the Forms and Submissions page at www.cftc.gov, and to determine the format, coding structure, and electronic data transmission procedures for submitting such information;

(iii) In paragraph (d)(1) of this section to review any bona fide hedge application and all records required to be kept by a designated contract market or swap execution facility in connection with such application, to request such records from such designated contract market or swap execution facility, and to request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant; and

(iv) In paragraph (d)(2) of this section to determine that it is not appropriate to recognize a derivative position for which an application for recognition has been submitted as a bona fide hedge, or that the disposition of such application by a designated contract market or swap execution facility is inconsistent with the Act, and, in connection with such a determination, to grant the applicant a reasonable amount of time to liquidate the derivative position or otherwise come into compliance.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

12. Add and reserve appendices (A) through (D).

13. Add appendix E to part 150 after appendix D to part 150 to read as follows:

APPENDIX E TO PART 150—GUIDANCE REGARDING § 150.5

Guidance for designated contract markets. (1) Until a board of trade has access to sufficient swap position information, a board of trade need not demonstrate compliance with Core Principle 5(B) with respect to swaps. A board of trade has access to sufficient swap position information if, for example:

(i) it has access to daily information about its market participants' open swap positions; or

(ii) it knows, including through knowledge gained in surveillance of heavy trading activity occurring on or pursuant to the rules of the designated contract market, that its market participants regularly engage in large volumes of speculative trading activity, that would cause reasonable surveillance personnel at an exchange to inquire further about a market participant's intentions or open swap positions.

(2) When a board of trade has access to sufficient swap position information, this guidance is no longer applicable. At such time, a board of trade is required to demonstrate compliance with Core Principle 5(B) with respect to swaps.

Guidance for swap execution facilities. (1) Until a swap execution facility that is a trading facility has access to sufficient swap position information, the swap execution facility need not demonstrate compliance with Core Principle 6(B). A swap execution facility has access to sufficient swap position information if, for example:

(i) it has access to daily information about its market participants' open swap positions; or

(ii) if it knows, including through knowledge gained in surveillance of heavy trading activity occurring on or pursuant to the rules of the swap execution facility, that its market participants regularly engage in large volumes of speculative trading activity that would cause reasonable surveillance personnel at an exchange to inquire further about a market participant's intentions or open swap positions.

(2) When a swap execution facility has access to sufficient swap position information, this guidance is no longer applicable. At such time, a swap execution

facility that is a trading facility is required to file rules with the Commission to demonstrate compliance with Core Principle 6 (B).

Issued in Washington, DC, on May __, 2016, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Position Limits for Derivatives: Certain Exemptions and Guidance – Commission Voting Summary, Chairman's Statement, and Commissioner's Statement

Appendix 1 – Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

Appendix 2 – Statement of Chairman Timothy G. Massad

Today, the CFTC has taken a significant step toward finalizing its rules on position limits this year.

The supplemental rule we have unanimously proposed today would ensure that commercial end-users can continue to engage in bona fide hedging efficiently for risk management and price discovery. It would permit the exchanges to recognize certain positions as bona fide hedges, subject to CFTC oversight.

For years, exchanges have worked with the CFTC's general definition of a "bona fide hedging position" to grant these exemptions to exchange-set limits. Under this supplemental proposal, they would do so for federal limits, subject to strict oversight by the CFTC. Today's action comes after listening closely to the concerns of market participants, and in particular commercial-end users, who use these markets every day to hedge commercial risk. Today's proposal would also make some helpful clarifications to definitions used in our earlier proposal, including the definition of "bona fide hedging position," to conform it to the statutory language.

This proposal is a critical piece of our effort to complete the position limits rule this year. Another key piece of that effort was the Commission's 2015 proposal to streamline the process for waiving aggregation requirements when one entity does not control another's trading, even if they are under common ownership. We are also working to review exchange estimates of deliverable supply so that spot month limits may be set based on current data.

Federal position limits for agricultural contracts have been in place in our markets for decades, and exchange-set position limits for most other physical commodity contracts have been in place for years. It is critical that we fulfill our statutory responsibility to adopt a position limits rule. As I have said previously, we appreciate the importance and complexity of the issues surrounding the position limits rule. No current Commissioner was in office when these rules were proposed, and therefore we have taken the time to listen to market participants and consider the proposals very carefully.

