

1 U.S. COMMODITY FUTURES TRADING COMMISSION (CFTC)

2

3 OPEN MEETING OF THE COMMISSION

4

5 Thursday, October 15, 2020

6 9:30 a.m.

7

8 Teleconference

9

10 CFTC Commissioners in Attendance

11 Heath P. Tarbert, Chairman

12 Brian D. Quintenz, Commissioner

13 Rostin Behnam, Commissioner

14 Dawn D. Stump, Commissioner

15 Dan Berkovitz, Commissioner

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18

19 Also Present

20 Christopher Kirkpatrick, Secretary of the Commission

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P R O C E E D I N G S

CHAIRMAN TARBERT: Good morning. This meeting will come to order. This is a public meeting of the Commodity Futures Trading Commission. I would like to welcome members of the public and market participants, as well as those on the phone or watching our webcast.

I would also like to welcome my fellow commissioners, Commissioner Quintenz, Commissioner Behnam, Commissioner Stump, and Commissioner Berkovitz.

As always, we will begin with the Pledge of Allegiance. I will lead, and anyone is welcome to join.

(Pledge of Allegiance.)

CHAIRMAN TARBERT: Well, thank you very much. Today we will be discussing and voting on three important final rules during today's open meeting. For each final rule, we'll hear a staff presentation before the Commission deliberates and votes.

First, we'll have staff presentations and deliberations relating to a final rule to extend the

1 margin requirements for uncleared swaps for certain  
2 swap dealers and major swap participants.

3           Second, we'll consider a final rule providing  
4 registration exemptions for certain foreign  
5 intermediaries.

6           And last, we'll consider a final rule on  
7 speculative position limits for derivatives.

8 Deliberations on this rule will occupy most of our time  
9 today. We'll have a staff presentation followed by two  
10 rounds of Commissioners' questions and remarks.

11           We'll now move to opening statements. I'll  
12 go first, followed by my fellow commissioners in order  
13 of seniority. Commissioners are free to reserve their  
14 time to make a longer closing statement, if they wish.

15           So I'll begin my opening statement, and in my  
16 opening statement I will use some of the time that I  
17 have been allotted for my closing statement. I'll give  
18 a very short closing statement.

19           Well, first of all, I'm pleased to support  
20 all of today's final rules, but there is one final rule  
21 that I'm very proud in particular to bring to a vote  
22 today, and that is the final rule on speculative

1 position limits. Like all my fellow commissioners and  
2 so many who have held these seats before us, I promised  
3 during my confirmation hearing that I would work to  
4 finalize this rule. So to the Senate Ag Committee, to  
5 the market participants who rely on our futures  
6 markets, and to the American people, I'm proud to say  
7 promise made, promise kept.

8           Today, we are removing uncertainty that has  
9 hung over the agency and derivatives markets for a  
10 decade, an uncertainty that has impacted market  
11 participants, particularly the Americans that need  
12 these markets to hedge the risks inherent in their  
13 businesses.

14           Before we begin, I want to give a heartfelt  
15 thanks to all the staff who worked tirelessly on this  
16 rule. Position limits has been an incredibly arduous  
17 task for all the staff involved, and this has been a  
18 team effort throughout. One of the agency's four core  
19 values is teamwork, and nothing signifies that teamwork  
20 more than position limits. Later I'll go through the  
21 list of people, but there are no fewer than 26 staff  
22 members that played a material role in the position

1 limits rule, and there are dozens more, including the  
2 commissioners and their office staffs, that have made  
3 today possible.

4           Ralph Waldo Emerson is quoted as saying "Life  
5 is a journey, not a destination." Lucky for Ralph, his  
6 journey didn't involve position limits. This rule has  
7 been one of the most difficult journeys this agency has  
8 ever taken.

9           The Commission has issued five proposals over  
10 the past 10 years. The first was adopted in 2011 but  
11 then vacated by the District Court before it took  
12 effect. A proposal in 2013 and two more in 2016 were  
13 never finalized. All told, those four proposals  
14 received thousands of comments from the public, the  
15 vast majority of which objected to these proposals, and  
16 for good reason. Much ink was spilled, and many trees  
17 were felled over those proposals.

18           Finally, the Commission issued its fifth  
19 proposal in January of this year, and today we will  
20 finalize that rule. But today's rule isn't a complete  
21 rejection of prior attempts. Instead, it builds on the  
22 good from those proposals while recognizing and fixing

1 their shortcomings.

2           And don't get me wrong, any position limits  
3 rule involves a balancing act. And as that famous  
4 saying goes, you can please some of the people all the  
5 time, and all the people some of the time; but, as  
6 certainly is the case with position limits, you simply  
7 can't please all the people all the time.

8           And that is especially true given the three  
9 things we are tasked with balancing. The Commission  
10 has to balance: number one, whether position limits on  
11 a particular contract are more helpful than harmful;  
12 two, whose positions should be subject to the limits  
13 and whose shouldn't be; and three, what limits are at a  
14 level high enough that allow liquid markets, but at the  
15 same time not excessive speculation. Prior position  
16 limits proposals ultimately failed because they were  
17 unable to strike the correct balance on these three  
18 points.

19           First, prior proposals were based on a  
20 plausible, but ultimately unsupportable, statutory  
21 interpretation, the so-called "mandate." The mandate  
22 would mean there is no balancing test. Instead, all



1 futures would be subject to federal limits. Given the  
2 wide range of futures in our markets, this would  
3 require the Commission to evaluate thousands of  
4 contracts. It also requires limits, regardless of the  
5 benefits of those limits, or the burdens that they  
6 would impose.

7           Second, prior proposals failed to recognize  
8 all the ways in which participants use futures markets  
9 to hedge prices. Agricultural, metals, and energy  
10 markets are vital to American businesses, which is why  
11 Congress explicitly excluded bona fide hedges from  
12 position limits. Too broad a reading of bona fide  
13 hedging and, of course, you invite the wolf of  
14 speculative activity into the market wearing sheep's  
15 clothing. But, too narrow a reading, and you lock out  
16 the businesses that need these markets to manage their  
17 risks, thereby putting economic growth itself at risk.

18           Prior proposals were too restrictive on what  
19 constitutes bona fide hedging. They threw up too many  
20 roadblocks for businesses to access these markets.  
21 More than anything else, this overly rigid  
22 interpretation caused the prior proposals to fail.

1           Third, the prior proposals set limits that  
2 were too low and too rigid. Those limits didn't  
3 balance the need for liquidity and price discovery  
4 against the risk of excessive speculation, which is our  
5 real mandate that Congress requires. The proposed  
6 limits were frozen in time, not budging from limits  
7 updated as far back as 1999 -- yes, when we all had  
8 dial-up Internet, VHS tapes, and floppy disks.

9           The good news is that recognizing the  
10 problems faced by past attempts has given us a path to  
11 success. I think the best indication is the  
12 overwhelming support to the approach in the comment  
13 letters that we received to our January proposal.  
14 Unlike the prior proposals that garnered a library of  
15 negative comment letters, this proposal is largely  
16 supported by businesses and trade groups across so many  
17 facets of the real economy.

18           So let's talk about why today's rule will  
19 succeed where others have failed.

20           First, we must recognize the limits of  
21 limits. Position limits are a tool to combat corners  
22 and squeezes, but that doesn't mean they're a tool that

1 should always be deployed. Position limits are like a  
2 medicine that can help cure a disease, but also carries  
3 some potential side effects, and that's why Congress  
4 told us to use them only when necessary. The necessity  
5 finding is like a doctor's prescription: someone needs  
6 to evaluate the risks of the disease against the  
7 potential side effects of the prescription.

8           Second, we've got to recognize market  
9 participants' needs. As I have always said, position  
10 limits is the rare case where the exception is just as  
11 important as the rule itself. The rule lays out a  
12 robust set of enumerated bona fide hedging exemptions  
13 to ensure that participants in the physical commodity  
14 markets can access the futures markets. Building on  
15 that proposal, we've added clarity around unfixed price  
16 transactions and storage. And with this, we've met the  
17 needs of the market.

18           We've also focused on the different ways  
19 people access markets. We have streamlined the process  
20 for pass-through swap exemptions, making it easier for  
21 dealers to provide liquidity to commercial end users in  
22 the swaps markets; and finally, we're leveraging the

1 exchanges for evaluating exemptions that aren't  
2 enumerated in our rule. And as part of the final rule,  
3 we're clarifying that someone can take a position  
4 during the 10-day review period. In short, we're  
5 building a robust set of enumerated exemptions and a  
6 workable non-enumerated exemption process.

7           Third, we're balancing the right  
8 considerations when setting the limits themselves. We  
9 proposed significant increases to the spot and non-spot  
10 month limits for legacy agricultural products. A lot  
11 of commenters were concerned about these increases,  
12 particularly for the non-spot limits. But these  
13 increases reflect growth in our markets.

14           Open interest in many of the legacy grains  
15 contracts has doubled or tripled since we last updated  
16 the limits 10 years ago. Our markets have grown  
17 tremendously, and we can't expect them to wear the same  
18 shoes from 10 years ago.

19           It is important to remember that these  
20 federal limits are a ceiling and not a floor. The  
21 exchanges have their own limits, which can be no higher  
22 than the federal limits. Exchanges can calibrate those

1 limits quickly to account for issues with deliverable  
2 supply and other cash market issues.

3           As we have seen play out over the last  
4 decade, the CFTC would have a much more difficult time  
5 adjusting limits. So exchange-set limits are a way to  
6 fine-tune position limits on a particular market within  
7 the outer bounds of the federal limits.

8           Now, some of my colleagues, I realize, may  
9 see these three features of the final rule as a flaw.  
10 And, while these are significant departures from prior  
11 proposals, after four failed attempts, that departure  
12 is what we need. The flexibility in the necessity  
13 finding, the exemption process, and the adjusted limits  
14 are what make this rule workable. Otherwise, we are  
15 just repeating past mistakes and hoping for a different  
16 result, the very definition of insanity.

17           So let me conclude by saying that we have  
18 come a long way, and today we have reached the end of  
19 an arduous journey. We have recognized where past  
20 attempts have failed, and we have adjusted our  
21 approach. We have balanced the interests of all the  
22 participants in this market, some of which are in

1 diametric opposition. And we have crafted a workable  
2 and flexible system.

3           So I want to thank again my fellow  
4 commissioners, our staff, and to all of those  
5 stakeholders out there in the American agriculture  
6 sector specifically who have been part and parcel of  
7 this long journey, and I'm looking forward to voting in  
8 favor of this final rule. Thank you.

9           Commissioner Quintenz, you have the floor.

10           COMMISSIONER QUINTENZ: Thank you, Mr.  
11 Chairman, and good morning to you. Good morning to my  
12 fellow commissioners, to the staff at the agency, and  
13 to everyone in the general public that is listening  
14 today on what I believe is a great day for the  
15 Commission.

16           We have a saying at the agency that every day  
17 is a good day at the CFTC, and throughout my time here  
18 that has certainly been true, but I believe that today  
19 is a great day for this agency to finally put to bed a  
20 very important rulemaking that is being done, in my  
21 view, in a way that is truest to the CEA and best for  
22 the marketplace, and to provide a marketplace with the

1 most integrity, as well as the most liquidity, and to  
2 ensure that the price discovery function for physically  
3 delivered contracts is not negatively affected by any  
4 specific trader's excessive positions during the spot  
5 month.

6           Mr. Chairman, I agree with a lot of your  
7 comments -- in fact, I think with all of them -- around  
8 the approach that this rule takes. I will have a  
9 statement, part of which I will be reading during the  
10 consideration of the position limits rule that aligns  
11 myself with the thinking of the document. I think it  
12 is very notable that we're doing this in a way that  
13 really reflects, I think, the language of the statute.

14           We've heard a lot of discussion this week  
15 from Capitol Hill, as they debate a new Supreme Court  
16 nominee, of the interest in textual readings and  
17 originalism of the Constitution. I believe that that  
18 is also our obligation here with respect to this law,  
19 and that we need to analyze the words as they are  
20 written because that is what Congress passed as a body,  
21 and that is what a president signed as a text. I  
22 believe that our interpretations here are bullet-proof

1 and the best reading of the statute that will ground  
2 what is a very good rule for many, many years to come.

3 With that, Mr. Chairman, I'll yield back and  
4 look forward to the discussion. I'd also like to  
5 compliment the staff on the two rules that we'll be  
6 considering here shortly. I commend them for their  
7 work. Thank you again.

8 CHAIRMAN TARBERT: Thank you, Commissioner  
9 Quintenz.

10 Commissioner Behnam?

11 COMMISSIONER BEHNAM: Thanks, Mr. Chairman,  
12 and good morning to you, my fellow commissioners and  
13 the listening public.

14 I'm going to, like you, Mr. Chairman, use my  
15 time now to give prepared remarks, and I'll save a  
16 little bit of time for my closing remarks, keeping  
17 those brief.

18 The last time we gathered as a Commission to  
19 discuss position limits, I used some of my time to  
20 speak a bit about the award-winning movie, Ford versus  
21 Ferrari. At that point we were nearing the airing of  
22 the 92nd Academy Awards, and this action-packed drama



1 had earned four nominations, not to mention the  
2 distinction of being one of the few films I actually  
3 saw in a theater. For those of you who have not found  
4 it in one of your quarantine movie queues, Ford versus  
5 Ferrari tells the true story of American car designer  
6 Carroll Shelby and British-born driver Ken Miles, who  
7 built a race car for Ford Motor Company, the GT40, and  
8 competed with Enzo Ferrari's dominating, iconic red  
9 racing cars at the 1966 "24 Hours of Le Mans."

10 I used the film and racing metaphors  
11 throughout my speaking and written statements to  
12 highlight serious concerns that the proposed amendments  
13 to the CFTC rules addressing position limits signified  
14 yet one more instance where the Commission seemed to be  
15 comfortable with deferring core, congressionally  
16 mandated duties to others and calling it a victory.

17 We are here today to finalize the proposal.  
18 In just short of nine months, we have come to terms  
19 with life during a global pandemic, complete with  
20 economic turmoil and pockets of historic market  
21 volatility. Amid the mere 60-day open comment period  
22 following the proposal's publication in the Federal

1 Register, on April 20th, the price of the West Texas  
2 Intermediate crude oil futures contract, WTI, a key  
3 benchmark in the energy and financial markets,  
4 experienced an unprecedented collapse one day prior to  
5 the last day of trading and expiration for May  
6 delivery. Defying market mechanics, the price of the  
7 contract fell from \$17.73 per barrel at market open, to  
8 a closing settlement price of negative \$37.63, with the  
9 price dropping approximately \$40 in the last 20 minutes  
10 of trading.

11           And while we are still in recovery, with  
12 great fanfare after almost 10 years, the Commission is  
13 going to establish the position limits regime required  
14 under the Dodd-Frank Act. I am reminded again of Ken  
15 who, at the 1966 "24 Hours of Le Mans," went against  
16 his gut, giving way and leaving behind a milestone in  
17 car racing that to this day remains elusive.

18           If you haven't seen the movie, this is a  
19 spoiler alert: Ken did not win Le Mans in 1966. While  
20 he was one-and-a-half laps ahead of the two other  
21 GT40s, he was asked to slow down so that the three  
22 Fords in the lead would cross the finish line in a dead

1 heat formation. Ken lost his well-deserved win because  
2 the "24 Hours of Le Mans" awards the victory to the car  
3 that covers the greatest distance in 24 hours. In the  
4 event of a tie, the rules provide that the car that had  
5 started farther down the grid had traveled the greater  
6 distance. Ken's GT40 had started in the grid 60 feet  
7 ahead of the GT40 driven by Bruce McLaren and Chris  
8 Amon, who were the declared winners.

9           In the film, Ken seems to accept his loss  
10 with quiet dignity. However, in reality he was fully  
11 aware that in many respects, he had been robbed. From  
12 what I've read, Ken likely articulated his feelings a  
13 bit more colorfully.

14           The point is that bringing something across  
15 the finish line doesn't always equate to a success. As  
16 detailed in my questions today and written statement, I  
17 believe that by going against our congressional mandate  
18 and clear statutory intent by overly deferring to the  
19 exchanges, we have relinquished a claim to victory in  
20 this final position limits rule, which in many ways has  
21 itself felt like the CFTC's version of the "24 Hours of  
22 Le Mans." Therefore, I will go with my gut and not be

1 part of the formation in supporting this final rule.

2           Before turning to the other matters before  
3 the Commission today, I do wish to acknowledge and  
4 thank the Commission staff who worked on the proposal,  
5 today's final rule, and every related study, matter,  
6 and undertaking to support it for the better part of 10  
7 years. You were the design team, the engineers, the  
8 production team, and the pit crew. You kept us on  
9 course at a pace set by our Chairman -- and kudos to  
10 you, Mr. Chairman, for leading us here today -- and you  
11 have performed at the staff level at the top of your  
12 field.

13           There are two other final rules before the  
14 Commission today, and I am pleased to say that I will  
15 be supporting both.

16           First, the Commission will vote to extend by  
17 one year the implementation schedule for the margin  
18 requirements for uncleared swaps by postponing the  
19 compliance date for the final phase, known as Phase VI,  
20 to September 1st, 2022. I expect that the covered  
21 entities will work diligently in the time they have  
22 been given to come into compliance. We are

1 collectively working towards goals of continuity,  
2 resiliency, and normalcy. The Commission's open  
3 engagement and willingness to address appropriate  
4 concerns, which is a hallmark of our agency, ought not  
5 to be tread upon or used to undermine core reforms at  
6 the time when the very relief we have provided  
7 addresses market volatility and stress.

8 I would like to commend the ongoing work of  
9 our CFTC staff in demonstrating its analytical  
10 expertise and by engaging in significant data-driven  
11 efforts with our domestic and international  
12 counterparts through the BCBS/IOSCO Working Group on  
13 Margining Requirements.

14 Second, the Commission will vote on a final  
15 rule revising, among other things, the conditions for  
16 the registration exemption under Commission regulation  
17 3.10(c), available to non-U.S. commodity pool  
18 operators, or CPOs. The amendments expand the 3.10  
19 exemption to non-U.S. commodity pool operators who  
20 operate both qualifying offshore commodity pools and  
21 other commodity pools. As amended, the 3.10 exemption  
22 will further reflect the increasingly global nature of

1 this space and clarify the Commission's approach with  
2 respect to its oversight of foreign intermediaries that  
3 are not engaged on behalf of U.S. customers.

4           This final rule is brief in its delivery,  
5 less than one-tenth the length of the final rule on  
6 position limits, but it reflects many years of staff  
7 experience and familiarity with the Commission's  
8 historical positions and reasoning in addressing  
9 material policy issues raised by appropriately  
10 balancing the financial interests of foreign  
11 intermediaries and their customers with our commitment  
12 to the financial integrity of U.S. markets and U.S.  
13 customer protections.

14           Getting back to the topic on most of your  
15 minds, Ford v. Ferrari ended up taking home two Academy  
16 Awards for Best Sound Editing and Best Film Editing.  
17 Like today's final rules amending the CFTC margin rule  
18 and the 3.10 exemption, the film exhibited the finest  
19 editing and preservation of the aesthetic in multiple  
20 disciplines. It ultimately lost Best Picture to  
21 Parasite, a dark comedy thriller. I will stop my  
22 comparisons there.

1           In closing, I want to thank again the  
2 Chairman for his commitment to crossing the finish line  
3 on so many rules intended to implement core Dodd-Frank  
4 reforms. As a five-member Commission, our goal is  
5 always to reach consensus. However, like Ken Miles  
6 learned, consensus may not always equate to a victory  
7 or the success you were aiming for. We can disagree on  
8 various aspects of the proposals before us and  
9 nevertheless commit to moving forward. We will do that  
10 today. The important part is that we provide  
11 transparency through presentation and debate.

12           Back in 1966, by holding back, Ken lost the  
13 win at Le Mans, which denied him the Triple Crown of  
14 endurance racing: the 24 Hours of Daytona, the 24 Hours  
15 of Sebring, and the 24 Hours of Le Mans. No driver has  
16 won all three races in the same year, and Ken missed  
17 out because he was part of a team and Ford had been  
18 good to him. He committed and moved forward without  
19 the victory that should have been his because he was  
20 the best driver that day. I am committed to vote and  
21 move forward, even if it means giving up the Triple  
22 Crown of the day, but I won't go against my gut.

1           Mr. Chairman, thanks to you again for your  
2 leadership on this. It is a good day for the CFTC to  
3 be moving forward, and I look forward to the staff  
4 presentations. Thank you.

5           CHAIRMAN TARBERT: Thank you very much,  
6 Commissioner Behnam.

7           Commissioner Stump?

8           COMMISSIONER STUMP: Thank you, Mr. Chairman.  
9 I will reserve the balance of my comments for the  
10 debate as we consider each individual rule.

11           I would like to take the opportunity to note  
12 that today's agenda reflects the vastness of what we do  
13 here at this agency and the diversity of the market  
14 participants we serve. We are dealing today with a  
15 rule that assists in helping those who are financial  
16 end users who are for the first time are coming into  
17 scope of swap margin requirements. We are updating our  
18 commodity pool operator requirements for foreign  
19 commodity pools. We are finally finalizing a rule that  
20 enables those who provide for our energy needs and our  
21 food and our fiber to have some clarity with regard to  
22 position limits. It's been a very long 10 years.



1           So I just would like to commend all of the  
2 commissioners and all of the teams that have worked on  
3 this, and all of the staff that worked for the  
4 commissioners for having such a great breadth of  
5 knowledge and providing us with the opportunity to  
6 highlight how many different things we do here at this  
7 agency every day.

8           So with that, I'll reserve the balance of my  
9 comments for later. Thank you.

10           CHAIRMAN TARBERT: Thank you very much,  
11 Commissioner Stump.

12           Commissioner Berkovitz?

13           COMMISSIONER BERKOVITZ: Thank you, Mr.  
14 Chairman. I'm pleased to be here today to consider the  
15 three rules before us.

16           I'm going to reserve particular statements on  
17 the position limits rule and one of the other rules for  
18 when we take up those particular rules, but I do want  
19 to say one thing about the work the Commission has been  
20 doing, as well as about the position limits rule.

21           We've had a very busy year. We've had a very  
22 busy year and a very productive year. As Commissioner

1 Stump observed, the breadth of the issues that we've  
2 taken up has been quite extraordinary, from derivatives  
3 clearing organization registration to cross-border, to  
4 foreign and U.S. commodity pools, to swap data  
5 reporting, to automated trading, to bankruptcy, and  
6 position limits.

7           When we set our mind to accomplishing  
8 something and addressing it, we can do it, and there's  
9 been no lack of resolve either by the commissioners or  
10 by the CFTC staff, who has worked tirelessly around the  
11 clock to achieve the Commission's agenda this year.

12           In light of that determination and that hard  
13 work and the rolling up of the sleeves, I don't  
14 understand why we couldn't address two of the most  
15 fundamental issues in this rule facing us. One is, as  
16 I've been saying since shortly after the events  
17 happened, understanding what happened on April 20th of  
18 this year with respect to the WTI contract. The events  
19 of April 20th were one of the most spectacular  
20 divergences of the futures market from other derivative  
21 markets or the physical market that we have ever seen  
22 in a commodities market. Here we are in October, and

1 we still haven't determined what the causes of that  
2 event are, or released a report to the public.

3           Secondly, the issue, regardless of what we  
4 determine in the WTI, in the case of the WTI, there is  
5 a glaring deficiency in the rule before us on position  
6 limits today with respect to the issue of trading at  
7 settlement. This issue has been around for years.  
8 It's a well-known issue in the trading settlement  
9 period, and leading up to the settlement period: The  
10 structural issues with that type of order and how it's  
11 being used, and how it can be misused. This rule is  
12 silent on that. It doesn't address it in any manner.

13           I think, in light of those two really  
14 significant issues -- and we're talking about the core  
15 of this agency's mission -- something like the crude  
16 oil contract, the West Texas Intermediate contract,  
17 which is the global benchmark of crude oil in the  
18 context of this rulemaking, that it's not being  
19 addressed. And I just find that, in light of our  
20 ability to address issues, and in light of our staff's  
21 capability, in light of this Commission's capability, I  
22 find that just not acceptable to have this rule before

1 us today without being able to address that issue.

2           There have been statements made about today  
3 at the end of the arduous journey on position limits --  
4 we can finally put to bed position limits. That is  
5 simply not the case. We can't sit here and say that  
6 today, with the causes of April 20th not determined, no  
7 public report on it, and with a well-known deficiency  
8 in how certain contracts are traded.

9           I understand a lot of work has been put into  
10 this rule. It addresses many aspects of position  
11 limits. But, until those aspects are addressed, I  
12 don't think we are at the end of the road in terms of  
13 position limits.

14           We'll have a further discussion on these  
15 issues today, and I look forward to that discussion. I  
16 know everybody here is committed to the issues before  
17 us, and in all sincerity and good faith trying to  
18 address those, but at best the Commission gets a grade  
19 of "Incomplete" today on position limits.

20           Thank you, and I look forward to a  
21 discussion.

22           CHAIRMAN TARBERT: Thank you very much,

1 Commissioner Berkovitz.

2           We'll now move to consideration of the final  
3 rule on margin requirements for uncleared swaps for  
4 swap dealers and major swap participants, the so-called  
5 Phase VI Compliance Extension Date.

6           After a short presentation, the floor will be  
7 opened for questions and remarks from each  
8 commissioner. The final votes conducted in this public  
9 meeting will be recorded votes. The results of the  
10 votes approving the issuance of rulemaking documents  
11 will be included with those documents in the Federal  
12 Register.

13           To facilitate the preparation of approved  
14 documents for publication in the Federal Register, I'd  
15 now ask the Commission to grant unanimous consent for  
16 the staff to make necessary technical corrections prior  
17 to submitting them to the Federal Register.

18           COMMISSIONER QUINTENZ: So moved.

19           CHAIRMAN TARBERT: Without objection, so  
20 ordered.

21           So, at this time, I'd like to welcome the  
22 following staff for their presentations. From the

1 Division of Swap Dealer and Intermediary Oversight, we  
2 have Associate Director Warren Gorlick and Special  
3 Counsel Carmen Moncada-Terry. I'd also like to welcome  
4 Assistant General Counsel Mark Fajfar; and, from the  
5 Office of the Chief Economist, Financial Economist  
6 David Reiffen.

7 Warren, Josh, and others, the floor is yours.

8 MR. GORLICK: Thank you, Mr. Chairman. As  
9 you mentioned, I am, in fact, Warren Gorlick, the  
10 Associate Director in DSIO. And, as you also  
11 mentioned, I'm joined by my colleague, Carmen Moncada-  
12 Terry.

13 But, I also do want to recognize the great  
14 assistance we received from the Office of General  
15 Counsel and the Office of the Chief Economist who, as  
16 you noted, are also on the call today.

