UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of	CFTC Docket No. 97-[illegible]
ROGER J. WRIGHT, et al.	OPINION and ORDER

The Division of Enforcement ("Division") appeals from the Administrative Law Judge's finding that certain hedge-to-arrive ("HTA") contracts were a species of *bona fide* forward contracts, not illegal, off-exchange futures, as was charged. The Division also challenges the finding that options sold to some of the parties who entered into the HTA contracts did not violate Commission rules prohibiting the sale of agricultural trade options. For the reasons that follow, we reject the Division's arguments and affirm the result of the initial decision.

BACKGROUND[1]

In early 1995, Buckeye Countrymark, Inc. ("Buckeye"), a cooperative elevator located near Dayton, Ohio, entered into certain HTA contracts with Agricultural Marketing Service ("AMS"), a firm owned by Roger J. Wright ("Wright"), a local commodity dealer and trading advisor to farmers in the vicinity of Dayton. HTA contracts are agreements that allow producers to manage price risk. The HTA contracts at issue here called for AMS to deliver corn to Buckeye in late 1995. AMS was to obtain corn from a group of farmers who had authorized Wright to market it on their behalf; AMS stood as middleman between the farmers and Buckeye.

AMS and Buckeye had a dispute over the terms of their agreement, however, and AMS repudiated its delivery obligations to Buckeye. With no objection from AMS or Wright, the

[1] This opinion summarizes the principal facts necessary to our decision. The decision below contains a detailed account of the facts and circumstances underlying this case.

farmers who were to have supplied grain to AMS took advantage of an exit clause in their contracts allowing them to avoid delivery. Concurrently, Buckeye's lender objected to AMS's status as middleman and asked Buckeye to deal directly with producers. The lender refused to extend further credit unless Buckeye found actual producers to replace AMS.

As a consequence, in late 1995 Buckeye entered into new, "substitute" HTA contracts directly with farmers, who assumed AMS's obligations under its contracts with Buckeye. Wright helped draft the substitute contracts and helped find a group of farmers and farming entities willing to step into AMS's shoes.[2] The substitute farmers agreed to deliver various amounts of corn between late 1996 and 2000. Among other provisions, the contracts allowed them to defer delivery obligations to a later date or cancel them altogether (for a fee).

The initial reference price for the substitute HTAs did not reflect the then-current futures prices for the months of planned delivery, as was standard. Instead, the contracts referenced the adjusted price for December 1995. The price term was incorporated from the HTA contracts between Buckeye and AMS, and was lower than the current December futures price. The Division asserted that Buckeye did not expect actual delivery at the below-market prices and was primarily interested in getting "names on the contracts" that would satisfy its lender and keep its credit flowing.

Buckeye also offered cash-settled put options to the farmers who entered into HTA contracts. The puts were not a mandatory provision of the substitute HTAs; farmers could purchase them or not as they wished. At the time, corn prices were high. Wright believed that a price reversal was imminent and that prices would fall before the farmers were due to deliver, when the HTA contract price would be subject to further adjustment. Expecting a price drop, he

[2] Wright benefited from helping Buckeye because Buckeye agreed to forego any breach of contract claims it may have raised against him. He also received a fee for each farmer who signed a substitute HTA.

recommended that the substitute HTA farmers purchase puts from Buckeye, and most of them did.

As it turned out, the price reversal did not come soon enough for the farmers to profit on the options. Prices remained high throughout 1996. In any event, Buckeye's substitute HTA contracts and its related option program were short-lived. Fueled by unusual market conditions, disputes arose in Ohio that led to the filing of this proceeding and other litigation. The farmers ceased performance under the substitute HTAs and the elevator ceased operations.