I thank our staff for their excellent work on this proposal. I also thank my fellow Commissioners Bowen and Giancarlo for their input and support. And I look forward to hearing the views of market participants and to completing a position limits rule this year.

Appendix 3 – Statement of Commissioner J. Christopher Giancarlo

I support issuing for public comment today's proposal to supplement and revise the Commission's 2013 proposed rule to establish federal position limits for certain core referenced futures, options and swaps contracts. The supplemental proposal appears responsive to a broad range of public comments. I believe it is a positive step forward in devising a final rule that will take into account certain practical realities associated with administering a workable position limits regime.

The proposal appropriately recognizes that most exchanges do not have access to sufficient swap positon information to effectively monitor swap position limits. If adopted, it would seem to relieve designated contract markets (DCMs) and swap execution facilities (SEFs) from setting and monitoring exchange limits on swaps until such time as DCMs and SEFs have access to data that is necessary to be able to do so. Position limits for swaps would still be set and monitored by the CFTC. The proposal simply acknowledges that the Commission cannot require exchanges to do the impossible.

The proposal also recommends changes to the definitions of "bona fide hedging position," "futures equivalent," "intermarket spread position" and "intramarket spread position." The elimination of the incidental test and the orderly trading requirement from the general definition of bona fide hedging position makes sense as the incidental test is already included in the economically appropriate test and the orderly trading requirement

is addressed in other provisions of the Commodity Exchange Act (CEA).[1] Further, as discussed in the preamble, because the meaning of the orderly trading requirement in the context of over-the-counter swaps markets is unclear, those markets will benefit from greater precision by its removal. The proposed amendments to the definitions of "futures equivalent," "intermarket spread positon" and "intramarket spread position" appear to be helpful clarifications. I look forward to public comment on whether the proposed changes are appropriate.

Importantly, the proposal would also allow certain spread exemptions from federal position limits. It would establish a process to permit exchanges to recognize exemptions from exchange and federal position limits for non-enumerated bona fide hedging positions (NEBFH) and spread positions. The proposal would also provide an expedited process for exchange recognition of enumerated anticipatory bona fide hedges.

Exchanges are in the best position to initially recognize the foregoing exemptions from position limits. They have both the expertise and the resources[2] to perform this task in a responsible way as demonstrated by the long history of DCMs analyzing and granting requests for NEBFH exemptions in the context of exchange-set limits. Moreover, the CFTC has a long history of overseeing the performance of DCMs in doing so. In addition, DCMs already have a long-existing framework in place for recognizing

[1] See CEA sections 4c(a)(5) and 4c(a)(6).

[2] As noted in footnote 127 of the preamble, from June 15, 2011 to June 15, 2012 ICE Futures U.S. received 142 exemption applications, 92 of which were granted. From November 1, 2010 to October 31, 2011 the Market Surveillance Group from the Chicago Mercantile Exchange (CME) Regulation Department approved 420 exemption applications for products traded on the CME and the Chicago Board of Trade. This is old data, but one could reasonably predict that the number of applications have increased over time and will continue to increase in the future as trading levels increase. Given its current resources, the CFTC is not in a position to timely process the hundreds of applications that likely will be filed with the exchanges each year.

exemptions from exchange-set limits with which market participants are well familiar. The supplemental proposal, when incorporated into a final rule, would build upon the existing framework for exchange-set limits. It also would lower unreasonable burdens on market participants under the Commission's 2013 proposal, including provisions that would have required hedge exemption applicants to file duplicative requests with both the CFTC and the exchanges.

In short, the supplemental proposal leverages exchange expertise and resources to enable exemptions to be granted in an efficient and timely manner without sacrificing market integrity. The Commission would remain the ultimate arbiter of exemptions from position limits by retaining the authority to review and reverse any exchange-granted exemption.

I commend Commission staff for their responsiveness to broad-based concerns of market participants. I appreciate the professionalism of my fellow commissioners in persevering to make this rule more workable. I look forward to taking additional steps to ensure that the practical issues raised by the agricultural and end-user communities are addressed in the final rule.

Now and always, prosperity requires durable and vibrant markets. We must balance regulatory burdens with clear economic benefits if we are to maintain liquid commodity hedging markets that support our American way of life.