17 We're pleased to present this morning the  
18 final rule for your consideration to amend the CFTC  
19 margin rule by delaying for certain entities the  
20 September 1, 2021 deadline for compliance with the  
21 initial margin requirements, which we sometimes refer  
22 to as "IM," until September 1st, 2022.

1           By way of background, the CFTC's margin rule  
2 requires that swap dealers and major swap participants  
3 post and collect margin in accordance with the  
4 compliance schedule set forth in the CFTC's  
5 regulations. As adopted in 2016, the schedule requires  
6 compliance on staggered dates spanning from September  
7 2016 to September 2020.

8           In April 2020, consistent with revisions to  
9 the Basel Committee IOSCO Margin Framework for Non-  
10 Centrally Cleared Derivatives, the Commission published  
11 in the Federal Register a final rule that effectively  
12 extended by one year, until September 2021, the  
13 compliance date for entities with smaller average daily  
14 aggregate notional amounts and certain other financial  
15 products. These we refer to as the smaller portfolio  
16 group, with notional amounts between \$8 billion to \$50  
17 billion. And sometimes, as you mentioned, Mr.  
18 Chairman, we simply refer to this as Phase VI.

19           The Commission's intent in adopting the April  
20 2020 final rule was to mitigate the potential for  
21 market disruption that could have resulted from the  
22 large number of entities that would have come into IM

1 compliance at the end of the phased compliance schedule  
2 in September 2020. The entities would have needed to  
3 engage at the same time a limited number of financial  
4 services providers with IM-compliant documentation,  
5 obtain approval of risk-based models, and establish  
6 custodial arrangements.

7           However, due to the COVID-19 pandemic and  
8 resulting changes in the BCBS and IOSCO Framework, in  
9 July 2020, the Commission published in the Federal  
10 Register an interim final rule, we sometimes refer to  
11 it simply as the IFR, extending the September 2020  
12 compliance date for entities subject to that compliance  
13 date -- this is referred to as the IFR extension group,  
14 with notional amounts between \$50 billion to \$750  
15 billion, or sometimes simply referred to as Phase V --  
16 to September 2021 in order to alleviate the immediate  
17 impact of the COVID-19 pandemic on such entities.

18           The IFR did not extend the compliance  
19 deadline for entities that will be required to begin  
20 compliance in September 2021, as the impact of the  
21 pandemic on these entities was less clear.

22           As a result of the IFR, the IFR extension



1 group with notional amounts between \$50 billion and  
2 \$750 billion, and the smaller portfolio group with  
3 notional amounts between \$8 billion and \$50 billion,  
4 are required to begin IM compliance on the same day,  
5 which could lead to congestion and the potential for  
6 market disruption that the April 2020 final rule was  
7 intended to ameliorate.

8           In order to address this concern, in July  
9 2020, the Commission published an NPRM in the Federal  
10 Register that proposed to extend the smaller portfolio  
11 group's compliance deadline from September 2021 to  
12 September 2022. The Commission received only one  
13 comment letter and it was submitted by a group of  
14 industry trade associations expressing support for the  
15 proposal to extend the compliance schedule for this  
16 smaller portfolio group. The comment letter stated  
17 that the deferral of the compliance date is necessary  
18 to facilitate orderly preparations for the exchange of  
19 regulatory initial margin between swap dealers and the  
20 counterparties that come into the scope of the IM  
21 requirements in the last phase.

22           Therefore, consistent with this feedback,

1 staff recommends that the Commission adopt the final  
2 rule as proposed. The staff believes it is reasonable  
3 to extend the smaller portfolio group's compliance  
4 deadline to September 2022, in order to reduce the  
5 potential for market disruption.

6 Thanks for your attention. We will be happy  
7 to answer any questions you may have.

8 CHAIRMAN TARBERT: Well, thank you very much,  
9 Warren, for that insightful presentation and for the  
10 outstanding work in preparing these significant  
11 rulemakings for Commission consideration.

12 To begin the Commission's consideration and  
13 discussion of these rulemakings, I will now entertain a  
14 motion to adopt the final rule on margin requirements  
15 for uncleared swaps for swap dealers and major swap  
16 participants.

17 COMMISSIONER QUINTENZ: So moved.

18 COMMISSIONER BERKOVITZ: Second.

19 CHAIRMAN TARBERT: Thank you.

20 I'll now open the floor for commissioners to  
21 ask any questions. We'll start with me, but the good  
22 news is I don't think I have any questions for you,

1 Warren. This is very straightforward. I appreciate  
2 the hard work. This will bring us in line with what  
3 the Basel Committee and IOSCO are doing, and I think it  
4 makes a lot of sense. So I just want to commend you  
5 guys for your great work on this, and I'll be pleased  
6 to support it.

7 Commissioner Quintenz?

8 COMMISSIONER QUINTENZ: Thank you, Mr.  
9 Chairman. I don't have any questions myself, so if I  
10 may just read a quick statement on this final rule,  
11 that I support today's final rule that extends the last  
12 phase of the compliance for initial margin requirements  
13 to September 1st, 2022, in light of the unprecedented  
14 economic and social impacts of COVID-19 and the  
15 potential market disruption that could result from a  
16 large number of entities coming into scope on September  
17 1st, 2021. I strongly support an additional one-year  
18 deferral for these firms.

19 As I've noted previously, given the large  
20 number of firms covered by the final compliance phase,  
21 the estimated 7,000 initial margin relationships that  
22 need to be negotiated, and the small overall percentage

1 of swap activity that these firms represent, a one-year  
2 delay for these firms is very appropriate, in order to  
3 facilitate an efficient, orderly transition for the  
4 market into the uncleared margin regime.

5 In addition, today's final rule also ensures  
6 the Commission is consistent with BCBS IOSCO, the  
7 recommended margin framework, and similar actions taken  
8 by U.S. prudential regulators to extend the margin  
9 compliance schedule. I'm very pleased to support this,  
10 and I thank the staff for their work.

11 CHAIRMAN TARBERT: Thank you very much,  
12 Commissioner Quintenz.

13 Commissioner Behnam?

14 COMMISSIONER BEHNAM: Thanks, Mr. Chairman,  
15 and thanks to Warren and Carmen for your work on this;  
16 and, of course, DSIO and OGC and the Chief Economist,  
17 as well.

18 Two quick questions, Warren or Carmen,  
19 whoever is best to take it. But, in your engagement  
20 with the entities that have requested the extension, do  
21 you have any sense -- do you get a sense that the extra  
22 year will be enough? And, I fully understand and

1 appreciate that we're in very unique circumstances. I  
2 think we all hope that we will emerge sooner rather  
3 than later.

4           But, as the market has stabilized and I think  
5 we have all gotten accustomed to remote working, and  
6 even potentially going back in phases, do you feel  
7 comfortable based on your conversations that the new  
8 deadline in the proposal that we're about to vote on is  
9 sufficient, will be sufficient?

10           MR. GORLICK: Well, Commissioner Behnam,  
11 that's an interesting question. We certainly haven't  
12 received any indication that it won't be sufficient.  
13 One thing that's helpful is that by splitting out Phase  
14 V and Phase VI -- that is, the entities that are  
15 between \$8 billion and \$50 billion -- while that's  
16 still a large number of entities, we also undertook one  
17 other action under our administrative processes. That  
18 is, we clarified in 2019 that firms that haven't yet  
19 hit the \$50 million threshold, which is another speed  
20 bump, so to say, in having to actually exchange initial  
21 margin -- so, even if you're in compliance because you  
22 have \$8 billion and over in notional amounts, you don't

1 actually have to exchange initial margin until you hit  
2 the \$50 million.

3           It would appear that those firms that are in  
4 that last phase are likely to be the ones that are  
5 least likely to actually hit the \$50 million. So, they  
6 have that additional speed bump, in addition to hitting  
7 the \$8 billion. I think between those two speed bumps  
8 that we have deliberately put in place to ensure that  
9 initial margin requirements are focused on the firms  
10 that have the largest amount of initial margin, I think  
11 we should have sufficient industry capacity to prepare  
12 the documentation, for the NFA to review the initial  
13 margin models, and perhaps, for third-party vendors to  
14 also help firms in preparing those initial margin  
15 models, and finally to enter into the custodial  
16 arrangements.

17           COMMISSIONER BEHNAM: Thanks, Warren. I  
18 appreciate that detail, and I hope that you're right,  
19 and I would suggest and also hope that the market  
20 understands. I mentioned this in my opening statement,  
21 where we are and should have been flexible, rightfully  
22 so, and I think that's in part our job. We will

1 continue to be engaged, and I appreciate the work of  
2 DSIO, certainly, over the past nine months. But we  
3 have to get to Phase VI soon and finish this off. So,  
4 whatever we can do, I will support that.

5           A quick second question, Warren, also. We  
6 have two notices of proposed rulemakings that relate to  
7 average aggregate notional amounts and the minimum  
8 transfer amount that are currently, I think, both open  
9 until next week, the comment period. With this final  
10 move for Phase VI to 2022, is there any reason to think  
11 that these two open NPRMs will be affected by the Phase  
12 VI bump?

13           MR. GORLICK: I think those are somewhat  
14 different. The rulemaking you're referring to, which I  
15 believe is on the Commission calendar, hopefully for  
16 later in the year, after we see the public comments  
17 concerns average aggregate notional amounts in order to  
18 align the dates with international requirements.

19           So, that's a little bit of a different animal  
20 from simply delaying the phase-in period from 2016.  
21 But, they both have in common the fact that, as the  
22 Chairman mentioned at the beginning of the meeting,

1 they both are steps in harmonizing our requirements  
2 with the international requirements, and therefore, not  
3 putting U.S. firms at a competitive disadvantage. If  
4 we hadn't undertaken the rule today, assuming that you  
5 vote in favor of it, you had the potential that U.S.  
6 firms would be forced to put up margin a year ahead of  
7 other firms in other jurisdictions that would have had  
8 the benefit of a one-year delay. So, that's a  
9 competitive disadvantage.

10 So, in general, both the rules you're  
11 referring to, as well as the rule under consideration  
12 today, are focused on international harmonization  
13 requirements.

14 COMMISSIONER BEHNAM: Thanks, Warren. I  
15 appreciate that. Thanks again to the team. I look  
16 forward to supporting this rule.

17 That's all for me, Mr. Chairman. Thank you.

18 CHAIRMAN TARBERT: Thank you very much,  
19 Commissioner Behnam.

20 Commissioner Stump?

21 COMMISSIONER STUMP: Thanks, Mr. Chairman. I  
22 also do not have any questions, although I would like



1 to note that even though the CFTC margin requirements  
2 were established before I arrived here at the  
3 Commission, I do have a history with this issue, and I  
4 very much support what we're doing. I was present when  
5 Congress actually determined that the agency and  
6 various other agencies should establish margin  
7 requirements for those transactions that are not  
8 subject to mandatory clearing or not appropriate for  
9 mandatory clearing. And, I was also present for the  
10 conversation that occurred subsequent to that, in which  
11 there was much debate about how these requirements  
12 should apply to the ultimate end-users.

13           That is, in fact, what we're discussing  
14 today. The margin requirements have been phased in  
15 over the course of a number of years, and to date, it's  
16 been primarily the large financial institutions that  
17 have been implicated. Now we're turning to how we  
18 apply these margin requirements to financial end users.

19           And, just during the two years since I've  
20 been here, the final phases of these margin  
21 requirements have been a particular focus for me and  
22 the subject of great debate globally. In 2018 and

1 early 2019, I was fortunate to participate in  
2 discussions, where the unique challenges of these final  
3 phases were discussed within the IOSCO Framework.  
4 Since then, as has been noted, the BCBS and IOSCO  
5 recommended, and the CFTC subsequently agreed, to both  
6 extend and to stagger the compliance schedule for these  
7 final implementation phases.

8           We created a new Phase VI, which I supported,  
9 and I think it was very prudent and reasonable given  
10 the number of potential parties coming into scope is  
11 significantly higher than in prior phases, and also the  
12 unique nature of the participants that are coming into  
13 scope.

14           But then, in light of all the challenges  
15 presented by COVID-19, BCBS and IOSCO further amended  
16 the recommendation for the margin Framework to push out  
17 further by one year the Phase VI compliance date. So,  
18 this past summer, the CFTC proposed a rule to  
19 accomplish the extension, and I supported that. Public  
20 comments seemed to all be fairly supportive that the  
21 proposed extension be granted, and I'm pleased we're  
22 finalizing it today.

1           I do think that the vast number and the  
2 distinct needs of those implicated in this final phase  
3 is what warranted this change. However, COVID-19  
4 further complicated the compliance capabilities. I  
5 hope that we will be able to continue to work through  
6 some of the things, beyond just the extension, that  
7 have been put forward, that Commissioner Behnam noted  
8 and that Warren described. I've really enjoyed working  
9 with Carmen and Warren on this issue over the course of  
10 the past year or two.

11           So, with that, I just wanted to thank  
12 everyone. I don't have any questions, but thanks for  
13 the time.

14           CHAIRMAN TARBERT: Thank you very much,  
15 Commissioner Stump.

16           Commissioner Berkovitz?

17           COMMISSIONER BERKOVITZ: Thank you, Mr.  
18 Chairman. I don't have any questions for Warren or  
19 Carmen either, but I do want to thank them and  
20 recognize the work that they've done in DSIO. DSIO has  
21 had a very, very busy summer, and what would seem like  
22 a relatively straightforward extension, going through

1 the rulemaking process and the comment process and  
2 doing it properly is more difficult than it might  
3 appear at first, and I think the work that you've done  
4 in this rule, as well as the other extension on top of  
5 the additional load this summer, was worthy of  
6 recognition.

7 I want to thank you, and thank you for  
8 working with my office to get the proposed rule out and  
9 then carrying through on that. So, I appreciate all  
10 the work you've done on this.

11 I'm pleased to support it under the  
12 circumstances of COVID and the time it takes for market  
13 participants to implement these new requirements. It's  
14 appropriate.

15 So, I thank you again, and I'm pleased to be  
16 able to support it.

17 CHAIRMAN TARBERT: Thank you very much,  
18 Commissioner Berkovitz.

19 Is there any commissioner who is not prepared  
20 to vote?

21 (No response.)

22 CHAIRMAN TARBERT: Okay. Since all

1 commissioners appear to be prepared to vote, Mr.  
2 Kirkpatrick, our Secretary, would you please call the  
3 roll for the final rule on margin requirements for  
4 uncleared swaps?

5 MR. KIRKPATRICK: Thank you, Mr. Chairman.

6 The motion now before the Commission is on  
7 the adoption of the final rule on margin requirements  
8 for uncleared swaps for swap dealers and major swap  
9 participants.

10 Commissioner Berkovitz?

11 COMMISSIONER BERKOVITZ: Commissioner  
12 Berkovitz votes aye.

13 MR. KIRKPATRICK: Commissioner Berkovitz  
14 votes aye.

15 Commissioner Stump?

16 COMMISSIONER STUMP: Commissioner Stump votes  
17 aye.

18 MR. KIRKPATRICK: Commissioner Stump votes  
19 aye.

20 Commissioner Behnam?

21 COMMISSIONER BEHNAM: Commissioner Behnam  
22 votes aye.

1 MR. KIRKPATRICK: Commissioner Behnam votes  
2 aye.

3 Commissioner Quintenz?

4 COMMISSIONER QUINTENZ: Commissioner Quintenz  
5 votes aye.

6 MR. KIRKPATRICK: Commissioner Quintenz votes  
7 aye.

8 Chairman Tarbert?

9 CHAIRMAN TARBERT: Chairman Tarbert votes  
10 aye.

11 MR. KIRKPATRICK: Chairman Tarbert votes aye.

12 Mr. Chairman, on this matter, the ayes have  
13 5, the noes have zero.

14 CHAIRMAN TARBERT: Thank you very much, Mr.  
15 Secretary.

16 I'm pleased to say that the ayes have it and  
17 the motion to adopt the final rule is hereby approved.

18 We'll now hear a staff presentation on the  
19 final rule on exemption from registration of certain  
20 foreign intermediaries. Following the presentation,  
21 commissioners will be able to ask questions about the  
22 rule.

1           At this time, I'd like to welcome the  
2 following staff for their presentation. From the  
3 Division of Swap Dealer and Intermediary Oversight we  
4 have Associate Director Pamela Geraghty; Special  
5 Counsel Elizabeth Groover; and Chief Counsel Frank  
6 Fisanich.

7           DSIO team, the floor is yours.

8           MS. GERAGHTY: Thank you, Mr. Chairman; and  
9 good morning, Commissioners. It is my privilege to  
10 introduce the staff presentation on the final rule  
11 amending Regulation 3.10. These amendments finalize  
12 revisions that were first proposed on May 28th of this  
13 year related to commodity pool operators, as well as  
14 others that were first proposed in 2016 that are more  
15 broadly applicable.

16           Staff believes that these amendments, when  
17 taken as a whole, better align the regulatory text of  
18 Regulation 3.10 with the Commission's stated policy  
19 objectives of focusing its customer protection efforts  
20 on benefitting U.S. persons.

21           This has truly been a remarkable effort, and  
22 DSIO wishes to extend its gratitude to our colleagues

1 in the Office of General Counsel, as well as the Office  
2 of the Chief Economist, for their assistance in helping  
3 to bring this final rule forward for your consideration  
4 today.

5 So with that, I'm going to turn it over to  
6 Elizabeth Groover and Frank Fisanich to begin the  
7 substantive portion of our presentation. Thank you.

8 MS. GROOVER: Thank you, Pamela.

9 Good morning, Mr. Chairman and Commissioners.  
10 I am Elizabeth Groover. The final rule you are  
11 considering today will, if adopted, finalize the  
12 Commission's May 2020 proposal to amend the exemption  
13 from intermediary registration for certain foreign-  
14 located persons trading in U.S. derivatives markets  
15 which is set forth in Regulation 3.10(c). That May  
16 2020 proposal also reopened the public comment period  
17 for a 2016 proposal amending this provision, and in a  
18 few moments, Frank Fisanich, our Chief Counsel, will  
19 explain how today's final rule would also finalize  
20 those amendments.

21 For now, however, I will review and present  
22 the bulk of the substantive amendments the Commission



1 is considering in this final rule, which revised what I  
2 will refer to broadly as the 3.10 Exemption, as it  
3 applies to persons located outside the United States  
4 who are engaged in the activities of commodity pool  
5 operators, or CPOs.

6           Specifically, with respect to non-U.S. CPOs  
7 and their offshore pools, the May 2020 proposal sought  
8 to: one, establish that the 3.10 Exemption may be  
9 relied upon by non-U.S. CPOs on a pool-by-pool basis;  
10 two, add a conditional safe harbor to permit non-U.S.  
11 CPOs to rely on the 3.10 Exemption even if, by virtue  
12 of the structure or characteristics of their offshore  
13 pools, they cannot represent with absolute certainty  
14 that there are no U.S. participants in such offshore  
15 pool; three, clarify that the revised 3.10 Exemption  
16 may be utilized concurrently with other exemptions or  
17 exclusions available to CPOs; and four, provide an  
18 exception from the U.S. participant prohibition in the  
19 3.10 Exemption for initial capital contributions  
20 received from a controlling affiliate of an offshore  
21 pool's non-U.S. CPO, subject to certain limitations  
22 intended to limit the possibility of evasion.

1                   When the Commission initially adopted the  
2 3.10 Exemption in 2007, it cited as its longstanding  
3 policy a focus on customer protection activities upon  
4 domestic firms and upon firms soliciting or accepting  
5 orders from domestic users of the futures markets. In  
6 the May 2020 proposal, the Commission further  
7 recognized that the increasingly global nature of the  
8 commodity pool space, along with statutory and  
9 regulatory developments since the 3.10 Exemption's  
10 adoption, led to a growing misalignment between the  
11 stated policy purposes underlying that regulation --  
12 namely, to focus the Commission's resources on the  
13 protection of persons located in the U.S. -- and the  
14 current exemption as applied to non-U.S. CPOs and their  
15 offshore pools.

16                   In particular, staff believed that this  
17 proposal would provide much needed regulatory  
18 flexibility and clarity for non-U.S. CPOs operating  
19 offshore commodity pools, in part because the  
20 amendments would appropriately take into account the  
21 expanding international footprint of the CPO and  
22 commodity pool industry ,without compromising this

1 Commission's mission of protecting U.S. pool  
2 participants.

3           Because today's final rule would adopt these  
4 amendments largely as proposed, staff continue to  
5 believe this to be true, that the final rule will amend  
6 the 3.10 Exemption in a manner that clarifies under  
7 what circumstances a non-U.S. CPO operating an offshore  
8 pool trading in U.S. commodity markets should be  
9 required to register with the Commission, and under  
10 what circumstances relief from such registration is  
11 available and appropriate.

12           In response to this spring's proposal,  
13 commenters offered their strong support of the proposed  
14 amendment to the 3.10 Exemption, and they specifically  
15 praised the Commission for clarifying the  
16 jurisdictional boundaries of CPO registration, although  
17 they also made some suggestions for staff to consider  
18 adding to the final rule.

19           For instance, commenters stated that the  
20 proposed exception to the 3.10 Exemption's U.S.  
21 participant prohibition for initial capital investment  
22 in offshore pools by affiliates of a non-U.S. CPO,

1 should be available to all affiliates that control, are  
2 controlled by, or are under common control of such non-  
3 U.S. CPO. Staff agrees with this argument because, in  
4 its experience and observation, affiliate  
5 relationships, as defined for CPO and commodity pool  
6 purposes in Regulation 4.7, inherently involve a level  
7 of control that staff believes should assuage the  
8 Commission's concerns that such affiliates have access  
9 to sufficient information to make an informed  
10 investment decision with respect to an offshore pool,  
11 absent other regulatory protections from the  
12 Commission.

13           Therefore, today's final rule will adopt this  
14 exception for affiliate initial capital investment for  
15 offshore pools largely as proposed, except that, per  
16 commenters' suggestion, staff recommends expanding  
17 availability to all affiliates of the non-U.S. CPO, as  
18 defined in Regulation 4.7, and clarifying that the  
19 exception is limited to juridical as opposed to natural  
20 person affiliates of such non-U.S. CPOs.

21           Additionally, while commenters strongly  
22 supported the proposed amendment clarifying that non-

1 U.S. CPOs may utilize the 3.10 Exemption concurrently  
2 with other CPO registration exemptions or regulatory  
3 exclusions, such as those found in Regulation 4.5 or  
4 4.13, they correctly pointed out that non-U.S. CPOs  
5 frequently rely upon relief other than those two  
6 regulations for their operated pools. Thus, they  
7 suggested the Commission remove the specific regulatory  
8 references from the final regulatory text.

9           Consequently, staff recommends in the final  
10 rule the adoption of a provision permitting non-U.S.  
11 CPOs to rely upon the 3.10 Exemption for their offshore  
12 pools without affecting their ability to register as a  
13 CPO, or to claim or rely upon other relief from CPO  
14 regulations from the Commission for their other  
15 qualifying pool. Staff appreciates this suggestion  
16 from commenters, which we believe better tracks the  
17 intention of this Commission to permit non-U.S. CPOs to  
18 "stack" or combine registration and/or other available  
19 CPO regulatory relief for their varied commodity pool  
20 operations, with reliance on the 3.10 Exemption.

21           Moreover, staff believes that the final rule  
22 before you today will generally enable non-U.S. CPOs to

1 avoid the additional organizational complexity of  
2 separating their U.S. and non-U.S. commodity pool  
3 operations due to the legal clarity and flexibility the  
4 final rule will provide in the 3.10 Exemption.

5           In staff's opinion, the final rule is  
6 significant because it would clearly establish that the  
7 3.10 Exemption is available to non-U.S. CPOs for their  
8 qualifying offshore pools on a pool-by-pool basis, and  
9 provide additional tailored relief that staff believes  
10 better reflects the integrated international investment  
11 management sector that has continued to grow since the  
12 3.10 Exemption's original 2007 adoption.

13           Staff expects, therefore, that the final rule  
14 could potentially deepen and increase the liquidity and  
15 vibrancy of the U.S. commodity interest markets through  
16 increased competition and variation in the commodity  
17 pools and CPOs able to legally participate in those  
18 markets because of these amendments.

19           Finally, staff believes that the final rule  
20 will also allow the Commission to better focus agency  
21 resources on its primary jurisdictional mandate under  
22 the Commodity Exchange Act, which, in this context, are

1 the thorough and effective oversight of CPOs operating  
2 commodity pools offered and sold to participants in the  
3 United States, and ensuring those U.S. participants  
4 receive sufficient customer protections through the  
5 Commission's statutory and regulatory authorities.

6 For these reasons, and after considering the  
7 proposal amendments and the public comment received,  
8 staff recommends that the Commission approve this final  
9 rule amending the 3.10 Exemption as it applies to non-  
10 U.S. CPOs and their offshore pools, largely as proposed  
11 and with certain adjustments advocated by commenters  
12 and staff today.

13 I will now turn the presentation over to  
14 Frank Fisanich to discuss the reopening of the 2016  
15 proposal comment period, and how this final rule would  
16 also incorporate those amendments to Regulation  
17 3.10(c). Thank you.

18 MR. FISANICH: Thank you, Elizabeth.

19 Good morning. The May proposal to amend  
20 Regulation 3.10(c) also reopened the comment period for  
21 an amendment to 3.10(c) originally proposed in 2016  
22 asking whether the Commission should finalize the 2016

1 proposal along with the other changes to 3.10(c) which  
2 Elizabeth just discussed.

3           Generally, in 2016, the Commission proposed  
4 to update the conditions under which the exemption from  
5 registration would apply to foreign intermediaries by  
6 codifying relief provided under two DSIO no-action  
7 letters.

8           First, the Commission proposed the  
9 registration exemption for foreign intermediaries  
10 acting on behalf of international financial  
11 institutions, such as the World Bank or International  
12 Monetary Fund.

13           Second, the Commission proposed to modify the  
14 existing registration exemption to confirm the  
15 availability of the exemption for foreign  
16 intermediaries, when acting for persons located outside  
17 the U.S., in connection with transactions that are not  
18 required to be cleared under the Commission's  
19 regulations.

20           The Commission received two additional  
21 comments from reopening the comment period, both of  
22 which, like the vast majority of comments received



1 following the original proposal, were supportive of  
2 finalizing the 2016 proposal along with the other  
3 changes to 3.10(c) presented by Elizabeth.

4           Therefore, the final rule presented today  
5 includes the amendments to 3.10(c) proposed in 2016  
6 with two modifications.

7           First, the final rule requires transactions  
8 of foreign-located persons required or intended to be  
9 cleared on a registered DCO, to be cleared through a  
10 registered FCM, unless the foreign person is a member  
11 of the DCO, and thus, can self-clear. Second, the  
12 final rule has updated the definition of "international  
13 financial institution" to be consistent with the  
14 definition recently adopted in August by the Commission  
15 in the cross-border final rule.