* * *

In November 1996, the Commission brought this enforcement action that, among other charges, challenged the legality of the substitute HTAs and the put options. The Commission issued a nine-count complaint, subsequently amended, naming respondents Wright; Buckeye;[3] A.G. Edwards & Sons, Inc. ("A.G. Edwards"), a registered futures commission merchant that maintained a branch office in Columbus, Ohio; and Philip L. Luxenburger ("Luxenburger"), an employee of A.G. Edwards who dealt with Wright and Wright's clients.

As relevant to this appeal, the Commission alleged that Buckeye, aided and abetted by Wright, dealt in off-exchange futures transactions in violation of Section 4(a) of the Commodity Exchange Act ("Act" or "CEA"), and in prohibited trade options in violation of Section 4c(b) of the Act and Commission Rule 32.2.[4] Respondents denied all charges. They contended that the

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[3] Buckeye entered into bankruptcy in 1997, while this case was pending below. Buckeye's principal secured creditor, Fifth Third Bank ("Bank") and the bankruptcy trustee have filed motions to substitute the Bank in lieu of Buckeye as respondent in this proceeding. The Division opposes these motions. The Bank has appeared in these proceedings as an interested participant, pursuant to Commission Rule 10.34, without being granted party status. Based upon our review of the record, we believe that the Bank has acted diligently and effectively throughout the course of this proceeding as a participant. In view of our resolution of this appeal, we deny the motions to substitute.

[4] The complaint as amended also alleged that:

- Wright committed fraud in violation of Sections 4b(a), 4c(b) and 4o(1)(A)-(B) of the Act and Commission

HTA contracts qualified as forward contracts and thus were excluded from the CEA.[5] They argued also that the options had no freestanding existence, but were embedded in the HTA contracts. As integral features of forward contracts, the options did not violate Rule 32.2, respondents asserted.

After prehearing proceedings, the ALJ presided over a five-day hearing in November 1998, and in February 2003, issued an initial decision. As pertinent to this appeal, he determined that the Division failed to prove that Buckeye and Wright offered off-exchange futures, as alleged in Count I, or illegal agricultural options, as charged in Count II. *In re Wright*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,412 (Initial Decision Feb. 25, 2003) ("I.D.").[6]

The ALJ concluded that the Division failed to carry its burden of proof that the HTA contracts were futures rather than forwards. He found separately that Wright did not aid and abet

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Rule 33.10;

- Wright failed to comply with Commission Rules 4.13(b)(1)-(2) (disclosure obligations of exempt commodity pool operators) and 4.31(a) (disclosure obligations of commodity trading advisors registered or required to be registered);
- Wright, aided and abetted by Luxenburger, failed to register as a commodity trading advisor in violation of Section 4m(1) of the Act; and
- A.G. Edwards failed to keep records of a person who controlled trading in an account in violation of Rule 1.37(a), aided and abetted by Wright and Luxenburger.

Citations to the Act are to the version of the statute in force prior to amendments enacted in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat 1376 (2010), except as noted in footnote 14.

[5] *See* CEA Section 1a(19) (formerly numbered Section 1a(11)), the so-called "forward exclusion," which defines "future delivery" and states: "The term 'future delivery' does not include any sale of any cash commodity for deferred shipment or delivery."

[6] The ALJ found that as a commodity trading advisor, Wright violated Sections 4m(1) and 4o(1)(A)-(B) of the Act, and Rule 4.31(a); that he violated Rule 4.13(b)(2) as an exempt commodity pool operator; and that he committed fraud in on-exchange options in violation of Section 4c(b) of the Act and Rule 33.10. He held that respondent A.G. Edwards violated Rule 1.37(a).

Buckeye's alleged violations of Section 4(a). I.D. at 54,763-67, and also found no illegality with respect to the put options, for reasons discussed *infra*.

