Commodity Futures Trading Commission
Office of Public Affairs
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
202.418.5080

Statement

Concurring Statement of Commissioner Scott D. O'Malia Regarding the Proposed Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations

January 14, 2010

I concur on the release of the Federal Register notice of proposed Federal speculative position limits for certain energy commodities because I think it is important that the Commission receive comments on the proposal. I encourage our market participants, the public, and anyone with an interest in the markets to inform the Commission about the impact of the proposed limits or other limits, meaning limits as currently proposed, or potentially lower limits as a result of this rulemaking or future rulemaking.

Notwithstanding my concurrence on the release for comments, I have many concerns regarding the proposal's effectiveness and justification. Keeping in mind the importance of maintaining the market's fundamental purpose of allowing customers to hedge commercial risk, I question the utility of rules that either present any potential for circumventing CFTC authority or make energy markets less transparent or liquid.

The Proposed Limits Could Result in Less U.S. Regulatory Oversight

I question the effectiveness of these regulatory changes, especially as Congress is considering a much broader and comprehensive financial reform package. I remain particularly concerned with the impact of enacting the proposed position limits on the regulated exchanges, while the Commission lacks the regulatory authority to impose limits equitably upon all similar energy transactions, including over-the-counter transactions. As we work to increase transparency in these markets, the proposed position limits may undermine our efforts by allowing participants to turn to the less regulated and less transparent over-the-counter markets, which would be detrimental to the markets and to the public.

Status Quo for Index and Speculative Investors

Earlier this year, the Commission held hearings and heard testimony from witnesses who were frustrated with recent prices and volatility in commodity markets. Some advocated that the Commission immediately impose position limits as a solution. This

created high expectations that any Commission proposal would impose limitations on passive index and speculative investors. The release states that no more than ten trading entities would be affected and most of those would likely be entitled to a *bona fide* hedge exemption. This means that few, if any, passive index and speculative investors will be significantly impacted by the proposed position limits. The proposed position limits will not change the investing behavior of passive index investors, so long as they remain under the limits or utilize the over-the-counter markets over which the Commission has limited authority. The Commission would benefit from receiving information on the impact, if any, the proposed position limits might have on the trading strategies of passive index investors going forward. In addition, the Commission should endeavor to improve its understanding of the impacts of passive index investors rolling over their position on a monthly basis to determine what, if any, action is required.

Concerns About Effectiveness and Necessity

This proposal makes a case for the statutory justification for the CFTC to impose position limits under Section 4a(a) of the Act. However, the proposal fails to make a compelling argument that the proposed position limits, which only target large concentrated positions, would dampen price distortions or curb excessive speculation. In large part, the lack of a compelling justification may be due to the CFTC's own research and the Interagency Task Force on Commodity Market's conclusion that the rise in oil prices was largely attributable to fundamental supply and demand factors, which is also supported by independent analysis. In addition, the fact that the proposed position limits are modeled on the agricultural commodities position limits forces us to examine whether those agriculture limits were effective in preventing the price spikes in 2007 and 2008. Despite federal position limits, contracts such as wheat, corn, soybeans, and cotton contracts were not spared record setting price increases.

Missed Opportunity for Transparency

The proposed position limits provide swap dealers with twice the single and all-months combined levels. This is a divergence from the current practice of providing swap dealers with a hedge exemption for commercial risk taken on over-the-counter transactions. I question whether the Commission has missed an opportunity to consider an alternative approach to provide swap dealers with a "look through" exemption, meaning swap dealers would receive a *bona fide* hedge exemption for business related to counterparties who would have been entitled to a hedge exemption if the counterparties had used the futures markets. In exchange for this "look through" exemption, swap dealers would provide the Commission with their customer's over-the-counter position data. That data would allow the Commission to determine whether customers are attempting to circumvent the position limits. I would be interested to receive comments on whether the Commission should impose this "look through" exemption, rather than the swap dealer exemption in the proposed rule. In addition, I am interested to know what types of data could be made available under a "look through" exemption. While I am aware that the proposed rule contains a provision for "look through" recordkeeping, meaning data would be provided only upon Commission request, this would not provide the same transparency as the above.

Position Limits Must Not Hinder Commercial Risk Management

If position limits are implemented, the Commission must ensure that such limits do not affect market liquidity and thus hinder the market's fundamental purpose of allowing commercial hedgers to manage risk. This is true for position limits on energy products or for any other commodity.

In light of the many questions and concerns I have, I look forward to receiving comments from market participants, the public, and anyone with an interest in the markets that would be impacted by the proposed position limits.