16           This completes the staff presentation. We  
17 would be happy to answer any questions you may have.

18           CHAIRMAN TARBERT: Well, thank you very much  
19 to our staff for another informative presentation.

20           To begin the discussion and consideration of  
21 these rulemakings, I'll now entertain a motion to adopt  
22 the final rule on exemption from registration for

1 certain foreign intermediaries.

2 COMMISSIONER QUINTENZ: So moved.

3 COMMISSIONER BEHNAM: Second.

4 CHAIRMAN TARBERT: Thank you.

5 I'd now like to open the floor for  
6 commissioners to ask any questions. I'll just begin.  
7 I may have one question, but I think just to frame this  
8 at a big-picture level, kind of the way that I look at  
9 this is, if you take a really strict reading of what we  
10 currently have, our rule, it basically has us policing  
11 foreign funds with only foreign investors, or at least  
12 it allows for that to take place. Is that generally  
13 right? You can nod your head. Yes, right.

14 So, my view on this is we serve the American  
15 taxpayers, and if these foreign countries, where their  
16 investors are being protected by the CFTC, want to cut  
17 a check to the U.S. Treasury, then I'm happy to have a  
18 discussion. But, at this point I think, given where we  
19 are, given our resources, as well as our duties and  
20 what Congress laid out, we really need to be, as an  
21 agency, focused on U.S. CPOs, or foreign CPOs that have  
22 U.S. investors, even if there's only one U.S. investor

1 in there.

2 But, when you have a situation where there  
3 are entirely foreign investors, and the fund itself is  
4 foreign, you've got to ask that fundamental question,  
5 which we've just done, and that is, what is the U.S.  
6 interest, and should the agency be spending time,  
7 money, and resources?

8 So, I'm pleased to support the rule because I  
9 think it makes a lot of sense, and also too, I think it  
10 recognizes the important role that our regulatory  
11 counterparts abroad have in protecting their own  
12 investors.

13 So, one question, and that's just the  
14 definition of "international financial institution"  
15 being finalized in this rulemaking, I was wondering how  
16 it relates to the IFIs that are being excluded from the  
17 "U.S. person" definition that DSIO worked on, and was  
18 finalized in the recent cross-border rule, and is there  
19 any connection between the two?

20 MR. FISANICH: Thank you for the question.  
21 Yes, they are -- for this final rule, given that the  
22 Commission has just finalized the cross-border rule

1 and, as you stated, the "U.S. person" definition has an  
2 exclusion for international financial institutions,  
3 that definition of - or, that list of international  
4 financial institutions is a finite list, and then a  
5 catchall for other similar institutions, this is  
6 harmonizing with the SEC's definition of "U.S. person."

7           So, given that in the 2016 proposal what we  
8 had proposed was a definition of IFIs that was limited,  
9 and through our experience we know that it usually  
10 results in other institutions coming in to ask the  
11 question "am I an IFI, can I be added to the list?  
12 Instead, we went with what the Commission had just  
13 finalized in August, which was a definition of IFI that  
14 has a list, but also has a catchall. Thus, the  
15 definition of IFI is now harmonized across both Part 3  
16 and Part 23.

17           CHAIRMAN TARBERT: Perfect. Well, as a  
18 former member of the Board of the World Bank Group in  
19 my last job at Treasury, I very much appreciate that,  
20 and I'm sure our international financial community does  
21 as well, and it's obviously important, as we've spoken  
22 on before, harmonizing to the extent possible with the

1 SEC.

2 But, far more important is that we actually  
3 harmonize among ourselves, so that we don't have rules  
4 that are themselves contradictory when it comes to a  
5 definition like this.

6 So, I want to applaud you for bringing  
7 uniformity to the way we approach international  
8 financial institutions.

9 That's all my comments. I'm very grateful,  
10 again, for your hard work, and I'm pleased to vote aye  
11 for the rule.

12 With that, I'll pass it on to Commissioner  
13 Quintenz.

14 COMMISSIONER QUINTENZ: Thank you, Mr.  
15 Chairman. Let me associate myself with your comments  
16 and first thank the team. Director Sterling and  
17 everybody here are becoming regular fixtures. It's  
18 almost like if you don't appear at a Commission  
19 meeting, something must be wrong, so congratulations  
20 for all your hard work again.

21 I don't have any questions and I'm very  
22 pleased to support this today because I think it's a

1 very commonsense approach to this issue that will  
2 foster investment and innovation, and again, my  
3 congratulations to this team. Thank you.

4 CHAIRMAN TARBERT: Thank you, Commissioner  
5 Quintenz.

6 Commissioner Behnam?

7 COMMISSIONER BEHNAM: Thanks, Mr. Chairman,  
8 and thanks to the team for putting this together.

9 I just have a quick question that I think  
10 relates to what we finalized last week with respect to  
11 Form CPO-PQR and some of the amendments we made  
12 regarding the data we collect and request from market  
13 participants. If you can help me understand, if at  
14 all, the relationship between what we're putting out  
15 today and what we did last week, and how it's going to  
16 affect the amount of data we collect. Presumably,  
17 we're collecting less data, which I think was the  
18 target and goal of last week. Would we still be able  
19 to collect data from the non-U.S. entities given what  
20 we did last week with respect to CPO-PQR?

21 MS. OLEAR: Thank you for that question,  
22 Commissioner Behnam. Can you hear me? Just making

1 sure. Okay, good.

2           So, we do anticipate that there may be a  
3 certain number of pools that migrate from 18-96 relief,  
4 which is subject to CPO-PQR, and migrate to this new  
5 3.10 regime, but we expect that number to be small.  
6 And, by definition, the terms of the 3.10 Exemption  
7 today, these pools really are offshore vehicles with no  
8 U.S., or very limited, other than any capital that's  
9 contributed pursuant to the affiliate contribution  
10 exception, no U.S. participation. So, their only  
11 involvement in our markets is actually participating in  
12 our markets, and we believe that CPO-PQR really is more  
13 of an understanding of pools that are involving U.S.  
14 participation.

15           So, one, quantitatively, the amount of data  
16 lost should not be significant. And two, the types of  
17 pools who no longer will be filing will not be the  
18 types of pools that CPO-PQR really is intended to  
19 address.

20           MR. STERLING: I would add to that,  
21 Commissioner -- thank you, sir. Sorry to interject. I  
22 was just going to add, as well, that any of those funds

1 that trade in our markets will continue to have to be  
2 subject to our own reporting regime for any market  
3 participant over a certain threshold in contracts, and  
4 we now in the Division have access to that information  
5 on a fund-by-fund level. So, we will have a way of  
6 getting information about these funds, and I think it  
7 will be limited. It just won't be used for PQR, sir.

8 COMMISSIONER BEHNAM: Thanks, Josh.  
9 Appreciate that. Thanks, Amanda, for the response.  
10 And thanks to the team for all your work on this and  
11 other matters in the past few months.

12 That's all for me, Mr. Chairman. I look  
13 forward to supporting this rule.

14 CHAIRMAN TARBERT: Thank you very much,  
15 Commissioner Behnam.

16 Commissioner Stump?

17 COMMISSIONER STUMP: Thank you, Mr. Chairman.  
18 I understand there are some technical complications  
19 with my video feed. So you all may not be able to see  
20 me, so I will just be the voice from afar.

21 I just wanted to say from the onset that I  
22 firmly believe that the rule amendments we are adopting



1 today reflect the right public policy, and I'm very  
2 supportive of the amendments to better account for the  
3 realities of a modern international investment  
4 management environment, and I want to thank the team  
5 for all their work.

6 Many CPOs are located outside of the United  
7 States and operate internationally for the benefit of  
8 their clients in a global derivatives market, and our  
9 registration rules can get pretty complicated pretty  
10 fast. So, a rule in which a CPO outside the United  
11 States with many different commodity pools, could have  
12 to register with the Commission with respect to  
13 offshore pools that have no U.S. participants simply  
14 because it also operates other pools in which U.S.  
15 persons do participate is often unworkable from an  
16 operational standpoint, and I think it makes very  
17 little sense from a regulatory standpoint, as well.

18 I just have a couple of questions. One of  
19 the primary drivers of this rule amendment, these rule  
20 amendments that we're adopting today was to provide  
21 that if the non-U.S. CPO is operating both some  
22 offshore commodity pools that have U.S. participants

1 and some that don't, we're going to answer the question  
2 of registration on a pool-by-pool basis, and that means  
3 that the CPO in that situation would have to register  
4 and be subject to CFTC regulations with respect to the  
5 commodity pools that have U.S. participants, but not  
6 for the pools that have no U.S. participants. Do I  
7 have that right?

8 MS. OLEAR: Yes, you do.

9 COMMISSIONER STUMP: And did we receive any  
10 comments objecting to this pool-by-pool approach?

11 MS. OLEAR: We did not receive any comments  
12 opposing this approach.

13 COMMISSIONER STUMP: Right. So the core of  
14 what we're adopting today, it's not controversial, at  
15 least not with the commenters. So, now we get to the  
16 question of what is a U.S. participant, and I think  
17 this is something worth highlighting, that under our  
18 current rules, when you have a situation where a non-  
19 U.S. CPO is operating an offshore pool, if a U.S.  
20 affiliate the CPO provides capital to that offshore  
21 pool, the CPO is going to have to register with the  
22 CFTC with respect to that pool. Is that correct under

1 our current set of rules?

2 MS. OLEAR: Yes. Absent these amendments,  
3 that is the case.

4 COMMISSIONER STUMP: Right. So, today we're  
5 making these amendments, and for the first time we're  
6 going to include what I'll call a "seed capital  
7 exception," such that if a U.S. affiliate of a non-U.S.  
8 CPO contributes initial capital to an offshore pool  
9 operated by the non-U.S. CPO, and certain conditions  
10 are satisfied, that won't count as a U.S. participation  
11 in the pool. Is that right?

12 MS. OLEAR: That is correct.

13 COMMISSIONER STUMP: Right. Thank you. And  
14 did we receive any comments opposing that proposed  
15 exception?

16 MS. OLEAR: We did not.

17 COMMISSIONER STUMP: Right. We did request  
18 some comments on some possible additional conditions,  
19 in addition to the conditions that we've already  
20 incorporated here, with regard to the seed capital  
21 exception. So, maybe you would want to take an  
22 opportunity to briefly describe the conditions we

1 provided for in the proposal and in the final, and why  
2 we are not incorporating any additional conditions, and  
3 why we are also not incorporating the suggestions made  
4 by several commenters that thought the proposed seed  
5 capital exception was too narrow.

6 MS. OLEAR: Sure. Thank you for that  
7 question, Commissioner.

8 So, in the proposal we proposed limiting the  
9 types of affiliates who would be eligible to provide  
10 seed capital to controlling affiliates, and that was  
11 done really because we had a concern regarding ensuring  
12 that the contributor of the capital would have full  
13 access to the information that they would need.

14 In response to that condition, we got  
15 significant comments suggesting that that really wasn't  
16 necessary just because of, I believe, as Elizabeth  
17 discussed in her substantive discussion, that because  
18 we were incorporating the definition of affiliate as it  
19 appears in 4.7, which inherently includes an element of  
20 control in order to be considered an affiliate. So,  
21 that means not just that the affiliate contributing  
22 controls the CPO, but also that those two entities

1 could be under common control, or the CPO could control  
2 the contributing affiliate.

3           So, all of those relationships are inherently  
4 different from a traditional arms-length contributor of  
5 capital with respect to the CPO and the commodity pool.

6           Additionally, we asked some questions about  
7 potential additional further restrictions that we  
8 considered proposing, but I think because the  
9 commenters very strongly believed that the regulatory  
10 definition of "affiliate" was sufficient to ensure that  
11 the relationship was appropriate, they also opposed the  
12 inclusion of any further restrictions.

13           With respect to the timing of those capital  
14 contributions, we proposed limiting the capital  
15 contributions to those occurring at or around the time  
16 of inception of trading by the offshore vehicle.

17 Commenters appreciated that exemption, but they wished  
18 that it would be broader to permit further capital  
19 infusions to occur over the lifetime of the pool, to  
20 support the ongoing operations of the pool.

21           Staff today is recommending against that  
22 further expansion, in part, because we felt that if we

1 permit ongoing capital infusions, we run the risk of  
2 permitting U.S. affiliates to be used to essentially  
3 prop up failing offshore vehicles, which just results  
4 in risk being brought onshore with respect to an  
5 unregulated pool. And so, for that reason, we felt  
6 that it was appropriate in this final rule to continue  
7 to limit the timing of those capital contributions to  
8 initial seed capital.

9           COMMISSIONER STUMP: Okay. Thank you. Thank  
10 you for helping the public understand that, since they  
11 aren't able to see exactly what we've done thus far.  
12 But by and large, we are adopting the proposal. We are  
13 attempting to adopt the proposal largely as it was  
14 several months ago, and I think the reasons you guys  
15 have given here are quite appropriate.

16           I'd like to shift gears just a little bit and  
17 ask about an issue that we talked about back when we  
18 proposed the rulemaking. The rule amendments adopting  
19 a pool-by-pool approach to registration of non-U.S.  
20 CPOs originally arose out of a completely different  
21 proposed rulemaking in 2018, which would have codified  
22 a staff action known as Advisory 18-96. Is that

1 correct?

2 MS. OLEAR: That is correct.

3 COMMISSIONER STUMP: And Advisory 18-96  
4 provides certain relief to both U.S. and non-U.S. CPOs.  
5 But, as a result of the rulemaking we're adopting  
6 today, non-U.S. CPOs will no longer need to rely on  
7 that advisory; correct?

8 MS. OLEAR: That's correct.

9 COMMISSIONER STUMP: But, the proposed  
10 rulemaking that we issued in 2018 would have also  
11 codified Advisory 18-96 with respect to U.S. CPOs.  
12 But, because that fell by the wayside when we turned  
13 our attention to the non-U.S. CPO issue we're dealing  
14 with today, we have yet to codify elements of 18-96  
15 with regard to U.S. CPOs. Is that correct, too?

16 MS. OLEAR: We have not.

17 COMMISSIONER STUMP: I know we have not.  
18 Okay. And, in reviewing the effort to codify 18-96  
19 with respect to registered U.S. CPOs, I think we can't  
20 forget about that, and I'm hopeful that that's  
21 something that we can continue to consider as we go  
22 forward.

1           I think it might be worthwhile just for  
2 everyone's benefit to understand what exactly the  
3 advisory permits, as opposed to what U.S. commodity  
4 pools could avail themselves of, if we finalized the  
5 rule from 2018. Would you mind reviewing that? I  
6 think that will explain why I think we need to revisit  
7 that at some point.

8           MS. OLEAR: Of course, Commissioner. I'm  
9 happy to do so.

10           Staff Advisory 18-96 provides certain  
11 compliance relief for registered CPOs, with respect to  
12 offshore commodity pools. It provides relief from  
13 certain recordkeeping, reporting, and disclosure  
14 obligations under Part 4. And so, 18-96 presupposes  
15 that the pool in question has a registered CPO.

16           As proposed in 2018, the codification of 18-  
17 96 would have been done as a registration exemption  
18 under Regulation 4.13. And so, the big distinction  
19 would be that, under the current advisory, registered  
20 CPOs must still report on those offshore pools operated  
21 pursuant to 18-96 on their Form CPO-PQR filings,  
22 whereas if the advisory would be codified as a



1 registration exemption, they would no longer have to  
2 report on CPO-PQR with respect to those pools for which  
3 they claim that regulatory relief.

4 COMMISSIONER STUMP: Thank you. Is renewing  
5 the effort to codify Advisory 18-96 with respect to the  
6 U.S. commodity pool operators something that staff  
7 would be considering recommending for future Commission  
8 action?

9 MS. OLEAR: It is.

10 COMMISSIONER STUMP: Great. Thank you. That  
11 concludes my questions.

12 Again, great work, and I appreciate you guys  
13 taking some time to walk through these questions with  
14 me, and I appreciate all of DSIO for the many efforts  
15 over the course of the past months. Thank you.

16 CHAIRMAN TARBERT: Thank you very much,  
17 Commissioner Stump.

18 Commissioner Berkovitz?

19 COMMISSIONER BERKOVITZ: Thank you, Mr.  
20 Chairman. I have a statement that will be inserted for  
21 the record and posted on the website, and I won't read  
22 that here today. I'm basically supportive of 3.10 for

1 the reasons stated, that our primary focus is on  
2 protection of U.S. investors. These non-U.S. pools are  
3 trading solely for non-U.S. investors, we need to  
4 prioritize our resources at home, so I will support it.

5 I want to follow up on a couple of lines of  
6 questioning that Commissioner Stump was just raising.  
7 There were some provisions in the proposal, and perhaps  
8 modified into the final rule, regarding the seed  
9 capital provision that allows these affiliates, as  
10 you've explained, Amanda, to invest capital in the non-  
11 U.S. pools. But, there are some anti-evasion  
12 provisions designed so that that the seed capital  
13 wouldn't be a mechanism for these prohibited U.S.  
14 investments to get to these foreign pools.

15 Can you explain what was proposed and then  
16 how it would be modified in response to comments, so  
17 that the seed capital is not a bypass of the non-U.S.  
18 investors provision?

19 MS. OLEAR: Thank you for that question, Mr.  
20 Commissioner.

21 So, as proposed, the affiliate contribution  
22 exception included two anti-evasion provisions. One

1 would have prohibited U.S. affiliates and principals  
2 who are subject to certain enumerated conditions --  
3 i.e., statutory disqualifications, bars or suspensions,  
4 or trading prohibitions -- from using the exception as  
5 a manner to circumvent that prohibition and regain  
6 access to the U.S. commodity interest markets through  
7 an offshore vehicle.

8           The other anti-evasion provision would have,  
9 as proposed, prohibited the U.S. affiliate from being  
10 marketed to U.S. potential investors as a vehicle for  
11 gaining exposure to the U.S. commodity interest  
12 markets. As finalized, that second condition is  
13 finalized as proposed.

14           The first condition related to the status of  
15 the affiliate or its principals has been narrowed  
16 somewhat, so that it really is focused on entities who  
17 are subject to a bar or a suspension from accessing  
18 U.S. commodity interest markets. That was in response  
19 to commenters who made the argument that the inclusion  
20 of statutory disqualifications in that list really was  
21 ill-suited for the purpose of the anti-evasion  
22 language, and that was because the Commission's

1 articulated concern was that persons who are prohibited  
2 from acting in our markets not have basically a  
3 loophole to do something indirectly that they would be  
4 prohibited from doing directly.

5           Statutory disqualifications are somewhat  
6 different beasts, where it's more focused on  
7 registration with the Commission, which is typically  
8 required when you are acting on behalf of other  
9 persons, as opposed to acting on your own behalf. So,  
10 given that what we're concerned about is the affiliate  
11 being barred, or its principals being barred from  
12 acting on their own behalf, staff agreed with  
13 commenters that eliminating the statutory  
14 disqualification prohibition made sense given the  
15 Commission's articulated concern.

16           COMMISSIONER BERKOVITZ: But, although the  
17 statutory disqualification was eliminated and, as you  
18 said, narrowed, if you're actually subject to a trading  
19 ban or a registration bar, you can't gain access  
20 through these foreign pools to come back into the U.S.  
21 Is that right?

22           MS. OLEAR: Yes. If you are barred from

1 acting or participating in our markets, or suspended  
2 from participating in our markets, that remains  
3 prohibited as an anti-evasion provision in the final  
4 rule under consideration today.

5 COMMISSIONER BERKOVITZ: Okay. With respect  
6 to the marketing provision that prohibits the  
7 affiliates, if they're going to provide seed capital  
8 contributions, although they can't market to U.S.  
9 investors, even absent the marketing restriction, is it  
10 our belief that these affiliates would not be entities  
11 that would be consisting of pool investors from U.S.  
12 contributors?

13 MS. OLEAR: Yes. Your prohibited from - So  
14 if, let's say, the U.S. affiliate, in fact, is operated  
15 as a conduit entity, or as a fund of funds with respect  
16 to the offshore vehicle. One, they're prohibited from  
17 marketing their participations in that way. And so, if  
18 they do market themselves that way, they're in  
19 violation of the terms of the exception.

20 If they are, in fact, operated that way, but  
21 they don't market themselves that way, that in and of  
22 itself is a materially misleading solicitation, and

1 that could open them up to an enforcement action, and  
2 they also may meet the definition of commodity pool at  
3 that point, and they themselves might be required to be  
4 a registered CPO in order for them to operate.

5           COMMISSIONER BERKOVITZ: I appreciate the  
6 work that you've done in response to comments and  
7 working with my office to draw the appropriate balance  
8 in ensuring that, while enabling these contributions to  
9 be made, but again putting appropriate limitations on  
10 how they're done, how long they can be made for, the  
11 initial period of time limitation. So, I think you've  
12 done a good job in trying to balance those interests  
13 and ensuring that this isn't an avenue to get around  
14 the core protections for the U.S. markets. If they are  
15 truly offshore pools for truly offshore investors, and  
16 if these are truly initial capital seed contributions,  
17 there's not a mechanism for evasion.

18           So, I appreciate the work you've done on  
19 this, and the appropriate balance you've made to let  
20 these non-U.S. pools go forward without this  
21 uncertainty about registration in the U.S. So, thank  
22 you for all the work you've done on it, and I'm pleased

1 to support it.

2 CHAIRMAN TARBERT: Thank you very much,  
3 Commissioner Berkovitz.

4 Is there any commissioner who is unprepared  
5 to vote at this time?

6 (No response.)

7 CHAIRMAN TARBERT: Hearing none, everyone is  
8 prepared to vote. So, Mr. Kirkpatrick, would you  
9 please call the roll for the final rule on exemption  
10 from registration for certain foreign intermediaries?

11 MR. KIRKPATRICK: Thank you, Mr. Chairman.

12 The motion now before the Commission is on  
13 the adoption of the final rule on exemption from  
14 registration for certain foreign intermediaries.

15 Commissioner Berkovitz?

16 COMMISSIONER BERKOVITZ: Commissioner  
17 Berkovitz votes aye.

18 MR. KIRKPATRICK: Commissioner Berkovitz  
19 votes aye.

20 Commissioner Stump?

21 COMMISSIONER STUMP: Commissioner Stump votes  
22 aye.

1 MR. KIRKPATRICK: Commissioner Stump votes  
2 aye.

3 Commissioner Behnam?

4 COMMISSIONER BEHNAM: Commissioner Behnam  
5 votes aye.

6 MR. KIRKPATRICK: Commissioner Behnam votes  
7 aye.

8 Commissioner Quintenz?

9 COMMISSIONER QUINTENZ: Commissioner Quintenz  
10 votes aye.

11 MR. KIRKPATRICK: Commissioner Quintenz votes  
12 aye.

13 Chairman Tarbert?

14 CHAIRMAN TARBERT: Chairman Tarbert votes  
15 aye.

16 MR. KIRKPATRICK: Chairman Tarbert votes aye.

17 Mr. Chairman, on this matter, the ayes have  
18 5, the noes have zero.

19 CHAIRMAN TARBERT: Thank you very much, Mr.  
20 Secretary.

21 I'm pleased to say that the ayes have it and  
22 the motion to adopt the final rule is hereby approved.



1           Congratulations to the DSIO team for two  
2 final rules, much appreciated.

3           Now, we will conclude today's open meeting  
4 with our final rule on position limits for derivatives.

5           So, I want to recognize all of those that  
6 have participated in this rulemaking and who will be  
7 with us today on the line to field potential questions.  
8 Now, if we included everyone on video, I'm afraid it  
9 would bring down our system. So, we will just include  
10 a few people on video, but everyone else is available  
11 on audio to answer any questions.

12           We will start, as always, with the staff  
13 presentation, and I want to recognize, first of all,  
14 our leadership of the Division of Market Oversight,  
15 Dorothy DeWitt; and I also want to recognize Vince  
16 McGonagle, the former DMO Acting Director who helped  
17 drive this rule.

18           I also want to recognize our three team  
19 leaders in DMO on this project: Aaron Brodsky, who led  
20 the team for the January proposal; Steven Haidar, who  
21 led this team for this final rule; and Rachel Reicher,  
22 who joined DMO as Chief Counsel this year and who has

1 provided invaluable help to the team.

2           For all the DMO staff who brought their  
3 expertise on market operations to make this rule as  
4 sound as it is, they are joining us today as well:  
5 Lillian Cardona; Jeanette Curtis; Harry Hild; Steve  
6 Benton; Swati Shah; Aleko Stamoulis.

7           To all our colleagues in the Office of the  
8 Chief Economist who made sure this rule is analytically  
9 sound, and with us in particular we have Scott Mixon,  
10 the Acting Chief Economist; and Steve Kane.

11           Also, the Office of General Counsel, as they  
12 ensured the rule covered all of our statutory  
13 obligations, and particularly with the necessity  
14 finding, we have with us Dan David, Carlene Kim, Rob  
15 Schwartz, Paul Schlichting, Martin White, Herminio  
16 Castro, and Jeff Burns.

17           And then finally we have staff from other  
18 divisions who took up the call to arms when we needed  
19 support, and they're joining us as well: Brigitte  
20 Weyls and Rachel Hayes of the Enforcement Division;  
21 Chang Jung and Michael Ehrstein of DSIO; and Dana Brown  
22 and Dan Bernstein of the Office of International

1 Affairs.

2           So, with that, I will hand the floor over to  
3 you, Dorothy, to begin the presentation and discussion.  
4 Thank you.

5           MS. DEWITT: Thank you, Mr. Chairman.

6           The final rule we present today to you and to  
7 the Commission has benefitted greatly from the feedback  
8 we received from over 75 market participants in the  
9 physical commodity industry submitted to us through  
10 comment letters in response to our January proposal.  
11 Most were overwhelmingly supportive.

12           The final rule is further informed by  
13 invaluable feedback and insights that the team gained  
14 through meeting with every breed of market participant  
15 that wished to share their perspective on the proposed  
16 rule. We received comments both from the financial  
17 industry entities and feeder associations. We  
18 conferred with producers of cotton and crude. We  
19 listened to sugar traders, Chevron, Shell, ICE and CME.  
20 We contemplated the complexities of cotton with no  
21 fewer than 10 constituents. We noodled the nuances  
22 raised by nationals, and by that I mean the likes of

1 the National Council of Farmer Cooperatives, National  
2 Grain and Feed Association, National Oilseed Processors  
3 Association, and National Rural Electric Cooperative  
4 Association.

5           These are just a few. Indeed, we believe  
6 everyone who wanted to comment on or discuss the  
7 proposed rule received an audience with our staff to  
8 ensure that all voices were heard in finalizing the  
9 rule.

10           The Commission staff who developed this final  
11 rule is made up of lawyers, economists, traders, and  
12 former farmers of America, myself included in that last  
13 group. These staff members have spent decades  
14 considering these issues from the policy side, the  
15 industry side, and the producer side, bringing those  
16 perspectives to bear to ensure all perspectives were  
17 understood in a timely, optimal balance to solve vexed  
18 and complex issues.