The ALJ did find that the Division proved part of its case against Wright, including some of the fraud charges, and some of its claims against A.G. Edwards.[7] He found no liability against Buckeye or Luxenburger. The Division appealed.[8]

DISCUSSION

The critical question in this appeal is whether the HTA contracts qualify as forwards and are therefore exempt from the CEA. In assessing this question, the ALJ considered the language of the contracts, the contracting parties' objective capacity to make or take delivery, testimonial evidence regarding the farmers' subjective intent respecting delivery, evidence of post-execution events, and other factors. As the Division stated, it is well-established that the intent to make or take delivery is the critical factor in determining whether a contract qualifies as a forward. *See generally, In re Stovall*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. ¶ 20,941 (CFTC Dec. 6, 1979); *Statutory Interpretation Concerning Forward Transactions*, 55 FR 39,188 (CFTC Sept. 25, 1990).

The Division has the burden of proof to establish that the HTA contracts are not forwards. The Division contends that the provisions in Buckeye's HTA contracts allowing

[7] The ALJ imposed a $500,000 civil monetary penalty and a permanent trading prohibition against Wright, and ordered him to cease and desist from further violations. He imposed a $20,000 penalty and cease and desist order against A.G. Edwards.

[8] Developments subsequent to the initial decision materially impact our resolution of this case. Shortly after the issuance of the initial decision, Luxenburger died and the Division moved to dismiss him as a party. That motion is granted. A.G. Edwards and the Division thereafter reached a full settlement whereby A.G. Edwards paid a civil monetary penalty of $45,000 to resolve all charges against it. Wright did not appeal the findings and sanctions against him. This decision resolves the Division's appeal of the dismissal of charges against Buckeye (a term we use to include any successors in interest) and of some charges against Wright (although the Division requested no change in the sanctions imposed against him).

delivery to be deferred or cancelled should be given great weight, if not controlling weight, in establishing that the farmers did not intend to make delivery.

This Commission, however, has specifically held that provisions within the four corners of an HTA contract allowing the parties to defer or avoid delivery do not automatically establish the lack of intent to deliver; the actual conduct of HTA users with respect to a cancellation provision is also a factor. *See In re Grain Land Cooperative*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,636 (CFTC Nov. 25, 2003) ("*Grain Land*"); *In re Competitive Strategies for Agriculture, Ltd.,* [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,635 (CFTC Nov. 25, 2003) ("*Competitive Strategies*"); *see also Policy Statement Concerning Swap Transactions*, 54 Fed. Reg. 30,694 (CFTC July 21, 1989) (In distinguishing futures from forwards "the Commission and the courts have assessed the transaction 'as a whole with a critical eye toward its underlying purpose.' Such an assessment entails a review of the 'overall effect' of the transaction as well as a determination as to 'what the parties intended.'" (quoting *CFTC v. Co Petro Mktg. Group*, 680 F.2d 573, 581 (9th Cir. 1982), and *CFTC v. Trinity Metals Exchange*, No. 85-1482-CV-W-3 (W.D. Mo. Jan. 21, 1986)); *accord, CFTC v. Fleury*, No. 03-61199, slip op. at 13 (S.D. Fla. June 17, 2010).

In assessing the parties' expectations or intent regarding delivery, the Commission applies a "facts and circumstances" test rather than a bright-line test focused on the contract's terms. While we acknowledged that the language of any written agreement is relevant, both *Grain Land* and *Competitive Strategies* declined to give such language controlling weight in all circumstances. Instead, the cases indicated that in assessing intent, evidence of the parties' course-of-performance conduct under the contract generally would be given at least as much

weight as evidence of the words they used to express their agreement. *See Grain Land*, ¶ 29,636 at 55,748; *accord, Competitive Strategies*, ¶ 29,635 at 55,731.