19           Indeed, I'm presenting to you today as the  
20 proud daughter of the first woman member of our local  
21 Cattlemen's Association, having grown up on a farm  
22 raising feedstock beef cattle and tending corn and

1 maize crops in our fields surrounded by rice farms, oil  
2 wells, and natural gas pipelines along the banks of the  
3 Colorado River in South Texas. I remember well the  
4 feast and the famine of farming experienced year in and  
5 year out by our families, friends, and neighbors, and  
6 the local economy. We all faced challenges of managing  
7 the risk of production and harvest, as well as the risk  
8 of a cash crunch arising out of the decision to invest  
9 in a new combine or auger, or of making due with  
10 another year without, and being able to manage your  
11 risk by locking in prices was and continues to be  
12 critical to farmers, manufacturers, producers of these  
13 physical commodities that we'll address today.

14           Commission staff, the Chairman, and if we may  
15 speak on your behalf, the Commissioners, sought to  
16 listen to and understand the comments made and  
17 perspectives of all market participants -- producers,  
18 processors, distributors, speculators, and others. We  
19 did it in an effort to finalize the position limit  
20 rules in a pragmatic way, to limit excessive  
21 speculation in our ag, energy, and metals markets,  
22 aiming to prevent corners and squeezes and chaotic

1 price swings caused by speculative gamesmanship,  
2 activity that can distort the prices at which farmers,  
3 ranchers, and other industry participants in these  
4 physical commodities can lock in prices to hedge their  
5 risks.

6           Aiming to finalize a rule that pleases all in  
7 all details is likely an unattainable goal, as a near-  
8 decade of efforts to finalize this rule underscores.  
9 However, we are still satisfied, and indeed proud, to  
10 present to you today a final rule that we believe is  
11 pragmatic, balanced, and effective, meeting the  
12 decades-long goal of permitting our farmers and other  
13 physical commodities market participants to manage  
14 their risks effectively through the derivatives markets  
15 we oversee, encouraging liquidity in market speculation  
16 globally while limiting excessive speculation and  
17 preventing potential misconduct.

18           I now turn it over to Rachel Reicher, whom  
19 the Chairman has introduced as our relatively new-this-  
20 year General Counsel to the Division of Market  
21 Oversight. Thank you.

22           MS. REICHER: Thank you, Dorothy. And thank

1 you, Mr. Chairman and Commissioners.

2           The final rule that the team presents before  
3 you today is designed to limit the size and speculative  
4 position market participants may place in certain  
5 physical commodity derivatives. The limitations are  
6 intended to promote market integrity, market liquidity,  
7 and the price discovery process. The limits are also  
8 designed to protect the hedging abilities of commercial  
9 end users. The limits will not prevent commercial end  
10 users from entering into positions for legitimate  
11 hedging purposes.

12           Updating position limits and bringing this  
13 final rule to the finish line in the midst of a global  
14 pandemic, no less, is a milestone to be sure, and at  
15 times resembles an ultra-marathon. Yet, the team  
16 gracefully navigated around countless logistical  
17 hurdles and always kept in mind the needs of market  
18 participants and the goals of this rule. We are so  
19 lucky to have this dream team.

20           Team, before I turn the presentation to you,  
21 Dorothy and I want to thank you for all of your hard  
22 work, and also to thank all of your families for their

1 patience and support during this time.

2 Aaron Brodsky, the floor is yours.

3 MR. BRODSKY: Thank you, Rachel. And thank  
4 you, Mr. Chairman and Commissioners, for this  
5 opportunity to speak.

6 The final rule reflects the hard work of many  
7 team members and colleagues across the Commission. On  
8 behalf of the large group presenting here today, we  
9 would also like to thank the many colleagues who  
10 contributed to this project, including colleagues  
11 throughout the Division of Market Oversight and staff  
12 detailed to DMO to help get this project across the  
13 finish line.

14 We would also like to thank our colleagues in  
15 the Office of the General Counsel, the Office of the  
16 Chief Economist, and the Division of Enforcement.

17 Finally, we would also like to thank the  
18 staff of Chairman Tarbert and the Commissioners'  
19 offices who have helped us immensely in analyzing and  
20 improving this final rule.

21 The final rule before you today is intended  
22 to achieve statutory directives and policy goals,



1 including deterring and preventing corners and  
2 squeezes, while minimizing burdens on the farmers,  
3 ranchers, and end users that CFTC regulated markets are  
4 meant to serve.

5           By way of background, the Commission has long  
6 used position limits to protect futures markets from  
7 excessive speculation that can cause unreasonable or  
8 unwarranted price fluctuations. In 1938, the  
9 Commission's predecessor, the Commodity Exchange  
10 Commission, first promulgated position limits for  
11 grains. Since then, the Commission has continued to  
12 establish and enforce speculative position limits for  
13 futures and options on various agricultural  
14 commodities.

15           The Commission's existing position limit  
16 regulations include three components: first, the level  
17 of the limit, which currently apply to nine  
18 agricultural commodity derivatives contracts; second,  
19 exemptions from the limit; and third, regulations to  
20 determine which accounts and positions a person must  
21 aggregate for purposes of determining compliance with  
22 the position limit levels. The existing federal

1 position limits function in parallel with exchange-set  
2 limits required by the designated contract market core  
3 principles.

4           The Commission has decades of experience  
5 applying federal position limits. However, the  
6 Commission recognizes that federal position limits are  
7 not the only tool for protecting markets. Other tools,  
8 such as surveillance by Commission and exchange staff,  
9 exchange-set position limits and position  
10 accountability, rule enforcement reviews and robust  
11 enforcement are also effective.

12           To that end, the final rule contemplates a  
13 summarily tailored position limits framework that  
14 recognizes differences across commodities, including  
15 differences in hedging practices by commercial end  
16 users, that focuses on derivatives contracts for which  
17 an antecedent necessity finding has been made, but  
18 focuses on a narrow subset of swaps that are truly  
19 economically equivalent and that reduces duplication  
20 and inefficiencies by leveraging existing expertise and  
21 processes at the exchange level.

22           I will now turn it over to my colleague,

1 Steve Haidar, who will provide an overview of the key  
2 improvements the final rule makes to the proposal.

3 MR. HAIDAR: Good morning. This is Steve  
4 Haidar. Thank you, Aaron. And thank you, Mr. Chairman  
5 and to the Commissioners, for this opportunity to  
6 speak.

7 Based on the public feedback received, the  
8 final rule improves upon the proposal in four general  
9 categories which I will identify here briefly and which  
10 my colleagues will discuss in greater detail  
11 momentarily.

12 For the first general category, the final  
13 rule amends the proposal to better address the needs of  
14 bona fide hedgers and other market participants. It  
15 does so with three specific improvements to the  
16 proposal.

17 For the first change, the final rule  
18 affirmatively addresses unfixed price transactions.  
19 The final rule now provides that commercial end users -  
20 - that is, folks in the real economy such as farmers  
21 and ranchers -- that have entered into unfixed price  
22 transactions may qualify for an enumerated bona fide

1 hedge. This was, perhaps, the most common request to  
2 minimize burdens on commercial end users.

3           For the second specific change, the final  
4 rule has expanded the spread transaction definition to  
5 include additional common spread strategies. The final  
6 rule also now includes guidance for exchanges and  
7 market participants in connection with recognizing  
8 spreads.

9           The third specific change involves the non-  
10 enumerated bona fide hedge application process. Under  
11 the final rule, market participants may now enter into  
12 their hedge position while the non-enumerated hedge  
13 application is pending under Commission review,  
14 subject, of course, to the Commission either entering a  
15 stay or denying the application.

16           For the second general category of  
17 improvements, the final rule amends the proposal's  
18 treatment for two specific commodity markets based on  
19 feedback from commercial end users. The first market  
20 is the Henry Hub Natural Gas market. The proposal  
21 applied an aggregate position limit across exchanges  
22 for all commodities. That means that if you have a

1 position on a contract on Exchange A, you have to add  
2 or aggregate it to your position in a related contract  
3 on Exchange B for purposes of federal position limits.  
4 However, in response to commenters, federal position  
5 limits for natural gas under the final rule will now  
6 apply on a disaggregated or per-exchange basis.

7           The second market involves cotton. In  
8 response to commenters and a supplemental letter from  
9 the listing exchange, the spot month limit will be  
10 reduced from the proposed level. Similarly, the final  
11 rule also reduces the non-spot single-month limit for  
12 cotton compared to the proposal.

13           For the third general category of  
14 improvements, the final rule now narrowly tailors -  
15 appropriately tailors - the contract types that are  
16 subject to position limits, based again on feedback  
17 from bona fide hedgers. Specifically, the final rule  
18 excludes calendar month average contracts since these  
19 types of contracts are commonly used by commercial end  
20 users and are relatively less susceptible to  
21 manipulation.

22           For the fourth general category of

1 improvement, the final rule offers a practical  
2 compliance period. The final rule maintains the  
3 proposal's 12-month compliance period for federal  
4 limits for the 16 new non-legacy commodity contracts.  
5 But the final rule now also provides an additional 12  
6 months, for a total of two years, for economically  
7 equivalent swaps.

8 I will now turn over the presentation to my  
9 colleagues Brigitte Weyls and Michael Ehrstein, who  
10 will provide an overview of the contract types covered  
11 by the proposal.

12 Brigitte?

13 MS. WEYLS: Thank you, Steve. And thank you,  
14 Mr. Chairman and Commissioners, for the opportunity to  
15 speak about the final rule.

16 The final rule creates the new defined term  
17 "reference contract" to include three categories of  
18 contracts: core reference futures contracts; linked  
19 contracts; and economically equivalent swaps.  
20 Contracts that fall within these categories are subject  
21 to federal position limits.

22 The first category, core reference futures

1 contracts, which we will refer to as CRFCs --

2 MS. DEWITT: Sorry, I just want to interrupt  
3 briefly and just ask that those who may be speakers on  
4 this call try and mute your phones.

5 Apologies for that interruption. Please  
6 carry on.

7 MS. WEYLS: No worries. -- generally  
8 includes the 25 largest physically-settled futures  
9 contracts in terms of open interest and volume.  
10 Specifically, the 25 CRFCs include the existing nine  
11 legacy agricultural futures currently subject to  
12 federal position limits and 16 additional futures  
13 contracts. Of the 16 additional contracts, seven are  
14 agricultural, five are metals, and four are energy  
15 contracts.

16 The second category, linked contracts,  
17 includes futures contracts and options thereon that are  
18 directly or indirectly linked to either the price of  
19 the applicable CRFC or to the price of the same  
20 commodity underlying the applicable CRFC for delivery  
21 at the same location. This category generally consists  
22 of cash-settled look-alike futures and specifically

1 excludes the following six contract types: location-  
2 based contracts; commodity index contracts; contracts  
3 that are based on prices across months -- for example,  
4 a calendar month average contract; outright contracts  
5 that are based on a price reporting agency index price;  
6 swap guarantees; and certain trade options.

7           Generally speaking, staff believes that  
8 linked and physically-settled futures contracts form  
9 one market, and therefore should be subject to federal  
10 position limits. Specifically, staff has observed that  
11 it is common for the same market participants,  
12 arbitrage linked and physically-settled contracts.  
13 Staff has also observed instances where linked and  
14 physically-settled contracts squeeze together to  
15 manipulate the markets.

16           For the third category, economically  
17 equivalent swaps, I'll now turn the presentation over  
18 to my colleague, Michael.

19           MR. EHRSTEIN: Thank you, Brigitte. And  
20 thank you, Mr. Chairman and Commissioners.

21           The third reference contract category  
22 includes economically equivalent swaps. The CEA



1 requires the Commission to establish limits for  
2 economically equivalent swaps, as appropriate,  
3 simultaneous with position limits on futures. Since  
4 the CEA does not define economically equivalent, staff  
5 has applied its expertise in construing this term.

6           A swap qualifies as economically equivalent  
7 so long as the swap shares identical material  
8 contractual specifications, terms and conditions with  
9 the reference contract, disregarding differences with  
10 respect to any of the following three things: number  
11 one, lot size or notional amount; two, post-trade risk  
12 management arrangements; and three, delivery dates for  
13 physically-settled swaps, as long as these delivery  
14 dates diverge by less than one calendar day from the  
15 reference contract's delivery date.

16           However, there is an exception for natural  
17 gas swaps. Natural gas swaps qualify as economically  
18 equivalent if a swap's delivery date diverges by less  
19 than two calendar days rather than one calendar day.  
20 This exception captures penultimate natural gas swaps.

21           Compared to other futures markets, the  
22 natural gas market includes relatively active cash-

1 settled penultimate futures. Therefore, the  
2 economically equivalent definition is slightly expanded  
3 to include natural gas penultimate swaps.

4           Staff observes that there is a difference  
5 between swaps traded over the counter, or OTC, and  
6 exchange-traded futures. OTC swaps are bilaterally  
7 negotiated and customizable. As a result, it is  
8 necessary to have a relatively narrow economically  
9 equivalent definition to prevent market participants  
10 from inappropriately netting down their CRFC positions  
11 against bespoke swaps that may not necessarily offer  
12 identical economic exposure to the CRFC.

13           Further, CEA Section 4a(a)(2) requires the  
14 Commission to strive to ensure that federal position  
15 limits will not cause price discovery to shift to  
16 foreign venues. Accordingly, the economically  
17 equivalent definition is cognizant of the corresponding  
18 European Union definition. While the definitions are  
19 similar, the EU's definition requires only identical  
20 terms rather than identical material terms. This  
21 economically equivalent swap definition is relatively  
22 broader than the EU's in that the definition explicitly

1 covers swaps with different non-material terms.

2 Staff believes that this will deter market  
3 participants from inappropriately avoiding position  
4 limits merely by changing an immaterial term of a swap  
5 that otherwise offers identical economic exposure to a  
6 CRFC, while the definition remains mindful of the EU's  
7 definition, as required by the CEA.

8 I'll now turn over the presentation to Chang  
9 Jung and Steve Benton, who will provide an overview of  
10 the federal position limit levels.

11 MR. JUNG: Thank you, Michael. And thank  
12 you, Mr. Chairman and all of the Commissioners, for the  
13 opportunity to speak about the final rule.

14 The final rule recognizes that during the  
15 spot month, physically-settled contracts can, in  
16 certain circumstances, be at risk of corners and  
17 squeezes, which can distort pricing, make it more  
18 costly to implement hedge strategies, and harm the  
19 underlying cash market.

20 To protect against these and other  
21 manipulated activity, as well as to curb excessive  
22 speculation, the final rule includes federal spot month

1 position limits for the 25 core reference futures  
2 contracts and their associated reference contracts.

3           The final rule spot month limits are  
4 generally set at or below 25 percent of estimated  
5 deliverable supply. Estimated deliverable supply for  
6 each commodity was calculated by the exchanges and has  
7 been reviewed, analyzed, and verified by Commission  
8 staff.

9           The Commission has long used 25 percent of  
10 estimated deliverable supply as the maximum permitted  
11 level when setting spot month limits because it has  
12 historically been an effective deterrent against  
13 corners and squeezes. But specifically, with this  
14 limitation in place, any potential economic gain  
15 resulting from market manipulation is generally  
16 insufficient to justify the potential cost.

17           Furthermore, in setting the federal spot  
18 month limit, the Commission sought to ensure sufficient  
19 liquidity for bona fide hedgers and ensure that the  
20 levels took into account differences between markets.

21           For most contracts, the final rule spot month  
22 limit levels are generally higher than their existing

1 federal and exchange-set spot month levels. This  
2 increase is primarily driven by the increases in  
3 estimated deliverable supply of the underlying  
4 commodity for each core reference futures contract.

5           However, there are several contracts for  
6 which the spot month levels remain unchanged. Outside  
7 of the spot month, federal position limits would only  
8 apply to the nine legacy agricultural contracts that  
9 are currently subject to federal position limits and  
10 their associated reference contracts. Contracts on the  
11 other 60 commodities will be subject to federal  
12 position limits only during the spot month. They will  
13 be subject to exchange-set position limits or exchange-  
14 set position accountability outside of the spot month.

15           Such exchange-set position limits or position  
16 accountability would be mandatory and would be subject  
17 to Commission oversight and to standards established by  
18 the Commission, including that the levels be necessary  
19 and appropriate to reduce the potential threat of  
20 market manipulation or price distortion of the contract  
21 for the underlying commodity's price or index.

22           The final rule's non-spot month limits are

1 generally set at 10 percent of open interest for the  
2 first 50,000 contracts, with an incremental increase of  
3 2.5 percent of open interest thereafter. This formula  
4 reflects a limited change from the existing and  
5 longstanding formula which applies a 2.5 percent  
6 incremental increase at 25,000 contracts rather than  
7 50,000 contracts. The final rule is adopting this  
8 change as a result of the significant increases in open  
9 interest in many markets, and as a result of the  
10 changes in the composition of market participants who  
11 trade in these markets.

12           For two-thirds of the contracts, the final  
13 rule's non-spot month levels are set higher than the  
14 existing levels primarily due to the increase in open  
15 interest. However, for the other third, the non-spot  
16 month levels remain unchanged from existing levels.

17           Although the final rule is generally adopting  
18 the federal spot month and non-spot month position  
19 limit levels as proposed, there are changes with  
20 respect to two contracts.

21           First, with respect to natural gas contracts,  
22 the final rule is applying the 2,000 contracts spot

1 month level for cash-settled natural gas contracts on a  
2 per-exchange and per-OTC swaps market basis instead of  
3 aggregating the positions across all markets. As a  
4 result, a market participant may hold up to 2,000 cash-  
5 settled natural gas contracts on NYMEX, 2,000 on ICE,  
6 2,000 on Nodal, and 2,000 in the OTC swaps market.  
7 This change is driven by the comments received, and  
8 this is consistent with the existing spot month  
9 position limit framework currently in place at the  
10 exchange level. No changes are being made with respect  
11 to the physically-settled natural gas contracts.

12           Second, with respect to cotton contracts, the  
13 final rule is decreasing the spot month limit level and  
14 the proposed level of 1,800 contracts to 900 contracts.  
15 Also, the final rule is adopting a lower single-month  
16 limit level of 5,950 contracts, which is half of its  
17 proposed single-month level. These changes are driven  
18 by the comments received from the end users to cotton  
19 contracts. No changes are being made with respect to  
20 the proposed all-month combined limit level.

21           Next, my colleague Lillian Cardona will  
22 provide an overview of the final rule standards for

1 granting exemptions from federal position limits.

2 MS. CARDONA: Thank you, Chang.

3 Good morning, Mr. Chairman and Commissioners.

4 My name is Lillian Cardona. I'm an Assistant Chief  
5 Counsel in DMO's Office of the Chief Counsel.

6 As Chang mentioned, I'm going to speak a  
7 little bit about some of the exemptions that are  
8 provided for in the final rule.

9 The final rule before you today provides  
10 exemptions for positions that qualify as a bona fide  
11 hedging transaction or position; spread transaction; a  
12 financial distress position; and what is referred to as  
13 the conditional spot month limit exemption, which  
14 relates to spot month positions in natural gas  
15 reference contracts. I'll also note that pre-enactment  
16 and transition period swaps are also exempted from this  
17 rule, as they will not be subject to federal position  
18 limits.

19 Next I'd like to focus my remarks on the  
20 exemptions for positions that are recognized as bona  
21 fide hedges, and I'll first highlight some of the  
22 amendments to the bona fide hedge definition, and then



1 shift to focus on some changes to the bona fide hedges  
2 that are enumerated in our regulation.

3           So with regard to amendments to the bona fide  
4 hedge definition, the final rule amends the existing  
5 definition by amending the existing general elements  
6 required for a position to be deemed a bona fide hedge;  
7 and in accordance with amendments to Dodd-Frank, it  
8 adds a new provision in the definition to allow as bona  
9 fide hedging a position that reduces the risk of a swap  
10 that is a pass-through swap and a pass-through swap  
11 offset.

12           Regarding the general elements of the bona  
13 fide hedging definition, I would like to highlight two  
14 amendments that would be finalized in this rule as  
15 proposed.

16           First, the final rule is eliminating the word  
17 "normally" from the definition's temporary substitute  
18 test to require that a bona fide hedge must always, and  
19 not just normally, create substitutes for positions in  
20 the physical marketing channel. As a result, with this  
21 amendment, positions in previously granted risk  
22 management exemptions must be reduced, unless that

1 position otherwise qualifies as a pass-through swap or  
2 a bona fide hedge.

3           Second, the final rule would codify the  
4 existing practice and treatment of price risk by making  
5 it explicit in the rule text that the word "risk" in  
6 the economically appropriate prong of the bona fide  
7 hedge definition refers to and is limited to price  
8 risk.

9           Now, while this amendment is codifying the  
10 existing practice and treatment of price risk, in  
11 response to public comments the final rule clarifies  
12 that the Commission acknowledges the price risk can be  
13 informed and impacted by other types of non-price risk  
14 such as geopolitical turmoil or weather risk.

15           You'll note the preamble also states that  
16 this clarification on price risk is limited to the bona  
17 fide hedge exemption and it does not change how market  
18 participants may otherwise hedge price risk with  
19 contracts that are not subject to federal position  
20 limits.

21           Now, as I mentioned, shifting a little bit to  
22 the amendments from the bona fide hedging definition

1 itself, the final rule also amends the current bona  
2 fide hedges that are listed or enumerated in our  
3 regulation by first expanding most of the existing  
4 enumerated hedges -- for example, the final rule  
5 eliminates the five-day rule or the prohibition on  
6 holding certain enumerated bona fide hedges in the last  
7 five days of trading -- as well as expanding our  
8 existing cost commodity enumerated hedge, which now  
9 would apply to all the enumerated hedges, including the  
10 unfilled anticipated requirements hedge and the hedge  
11 of anticipated merchandising.

12           In addition, another change to our existing  
13 enumerated hedges is actually an increase in the  
14 universe of enumerated hedges, and it would be  
15 increasing it by adding five new enumerated hedge  
16 categories, which include, as I mentioned, the hedges  
17 of anticipated merchandising.

18           As was evident in the public comments, many  
19 commenters stated that the amended bona fide hedge  
20 definition together with the expanded enumerated hedges  
21 will ensure that the most common hedging practices  
22 across the different commodity markets subject to this

1 rule would not be subject to position limits.

2           And next, my colleague Harry Hild will  
3 provide an overview of the final rule's treatment of  
4 unfixed price transactions and bona fide hedging.

5           MR. HILD: Thank you, Lillian.

6           Good morning, Mr. Chairman and Commissioners.  
7 My name is Harold Hild. I'm a policy advisor in DMO's  
8 Market Intelligence Branch. Thank you for the  
9 opportunity to speak today.

10           In response to the proposal, many commenters  
11 requested the Commission either clarify or make  
12 explicit that the bona fide hedge definition would  
13 apply to commodity derivative contracts used to hedge  
14 exposure to price risk arising from unfixed price  
15 transactions. The final rule addresses the concerns of  
16 commenters and broadens this treatment of unfixed price  
17 commitments for commercial participants.

18           Commercial participants that enter into  
19 unfixed price transactions may qualify for bona fide  
20 hedge treatment under the enumerated anticipatory  
21 hedges; that is, the anticipatory hedges of unfilled  
22 anticipated requirements, unsold anticipated

1 production, and anticipatory merchandising. These  
2 anticipatory hedge categories apply to commercial  
3 participants such as processors, producers, and  
4 merchandisers engaged in a variety of commercial  
5 hedging practices.

6           Underlying unfixed price purchases and/or  
7 sales commitments are among the accepted transactions  
8 that can be utilized by them under the anticipatory  
9 hedge categories. The Commission has a long history in  
10 overseeing some of these hedges by agricultural  
11 processors currently granted under Regulation 1.4(a).  
12 The proposal did not directly address the treatment of  
13 unfixed price commitments as a general matter. Staff,  
14 however, has previously considered the extent to which  
15 market participants with unfixed price commitments may  
16 qualify for an enumerated hedge in Staff Interpretive  
17 Letter 12-07.

18           In short, that interpretive letter clarified  
19 that commercial hedgers may qualify for the existing  
20 enumerated bona fide hedge for unfilled anticipated  
21 requirements even if the commercial entity has entered  
22 into a long-term unfixed price supply or requirement

1 contract because, as staff explained in the letter, the  
2 unfixed price purchase contract does not fill the  
3 commercial entity's anticipated requirements.

4           The final rule adopts this view and expands  
5 it by applying it to all three enumerated anticipatory  
6 hedges included in the final rule. The final rule  
7 declines, however, to create a new standalone  
8 enumerated hedge category for the unfixed price  
9 transactions. Such category is essentially unnecessary  
10 given that the final rule allows commercial  
11 participants with unfixed price commitments to qualify  
12 for the enumerated anticipatory hedges.

13           Further, given the differences among the  
14 various cash markets, creating a new category of  
15 enumerated bona fide hedge for any of these unfixed  
16 price transactions could, under certain circumstances,  
17 harm market integrity, enable potential market  
18 manipulation, and/or allow excessive speculation by  
19 potentially affording bona fide hedge treatment for  
20 speculative transactions.

21           Next, my colleague Jeanette Curtis will  
22 provide an overview of the proposed process for

1 granting exemptions.

2 Thank you, Harry, again. And thank you, Mr.  
3 Chairman and Commissioners, for this opportunity to  
4 speak.

5 Again, my name is Jeanette Curtis. I am an  
6 Assistant Chief Counsel in the Division of Market  
7 Oversight's Office of the Chief Counsel.

8 As Lillian and Harry just discussed, this  
9 final rule provides different types of exemptions from  
10 federal position limits. The final rule also sets  
11 forth different processes for market participants to  
12 request such exemptions from federal limits.

13 The Commission received several comments on  
14 these different processes, and this final rule reflects  
15 an approach that responds to commenters' views and that  
16 is designed to facilitate efficient hedging by  
17 commercial end users.

18 In addition, I'd like to note that the final  
19 rule also includes rules governing exchange-set  
20 position limits and exemptions therefrom. However,  
21 this presentation focuses on how market participants  
22 will request exemptions from federal position limits.

1           First, I will address the processes for  
2 obtaining enumerated and non-enumerated bona fide hedge  
3 exemptions; and next I will discuss the processes for  
4 relying on other types of exemptions available under  
5 the final rule.

6           So, first up, with respect to bona fide  
7 hedges that are enumerated in Appendix A of the  
8 regulations, the final rule allows these bona fide  
9 hedges to be self-effectuated for purposes of federal  
10 position limits, and this simply means that market  
11 participants would not be required to request the  
12 Commission's approval before exceeding position limits,  
13 federal position limits.

14           Next, with respect to bona fide hedges that  
15 do not fit within one of the enumerated hedges in  
16 Appendix A, these positions may be considered non-  
17 enumerated bona fide hedges that would not be self-  
18 effectuating, and this simply means that a market  
19 participant would be required to obtain the  
20 Commission's approval for holding such positions in  
21 excess of federal limits, and the final rule provides  
22 two different options for requesting the Commission's



1 approval.

2 Under the first option, a person could apply  
3 directly to the Commission under Section 150.3(b) of  
4 the final rule for approval of their non-enumerated  
5 bona fide hedge; and after the Commission approves the  
6 application, the person would need to then apply to the  
7 relevant exchange for an exemption from the exchange's  
8 position limit.

9 We recognize, however, that requiring market  
10 participants to comply with the different federal and  
11 exchange-level processes creates inefficiencies in the  
12 application process. So the final rule offers a  
13 second, streamlined alternative that leverages existing  
14 exchange processes with which many bona fide hedgers  
15 are familiar.

16 Under this second option, in Section 150.9 of  
17 the final rule, a person could submit one application  
18 directly to an exchange for obtaining the non-  
19 enumerated bona fide hedge exemption that would be  
20 valid for purposes of both federal and exchange-set  
21 position limit requirements.

22 Under this streamlined process, when an

1 exchange approves a non-enumerated bona fide hedge  
2 application for purposes of exchange-set limits, the  
3 Commission will then have a 10- or 2-day period to  
4 review and make a determination with respect to that  
5 application. If the Commission and not Commission  
6 staff does not deny or stay the application within its  
7 review period, then the non-enumerated bona fide hedge  
8 is considered approved for purposes of federal position  
9 limits.

10 I want to note here that in response to  
11 commenters' views on the proposal, the final rule  
12 permits market participants to exceed federal limits  
13 during the Commission's 10-day review period at their  
14 own risk. So if the Commission ultimately denies the  
15 application and a person has exceeded federal limits  
16 already, the Commission will not pursue a position on  
17 its violation so long as the application was filed in  
18 good faith and the market participant reduces their  
19 position within a commercially reasonable time.

20 I will also note that for either enumerated  
21 or non-enumerated bona fide hedges, under the final  
22 rule market participants will no longer be required to

1 file the Form 204 or 304 with the Commission on a  
2 monthly basis to demonstrate cash market positions  
3 justifying position limit overages. Instead, the  
4 Commission will have access to any cash market  
5 information the market participant files with the  
6 exchange.

7           So next, the rule also prescribes how market  
8 participants can rely on other types of exemptions,  
9 including exemptions for spread transactions and the  
10 conditional natural gas spot month limit position  
11 exemptions.

12           So for spread exemptions that meet the spread  
13 transaction definition in Section 150.1 of the final  
14 rule, and for positions that meet the conditional  
15 natural gas spot limit exemption in Section 150.3 of  
16 the rule, these exemptions are self-effectuating and  
17 under the final rule a person is not required to obtain  
18 Commission approval.

19           Finally, for spread exemptions that do not  
20 meet the spread transaction definition in Section 150.1  
21 of the rule, these positions must be approved by the  
22 Commission under Section 150.3 of the final rule.

1   However, we expect that any such requests are likely to  
2   be very rare because the final rule now broadens the  
3   spread transaction definition to better capture most,  
4   if not all, of the most common spread strategies  
5   currently offered by exchanges.

6                So next, my colleague Rachel Hayes will  
7   discuss the compliance period for the final rule.  
8   Thank you.

9                MS. HAYES: Thank you, Jeanette. And thank  
10   you, Mr. Chairman and all of the Commissioners, for the  
11   opportunity to speak about the compliance date of the  
12   final rule.

13               The proposed rule provided a single general  
14   compliance date of 365 days after publication in the  
15   Federal Register. In addition, the proposal provided  
16   that previously granted risk management exemptions will  
17   have to be eliminated after the final rule's effective  
18   date. But the final rule modifies the proposal by  
19   providing these two compliance dates.

20               First, the final rule provides market  
21   participants and exchanges a general compliance date of  
22   January 1st, 2022. This general compliance date

1 applies to the 16 non-legacy core reference futures  
2 contracts that will be subject to the federal limits  
3 for the first time, as well as any associated reference  
4 contracts other than economically equivalent swaps.

5           The general compliance date of January 1st,  
6 2022 also applies to exchanges for purposes of  
7 establishing exchange-set position limits and  
8 provisions associated with exemptions.

9           Because the final rule does not require  
10 exchanges to increase exchange-set position limits, an  
11 exchange may raise or change that limit to tie to  
12 corresponding federal position limits immediately on  
13 the effective date. They may phase in exchange-set  
14 position limits over time, or they may raise or not  
15 raise exchange position limits at all.

16           Second, the final rule establishes a separate  
17 compliance date of January 1st, 2023 for economically  
18 equivalent swaps and for the elimination of previously  
19 granted risk management exemptions. The final rule  
20 delays the compliance date for economically equivalent  
21 swaps for an additional year in response to comments  
22 that we received requesting additional time to mitigate

1 the legal, operational, and compliance challenges of  
2 entering position limits for swaps for the first time.

3 Last, with respect to the nine legacy  
4 agricultural contracts, the new federal position limits  
5 and the expanded list of enumerated hedges go into  
6 effect on the effective date. The legacy agricultural  
7 contracts are already subject to federal position  
8 limits, and this final rule generally increases those  
9 limits.

10 The compliance period for these contracts is  
11 unnecessary because market participants trading in  
12 these markets are already familiar with position limits  
13 and have established necessary monitoring and  
14 compliance programs.

15 Now I turn the presentation over to my  
16 colleague Steven Haidar.

17 MR. HAIDAR: Thank you, Rachel. And I want  
18 to thank all members of the position limits team for  
19 this wonderful presentation.

20 Mr. Chairman, the position limits team is now  
21 ready for any questions that you and your fellow  
22 Commissioners may have. Thank you.

1           CHAIRMAN TARBERT: Well, thank you all very  
2 much for that wonderful and very expansive  
3 presentation, as well as for all the great work that  
4 went into preparing this rule for our consideration  
5 today.

6           To begin the Commission's deliberations, I  
7 will now entertain a motion to adopt the final rule on  
8 position limits for derivatives.

9           COMMISSIONER QUINTENZ: So moved.

10          COMMISSIONER BEHNAM: Second.

11          CHAIRMAN TARBERT: Thank you.

12          I'd now like to open the floor for  
13 Commissioners to ask any questions, and we're actually  
14 going to have two rounds of questions because we want  
15 to make sure that there's a lot of discussion and  
16 people can ask any questions of our team that they  
17 need.

18          So I'll go ahead and go first. I have just a  
19 couple of questions, actually, and then I might make a  
20 few comments or observations.

21          The first question I have, and I'm not sure  
22 if this is to Lillian or maybe to Harold, who mentioned

1 this, but I'd like it if you could walk us through how  
2 the enumerated exemptions would apply to a producer, a  
3 merchandiser, or an end user, so sort of like an  
4 example that has a contract to buy or sell a commodity  
5 at an unfixed price. This had been a major concern  
6 from commercial market participants. I know in  
7 particular in cotton, and also in energies, where  
8 people often sell in advance but they don't do so at a  
9 fixed price. But they say we'll give you a million  
10 bales of cotton, and we're going to sell it for X  
11 amount, or we're going to sell it for the amount that  
12 will be decided on the day of the sale, or some other  
13 mechanism where the price isn't determined in advance,  
14 and I want to make sure we understand when the  
15 unenumerated hedge can account for those types of  
16 unfixed price contracts.

17 MS. CARDONA: Thank you, Mr. Chairman. This  
18 is Lillian. I will start, and I'm sure Harry will have  
19 a few things to add, as well.

20 I guess the first thing I will say is  
21 generally, each market participant will sort of see  
22 based on their own business and the circumstances for



1 the types of risk that they're hedging. That will sort  
2 of be the first driver into how they decide to look at  
3 the expanded list of enumerated hedges.

4           But generally speaking, if you assume the  
5 market participant qualifies as a producer, certainly  
6 the hedge of unsold anticipated production is a hedge  
7 that they could use to hedge the risk that they have  
8 from the unfixed price transactions that you mentioned,  
9 as well as other unsold production that may not yet  
10 have been contracted for, that they may not have yet  
11 sold.

12           So it's really more about them. Depending on  
13 the type of market participant, they have many avenues  
14 under the enumerated bona fide hedges. So again, they  
15 do not need a pre-approval from the exchange, or from  
16 the Commission, to take that hedge.

17           MR. HILD: Hi, Mr. Chairman. This is Harry.  
18 I'll add that this approach was supported by some of  
19 the comment letters that were filed on the proposal.  
20 The market participants must still satisfy the  
21 requirements of the anticipatory bona fide hedges. I  
22 think Lillian might have mentioned that. But the new

1 hedge, I guess the newest hedge is the anticipatory  
2 merchandising hedge, and there are essentially two  
3 prongs to that test to qualify for that, that it should  
4 be approved for up to 12 months' worth of your  
5 anticipatory merchandising needs, but also you have to  
6 demonstrate that you have a history, a 12-month  
7 history, of dealing or taking delivery or managing and  
8 dealing with that particular market.

9           CHAIRMAN TARBERT: Got it, right. So this  
10 goes beyond just the situation which is more simplistic  
11 where you sell something and the price is determined at  
12 a later time. This is really about I am pretty sure  
13 that I am going to sell this merchandise that I have,  
14 but I don't know the price at which I'm going to sell  
15 it, but I know I need to (inaudible) now. Is that  
16 right?

17           MR. HILD: Yes, that's correct.

18           CHAIRMAN TARBERT: Exactly. Okay.  
19 Excellent.

20           My second question is that obviously we want  
21 to make sure that banks and dealers can continue  
22 offering commercial market participants the ability to

1 hedge through swaps. This can be incredibly important  
2 for some commercial firms for capital efficiency  
3 reasons or the ability to hedge bespoke risk. So, in  
4 other words, we've got a lot of producers out there,  
5 manufacturers, other people in the ag industry, energy,  
6 and maybe even metals, that have very unique risks,  
7 risks that aren't necessarily directly tied to the  
8 futures markets, and there may also be other financing  
9 and other things that they're doing at the same time.  
10 So they may want to go to their financial institution  
11 and say can we enter into a swap transaction that is  
12 really targeted at the risk my business is going to  
13 face in the next couple of years.

14           But then what happens, of course, is the  
15 financial institutions then take on that risk, and they  
16 need to then use our futures markets to offset that  
17 risk, and often they'll get all of their swap contracts  
18 together, for example, and think about the overall risk  
19 to the institution, and then use the futures markets to  
20 offset or overlay some of that risk.

21           So what are we doing in the final rule to  
22 make sure that dealers can use the pass-through swaps

1 exemptions in an efficient manner?

2 MS. CARDONA: Mr. Chairman, under the final  
3 rule, the bona fide hedge definition is amended to add  
4 this new provision which would cover the exact  
5 situation that you just described where a swap dealer  
6 or an entity that is entering into swaps with a bona  
7 fide hedger can then offset its risk with a bona fide  
8 hedge in the futures market. And in the final rule,  
9 unlike in the proposal, we agreed that the dealer  
10 counterparty, the bona fide hedger, is a suitable party  
11 to make the determination of that swap as a bona fide  
12 hedge. It's a slight change that kind of makes it  
13 easier to reflect the counterparty's relationship.

14 CHAIRMAN TARBERT: Terrific. Well, thank  
15 you.

16 I only just want to offer some final  
17 comments. Obviously, I said a lot in my opening  
18 statement, but I do think I want to respond to the idea  
19 that the events of April 20th should somehow hold up  
20 this rule. Obviously, the events of April 20th are  
21 very important, and I know the staff is dedicated to  
22 doing a report on those.

1           But I want to just make clear, first of all,  
2   that this rule is about making farmers, ranchers,  
3   producers, end users, and merchandisers, to be able for  
4   them to access our futures markets and hedge their  
5   risk; so, in other words, all of the enumerated hedges  
6   that we're working on.

7           This rule is also about putting in place  
8   workable procedures for evaluating exemptions to  
9   position limits. This rule is about setting position  
10  limits that balance the liquidity needs of hedgers  
11  against the risk of corners and squeezes, and I might  
12  add for 25 specific core referenced contracts, not just  
13  one.

14           This rule is about the big picture of how  
15  position limits should work in orderly markets, and  
16  essentially it creates a framework, and that framework  
17  is really what we're doing today, and so in that  
18  respect it is absolutely the end of an arduous journey  
19  where we are creating a new framework for position  
20  limits that I believe will stand the test of time.

21           Now, obviously within that framework there  
22  are going to be a number of technical issues. One of

1 the issues that was raised that I think was mentioned  
2 was the TAS issue, a potential issue, should we  
3 consider that. I view that as an interpretive issue,  
4 how do we apply our netting rules. Our current  
5 position limits rule is silent on that, but given that  
6 it's a technical issue, I would expect the Commission  
7 may consider that in the weeks and months ahead. It  
8 wouldn't necessitate another rulemaking, but I think it  
9 would be an interpretation of what we allow netting  
10 under our netting provision in the rule.

11           There's also the WTI report which was  
12 mentioned, and I'm relying on staff's good judgment,  
13 its expertise, and most importantly to get it right. I  
14 understand it's going through a thorough peer review.  
15 So when that comes out, if that sheds any light on how  
16 we can continue to work within the framework of the  
17 position limits that we're finalizing today, then  
18 obviously we're certainly open to that, and it could  
19 very well be that the events of the last six or eight  
20 months will change things like deliverable supply and  
21 other things where ultimately the adjustments can be  
22 made under our rule.

1           But ultimately, the key is that this is 10  
2 years in the making. This creates the overall  
3 framework where we can go ahead and solve technical  
4 issues as we implement this over the next two to three  
5 years.

6           And then the final point I'd like to make is  
7 I want to commend my colleagues on the Commission for  
8 all of their work on this alongside, particularly the  
9 two Commissioners who I think will not support this  
10 final rule, didn't support the proposal, but I will say  
11 that throughout this entire process were continually  
12 engaged and offering constructive feedback and comments  
13 when I think they didn't have to. They could have just  
14 said, look, we don't support this, we're not even going  
15 to bother offering up comments and constructive  
16 feedback, but they didn't do that. They really worked  
17 hard on it, and I think it demonstrates their  
18 collegiality, their professionalism, and their  
19 commitment to the Commission. So I want to thank all  
20 of my fellow Commissioners for all of their hard work  
21 on the rule that we're going to vote on today.

22           With that, I think that concludes my first

1 round of questions and I'd like to pass it on to  
2 Commissioner Quintenz.

3           COMMISSIONER QUINTENZ: Thank you, Mr.  
4 Chairman. Let me just first congratulate you on your  
5 leadership on getting us to today and, as my colleague  
6 Commissioner Behnam said, getting this across the  
7 finish line. It's been 10 years in the making. I  
8 personally believe that that's long enough. Some may  
9 not, but I think it is, especially with all of the  
10 comments that we received on four prior proposals and  
11 one vacated final rule. I think now is the time to get  
12 this done.

13           Let me compliment the team, Dorothy and  
14 Vince, Rachel, Rob Schwartz, Aaron Brodsky, Steven  
15 Haidar all of you. I see a lot of your names here. I  
16 also wish that we could do this in person so that I  
17 could shake all of your hands when that would have been  
18 allowed, or maybe even give you hugs, whatever would be  
19 most appropriate. But it's wonderful that you've  
20 gotten us to today. I think Rachel described this as  
21 an ultra-marathon. I think that you may have been  
22 sprinting in that ultra-marathon, so congratulations on



1 your endurance and your conditioning. It's great to be  
2 here with you today, and I'm very pleased to support  
3 this rule today.

4 I think what I'll do is, because I didn't go  
5 through my statement originally during the opening  
6 statement, I think I'd like to read a good portion of  
7 that first to lay the groundwork for my rationale for  
8 supporting this rule and why I believe it's so well  
9 done, and then maybe move to a few questions before  
10 yielding back to my colleagues. So if you'll bear with  
11 me for a minute.

12 I'm very pleased to support the agency's  
13 revitalized approach to position limits. The  
14 rulemaking finalized today follows four proposals and  
15 one vacated final rule since the passage of Dodd-Frank,  
16 and it is in my opinion by far the strongest of all of  
17 them.

18 Today's rule promotes flexibility, certainty,  
19 and market integrity for end users -- farmers,  
20 ranchers, energy producers, transporters, processors,  
21 manufacturers, merchandisers -- all who use physically-  
22 settled derivatives to manage their exposure to

1 physical goods.

2           The rule includes an expansive list of  
3 enumerated and self-effectuating bona fide hedging  
4 exemptions and spread exemptions; and, importantly, it  
5 streamlines an exchange-centered process to adjudicate  
6 non-enumerated bona fide hedge exemption requests.

7           I'm pleased that the rule seriously  
8 considered the usability of hedging exemptions,  
9 something which I strongly advocated for, and in  
10 particular I thank Commissioner Stump for her  
11 leadership on those issues.

12           In contrast to the Commission's failed  
13 proposed rulemakings in 2011, 2013, and 2016, as well  
14 as the vacated final rule from 2012, this rule in my  
15 view is the most true to the CEA in many significant  
16 respects. It requires, as has long been the  
17 Commission's practice, a necessity finding before  
18 imposing position limits. It includes economically  
19 equivalent swaps. And, perhaps most importantly, it  
20 balances the interests that are stated in the statute  
21 that we have to consider among promoting liquidity,  
22 deterring manipulation, and ensuring the price

1 discovery function of the underlying market is not  
2 disrupted.

3           The confluence of these factors occurs most  
4 acutely in favor of position limits only in the spot  
5 month, only for physically-settled contracts. In the  
6 spot month, price convergence through the delivery  
7 mechanism is particularly vulnerable to potential  
8 manipulation or disruption due to outsized positions.  
9 By establishing position limits for non-legacy  
10 contracts only in the spot month, the rule in my view  
11 elegantly balances the countervailing policy interests  
12 enumerated in the statute.

13           Through staff's serious consideration of over  
14 70 public comments, almost all of which came from  
15 market participants, the final rule significantly  
16 improves on what appeared in the proposal. Examples of  
17 modifications based on public comment include  
18 considerations of gross hedging, price risk, the pass-  
19 through swap exemption, spot month limits for natural  
20 gas and cotton, a special non-spot single-month limit  
21 for cotton, spread exemptions, and the Commission's  
22 review of exchange-granted non-enumerated hedge

1 exemptions.

2           With regard to enumerated bona fide hedges,  
3 the final rule takes into account several suggestions  
4 from commenters. The proposed enumerated hedges were  
5 already a significant improvement upon previously  
6 proposed hedge exemptions. For example, the proposal  
7 eliminated the mandatory five day rule and no longer  
8 conditions cross-commodity hedging on a needlessly  
9 rigid quantitative test.

10           Now, under the final rule, the enumerated  
11 hedges will be even more practical. For example, the  
12 final rule makes clear that a hedger with only an  
13 unfixed price cash commodity sale or purchase, but not  
14 an offsetting pair, may rely on one of the three  
15 anticipatory hedges. The final rule also makes clear  
16 that the new anticipatory merchandising hedge can be  
17 used both by integrated energy firms and by firms that  
18 limit their business to merchandising. Furthermore,  
19 the final rule permits the anticipatory merchandising  
20 hedge to now be used in conjunction with storage  
21 hedges.

22           I support the final rule's determination to

1 delay by two years two important elements that will  
2 require significant changes in the marketplace: the  
3 imposition of position limits on swaps economically  
4 equivalent to the referenced futures contracts; and the  
5 required unwinding of previously elected risk  
6 management exemptions. It is prudent to allow for that  
7 additional time.

8           Now on to the necessity findings.

9           Today's rule correctly premises new limits on  
10 a finding that they are necessary to diminish,  
11 eliminate, or prevent the burden on interstate commerce  
12 from extraordinary price movements caused by excessive  
13 speculation in specific contracts, as Congress has long  
14 required in the CEA and its legislative precursors  
15 since 1936. I am pleased that the rule complies with  
16 the District Court's ruling in the ISDA position limits  
17 litigation that the Commission must decide whether  
18 Section 4(a) of the CEA mandates the CFTC set new  
19 limits or only permits the CFTC to set such limits  
20 pursuant to a necessity finding. As the District Court  
21 noted, "The Dodd-Frank amendments do not constitute a  
22 clear and unambiguous mandate to set position limits."

1 I agree with the rule's determination that, when read  
2 together, paragraphs 1 and 2 of Section 4(a) demand a  
3 necessity finding.

4           As I said during the proposal's  
5 consideration, the language in Paragraph 1 of this  
6 subsection, which is 4(a)(a)(2)(A), refers directly --  
7 in fact, almost verbatim -- to legislation passed in  
8 1936, in which Congress directed the CFTC's precursor  
9 to make a necessity finding before imposing position  
10 limits. The Congressional report accompanying the CEA  
11 from the 74th Congress includes the following  
12 directive: "Section 4(a) of the CEA gives the  
13 Commodity Exchange Commission, the precursor agency,  
14 the power, after due notice and opportunity for hearing  
15 and a finding of a burden on interstate commerce caused  
16 by such speculation, to fix and proclaim limits on  
17 futures trading." In its ISDA opinion, the District  
18 Court noted the following: "This text clearly  
19 indicated that Congress intended for the CFTC to make a  
20 'finding of a burden on interstate commerce caused by  
21 such speculation' prior to enacting position limits."

22           If Congress intended that the Commission

1 impose position limits on all physical commodity  
2 derivatives, there is little reason it would have  
3 referred to paragraph 1 and the Commission's long  
4 established practice of necessity findings. Instead,  
5 the plain reading of the deliberate word choices by  
6 Congress intended to focus the Commission's attention  
7 on whether additional position limits should be  
8 considered for a broader set of contracts than the  
9 legacy agricultural contracts, which is exactly what  
10 the Commission is doing today.

11           The rule also determines that position limits  
12 are necessary to diminish, eliminate, or prevent the  
13 burden on interstate commerce posed by unreasonable or  
14 unwarranted price moves that are attributable to  
15 excessive speculation in 25 referenced commodity  
16 markets, each of which play a crucial role in the U.S.  
17 economy. Conditionally and conversely, the rule also  
18 explicitly states that the contracts on which the  
19 referenced limits are placed are the only contracts  
20 which met the necessity finding. It says that no other  
21 contracts met the necessity test, and position limits  
22 on them are therefore unnecessary.

1           I am aware that there is significant  
2 skepticism in the marketplace and among academics as to  
3 whether position limits are an appropriate tool to  
4 guard against extraordinary price movements caused by  
5 extraordinarily large position sizes. Some argue there  
6 is no evidence that excessive speculation currently  
7 exists in U.S. derivatives markets. Others believe  
8 that large and sudden price fluctuations are not caused  
9 by hyper-speculation but rather by market participants'  
10 interpretations of supply and demand fundamentals, some  
11 of which can swing rapidly. In contrast, still others  
12 believe that outsized speculative positions, however  
13 defined, may aggravate price volatility, leading to  
14 price run-ups or declines that are not fully supported  
15 by market fundamentals.

16           In my opinion, one thing is predominately  
17 clear: position limits should not be viewed as a means  
18 to counteract long-term directional price moves. The  
19 CFTC is not a price-setting agency and we should not  
20 impede the market from reflecting long-term supply and  
21 demand fundamentals. A case in point is palladium, the  
22 physically-settled contract which has seen the largest



1 sustained price increase recently, over the last two  
2 years, and which has also seen its exchange-set  
3 position limit decline four times since 2014 to what is  
4 now the smallest limit of any contract in the  
5 referenced contract set. Nevertheless, between the  
6 start of 2018 and the end of 2019, palladium futures  
7 rose 76 percent. Taking these conflicting views and  
8 facts into account, it is clear the Commission  
9 correctly stated in its 2013 proposal that "there is a  
10 demonstrable lack of consensus in the academic studies"  
11 as to the effectiveness of position limits.

12           With that healthy dose of skepticism in mind,  
13 and in strict accordance with the balance of factors  
14 which Dodd-Frank added to the CEA for the Commission to  
15 consider, I think the rule appropriately focuses on the  
16 time period and contract type where position limits can  
17 have the most positive, and the least negative, impact,  
18 the spot month of physically-settled contracts, while  
19 also calibrating those limits to function as just one  
20 of many tools in the Commission's regulatory toolbox  
21 that can be used to promote credible, well-functioning  
22 derivatives and cash commodity markets.

1           Let me actually transition from there to a  
2 few concrete questions that I would like to ask the  
3 staff. I think some of these did come up in the  
4 presentations. I think I have maybe a slightly more  
5 detailed question than what was addressed, or maybe  
6 just a request to repeat some of the information that  
7 was already provided.

8           The first involves the possibility of  
9 changing the limits in the future. Could the staff  
10 explain why it recommends that the Commission not  
11 commit to reconsidering the limit levels on a regular  
12 basis going forward in light of market developments,  
13 such as changes in estimated deliverable supply and new  
14 open interest data, given how long it has been since  
15 this was done? I think there is a cost and a benefit  
16 to doing that. We shouldn't be doing it too  
17 frequently, but at some point it may be a good idea.

18           But if I could just get some thinking there  
19 from the staff on that process and how it foresees the  
20 need for a future Commission to revisit this.

21           MR. BENTON: Thank you for your question,  
22 Commissioner. This is Steve Benton.

1           To answer your question, it makes more sense  
2 for CFTC and exchanges to retain some flexibility when  
3 it comes to when there's a need to adjust the limits.  
4 Estimated deliverable supplies is the key metric that  
5 we use to determine the spot month limit, and a pre-  
6 determined schedule may not coincide with changes that  
7 we see in estimated deliverable supplies or changes  
8 that we note in the market itself and the trading.

9           The Commission's Regulation 150.2(f) will  
10 provide flexibility and authority for the Commission to  
11 request an update of estimated deliverable supplies  
12 from one or more exchanges on one or more commodities  
13 at a particular time.

14           In addition, exchanges retain the flexibility  
15 to adjust their exchange-set position limits so long as  
16 they are not higher than the Commission's federal  
17 limit. Changes to the Commission's limits would  
18 require a rulemaking process, which includes a proposal  
19 and a comment period and a final rule. The Commission  
20 simply asking for an update of estimated deliverable  
21 supply does not mean there will be a change in the  
22 final rule or a federal position on that rule, on

1 150.2, but at least we're looking at it.

2           COMMISSIONER QUINTENZ: Okay. Thank you very  
3 much for that. That was a very comprehensive answer.  
4 I appreciate that. I think a lot of the things you  
5 said there, especially about requiring a follow-on  
6 rulemaking, are important.

7           In terms of the use of the estimated  
8 deliverable supply data, could I hear an explanation as  
9 to why staff believes that the estimates of deliverable  
10 supply, if relied upon in recommending the limit levels  
11 to the Commission, are suitable?