Here, however, evidence of course-of-performance conduct is not available. In both *Grain Land* and *Competitive Strategies*, there was some evidence showing whether delivery obligations were met, deferred or settled in cash.[9] The instant case provides no such evidence of post-execution conduct from which the parties' intent may be inferred. While it is true that no farmer delivered corn under the substitute HTA contracts, no farmer resorted to the cancellation or deferral provisions either. They simply ceased to perform. The ALJ found on this point:

> Perhaps the best indicator of an ex ante expectation of delivery is whether it eventually occurs. However, the strength of this indicator depends, in large part, on the absence of intervening factors that could drive a wedge between prior expectation and subsequent action. In this case, it appears that none of the substitute farmers ever delivered on the substitute HTAs. However, it also seems that none of them rolled [deferred] delivery or exercised the cancellation clause either. The fact that they took none of these acts seems to have resulted from a confluence of events that post-dated the substitute farmers' entry into the HTAs: Buckeye's cessation of operations related to its bankruptcy, the Commission's investigation of Wright and Buckeye, and private attorneys counseling the substitute farmers that they had no obligation to perform under the agreements. As a result of these circumstances, we can make no substantial inferences as to the ex ante delivery expectations from the absence of delivery.

I.D., ¶ 29,412 at 54,760 (footnotes omitted).[10]

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[9] In *Competitive Strategies*, the evidence regarding the disposition of the contracts at issue showed that they uniformly were cash-settled. ¶ 29,635 at 55,731-33. In *Grain Land*, "perhaps 60 or 70 producers exercised some sort of cancellation option" and an unknown number delivered, ¶ 29,636 at 55,749, while nothing was determined as to the disposition of other "apparently missing bushels" under contract. *Id.* Given this mix of post-execution outcomes, the Commission held that it could not reliably determine the parties' intent.

[10] Some of the "apparently missing bushels" under contract in *Grain Land* seem to have been caught up in the same market forces as those that affected the course of events in this case. The Commission noted:

> Most of the volume of undelivered grain apparently developed during the spring of 1996, when economic conditions in the corn market were highly unusual and Grain Land's [hedge-to-arrive] program was collapsing. As a result, we do not believe that reliable inferences about parties' intentions at the time they entered into contracts can be drawn from this information.

Grain Land, ¶ 29,636 at 55,749 n.31.

The intervening events undermined the relevance of the parties' post-execution conduct as an indicator of their intent. Accordingly, this case offers no basis on which to revisit our statements in *Grain Land* and *Competitive Strategies* that evidence of post-execution conduct should be considered in determining intent to deliver.[11]

* * *

We are left then only with the language of the HTA contracts and testimonial evidence concerning the farmers' subjective intent to deliver. The Division called producers who had entered into substitute HTAs to testify about their subjective intent to deliver, among other issues. Their testimony regarding their intent varied.[12] The ALJ found that the "the substitute farmer testimony, taken *arguendo* as credible, did not establish that a critical mass of farmers entered the substitute HTAs without an expectation of making delivery." ¶ 29,412 at 54,763 (footnote omitted). He also declared himself unable to reach a "critical mass" by imputing the testimony of farmers who lacked intent to deliver to non-testifying farmers. *Id.* The Division argues that no legal support exists for the ALJ's "critical mass" analysis, and contends the standard is "inherently imprecise." *See* Div. App. Br. at 30-31 and n.148.

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[11] The narrow time frame in which the events at issue on appeal occurred unavoidably hampered the Division's efforts to prove intent to deliver. The substitute HTAs were initiated during late 1995, the middle of a crop year, and imploded within months. This case began with a wider scope, but the Division truncated its Section 4(a) claims against Buckeye during the proceedings below. The Complaint alleged that Buckeye offered illegal, off-exchange futures "from 1991 through at least December 1995." At the hearing, the Division limited the scope of its proof to violations "from 1995," I.D., ¶ 29,412 at 54,755 and n.98, and in its post-hearing submissions, the Division further curtailed its case to cover only the substitute HTA contracts offered in late 1995. *Id.* at 54,755 and n.99. We do not second guess the Division's litigation strategy. Nevertheless, the compressed timeframe here, which stands in contrast to the lengthier timeframes that informed the *Grain Land* and *Competitive Strategies* cases, restricts our ability to reach reliable conclusions regarding the contracting parties' intent.