12           MR. BENTON: Again, sir, this is Steve  
13 Benton. Thank you for your question.

14           When we reviewed the deliverable supply  
15 estimates for this rulemaking, staff reviewed,  
16 verified, and analyzed each of the estimated  
17 deliverable supply data and the methodologies that the  
18 exchanges provided. In many cases, staff consulted  
19 industry experts to verify that the exchange figures  
20 were reasonable, in addition to our own analysis that  
21 included looking at alternative methodologies  
22 internally on the staff level.

1           Some of the estimates of deliverable supply  
2 figures that the CFTC ultimately relied on had been  
3 refined according to CFTC input and conversations with  
4 the exchanges, and ultimately Commission staff was  
5 comfortable and verified that the estimates of  
6 deliverable supplies were reasonable.

7           COMMISSIONER QUINTENZ: Okay. Thanks again,  
8 Steve. I appreciate that.

9           I'd like to move on to cross-commodity  
10 hedging, if I could. Could I hear an explanation as to  
11 how the cross-commodity enumerated hedge included in  
12 the final rule today differs from the proposal by  
13 taking some concerns from the energy industry into  
14 account?

15           MS. CARDONA: Yes, Commissioner. Unlike in  
16 the proposal, under the final rule, as you indicated,  
17 supported by the market participants in the energy  
18 industry, the enumerated cross-commodity hedge now  
19 permits cross-commodity hedging for both the unfilled  
20 anticipated requirements hedge and the anticipated  
21 merchandising hedge.

22           COMMISSIONER QUINTENZ: Okay, great. Thank

1 you.

2           And this is my last question for this round.  
3 I'd like to focus on a discussion that occurred in the  
4 staff presentation on price risk in the economically  
5 appropriate test. The final rule, like the proposal,  
6 includes a requirement that the hedging exemption be  
7 premised on hedging price risk. The preamble  
8 clarifies, as was described, that things like weather  
9 events or changes in a counterparty's worthiness, for  
10 example, could lead to price risk. I think those were  
11 important concepts to tie together. I feel as though  
12 the prior proposals and market participants may have  
13 been talking past each other a little bit, so I  
14 appreciate the inclusion of that description.

15           But could staff please discuss how price  
16 risk, as evidenced by other such events, could be  
17 hedged under the final rule?

18           MR. HILD: Sir, I'll be happy to take that.  
19 Thank you for the question. This is Harry Hild.

20           Just to kind of level set real quick, the  
21 main qualifier where one could draw the line is to look  
22 for the presence of an underlying cash transaction

1 concerning those different types of price risks.  
2 Commercial participants with cash market transactions  
3 that are subject to risk can utilize hedges in  
4 derivative markets to manage the price risk of that  
5 underlying transaction. Further, to satisfy the  
6 economically appropriate test, a position must  
7 ultimately offset the price risk of an underlying cash  
8 commodity. Non-price risk may also be a consideration  
9 in hedging decisions, and the final rule states that  
10 price risk can be informed and impacted by non-price  
11 risk factors. Yet, price risk from an underlying cash  
12 commodity is required in order to satisfy an  
13 economically appropriate test.

14 COMMISSIONER QUINTENZ: Great. Thanks for  
15 that, Harry.

16 Let me just conclude by saying that perhaps  
17 more than any other area of the CFTC's regulations,  
18 position limits directly affect the participants in  
19 America's real economy. Again, the farmers and the  
20 ranchers, the energy producers, the manufacturers,  
21 merchandisers, transporters, and commercial end users  
22 use these derivatives markets as a risk management tool

1 to support their businesses.

2 I'm pleased that today's final rule takes  
3 into account many of the serious concerns that they  
4 voiced consistently in the rulemaking process that  
5 dates back almost 10 years, and I'm very pleased to  
6 support this today.

7 With that, Mr. Chairman, I'll yield back.  
8 Thank you.

9 CHAIRMAN TARBERT: Thank you very much,  
10 Commissioner Quintenz.

11 Commissioner Behnam?

12 COMMISSIONER BEHNAM: Thanks, Mr. Chairman.  
13 I appreciate the time to ask some questions. And  
14 again, thanks to the team, all of you, for your work  
15 and Dorothy for your leadership, and certainly the  
16 other divisions -- OGC, OCE -- for your work in putting  
17 this together. Despite not supporting this rule, I  
18 certainly meant what I said in my opening statement.  
19 I've been around this rule since 2011, and knowing its  
20 history and the predecessor policy around position  
21 limits, there's a lot of differences and a lot of  
22 vested interests and a lot of different positions



1 managed from a policy perspective to get to where we  
2 are today.

3           With that, I do want to commend all of you  
4 and thank you for all of your work.

5           Mr. Chairman, I also want to thank you for  
6 your comments about engagement. Obviously, from my  
7 perspective, that's the most important responsibility  
8 we have as Commissioners. We are bipartisan. We aim  
9 to be collegial and work together and find consensus  
10 and let the friction of our differences produce better  
11 outcomes, and I think more often than not we're able to  
12 do that. But, unfortunately, sometimes we can't. But  
13 I think it demonstrates that we care deeply about our  
14 positions and we want to share our views and our  
15 opinions and do what we can to advocate as best we can  
16 so that the Commission can do its job better.

17           I do want to ask a number of questions, and  
18 I'll kind of split them up for the first and second  
19 round, but I want to start with the WTI event.

20           Mr. Chairman, you mentioned this in closing  
21 in your statement. I appreciate your point of view,  
22 but thinking about the position limits regime, thinking

1 about the law that was created and the circumstances  
2 that really, I think, created it, if you think about  
3 the commodity crisis and the commodity bubble that we  
4 experienced in the first decade of this century and  
5 closer to 2008, obviously, what we experienced in the  
6 April-May period was very different. Prices were  
7 falling sharply, and they were falling sharply because  
8 of a combination of events obviously related to COVID  
9 and the economic circumstances that we were going  
10 through, particularly at that time, and certainly some  
11 market dynamics which I hope the team that is  
12 conducting the research will be able to unpack and  
13 share with us soon.

14           But recalling very vividly the advocate about  
15 this policy and whether or not position limits and  
16 speculative position limits needed to be implemented,  
17 the full gamut of the constituency was sharing their  
18 views about what speculative limits would do for  
19 commodity prices, how excessive speculation led to  
20 excessive prices, and what that meant for the end user  
21 community and obviously for the country and our ability  
22 to purchase goods and fuel and any other number of

1 commodities that we use on a day-to-day basis.

2           Although we're in a very different situation  
3 with respect to the WTI event, it still, I think -- we  
4 should focus on the reality of what happened, at least  
5 potentially what happened. I don't want to make any  
6 conclusions, but when you have that kind of drastic  
7 move, it could potentially affect the end user  
8 community from being able to hedge risk and also  
9 discover prices, which is our core function as a  
10 market.

11           So I just want to focus on that particular  
12 instance, and I think within the context of this  
13 rulemaking and what we've been through over the past  
14 decade, I certainly appreciate the desire to just move  
15 forward and get this done. But if I look at this rule  
16 in many respects, notwithstanding the obvious changes  
17 around the edges, a lot of what's happening and a  
18 little bit of status quo, we're obviously deferring to  
19 the exchanges. I mentioned that in my opening  
20 statement. I mentioned that in my original dissent  
21 from January and in my larger dissent today.

22           But if we are going to be able to find

1 something or there are some issues or policy matters  
2 that are going to be exposed or revealed from the  
3 events in the April-May period, then I think it's  
4 certainly worth waiting, and I think those are the  
5 types of events that end users would care about.  
6 Certainly, if certain non-end user speculators are  
7 driving prices up or down outside the scope of what the  
8 real economy and true market forces are determining.

9           With that, the preamble points out, and I'm  
10 going to quote, "The Commission has been closely  
11 examining the circumstances surrounding the volatility  
12 of the WTI contract since it occurred in April 2020."

13           Dorothy, I don't know if this is for you or  
14 someone on the staff, but if you could just give us a  
15 little bit of an update on the state of play and what  
16 we should expect, but not substantively. I don't want  
17 to get ahead of ourselves, obviously, but the Chairman  
18 mentioned that we're going through a little bit of a  
19 peer review process now, and I think it would be  
20 helpful for me and the public writ large to understand  
21 where we are and what we might expect, when we might  
22 expect it, hopefully in the near future.

1 I think you're on mute, Dorothy.

2 MS. DEWITT: Thank you, Commissioner.

3 Certainly, as you know, we've circulated internally a  
4 timeline to get to finish. But for the purposes of  
5 this meeting and the public, what I would say is that  
6 this is important. We want to get it right. This was  
7 a significant event in the marketplace, in this  
8 particular marketplace, in the context of quite a bit  
9 of volatility and market movement caused by COVID-19.

10 We are doing an interdivisional,  
11 interdepartmental peer review, and we'll proceed with  
12 the consideration, drafting, and analysis apace to meet  
13 what the Chairman has committed publicly previously,  
14 which is finalization to the public by the end of the  
15 fall.

16 COMMISSIONER BEHNAM: Thanks, Dorothy. And a  
17 quick follow-up. I think I made this observation. I  
18 didn't read all of the comment letters word for word,  
19 but if you can help me, there were a number of  
20 commenters who either requested or acknowledged the  
21 event and suggested that we take into consideration  
22 what happened as we consider the final rule. Is that

1 right?

2 MS. DEWITT: There was one that talked about  
3 it specifically, but I'm going to turn to my team to  
4 make sure we're giving you an accurate answer.

5 MR. HAIDAR: Thank you, Dorothy. Thank you,  
6 Commissioner Behnam. This is Steve Haidar.

7 That's right. There were commenters that  
8 made that comment, yes.

9 COMMISSIONER BEHNAM: Okay. We'll leave it  
10 there, but for the record it's worth noting that there  
11 was some interest from the public to have a more  
12 conclusive view of the events before we move forward.

13 If I can move to aggregation, and  
14 specifically 4a(a)(6) and 4a(a)(7). I know this was  
15 discussed in the presentation. I appreciate it. Let  
16 me just dig into this a little bit more.

17 And correct me if I'm wrong, and I'm  
18 generalizing, but I want to make this easy for the  
19 audience and the public to understand it, and also to  
20 have a conversation. We're certainly deferring a lot  
21 to the exchanges to oversee the limits regime, and this  
22 was mentioned, I think, at least in part, like I said,

1 how are we going to be able to really appropriately  
2 execute the aggregation requirement within Section 4 if  
3 we're not doing more hands-on, taking on more of a  
4 hands-on responsibility, as opposed to the exchanges,  
5 given their role, given their lack of data in certain  
6 parts of the OTC market and their inability to  
7 aggregate positions across multiple markets within the  
8 context of a single market participant or multiple  
9 market participants within a single holding company or  
10 family?

11 MR. HAIDAR: Commissioner Behnam, this is  
12 Steven Haidar. I also invite any other of my team  
13 members to add anything.

14 I think there are a couple of sub-questions.  
15 The first is that you mentioned OTC markets, generally  
16 referring to, if I understand the spirit of your  
17 question correctly, OTC swap markets. And then there's  
18 also aggregation for exchange-traded futures. So I  
19 will address the OTC swaps question first.

20 First and foremost, I just want to emphasize  
21 that for the purposes of federal limits, the Commission  
22 will, after the two-year compliance period for

1 economically equivalent swaps, will monitor and enforce  
2 the OTC swaps markets, as well as other market  
3 participants' exchange-traded positions for the purpose  
4 of compliance and enforcing federal positions. So  
5 first and foremost, it's going to be an effort led by  
6 the Commission.

7           This effort will additionally be supported  
8 and informed by additional information and insight the  
9 Commission will build upon by the issuance of the  
10 recent swap data reporting rules.

11           So the Commission, I think, has developed in  
12 the past 10 years great insight into the OTC swaps  
13 market and will continue developing insight into the  
14 OTC swaps market by virtue of recent rulemakings.

15           So first and foremost, the Commission will be  
16 looking at the disaggregated OTC issue. We do mention  
17 in the preamble that because of the issues that you've  
18 identified today, that we're not going to require  
19 exchanges just yet to start looking into the OTC swaps  
20 market. Of course, if they have that ability they can  
21 do that. And then we will revisit this issue in two  
22 years when the compliance period for economically



1 equivalent swaps is over.

2           The second issue, I think, when you're  
3 talking about position aggregation, we can discuss in  
4 the context of exchange-traded futures and options on  
5 futures, and to an extent that's already occurring  
6 right now. With natural gas, you have positions on  
7 various exchanges, and we do understand that there is  
8 at least informal, if not formal, lines of  
9 communication between and among exchanges.

10           But again, most importantly, we have the gold  
11 standard in terms of our enforcement and surveillance  
12 staff that at the federal level monitors those  
13 aggregate positions, in addition to and supplemented by  
14 and working with our partners at the exchanges. We  
15 anticipate that that will continue to go forward, and  
16 it's not necessarily, especially with exchange-traded  
17 futures and options, it's not necessarily a change from  
18 the status quo. It's just an extension of the current  
19 partnership from the nine legacy agricultural contracts  
20 to now 16 new additional contracts under federal  
21 position limits.

22           COMMISSIONER BEHNAM: Thanks, Steven. That's

1 helpful, and I'm glad we have that sort of vision and  
2 plan over the course of the two years. There's  
3 certainly a lot of work to do, a lot of assumptions,  
4 but I think we can get there with respect to the  
5 reporting rule, which I know is fresh but a lot of  
6 moving parts.

7 I think one of the core very clear mandates  
8 from the legislative requirement, from the statutory  
9 requirement, is the aggregation policy and practice.  
10 In order for us to do this and fulfill that  
11 responsibility well and appropriately, I think we're  
12 going to have to have, in my view, a more proactive  
13 role than I think this rule suggests. So I look  
14 forward to working with you as that sort of plan and  
15 process is developed over the next two years and as we  
16 continue to engage with the exchanges.

17 On that note, with regard to 4a(a)(6), I do  
18 want to ask about natural gas, which was also mentioned  
19 I think in the presentations, specifically the  
20 exemption under 4a(a)(7). I see Rob Schwartz, and I  
21 don't want to pick on you just because you're the only  
22 one I see, but I think this might be a question for OGC

1 or someone from DMO to give a response to this.

2 But the legal authority under 4a(a)(7) to  
3 provide this exemption, do we have that? Obviously,  
4 the Commission believes we have this authority, and I'd  
5 like to just hear a little bit more specifically about  
6 the conversations or the deliberations that may or may  
7 not have happened regarding 4a(a)(7) with respect to  
8 the natural gas exemption.

9 MR. SCHWARTZ: Thank you, Commissioner. I  
10 think maybe Dan Davis is the right one to answer this  
11 one.

12 COMMISSIONER BEHNAM: Perfectly fine.  
13 Thanks, Rob.

14 MR. DAVIS: Good afternoon, Commissioner  
15 Behnam. On aggregation, I think we spell it out in the  
16 preamble. But the simple notion is that we think that  
17 this is within the agency's authority, in thinking  
18 about aggregation, to evaluate the aggregation limits.

19 COMMISSIONER BEHNAM: Okay. And there was no  
20 conflict in your deliberations between what the statute  
21 requires versus -- the rules that we were making within  
22 the context of the statute and what Congress required

1 us to do with respect to aggregation?

2 MR. DAVIS: I guess maybe I don't understand  
3 the question. I mean, I don't want to go too deeply  
4 into the internal deliberations of the agency, but I  
5 can say at a high level we did look at 4a(a)(7). We  
6 looked at our exemption authority. We looked at what  
7 the staff recommended here, and it did appear to us  
8 that the actions that DMO was taking and the staff is  
9 recommending in its rule is within the agency's  
10 authority within 4a(a)(7).

11 COMMISSIONER BEHNAM: Okay. Thanks, Dan. I  
12 appreciate that.

13 Mr. Chairman, I think I'm going to reserve  
14 the remaining questions I have for the second round.  
15 So I will throw it back to you. Thanks.

16 CHAIRMAN TARBERT: Commissioner Behnam, thank  
17 you so much.

18 Commissioner Stump?

19 COMMISSIONER STUMP: Thank you, Mr. Chairman.

20 With all that has transpired in our country  
21 and in our lives over the past year, it seems like ages  
22 ago that we were gathered together to consider

1 proposing position limit amendments that we're now  
2 considering finalizing today. That was actually only a  
3 few months ago, back in January.

4           Rachel, I think, in opening this discussion,  
5 analogized that process to that of a marathon, and I  
6 just want to say to the team that's worked on this,  
7 some of you may feel as though you've run this race  
8 many times over. And I genuinely wish to thank you for  
9 allowing me to cross-train with you both last winter  
10 and this summer when we had several detailed sessions,  
11 each lasting more than two to three hours. I very much  
12 appreciate the time you guys invested in addressing  
13 concerns I had, as well as hearing me out on things we  
14 couldn't come to terms on. I think you all have  
15 handled this remarkably well, and I'm hopeful that  
16 we're nearing the finish line.

17           And with that, I'll turn to my questions.

18           I assume that most of the folks listening  
19 today are familiar with the proposed rule that we  
20 issued. So I'd like to spend my time asking about some  
21 of the issues that were raised by the commenters and  
22 how they were addressed, and what changes were made in

1 the rulemaking before us today.

2           There was some consternation back when we  
3 issued the proposal about the fact that the enumerated  
4 bona fide hedge recognitions were set out in an  
5 appendix. This created a little bit of anxiety that  
6 their status was that of acceptable practices, and that  
7 market participants might not be able to count on these  
8 hedge recognitions.

9           I see that the final rule maintains this  
10 appendix, and I was hoping that you guys could explain  
11 how the approach in the final rule has changed from the  
12 proposal, and how maybe it addresses this concern.

13           MS. CARDONA: Commissioner Stump, this is  
14 Lillian. Thank you for raising this nuanced but really  
15 important point.

16           Although the enumerated hedges are set out in  
17 Appendix A to Part 150, the enumerated bona fide hedges  
18 are specifically incorporated by reference into the  
19 regulatory text in Section 150.3. So that's a slight  
20 change from the proposal, as you indicated, where they  
21 were set out as more acceptable practice.

22           So with this amendment in the final rule, the

1 enumerated hedges in Appendix A are binding. In  
2 effect, those hedging practices that qualify as  
3 enumerated bona fide hedges and are included in  
4 Appendix A to Part 150 are self-effectuating, which my  
5 colleague Jeanette Curtis has walked through in her  
6 opening remarks.

7           The important thing about the enumerated  
8 hedges is that no CFTC approval is required with  
9 respect to federal position limits, although, as you  
10 know, the trader must still obtain an exemption from  
11 the exchange with respect to the exchange-set limits.

12           COMMISSIONER STUMP: Thank you, thank you.

13           So, turning now to something that others have  
14 discussed but I think is worth reiterating, Lillian and  
15 Harry both discussed unfixed price transactions, and I  
16 just want to walk through what we do today, what we're  
17 thinking about, and how things have changed, or how  
18 they may not have changed.

19           Hedges of offsetting unfixed price cash  
20 commodity sales and purchases have historically been  
21 recognized as enumerated bona fide hedges under our  
22 rules, as they are in this rulemaking. These are

1 hedges of risk where a market participant has both  
2 bought and sold the underlying cash commodity at  
3 unfixed prices. And many commenters requested that the  
4 final rule expand this enumerated bona fide hedge to  
5 include situations where one leg, but not both, is an  
6 unfixed price contract, or that such a situation be  
7 added as an independent enumerated bona fide hedge.

8 I see that the final rule has done neither,  
9 and I was hoping that you could explain why, and how we  
10 expect such hedging practices to qualify as enumerated  
11 bona fide hedges.

12 MR. HILD: This is Harry, Commissioner.  
13 Thank you for the question.

14 The final rule clarifies that with respect to  
15 any unfixed price forward cash transaction, the  
16 commercial market participants may qualify for one of  
17 those three enumerated hedges, and the qualifier is  
18 that the market participant must demonstrate that they  
19 meet the threshold of what it takes to qualify for  
20 commercial market participants, and they're availed  
21 essentially any flavor of unfixed price transaction  
22 that they wish to use the markets to hedge. So it kind



1 of makes the special treatment in the categorization,  
2 the unfixed price category, in and of itself standing  
3 alone kind of unnecessary.

4           Back to what was mentioned maybe in the  
5 questions earlier, some of the complications between  
6 the different types of cash markets, and that we were  
7 rolling this rule out to 25 markets rather than  
8 obviously the previous agricultural of nine, there were  
9 a lot of intricacies among the different cash markets,  
10 how they operate, the different level of sophistication  
11 of the different types of participants in these  
12 markets.

13           But one of the other things that we really  
14 pointed to among the cash markets was the delivery  
15 styles. The spot periods are all different in times  
16 and lengths, delivery happens differently, so there was  
17 kind of a focus on convergence. So coming up with a  
18 one-size-fits-all solution for the unfixed price  
19 category was daunting, so we thought we would simplify  
20 it by qualifying it by, more or less, the commercial  
21 status.

22           That's what I have for that.

1                   COMMISSIONER STUMP: That's very helpful. So  
2 the participant qualification is going to be spelled  
3 out in the preamble of this final rule; is that  
4 correct?

5                   MR. HILD: Yes, that's right.

6                   COMMISSIONER STUMP: Great. I also want to  
7 talk about something that the Chairman mentioned in  
8 that this rulemaking talks about bona fide hedge  
9 treatment for pass-through swaps entered into by pass-  
10 through swap counterparties, which will generally be  
11 swap dealers. But swap dealers did raise some  
12 practical concerns when they commented as to how they  
13 would be expected to satisfy the proposed requirement  
14 that they demonstrate, upon request, that they are  
15 eligible for bona fide hedge treatment, because an  
16 offsetting position results from a bona fide hedge  
17 pass-through swap by their counterparty, the  
18 counterparty being the hedging entity.

19                   Accordingly, I think the final rule provides  
20 that in order for a swap dealer to treat a pass-through  
21 swap as a bona fide hedge, it must receive from its  
22 counterparty a written representation that the pass-

1 through swap qualifies as a bona fide hedge, and then  
2 the dealer can rely in good faith on that written  
3 representation.

4 I just would like for you all to clarify that  
5 that is, in fact, the case.

6 MS. CARDONA: Can you guys hear me? Can you  
7 hear me?

8 COMMISSIONER STUMP: Hi, Lillian. I can hear  
9 you now.

10 MS. CARDONA: Thank you, Commissioner Stump.  
11 Yes, as I mentioned, the final rule agrees that it is  
12 the dealer's counterparty, the bona fide hedger, would  
13 be the suitable party to determine that bona fide  
14 hedging status of the pass-through swap. So, as you  
15 mentioned, the final rule does provide that pass-  
16 through swap dealer can rely -- must receive from its  
17 counterparty a written representation that the pass-  
18 through swap qualifies as a bona fide hedge. But as  
19 you pointed out, the swap dealer can rely in good faith  
20 on that written representation, and, of course, unless  
21 it has some sort of information that would cause the  
22 reasonable person to question the accuracy of their

1 representation.

2 COMMISSIONER STUMP: Right, thank you. I do  
3 believe that's a more practical outcome, and I  
4 appreciate that. So thank you for clarifying.

5 I think this discussion is probably for  
6 Jeanette. You may recall, Jeanette, that I had some  
7 reservations about the so-called 10/2-day process for  
8 Commission review of applications requesting non-  
9 enumerated bona fide hedge exemptions. When we issued  
10 the proposal, I expressed concern that the 10/2-day  
11 review period was both too long for traders that needed  
12 to hedge and too short for the Commission to undertake  
13 a complete review.

14 I'd just be curious to know what the  
15 commenters said in regard to the 10-day/2-day process.

16 (Pause.)

17 COMMISSIONER STUMP: Sorry, I can't hear you.

18 MS. CURTIS: Can you hear me now?

19 COMMISSIONER STUMP: Yes.

20 MS. CURTIS: Okay, perfect. Thank you,  
21 Commissioner Stump. Yes, this is Jeanette.

22 So, there were comments submitted that

1 expressed the view that the Commission's review period  
2 was too long, and there were also comments submitted  
3 that expressed the view that the Commission's review  
4 period was too short, although I will say that  
5 generally both commenters were supportive of the  
6 overall process.

7 COMMISSIONER STUMP: Great, great. And I  
8 think that's a reasonable outcome. I'm happy that  
9 we're moving forward.

10 I'm also pleased that you pointed out earlier  
11 that the final rule will allow a trader who requests a  
12 non-enumerated bona fide hedge that's approved by the  
13 exchange to rely upon that approval and, in fact,  
14 exceed federal position limits during the Commission's  
15 10- or 2-day review process. I do believe that while  
16 not perfect, because that does involve some risk to the  
17 trader that we might disagree with the exchange, I do  
18 think that 10 days is an awfully long time for someone  
19 who has a hedging need to have to wait. So they can  
20 now have the option of exercising that approval from  
21 the exchange during that 10-day review period, and I  
22 think this is a change that some commenters had

1 requested. So I appreciate that you've already walked  
2 through that. I won't ask you to do it again, but I do  
3 think that it is an improvement.

4           And then one question, shifting again. I  
5 believe Commissioner Behnam brought up natural gas.  
6 Obviously, the way we have historically treated natural  
7 gas is somewhat different from the other commodities.  
8 So I just want to walk through my understanding of what  
9 we are allowing for natural gas and, frankly, what has  
10 changed in the rule from its proposed stage to this  
11 final stage, just to ensure that I have it correct and  
12 for the benefit of the public.

13           So today, exchange-set position limits for  
14 natural gas are 1,000 for the NYMEX physically-  
15 delivered contract and 1,000 each for the three cash-  
16 settled contracts listed on NYMEX, ICE, and Nodal.  
17 This yields a total of 4,000 contracts in the spot  
18 month: 1,000 physically delivered and 3,000 cash  
19 settled.

20           By contrast, the proposal set federal limits  
21 in the spot period for natural gas for 2,000 for NYMEX  
22 physically-delivered contracts and 2,000 total for the

1 three cash-settled contracts listed on NYMEX, ICE, and  
2 Nodal. This would have yielded the same 4,000  
3 contracts in the spot month as we have today, although  
4 they would have been allocated 2,000 physically  
5 delivered and 2,000 total cash settled.

6 So the total limit for the three cash-settled  
7 contracts actually would have gone down, from 3,000 to  
8 2,000 contracts under the proposal. And several  
9 commenters expressed concern with this result, and I  
10 was just hoping you guys could walk through how we have  
11 corrected that problem.

12 MR. JUNG: Thank you, Commissioner. This is  
13 Chang Jung. Your understanding is exactly correct. We  
14 did receive, as you noted, several comments that  
15 objected to the proposal. And as I noted in the  
16 opening remarks, we are making some changes to that.

17 Specifically, in the final rule the federal  
18 spot month position limit for natural gas contracts  
19 will be 2,000 contracts for the physically-settled  
20 natural gas contracts and 2,000 contracts for cash-  
21 settled contracts that apply separately at each  
22 exchange that lists a cash-settled natural gas

1 contract. Currently there are three such exchanges, as  
2 you noted -- NYMEX, ICE, and Nodal. As a result,  
3 market participants will be able to hold up to 8,000  
4 exchange-listed natural gas contracts, again 2,000  
5 physically-settled and 6,000 cash-settled contracts.