[12] Eleven producers participated in the substitute HTA program. Seven testified, all but one for the Division. I.D., ¶ 29,412 at 54,753 n.67, 54,762-63. The ALJ concluded that "credibility aside, four of the seven substitute farmer witnesses contemplated making complete delivery of some sort, one anticipated making delivery in satisfaction of some but not all of his obligations and two did not anticipate making delivery." *Id.* at 54,672. While the Division's characterization of one witness's testimony is at odds with the ALJ's (compare Div. App. Br. at 18-19, discussing Grieser testimony, with the I.D. at 54,762), it is undisputed that the evidence regarding intent to deliver was not uniform.

We view the ALJ's reference to "critical mass" as a descriptive term used in evaluating the weight of the witnesses' testimony, not as a novel legal standard. The standard for determining liability in administrative enforcement cases is, and remains, the preponderance of the evidence contained in the record as a whole. That is the standard applied by the ALJ in summing up his findings under Section 4(a). *Id.* at 54,763.

The ALJ confronted conflicting testimony from a majority but not all of the substitute HTA producers, based on which (together with other evidence) he had to "affix a label to a *class* of contracts." *Id.* at 54,758 (emphasis added). We faced a similar situation in *Grain Land*, where the Division offered the testimony of seven producers and Grain Land offered three, the ten constituting a fraction of the hundreds of producers who entered into the contracts at issue there. We found that "[n]othing in the record indicates that either side selected its witnesses in a manner suggesting that they were representative of the larger group of producers," *Grain Land*, ¶ 29,636 at 55,747, and held that the administrative law judge erred in making "broad findings about what producers as a class were told" or what they believed based on testimony from a limited number of nonrepresentative witnesses. *Id.* Accordingly, we declined to give the testimonial evidence any weight in determining the issue of intent. *Id.* at 55,750 and n.32. The ALJ in this case appears to have followed our *Grain Land* approach. *Cf. Miller v. CFTC*, 197 F.3d 1227, 1235 (9th Cir. 1999) (error to assume that respondent fraudulently solicited hundreds of other customers based on the testimony of seven customer witnesses not shown to be representative of the larger group).

We expressly do not hold that the Division invariably is required to produce a preponderant number, or a representative sample, of contract participants in every case where the nature of a class of contracts is disputed. As we have held since *Stovall*, the nature of a contract

involves a multi-factor analysis, and the strength of the evidentiary showing under individual factors may be expected to vary from case to case. In *Competitive Strategies*, for instance, the case turned on the evidence of the parties' post-execution conduct, not testimonial evidence. In this case, the ALJ considered the terms of the substitute HTAs, the status of the parties as commercial actors, and the manner in which Buckeye recorded the HTAs in its financial records, and found that these "objective circumstances lend support to both sides of this proceeding and are not inconsistent with either." I.D. at 54,671. As discussed above, he found that evidence of post-execution conduct was not probative, inasmuch as the parties neither cancelled nor rolled nor delivered under the contracts. *Id.* at 54,670. Thus, in this case, evidence of the parties' subjective intent became, by default, the decisive element of his multi-factor analysis.[13]

We have considered the Division's arguments under Section 4(a), contained in all its appellate submissions. While comprehensive, the arguments at bottom amount to a request to us to reweigh the record in its favor. After independently reviewing the factual record on which the ALJ found that the substitute HTAs did not violate Section 4(a), we conclude that he committed no material error of law or fact that warrants reversing his decision in Buckeye's favor under Count I. Accordingly, we affirm the ALJ's decision to dismiss Count I against Buckeye without further discussion, and adopt his factual findings relevant thereto as our own.