6 In addition, we also note that market  
7 participants will also be able to hold an additional  
8 2,000 cash-settled economically equivalent natural gas  
9 swaps from the OTC swaps markets. We have several ways  
10 of doing this. As you noted, this approach recognizes  
11 the commenters, and also this approach recognizes the  
12 unique nature of the natural gas markets in that there  
13 is significant liquidity in the cash-settled natural  
14 gas contract across multiple exchanges, which is  
15 frankly very different from the other contracts.

16 I think this also touches upon a point that  
17 was made by Commissioner Behnam. We are using the  
18 authority provided to us under the Dodd-Frank Act,  
19 under 4a(a)(7), to adopt this disaggregated approach to  
20 position limit levels just for the cash-settled natural  
21 gas contracts.

22 COMMISSIONER STUMP: Thank you, Chang. As a



1 follow-up question, I just want to clarify, is it fair  
2 to say that although the limit levels differ, the final  
3 rulemaking essentially adopts the same position limit  
4 framework for natural gas that exists today under the  
5 exchange-set limit regime?

6 MR. JUNG: Yes, Commissioner. This framework  
7 for natural gas is taken from the existing exchange-set  
8 framework, which has been in place for a number of  
9 years and which appears to have worked well based on  
10 our observations of that market.

11 COMMISSIONER STUMP: Thank you.

12 I will conclude my first round of questions  
13 with that. Again, thanks to the team. I very much  
14 appreciate your attention to all of these details.

15 CHAIRMAN TARBERT: Thank you very much,  
16 Commissioner Stump.

17 Before we move to Commissioner Berkovitz, I  
18 just want to make a quick announcement, and that is  
19 that to reduce the amount of feedback that we hear  
20 during this open meeting, if a Commissioner asks a  
21 question, when there's a response from staff, if the  
22 Commissioner could mute his or her line, that will

1 reduce the feedback while the staff is answering the  
2 question, and then unmute it to jump back in. And I  
3 would ask that staff do the same thing. So everyone  
4 who is not talking should have their line muted, if at  
5 all possible.

6 With that, I will pass it on to Commissioner  
7 Berkovitz.

8 COMMISSIONER BERKOVITZ: Thank you, Mr.  
9 Chairman. And if I may just ask a technical question  
10 on that, does it make a difference whether I mute my  
11 phone or use this mute button on the screen to mute it  
12 through my computer? Can I mute either one?

13 CHAIRMAN TARBERT: I don't believe it makes a  
14 difference. I myself have been muting my phone just  
15 because it's easier for me.

16 COMMISSIONER BERKOVITZ: I will try to do  
17 that. Thank you.

18 I've got several questions. I'd like to  
19 begin with the Office of General Counsel, either Dan  
20 Davis or Rob Schwartz. There was a discussion at the  
21 meeting we had on the proposed rule about the necessity  
22 finding and the scope of the Commission's

1 interpretation on when the necessity finding is  
2 necessary. In the proposed rule, at our open meeting  
3 in that colloquy, OGC gave the view -- and correct me,  
4 OGC, if I misstate this -- OGC provided the view that a  
5 necessity finding was a predicate only for the  
6 Commission's establishment of federal limits, that the  
7 necessity finding was not required for a directive by  
8 the Commission to the exchanges for the exchanges to  
9 establish position limits. Is that a correct statement  
10 of what was in the proposal, and has that carried into  
11 the final rule, that interpretation?

12 MR. SCHWARTZ: Thank you, Commissioner. This  
13 is Rob Schwartz speaking. Thank you for the question.

14 Yes, that's correct. The rule about  
15 exchange-set position limits was established pursuant  
16 to other statutory authority with a more flexible  
17 deferential standard to the Commission.

18 COMMISSIONER BERKOVITZ: And so when we  
19 provide direction to the exchanges not just to do it  
20 but with standards -- that term is used in Section 4,  
21 we can prescribe standards, and a necessity finding is  
22 not required in that respect. Is that correct?

1           MR. SCHWARTZ: That is correct.

2           COMMISSIONER BERKOVITZ: Okay. Thank you for  
3 that clarification.

4           As we discussed in the proposal, I have  
5 concerns about the fundamental interpretation that a  
6 necessity finding is a required predicate for the  
7 federal limits. I won't re-hash that argument here. I  
8 make reference to it in my written statement, as well  
9 as reference to the previous discussion. But I'm glad  
10 to see at least that it only applies with respect to  
11 federal spot limits and it doesn't apply to our  
12 direction to the exchanges. So thank you, Rob, for  
13 that.

14           I'd like to go back and ask the staff  
15 questions about spot month limits. At the risk of  
16 repeating the presentation, Chang Jung, in your  
17 presentation on spot month limits, I thought you had  
18 one of the most cogent and concise explanations for why  
19 we have spot month limits. Sometimes position limits  
20 are criticized that, well, we have rules against  
21 manipulation; why do we need position limits? But  
22 could you just explain again? You mentioned it in your

1 initial presentation, why we have spot month limits in  
2 addition to our rules against manipulation in the spot  
3 month.

4 MR. JUNG: Yes. Thank you for your question,  
5 Commissioner. In the spot month period, we are  
6 concerned about corners and squeezes in the market.

7 COMMISSIONER BERKOVITZ: And I think you  
8 mentioned something about the limits help ensure that  
9 there are insufficient gains from the manipulation to  
10 justify the cost. Is that --

11 MR. JUNG: Yes, that is correct. So with the  
12 -- please go ahead, Commissioner.

13 COMMISSIONER BERKOVITZ: I didn't mean to cut  
14 you off. Go ahead.

15 MR. JUNG: Just agreeing with what you had  
16 noted, specifically the way we had determined spot  
17 month limit levels and setting it specifically at 25  
18 percent or below the estimated deliverable supply, any  
19 economic gains that could result from the market  
20 manipulation would be generally insufficient to justify  
21 the potential cost of effectuating that market  
22 manipulation.

1                   COMMISSIONER BERKOVITZ: Great, thank you. I  
2 think that's a really significant, fundamental point as  
3 to why we have position limits to begin with. Yes, we  
4 have rules against manipulation, and after the fact we  
5 can prosecute manipulations, but that's after the  
6 manipulator has disrupted the market and caused  
7 economic harm to other people, and we have to  
8 investigate and we have to prosecute, and we're all  
9 familiar with the difficulties that we have in actually  
10 litigating manipulation cases and how long they take.

11                   It has taken literally decades to prosecute  
12 manipulation cases. We've had manipulation cases go on  
13 for 20 years. So if we have an effective way to  
14 prevent those harms to begin with, that goes to the  
15 prophylactic measures as well as after the fact work  
16 together to preserve the integrity of the market.  
17 These complementary mechanisms, the prophylactic as  
18 well as the post-event ability to prosecute violations,  
19 have worked pretty well, and that's why our markets  
20 have integrity.

21                   So let me ask the staff, the Chairman  
22 mentioned in one of the statements the netting. I'd

1 like to get into a little discussion on netting. Can  
2 staff explain what netting is and what is the basic  
3 concept of netting in this context?

4 MS. DEWITT: I'm going to turn that over to  
5 Steven Haidar.

6 MR. HAIDAR: Thank you, Dorothy.

7 Thank you, Mr. Berkovitz.

8 So, the concept of netting isn't unique in  
9 this final rule. It's the same as the proposal, and  
10 it's consistent with market practice. As we define  
11 speculative position limits in the final rule, federal  
12 limits apply net long or net short. So you aggregate  
13 or add all of your long positions, and you aggregate  
14 all of your short positions, and in the non-spot months  
15 everything that's on the same side, long or short,  
16 physically settled or cash settled, net together.  
17 During the spot month, federal position limits apply  
18 separately to physically-settled contracts. So you  
19 net, which means you add together both sides, long and  
20 short, for physically-settled positions, and separately  
21 for cash-settled positions. So during a spot month,  
22 physically-settled and cash-settled positions do not

1 net. That means you do not combine them, either to  
2 have them together or to subtract them from one  
3 another. That is consistent with the approach in the  
4 proposal.

5 COMMISSIONER BERKOVITZ: Yes. Thank you,  
6 Steve. And let me reiterate that point that you just  
7 made about why we don't allow netting of physically  
8 settled and cash settled in the spot month, and I'll  
9 read from the preamble of the final rule here.

10 "Allowing the netting of linked physically-  
11 settled and cash-settled contracts during the spot  
12 month would lead to disruptions in the price discovery  
13 function of the core referenced futures contracts or  
14 allow the market participants to manipulate the price  
15 of the core referenced futures contracts. Absent  
16 separate spot month limits for physically-settled and  
17 cash-settled contracts, the spot month position limit  
18 would be rendered ineffective as a participant could  
19 maintain large positions in excess of limits in both  
20 the physically-settled contract and the linked cash-  
21 settled contract, enabling the participant to disrupt  
22 the price discovery function at contract expiration by



1 taking large opposite positions in the physically-  
2 settled four referenced futures and cash-settled  
3 reference contracts, effectively allowing participants  
4 to effect a corner or squeeze.”

5           So basically, netting helps prevent  
6 manipulation. Contracts that are different, if you  
7 permitted them to net, you could do one way to leverage  
8 one contract, to leverage your position in another. Is  
9 that basically the concept here, you’re trying to  
10 prevent that leverage because they’re not identical?

11           MR. HAIDAR: Well, I think in the preamble, I  
12 think that’s a reasonable point. In the preamble I  
13 believe it’s in a footnote. The example we gave is  
14 someone could go during the spot month 100 percent  
15 short in cash settled and 100 percent long in  
16 physically settled, and that would net to zero, and  
17 therefore ostensibly be in compliance with federal  
18 position limits. So I think that’s the primary example  
19 that we use in the preamble, and I’m just repeating  
20 right now on the public record the way we were thinking  
21 about it. So if that’s consistent with your underlying  
22 assumption, then I’ll say yes to what you just said.

1                   COMMISSIONER BERKOVITZ: Thank you, yes. So,  
2 in a number of other places, the preamble also  
3 discusses netting, whether it's permitted or not. For  
4 example, the definition of a referenced contract, what  
5 we define as referenced contract is somewhat dependent  
6 on -- if it's a referenced contract, you can net it;  
7 correct? I mean, referenced contracts are netted with  
8 each other. Is that correct?

9                   MR. HAIDAR: So, referenced contracts are, by  
10 definition, subject to federal limits. And if  
11 something is not subject to federal limits, they're not  
12 a reference contract. And so, yes, you can only net  
13 referenced contracts with one another. Similarly,  
14 you're not required to add non-reference contracts to  
15 reference contracts for purposes of federal limits.  
16 So, yes. So for the question, yes, correct.

17                   COMMISSIONER BERKOVITZ: And only  
18 economically equivalent swaps can be netted, too;  
19 correct?

20                   MR. HAIDAR: Economically equivalent swaps,  
21 not just any swap but the defined term "economically  
22 equivalent swaps" would meet the criteria of that

1 definition, yes, are a type of referenced contract, and  
2 therefore would be, on an adjusted basis, would be  
3 required to be netted with other types of referenced  
4 contracts for purposes of federal position compliance.

5 COMMISSIONER BERKOVITZ: Now, there was a  
6 specific discussion that some commenters wanted to  
7 include commodity index contracts in referenced  
8 contracts. Is it not correct that we have determined  
9 not to include commodity index contracts as referenced  
10 contracts because of the concern that if they were  
11 referenced contracts they could be netted, and  
12 therefore you could have a very long position in a  
13 commodity index contract offset a very long outright  
14 position in futures contracts and net them off?  
15 Basically, that would enable very large positions in  
16 futures contracts. So the netting considerations were  
17 one consideration why commodity index contracts were  
18 not included as referenced contracts. Is that correct?

19 MR. HAIDAR: That was one factor in the  
20 preamble discussion, that is correct.

21 COMMISSIONER BERKOVITZ: Okay. So the  
22 fundamental point, I think, is that whether contracts

1 can be netted or not is really fundamental to this  
2 position limits regime. We've considered what should  
3 be a referenced contract, the definition of  
4 economically equivalent swaps, how to treat commodity  
5 index contracts, and the difference between physically  
6 settled and cash settled. The netting considerations  
7 are all significant considerations on those issues;  
8 correct?

9 MR. HAIDAR: Indeed, that is correct.

10 COMMISSIONER BERKOVITZ: Okay, thank you.

11 So let me turn now to trade at settlement  
12 contract. Could you just describe what a trade at  
13 settlement contract is? We're going to be talking  
14 about it, so I just want to make sure everybody is  
15 aware of what we're talking about here.

16 MS. DEWITT: Yes. Go ahead, Steven.

17 (Pause.)

18 MS. DEWITT: Apologies. This is Dorothy.  
19 We're just back and forth a little bit on the muting,  
20 so forgive us for the blank time.

21 Trade at settlement contract is a contract  
22 whereby someone undertakes to buy or sell futures

1 contracts. For example, I think you're going to WTI  
2 contract here in the questioning, a contract on that  
3 market, and the settlement price at the close of day  
4 will be the price at which it will be settled.  
5 Normally, a trade at settlement contract will be bought  
6 before the settlement. It could be intraday or it  
7 could be long before.

8           COMMISSIONER BERKOVITZ: So if you're long in  
9 a trade at settlement contract, you pay the price with  
10 a contract, and you get the contract -- you pay the  
11 settlement price at the end of the day. If you're  
12 short you receive it, presumably.

13           MS. DEWITT: If you're long you take it, and  
14 if you're short you sell it, and the price is fixed at  
15 the end of the day, the settlement price.

16           COMMISSIONER BERKOVITZ: And does the final  
17 rule address whether trade at settlement contracts can  
18 be netted with the associated futures contract? Can  
19 you net -- with WTI, for example, can you net the TAS  
20 contract in an outright futures long or short contract?

21           MS. DEWITT: There's an exchange rule that  
22 allows intraday netting, and the final rule does not

1 address that. The final rule does not change netting  
2 of the TAS at all. And like the Chairman indicated in  
3 his comments earlier, that's something that can be  
4 addressed in the implementation.

5 COMMISSIONER BERKOVITZ: So this rule has no  
6 limitations or doesn't address the limitations, no  
7 restrictions on netting of trade at settlement. So a  
8 speculator can have an unlimited amount of trade at  
9 settlement contracts and offset those with an unlimited  
10 amount of outrights. We have a spot month limit of,  
11 right now, 3,000 in WTI. It's going to go up to 6,000,  
12 graduated down. I'll just use the current limit just  
13 for ease of discussion. Right now a speculator is  
14 limited to 3,000 long or short. If they have TAS, they  
15 could have 50,000 TAS long and 50,000 short outrights  
16 under the exchange rules, and the federal rules don't  
17 preclude that.

18 MS. DEWITT: The answer to your question is  
19 that the rule does not change it, and that that is an  
20 exchange rule that is limited to intraday.

21 MR. KANE: I have a clarification. TAS is  
22 just an order type. So the contract is still -- it's

1 the same contract. It's just a way of trading out of  
2 the contract or into the contract.

3 MS. DEWITT: Yes, thank you. That's an  
4 important clarification that should be made, and  
5 there's no change in this rule to that order type. If  
6 need be, there can be a change to that. If it's coming  
7 out of our WTI study or otherwise, that can be  
8 addressed in the implementation phases, as the Chairman  
9 indicated earlier.

10 COMMISSIONER BERKOVITZ: So we would not need  
11 a Notice of Rulemaking to address this problem, to  
12 address TAS? I shouldn't say this problem. We'll get  
13 to the problem in a second. But you're saying we could  
14 address it in the implementation phase. Does that mean  
15 we -- what does that mean specifically? We would not  
16 need to go through a Notice of Rulemaking? If we were  
17 to say you can't net or that speculators can't net or  
18 speculators can only net to this extent, or the  
19 exchange must do X subject to our approval of their  
20 rule, could we tell the exchange to develop a rule and  
21 basically engage in a dialogue or work with them on how  
22 to do it without a Notice of Comment and Rulemaking?

1 MS. DEWITT: So, I would answer the question  
2 as best as I can in this way. OGC advises us on notice  
3 and comment obligations consistent with the APA, and we  
4 follow their advice to ensure that we have as robust a  
5 rule in the final version as what we have. What I will  
6 say in connection with TAS and intraday netting in  
7 connection with the WTI contract, which is I think what  
8 I'm hearing, if I'm correct, focused on this line of  
9 questioning, that we need to wait and see and make sure  
10 we understand fully what the results of our study on  
11 April 20th WTI markets are.

12 I will note that we have briefed all the  
13 Commissioners extensively over the past few months on  
14 where we are, and answered questions, but we're not in  
15 a position yet. We need to wait for what will come out  
16 and see whether this is, as you indicated a little bit  
17 earlier, a problem or isn't a problem. I think we  
18 don't want to pre-judge, and I'd be hesitant to walk  
19 through different hypotheticals when we're just not  
20 quite there yet in terms of finalizing a very, very  
21 important report that's subject to not only multi-  
22 divisional peer review but that will have been outlined



1 in sum and substance to the Commissioners in individual  
2 meetings throughout the past number of months and is in  
3 the process of being drafted and will be circulated to  
4 the Commission during the normal process. So I'd be  
5 hesitant to pre-judge on that.

6           It is possible that it won't be a problem.  
7 It is possible it will be a problem. It is possible  
8 that, depending on what comes out of it, there will  
9 need to be notice and comment, or it is possible that  
10 there won't.

11           What I will say is that this rule has been  
12 about 10 years in the making or so. We proposed in  
13 January, which is about nine months ago. April 20th  
14 was about six months ago. So we're a third of the way  
15 into the finalization process that happened. We've  
16 been working diligently to make sure we understand  
17 fully the elements of that, and it is the view of the  
18 staff and certainly of the Chairman, as he indicated,  
19 that this position limit should just move forward and  
20 that we can work with the results of our study and any  
21 needs or problems or not that are identified, and  
22 that's the way I can answer the question.

1                   COMMISSIONER BERKOVITZ: Thank you, and I  
2 appreciate that, and I appreciate the necessity to have  
3 the study on WTI before we devise a solution to  
4 whatever happened, whatever caused April 20th. We  
5 obviously have to act on the basis of the best  
6 available information.

7                   But let me just say a couple of things. One  
8 is that right after the event, the WTI event, there was  
9 enough commentary on what might have caused it, and  
10 this is what we're looking into, and that commentary  
11 pointed to TAS, trade at settlement. And regardless of  
12 what we find on WTI, trade at settlement, the TAS issue  
13 is a known issue, and the netting issue on it was  
14 known.

15                   Now, when we proposed it in January, it might  
16 not have been on the radar screen of anybody, this  
17 particular order type. There were a lot of working  
18 parts in the proposal in January, and I don't think it  
19 would be appropriate to be critical of the staff in  
20 January, or anybody or the Commission. I'm not  
21 criticizing anybody in January for not addressing TAS  
22 in the January proposal.

1           The April 20th event came along, and public  
2 attention and speculation focused on what happened.  
3 One of the things they focused on was TAS. They  
4 focused on TAS not because anyone necessarily knew what  
5 happened, but TAS is a longstanding problem. People  
6 looked at the published information about the order  
7 types and what was going on on that day, and they  
8 highlighted TAS. But what they really did in that was  
9 re-highlighted it for us.

10           We had the netting problem, the netting issue  
11 that we were talking about, that TAS doesn't net -- let  
12 me also just state at the outset that TAS is a valuable  
13 tool in the energy markets for many end users and many  
14 market participants to manage their price risks so they  
15 can get that final price risk. They don't want to  
16 speculate on intraday trading. They want the final  
17 settlement price. TAS is a tool and an order type that  
18 enables them to get the final settlement price. It's  
19 implemented in agricultural markets too because it's  
20 been useful there.

21           But where it's been implemented and how it's  
22 being implemented and when you can use it, it has to

1 satisfy certain conditions of liquidity. You can't  
2 trade it in the spot month in theags, it's only up to  
3 the penultimate day in crude oil. So the exchanges  
4 have recognized that this tool is best used at certain  
5 times, and it's also been abused. Like any of the  
6 contracts, if it's not structured right, if you don't  
7 allow netting, that's why we have netting rules,  
8 because there's significant potential for abuse if you  
9 don't have the appropriate rules that go with it.

10           With TAS, the potential for abuse is well  
11 known. Apart from whether it specifically caused the  
12 events on April 20th, we have had two manipulation  
13 cases on TAS in the past. We had the Optiver case,  
14 where we ended up with a \$1.4 million civil penalty in  
15 Optiver. This is from the CFTC's press release on  
16 Optiver from 2008: "The manipulative scheme involved  
17 trading a significant volume of futures contracts in  
18 the opposite direction of the TAS position before and  
19 after the close of the contract."

20           The Shak case a couple of years later,  
21 specifically on each of the trading days, respondents  
22 established substantial net short positions in WTI

1 futures through what's known as trading at settlement,  
2 contracts that are placed at a daily settlement price.  
3 Next, respondents potentially traded a significant  
4 volume of long futures contracts before and during the  
5 2-minute window referred to as the closing of  
6 settlement period of trading on the contracts that  
7 closed in an effort to improperly influence the  
8 effective price of the WTI futures contract, including  
9 the settlement price of the contract. This strategy of  
10 heavily trading on one side of the market during the  
11 close is commonly known as "banging the close" or  
12 "marking the close."

13           We had two manipulation cases on TAS where  
14 they were doing this, so it's well known. Professor  
15 Craig Pirrong was on EEMAC for a number of years. I've  
16 known Professor Pirrong for many years, and when I  
17 actually first got involved in commodity markets and  
18 CFTC issues and I was trying to understand the law of  
19 manipulation, I called up Professor Pirrong because he  
20 had written some very helpful law review articles. I  
21 had a number of questions, and he really helped me  
22 understand the law of manipulation. And I've always

1 been appreciative of his help to me back in the days  
2 when I was on Senate staff as to the law of  
3 manipulation. He was the foremost national expert on  
4 the law of manipulation. He's been on the EEMAC, as I  
5 stated.

6           Last year he wrote an article; it's available  
7 on the Web. I cited it in my opening statement, if  
8 people want to look at it. He labeled TAS as a type of  
9 derived pricing contract. A derived pricing contract  
10 is where the price of one transaction is used to  
11 determine the price of another. He says, "This article  
12 explores two particular types of derived pricing, trade  
13 at settlement contracts" and another type. And with  
14 respect to derived pricing he says, "Derived pricing  
15 creates the potential for trade-based manipulation  
16 strategies. If the market, using derived pricing,  
17 serves only uninformed traders, whereas the exchange  
18 serves both informed and uninformed traders, the price  
19 impact of trades is smaller in the derived pricing  
20 instrument (than on exchange. This disparity in price  
21 impact allows the manipulator to (inaudible)  
22 accumulating position in the derived pricing market,

1 and then affect the value of that position by trading  
2 in the exchange market.”

3           And he goes on. Section 3 of his article  
4 shows how the existence of TAS markets creates  
5 manipulative opportunities and how such manipulation  
6 affects prices. He is one of the foremost authorities  
7 on this in the country.

8           So TAS is a problem regardless of what we’re  
9 going to find in WTI. Now, we may find the WTI, there  
10 was a problem there. We may find other things. I  
11 don’t want to pre-judge that and state what we’re going  
12 to find before we find anything, but it’s a well-known  
13 problem. It was well-known to us -- we were reminded  
14 of it right after the events of April 20th. So it was  
15 on our radar screen on April 20th. I don’t see why we  
16 didn’t do anything about it, we haven’t done anything  
17 about it, we haven’t been more urgent in getting out  
18 the WTI report to be able to address that significant  
19 problem in this rulemaking.

20           Now, in terms of the event itself, the event  
21 itself was an extremely significant event. I mean, it  
22 was \$10 up to minus \$37 down, back to \$10 up. That

1 kind of V-shaped trading is indicative of some  
2 fundamental problem, either structural problem or a  
3 manipulation, not traditional, without speaking to this  
4 particular event, but that's the classic sign that you  
5 look for. When you see that type of price aberration,  
6 you want to look at, wow, what caused that, and we had  
7 that, and it was one of the most fundamental events in  
8 any of our markets in decades.

9 I was thinking back, when I was back at the  
10 CFTC the first time, the flash crash, the famous flash  
11 crash market, the flash crash event in May 2010; the  
12 event was on May 6th. On May 18th there was a  
13 preliminary report out excluding certain causes, and  
14 September 30th we in the SEC put out a joint report,  
15 and those of us who have worked on joint things know  
16 how even more complicated working jointly to get out a  
17 joint document with another agency is. But we did a  
18 joint report with the SEC on the flash crash in the  
19 span of time that we basically had to analyze the WTI  
20 event.

21 So this is a well-known problem, and the  
22 netting of TAS, the absence of any restrictions on the



1 netting of TAS. We knew about it. We've known about  
2 it since April, and we've known of the need to get the  
3 WTI report done. So I'm just clearly disappointed that  
4 we're not addressing it now.

5           But I am heartened. I'm encouraged by,  
6 Dorothy, your statement, and obviously the Chairman's  
7 statement, that we can address this. There may be ways  
8 to address this without going through a full comment  
9 and notice rulemaking. My concern is we're in the  
10 midst of this notice and comment rulemaking. We took  
11 the bankruptcy rule. The bankruptcy rule was proposed,  
12 that we're working diligently on, bankruptcy was  
13 proposed on April 14th, and in response to comments on  
14 the bankruptcy rule on September 17th we put out a  
15 supplemental proposal because we wanted to get that  
16 rulemaking done and commenters raised some issues.  
17 Commenters on this rulemaking raised the TAS issue, and  
18 if we had to do it in a notice and comment, our  
19 opportunity is gone. But we could have, I believe we  
20 could have.

21           So that's water under the bridge. We didn't.  
22 We're here today. It's not being addressed. But I'm

1 encouraged, Mr. Chairman, that your words about we can  
2 do it, and without necessarily going to full-blown  
3 notice and comment. Obviously, the exchange could  
4 submit a rule to us and we go through the exchange rule  
5 process if the exchange were to submit a rule that we  
6 felt solved the problem. We approve the rule, problem  
7 over, problem solved. That doesn't need an  
8 administrative proceeding by us.

9           Absent that, if we need to take action, then  
10 there's a way to do it without a full-blown rulemaking  
11 so we can get it done quickly, make sure this doesn't  
12 happen, then I'm all for working towards that goal.  
13 But regardless of the procedure that we use from here  
14 on, I'm just committed to working with everybody,  
15 working with the Division of Market Oversight to do it,  
16 because it really is a fundamental issue on market  
17 integrity. We have netting rules. Many types of  
18 contracts are specified in the preamble about when you  
19 can net, when you cannot net. I commend the work  
20 you've done in those instances. A lot of thought was  
21 put into which contracts are in which set, whether you  
22 should allow them to net or not, for the very reason

1 that we're talking about here with TAS. It's just that  
2 the TAS is notably absent from those considerations,  
3 and until we get that aspect within these rules, our  
4 work is not finished.