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[13] The Division argues that evidence of subjective intent has no role to play in analyzing the nature of the contract. "[T]the proper question is: based on all of the relevant factors, what did the contract enable the parties to do. If, as in this case, delivery is possible but not required, it is a futures contract. Whether or not the buyer or seller of a contract intends to take or make delivery does not define or change the fundamental nature of the HTA as a futures contract . . . ." Div. App. Br. at 32. The Division argues that a bright-line test based on the terms of the contract is necessary to avoid legal uncertainty, *i.e.*, to avoid the prospect of "a single contract starting out as a forward contract, but winding up as a futures contract if the signer changed his or her mind and cancelled the contract," or the same contract being a future for one signer and a forward for another, depending on how each intends to use it. *Id.* The Division argues that this situation "would create legal uncertainty throughout the life of the contract as to what regulatory framework will apply at any given moment." *Id.*

We acknowledge the importance of avoiding legal uncertainty. The Division's bright-line test, however, is an approach we affirmatively rejected in our other cases. Our views of the appropriateness of a multi-factor analysis remain unchanged. The Division's approach, strictly applied, potentially may undermine the usefulness of HTA contracts to the agricultural industry and may hamper innovation.

* * *

We also affirm the ALJ's decision to dismiss Count I against Wright, who was charged with aiding and abetting Buckeye. Dismissal of the Section 4(a) allegations against Buckeye compels the dismissal of the derivative liability charge against Wright. Because Buckeye's conduct does not constitute a violation as a matter of law, Wright cannot be held liable for aiding and abetting that conduct. Count I is dismissed in its entirety.

* * *

We turn now to the ALJ's resolution of Count II. In Count II, Buckeye was charged with violating Rule 32.2 and CEA Section 4c(b) by dealing in trade options on corn, and Wright was charged with aiding and abetting. Buckeye defended on the basis that its transactions were "embedded options" that did not violate Rule 32.2 or CEA Section 4c(b). The ALJ concluded that these options did not violate the Act because they did not take place in interstate commerce and thus occurred outside the Commission's jurisdiction.

We disagree with the ALJ's interstate commerce analysis,[14] but affirm his dismissal of Count II on other grounds.

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[14] Rule 32.2 states in part that:

> [N]o person may offer to enter into, confirm the execution of, or maintain a position in, any transaction in interstate commerce involving wheat, cotton, rice, corn . . . and frozen concentrated orange juice if the transaction is or is held out to be of the character of, or is commonly known to the trade as, an "option," ... "put," [or] "call" . . . . (Emphasis added).

Although the interstate commerce issue was not raised or argued by the parties, the ALJ determined that this language required the Division to prove on a transaction-by-transaction basis that each substitute HTA option qualified as a transaction in interstate commerce. The ALJ's analysis under the CEA is materially incomplete insofar as he overlooked the significance of the congressional findings contained in CEA Section 3 as it stood prior to enactment of the Commodity Futures Modernization Act of 2000, Pub. L. No. 106–554, 114 Stat. 2763. In 1983, the Act was amended to include congressional findings that option transactions not only take place "in" interstate commerce, but also that they "affect" interstate commerce and thereby impact the national interest. Thus, from 1983 until 2000, CEA Section 3 provided in part that:

> [T]ransactions which are of the character of, or are commonly known to the trade as, "options" are or may be utilized by commercial and other entities for risk shifting and other purposes. Options transactions are in interstate commerce or affect such commerce and the national economy,

Buckeye contends that a *bona fide* forward contract permissibly can include an option-like pricing term as long as the "predominant feature" of the overall contract is its use to market a commodity through actual delivery. Buckeye's argument relied on Commission staff guidance issued in 1985.[15] Embedded options may be used to adjust the forward price if they do not undermine the overall nature of the contract as a forward. If the option targets the delivery term and renders delivery optional then the "predominant feature" of the contract cannot be actual delivery and the transaction fails to qualify as a forward. Buckeye's puts operated to adjust the forward price. They did not render the farmer's overall obligation to make delivery optional.

The Division's argument focuses on the contention that Buckeye's puts were severed and marketed separately from the HTA component of the overall contract and therefore cannot satisfy the second step in the staff's analysis to qualify as an embedded option. Specifically, the Division states:

> [T]he purchase or sale of an option [was] just that, *i.e.*, an optional transaction not mandated by the underlying commitment. Indeed, even after the Substitute HTAs were signed, Buckeye continued to market its options, thus highlighting that the marketing was independent of the underlying contract. Importantly, some of the signers chose to purchase puts while others did not, again illustrating that the options were not inextricably woven in the fabric of the Substitute HTAs.

Div. Br. at 59.

> rendering regulation of such transactions imperative for the protection of such commerce and the national public interest.

We read this congressional finding as dispositive. Accordingly, we vacate the ALJ's interstate commerce analysis in its entirety, and find that the options lie within our jurisdiction.

[15] In the mid-1980s, a question arose as to whether option pricing could be merged within a delivery-settled contract under the forward contract exclusion of the CEA. The Commission's Office of General Counsel published an interpretative statement in 1985, which provides a two-step analysis of "embedded options." *See Characteristics Distinguishing Cash and Forward Contracts and 'Trade' Options*, 50 Fed. Reg. 39656 (Sept. 30, 1985). The first step focuses on whether the option operates on the price or the delivery term of the forward contract. The second step focuses on secondary trading.

Our review of the record shows that the put and HTA operated as a single contract, and in most cases, were issued simultaneously. That farmers could elect to buy puts after entering into HTAs does not establish that the puts were either free-standing or separately marketed. Each put, whenever purchased, involved the same parties and the same commodity as the HTA. We find no instance where a third person was assigned or substituted as a party in lieu of the original two parties to these contracts, or where the put was transferred separately from the HTA, nor any other indication that the option had an independent existence apart from the HTA.

Nor does the fact that not every farmer chose to use an option constitute evidence of severance or separate marketing. One farmer's choice to forgo option use cannot be reasonably viewed as prompting or resulting in the splitting into two the contracts of other farmers who did use options. We do not find that any put was severed from its forward or that either of them was traded separately from the other. We hold that in these circumstances, no freestanding option came into being, and thus, no violation of Rule 32.2 occurred. Thus, Count II is dismissed in its entirety against Buckeye and Wright.

* * *

The Division also argues that the ALJ erred in failing to find Wright liable for violating Section 4b of the Act in soliciting substitute HTA participants, and for aiding and abetting A.G. Edwards's violation of Rule 1.37(a). In light of our dismissal of Count I, we do not reach the Division's Section 4b argument. For reasons of decisional economy, we decline to revisit the ALJ's ruling against Wright under Rule 1.37(a). The Division seeks no increase in sanctions against Wright, and the respondent charged with direct liability has settled. We have not reviewed and do not address the ALJ's liability findings against Wright, from which Wright has

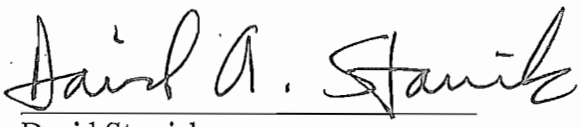
not appealed. *See* Commission Rule 10.104(a) (providing that the Commission "may limit the issues to those presented in the statement of issues in the brief").

CONCLUSION

For the reasons contained herein, we affirm the dismissal of Counts I and II of the Complaint, and the allegations that Wright violated Section 4b with respect to the substitute HTA contracts. We let stand without review the remainder of the initial decision. The ALJ's sanctions against Wright shall become final with the issuance of this opinion and order.

IT IS SO ORDERED.[16]

By the Commission (Chairman GENSLER and Commissioners DUNN, SOMMERS, CHILTON, and O'MALIA).



David Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: October 25, 2010

[16] Sanctions shall become effective 30 days after the date this order is served on the party. A motion to stay any portion of this order pending reconsideration by the Commission or judicial review shall be filed and served within 15 days of the date this order is served. *See* Commission Rule 10.106, 17 C.F.R. § 10.106.