5 So thank you and I look forward to continuing  
6 to work with everybody. Dorothy, I want to give you an  
7 opportunity to respond to anything I said, this  
8 monologue, a long question, so please feel free to do  
9 so.

10 MS. DEWITT: Sure. I would just close by  
11 saying that we recommend moving forward with this very  
12 significant rule, and we recommend making sure that we  
13 get our study right and that it's reviewed through the  
14 various processes, and that takes a little bit of time,  
15 and we've kept the Commission up to date on where we  
16 are in that time period. I'll just leave it at that.  
17 I appreciate your comments, and we heard them very  
18 clearly.

19 COMMISSIONER BERKOVITZ: Okay, thank you.

20 That ends my first round, and thank you.

21 CHAIRMAN TARBERT: Thank you very much,  
22 Commissioner Berkovitz.

1           We will begin round 2. The only thing I'll  
2 say -- I'm not going to repeat myself, but just to make  
3 clear that this is a monumental undertaking, and this  
4 is double-sided. I care about our environment -- 900  
5 pages, so obviously it covered a tremendous amount of  
6 ground. There are going to be technical issues, I want  
7 to make that clear, where we're going to have to  
8 interpret.

9           So I would say that just because we didn't  
10 say anything about something doesn't mean it's  
11 permissible or impermissible. I think that's up to us  
12 to render an interpretation down the line, and we may  
13 be informed by our studies on various things as to how  
14 we might go ahead and interpret these things as we  
15 implement it over the next couple of years.

16           So while this is, again, the end of an  
17 arduous journey, that doesn't mean we're not going to  
18 do position limits. No. Now we've got to implement  
19 the thing, and there will be a number of questions  
20 raised in implementation. So it's going to require  
21 continued work down the line, but having this framework  
22 in place I think is absolutely critical to us moving

1 forward, and more importantly for all of the end users  
2 out there in agriculture, energy, et cetera, to know  
3 that we now have a framework in place.

4 I think everyone has asked such tremendous  
5 questions during the first round that I don't think I  
6 have any further questions, except for one, actually.  
7 I think one of the benefits that I saw, while we're  
8 going to move pretty quickly to implement it but at the  
9 same time provide some phase-in period -- obviously,  
10 January of 2022, and then finally for the swaps January  
11 of 2023 -- but some of it I would actually ask of the  
12 DMO if you could remind me which parts will actually go  
13 effective within 60 days of the rule itself, just  
14 because I think people out there may want to hear that.

15 Is there anything in this thing that is  
16 beneficial to our producers, manufacturers,  
17 agricultural community that they can actually take  
18 advantage of before 2022?

19 MR. HAIDAR: Mr. Chairman, this is Steve  
20 Haidar. Can you hear me?

21 CHAIRMAN TARBERT: Loud and clear.

22 MR. HAIDAR: Thank you, Mr. Chairman.

1           So, the effective date -- and first let me  
2 dispense with the legal formalities. The effective  
3 date of the entire rule is 60 days after publication in  
4 the Federal Register. And as you pointed out, we are  
5 offering a compliance phase-in period, but let me  
6 directly answer the spirit of your question.

7           With respect to our commercial end users,  
8 farmers and ranchers, producers and processors and  
9 merchants, the new expanded and the new clarified  
10 enumerated bona fide hedges, for example, with respect  
11 to unfixed price transactions, that goes into effect  
12 upon the effective date. The new agricultural position  
13 limits for the nine legacy agricultural products, for  
14 federal purposes, again goes into effect upon the  
15 effective date.

16           So I think to help the commercial end users,  
17 I don't want to belabor the point but I want to  
18 emphasize, as Lillian and Harry made so clear, that the  
19 improvements that we're making to the bona fide hedge,  
20 enumerated bona fide hedges, they all go into effect on  
21 the effective date. And those, again, directly apply  
22 to the nine legacy agricultural products, because with

1 respect to the 16 new non-legacy contracts, we have a  
2 one-year compliance phase-in period.

3 CHAIRMAN TARBERT: Terrific. Well, what I  
4 will do, then, is I will end my questioning. I am  
5 prepared to vote on the final rule, so I will end my  
6 questioning here, and the balance of my time, whatever  
7 that is, can be disbursed among my four fellow  
8 Commissioners evenly.

9 So with that, I will turn it back to  
10 Commissioner Quintenz.

11 COMMISSIONER QUINTENZ: Thank you very much,  
12 Mr. Chairman. I don't think I'll even use my full  
13 amount of time, let alone dig into yours, and if other  
14 Commissioners have more that they'd like to ask about  
15 or express, I'll certainly give them that opportunity  
16 and look forward to hearing that discussion, and I  
17 appreciate the conversation so far very much.

18 I'm particularly interested in the prior  
19 discussion around the WTI contracts and specific  
20 trading protocols. I guess, just as a point of  
21 clarification, which is not necessarily to take a view  
22 on anything, and I don't know who the best person to

1 answer this would be given I'm asking about all of the  
2 prior proposals since 2011, but has the TAS trading  
3 functionality ever been addressed in any of the prior  
4 proposals or in the prior final rule that was vacated?

5 MS. DEWITT: Commissioner Quintenz, my team  
6 is confirming with us now, but what I can say is that  
7 it wasn't addressed in the proposal -- if I can ask  
8 someone to just mute. What I can say is TAS has been  
9 around for decades. As an order type it has tremendous  
10 benefits. It's used widely by all different  
11 participants in the marketplace. And what I can say is  
12 it was not addressed in the 2016 proposal and that  
13 commenters didn't raise it.

14 I can also say that we're not aware of it  
15 being brought up in any of the prior proposals on  
16 position limits.

17 I can also say that, as we all know, it was  
18 not specifically addressed in the proposal that we did  
19 on January 30th of this year, nor was it to our  
20 recollection addressed in any of the Commissioner or  
21 staff comments as we discussed that proposal on January  
22 30th.



1           So it is one of many order types that's been  
2 around for a long time. It's part of the market  
3 structure, and it's been around for a good long time.  
4 I think it became the focus of some attention in April,  
5 and I think we owe it to the marketplace in general to  
6 always be looking at the market structure of our  
7 exchanges and of contracts, of the various elements of  
8 that, always to be thinking about that and be  
9 considering that.

10           But I also think it's important not to put  
11 the cart before the horse, and we think that the study,  
12 evaluation, findings, or whatever the right word is for  
13 that, observations that come out of that study will  
14 inform you, Commissioner Quintenz, and each of the  
15 other Commissioners on this call as to what, if  
16 anything, should be any next steps on this rule or any  
17 others relating to that.

18           COMMISSIONER QUINTENZ: Thank you for that,  
19 Dorothy. I think if any particular trading protocol  
20 has been such a negative issue as was previously  
21 described and only used for abusive purposes, I would  
22 have expected prior Commissions and prior proposals to

1 at least raise those issues or some level of discussion  
2 of them. I think I would agree with your view that you  
3 stated and also state that the Commodity Exchange Act  
4 doesn't require the CFTC to ensure that trading  
5 protocols can never be used manipulatively. Our  
6 standard for manipulation is not reasonably susceptible  
7 from a contract perspective, which is why we have an  
8 enforcement division that goes after the improper use  
9 of trading protocols or trading behavior.

10           If a specific trading protocol is used at one  
11 point in time in a potentially negative way, I would  
12 expect that that would be something that we would want  
13 to look at, but that it's not necessarily something  
14 that deserves to be or is even appropriate to address  
15 in a final rule that has a market-wide focus. That is  
16 not the place to address the functionality on a  
17 particular trading day of a particular trading  
18 protocol, especially one that has such a long history  
19 and wide and, I think, justified use case.

20           The only other thing I'd like to mention is  
21 that I have complete confidence in the Commission staff  
22 to do a very thorough evaluation of what occurred in

1 the market during April. And I think, as the Chairman  
2 publicly stated, which is very common knowledge, there  
3 was a significant confluence of extraordinary factors  
4 that was occurring on that day and during that time  
5 period.

6           The other issue that I think is important to  
7 bear in mind is that because we're talking about  
8 position limits, and because we are talking about  
9 setting limits that balance the factors that Congress  
10 put into the CEA, on liquidity, the liquidity in that  
11 contract, in the May WTI contract on the penultimate  
12 trading day was incredibly thin, as it usually is  
13 during that trading time. And in my view, the best way  
14 to make or to promote the integrity of any contract and  
15 try to ensure its protection against manipulation is  
16 through increasing the liquidity.

17           So I think we have to understand that not  
18 only was there a confluence of factors that were  
19 occurring on this day in which any extraneous issue, a  
20 confluence of fundamental factors, of supply and demand  
21 and potential physical constraints to technical  
22 positioning, that we have to understand that all of

1 those things if they weren't present may have precluded  
2 any other issue outside of those from having any  
3 impact, in addition to the fact that liquidity was so  
4 thin that I think it calls into question, just as I  
5 described with the palladium contract, one of the most  
6 severely set position limits that's out there, which  
7 had seen a very significant sustained price move over  
8 time.

9 I think all of that goes to say it's  
10 important to view position limits themselves as one  
11 part of the regulatory tool set to add integrity to  
12 markets, and there are certainly others, and I would  
13 expect the Commission to use all of its tools,  
14 including its research functionality of the Market  
15 Intelligence Branch, as well as the other capabilities  
16 that we have, to understand and, if necessary, hold  
17 anybody accountable for activity that we feel we need  
18 to.

19 So I don't have any other questions, but I  
20 don't share the view that this is something that needs  
21 to be addressed here, and I don't share the view that  
22 because we are not addressing this issue here, this

1 rule needs to be delayed, because I do have the view  
2 that if there are extraneous factors that this research  
3 that the Commission is doing, the staff is doing,  
4 raises it to the level of recommendations, there are  
5 other, plenty of other ways, through interpretations,  
6 rule enforcement reviews, or subsequent actions that  
7 the Commission can take to express those views and act  
8 on those representations.

9           So with that, Mr. Chairman, I'll yield back.  
10 Thank you.

11           CHAIRMAN TARBERT: Thank you very much,  
12 Commissioner Quintenz.

13           Commissioner Behnam?

14           COMMISSIONER BEHNAM: Thanks, Mr. Chairman.

15           I have two, three, or four questions, but two  
16 buckets of areas. First I want to start with bona fide  
17 hedging. To the team I asked the question in January  
18 about the 10-day period specifically for non-enumerated  
19 bona fide hedging and the sort of process that would  
20 occur between the market participant, the exchange, and  
21 then any notification to us, subsequent notification to  
22 us at the Commission. There's this 10-day period. Can

1 you explain how the review period has changed since the  
2 proposal and what we'll be voting on today?

3 MS. CURTIS: Thank you, Commissioner Behnam.  
4 This is Jeanette.

5 So, from the proposal to the final rule, the  
6 actual timing of the review period remains the same.  
7 So there will be a 10-day review available to the  
8 Commission where a market participant has filed an  
9 application prior to needing to exceed federal limits,  
10 and there will continue to be a 2-day review period for  
11 the Commission where a market participant has filed a  
12 retroactive application due to sudden and unforeseen  
13 circumstances or increases in their bona fide hedging  
14 needs.

15 What has changed under the final rule is now  
16 a market participant, once they have filed their  
17 application ahead of time, they are able to exceed  
18 federal position limits after an exchange approves  
19 their application and during the Commission's 10-day  
20 review period. And they can do this at their own risk,  
21 because there is a risk that during the Commission's  
22 10-day review period the Commission could deny the

1 application, and if the person has exceeded limits,  
2 then they would be required to reduce their position.

3           In addition, another change to the Commission  
4 review period is under the proposal, although we give  
5 the Commission authority to stay an application under  
6 the streamlined review process, we did not impose any  
7 time limit on how long the Commission could stay an  
8 application. So now under the final rule the  
9 Commission is limiting its authority to stay  
10 application to 45 days.

11           COMMISSIONER BEHNAM: Thanks, Jeanette. I  
12 appreciate that.

13           This is something I kind of struggle with  
14 from a policy perspective, but help me think about it  
15 in a different way and what makes you and the division  
16 comfortable. But essentially, based on everything you  
17 said -- and I might be paraphrasing, but you said "at  
18 their own peril." But the idea being that a market  
19 participant can take a position that ultimately is  
20 determined to be outside the scope of a true bona fide  
21 hedge after this review period and that the exchange  
22 approves, essentially then putting that market

1 participant outside or in violation of the position  
2 limits rule because of that lag between the time the  
3 position is taken and then ultimately the determination  
4 by the Commission.

5           In short, is that true, or is that  
6 hypothetical possible? And if it is, can you help me -  
7 - is this truly sort of caveat emptor, you're at your  
8 own risk here and you'll suffer the consequences if you  
9 decide to go forward? Or what makes us now in the  
10 division feel comfortable that this is the best process  
11 to put forward, considering what I think is a little  
12 bit counterintuitive of essentially allowing a market  
13 participant to take that position without a decision  
14 being made?

15           MS. CURTIS: Thank you, Commissioner Behnam.  
16 This is Jeanette Curtis again.

17           So, to your first question, yes, it is very  
18 possible that someone could exceed limits during the  
19 Commission's 10-day review and then ultimately have the  
20 Commission come back and deny the application. The  
21 reason why we decided to permit this additional  
22 flexibility is because we heard loud and clear that



1 market participants felt that the 10-day review period  
2 may be too long in certain circumstances, and we wanted  
3 to provide the option, if they feel firm enough in  
4 their understanding of the bona fide hedge and also in  
5 the exchange's approval of their bona fide hedge, then  
6 they are allowed to exceed limits during the  
7 Commission's 10-day review.

8           So we wanted to try to balance market  
9 participants' needs for a little bit more flexibility  
10 with the Commission's need to actually have time to  
11 make its independent determination and either deny the  
12 application or let it move forward.

13           So I think, at least with the proposal, and  
14 also now with the final rule, I think what we're saying  
15 here is that we're still very confident in the  
16 structure that we put forth in terms of requiring  
17 exchanges to use the Commission's bona fide hedge  
18 definition when they're conducting their analysis such  
19 that we expect the exchanges, which have been doing  
20 this for many, many years, will do so prudently.

21           So we're balancing market participants' needs  
22 for flexibility with our expectations that the process

1 will be carried out prudently, and also with our need  
2 to just basically have time to review it and make the  
3 ultimate decision as we see fit.

4           COMMISSIONER BEHNAM: Thanks, Jeanette.  
5 That's helpful. I certainly hope the process and the  
6 way things play out meet our expectations, and I  
7 certainly would look forward to working with the  
8 division to ensure that the process is working as  
9 intended, and if it needs to be tweaked in one way or  
10 another, I know we're always staying on our toes and  
11 making sure we're doing what's best for the market in  
12 terms of the flexibility which you suggested, and I  
13 think that's important, but also not creating too much  
14 of a window for folks to violate rules or not really  
15 fulfill the spirit of the rulemaking and ultimately the  
16 regime that's intended to protect markets.

17           Last question, if you don't mind. And,  
18 Jeanette, I think this might be for you as well. You  
19 and I have had this discussion, and I believe you  
20 mentioned this in the staff presentation, about spread  
21 transactions. If you could just talk through, and I  
22 think I asked a question about this in January at the

1 proposal phase, but the difference between what we  
2 originally voted on back in January and the final rule  
3 and how the definition has changed, and ultimately I  
4 think from a practical perspective will more  
5 transactions be able to be caught within the spread  
6 transaction umbrella given any changes that the  
7 division has made in its final draft?

8 MS. CURTIS: Thank you, Commissioner Behnam.  
9 Yes, this is Jeanette again.

10 Under our existing regulations in Section  
11 150.3(a), the Commission generally allows for spread or  
12 arbitrage positions to be self-effectuating. The  
13 Commission does not have to approve those types of  
14 exemptions.

15 So what we tried to do in this proposal at  
16 that stage, we tried to adopt a regulation that would  
17 provide a little bit more granularity as to the  
18 specific types of spread exemptions that we understand  
19 to fit within the spread or arbitrage category. But  
20 our intention really was to be consistent with what we  
21 already have in our regulations, which generally allows  
22 spread or arbitrage positions as those types of

1 positions are permitted under the statute.

2           So in the proposal we tried to cast a broad  
3 net, but of course we put forth requests for comments  
4 from market participants in case we missed anything,  
5 and commenters provided us with some very helpful  
6 suggestions on how to expand the spread transaction  
7 definition so that it actually more accurately captures  
8 the various types of spread exemptions that exchanges  
9 are granting today.

10           So with that, under the final rule, we are  
11 expanding the spread transaction definition to include  
12 intra and intermarket spread, as well as intra-  
13 commodity spreads, and those terms were not included in  
14 the proposed definition of spread transactions.

15           In addition, under this final rule, to  
16 respond to the various comments we received about does  
17 this particular strategy or does that particular  
18 strategy fit, instead of drilling down on all those  
19 particular specific examples in the preamble, we  
20 decided to add a new Appendix G, which provides some  
21 additional guidance to both exchanges and market  
22 participants as to the types of spread exemptions that

1 would fit within the spread transaction definition, as  
2 well as just different considerations and core  
3 principles for exchanges to consider when they're  
4 granting those exemptions.

5           COMMISSIONER BEHNAM: Thanks, Jeannette. I  
6 appreciate that again. I appreciate your sharing the  
7 process and the dialogue that occurred between January  
8 and now to come up with what you believe is the best  
9 proposal, the best language for this rule that we're  
10 going to vote on.

11           Certainly, like with the previous issue of  
12 the non-enumerateda, it's important to listen to the  
13 constituents and what we did right or wrong. But  
14 certainly again, like I said earlier, I look forward to  
15 working with you and DMO staff to ensure that we got  
16 this right and that we didn't go farther than  
17 potentially we needed to given market dynamics and what  
18 the end user community needs.

19           That's all the questions I have, Mr.  
20 Chairman. I'll just make one quick note based on what  
21 Dorothy said with respect to the TAS trade. I asked a  
22 couple of questions about the WTI events, and I think

1 directly or indirectly made my feelings -- I hope I  
2 made them clear in my first round of questions, but I  
3 do appreciate Dorothy's responses. As she noted, TAS  
4 trades are an order type. They are effective in many  
5 respects and have been used by market participants for  
6 many years. But certainly given the events of the  
7 spring, regardless of the market dynamics at the time,  
8 it was a pretty remarkable market movement, one I don't  
9 think we've ever seen in such a short period of time.

10           So I hope the division continues to work on  
11 the report and any conclusions or findings that they  
12 may have. I certainly look forward to working with  
13 them and all of my fellow Commissioners to take the  
14 right action, whatever it may be or may not be, to  
15 mitigate anything that we find. Again, it's important  
16 to have a transparent, fair, and orderly markets.

17           That's all. Thanks again to the division for  
18 your work, and I'll pass it back to you, Mr. Chairman.  
19 Thank you.

20           CHAIRMAN TARBERT: Thank you very much,  
21 Commissioner Behnam.

22           Commissioner Stump?

1                   COMMISSIONER STUMP: Thanks, Mr. Chairman. I  
2 actually don't have any additional questions. And in  
3 lieu of a closing statement, I'd like to just offer a  
4 few closing remarks with regard to position limits now,  
5 if that's okay.

6                   I want to take us back to a really positive  
7 place, because I think that's where we've landed with  
8 this rule. In the months since we proposed this rule,  
9 we've heard from all corners of the marketplace --  
10 agricultural interests, energy interests, managed fund  
11 advisors, the dealers that provide liquidity, just to  
12 name a few -- and they have all voiced support for the  
13 fundamental architecture of the position limit  
14 framework that we proposed.

15                   That support stands in stark contrast to the  
16 serious concerns they had expressed about the several  
17 previous position limit proposals put forward by the  
18 Commission during the past decade. So I think we've  
19 refined this to a place where it's certainly not  
20 perfect, but it is a far better place than it has been  
21 at any point in the past.

22                   After nearly a decade of trying, we stand on

1 the cusp of amending the Commission's position limit  
2 rules. Before us is a thorough and well-reasoned final  
3 rulemaking release that considers the extensive  
4 comments that we received, not just in proposing this  
5 rule but over the past decade. And it clearly presents  
6 the Commission's rationale in addressing those comments  
7 and adopting the rules in the form that is presented  
8 today.

9           The fact that this release is before us less  
10 than nine months after we issued the proposal, in the  
11 midst of a pandemic no less, is a tribute to the  
12 dedication, perseverance, and analytical capabilities  
13 of the professionals in the Division of Market  
14 Oversight, the Office of the General Counsel, the Chief  
15 Economist's Office, and someone who has repeatedly and  
16 constantly demonstrated commitment and stamina for this  
17 issue and many others, Terry Arbit, who I have had the  
18 privilege of working with every day. Their work on  
19 this rulemaking has been nothing short of amazing.

20           My fellow Commissioners and I have each  
21 publicly committed that we would work to finish a  
22 position limit rulemaking. We made this commitment in



1 each of our confirmation hearings when asked by the Ag  
2 Committee. The time has come to fulfill that  
3 commitment, and I am pleased to support this final rule  
4 so that those who rely on these markets might finally  
5 have some clarity as to what is expected.

6 Thank you, Mr. Chairman, and thanks again to  
7 the team.

8 CHAIRMAN TARBERT: Thank you very much,  
9 Commissioner Stump.

10 Commissioner Berkovitz?

11 COMMISSIONER BERKOVITZ: Thank you, Mr.  
12 Chairman. I'm just going to make a quick remark on the  
13 previous topic, and then I want to move on to my second  
14 round on the non-enumerated bona fide hedge process.

15 I'm going to use the same prop, Mr. Chairman.  
16 This is the 900 or 896, whatever it is, pages, this  
17 considerable document. This whole document is designed  
18 to prevent, and the whole reason we're doing this is  
19 because of the directive in the Commodity Exchange Act,  
20 to prevent excessive speculation, because excessive  
21 speculation as Congress has found causes unwarranted  
22 price fluctuations in a commodity. Certainly, the

1 events of April 20th were an extraordinary price  
2 fluctuation, the type that these rules are designed to  
3 prevent.

4           Now, whether April 20th was caused by or  
5 could have been remedied by a position limit, we'll  
6 find out. But we have a situation -- and this is not  
7 addressed in those 900 pages -- where speculators are  
8 allowed unlimited lengths of contracts, positional  
9 length of contracts in the spot month in crude oil  
10 contracts, a well-known mechanism for manipulating the  
11 market. Call it an order type, call it a technical  
12 issue, try to call it what you like, but speculators  
13 have unlimited ability to exert market power and  
14 influence on that settlement price, absolutely no  
15 limitation, and that 900-page document doesn't address  
16 it at all.

17           So I think it's more than a technical issue.  
18 I think it's a fundamental issue. So I look forward to  
19 continuing to work to address it.

20           Let me turn to the non-enumerated bona fide  
21 hedge process. I'm going to focus my remarks right now  
22 on what's technically the 150.9 process. There are two

1 processes in here, I think the staff has explained.  
2 One is you can come to the Commission for a non-  
3 enumerated bona fide hedge, or you can go to the  
4 exchange for a non-enumerated bona fide hedge, and let  
5 me just back up a bit, enumerated bona fide hedge, non-  
6 enumerated bona fide hedge.

7           We've just spent 10 years or so in a very  
8 thorough iterative process with the market  
9 participants, and I believe a very productive process,  
10 and I want to commend the staff for working with the  
11 commercial end users and the end user community on the  
12 bona fide hedge process and to really adapt the rules.

13           One thing this rule does is it adapts the  
14 rules to the markets that the rules cover. I was here  
15 previously and, frankly, when we initially did these  
16 rules we took the ag market model and tried to expand  
17 it into non-ag commodities, and the commenters said it  
18 just doesn't really fit. We spent years, literally  
19 years, adapting our bona fide hedge definition to the  
20 markets that we're addressing in this rulemaking, and I  
21 want to commend the staff, and I want to say I've  
22 enjoyed working with end user communities on

1 accomplishing that objective, and this rule does that.

2           And it does it, I believe, in a fairly  
3 comprehensive way. I mean, there were numerous  
4 petitions. Here are all the circumstances we need to  
5 address, here are the practices, multiple iterations  
6 going back to 2014, 2015, 2016. I was in my office the  
7 other day. I actually went downtown into the office,  
8 and it was rather nice, and looked at the stacks of  
9 comment letters I had because it's all printed out  
10 there, and I didn't want to kill a few more trees by  
11 printing them out at home. And that dialogue has been  
12 very, very productive.

13           So I'm somewhat at a loss to know what did we  
14 miss? Why do we need a process after we've been  
15 through that that basically says, okay, we've made our  
16 determinations, now you get to make yours and put on  
17 your positions, and then after this public process we  
18 basically have this 10-day review or 2-day review of  
19 whether we got it wrong, and put on positions in  
20 violation of our limits that we have not recognized the  
21 bona fide hedges.

22           Now, they can come to us and ask for

1 permission to do it prospectively, and they can't put  
2 the position on until we approve the petition, unless  
3 there are sudden or unforeseen circumstances. Or they  
4 can go directly to the exchange.

5           If you go to either the exchange or us and  
6 there's sudden or unforeseen circumstances, you can put  
7 the position on and then ask for permission  
8 retroactively. Is that correct?

9           MS. CURTIS: Hi, Commissioner Berkovitz.  
10 Thank you for the question. Yes, that's correct.

11           COMMISSIONER BERKOVITZ: One of the concerns  
12 I have is what is a sudden or unforeseen circumstance.  
13 Everything in the market to some degree is  
14 unforeseeable. I mean, that's why you hedge in the  
15 first place, because you don't know -- if you knew what  
16 was going to happen, you'd lock in and you'd make a  
17 killing, basically. But in an efficient market, nobody  
18 knows what's going to happen. You don't know if the  
19 price is going to go up or the price is going to go  
20 down. Hedging protects you against that  
21 unforeseeability. So in a sense, everything is  
22 unforeseeable.

1           And sudden, I mean, everything is sudden in  
2 these markets, too. Things happen in real time.  
3 People spend their whole lives looking at these screens  
4 wondering what's going to happen from one second to the  
5 next.

6           So what do we mean in this rule by sudden and  
7 unforeseeable that would justify somebody putting on a  
8 position in these circumstances?

9           MS. CURTIS: Hi, Commissioner Berkovitz.  
10 This is Jeanette again.

11           So, I think you're right. There are many  
12 circumstances that could come up and warrant sudden or  
13 unforeseen increases in hedging needs. We do not  
14 provide specific examples about what that looks like in  
15 the preamble. We leave that to exchanges and the  
16 market participants to determine. And it very well may  
17 be the case that many of these applications get filed  
18 on a retroactive basis due to that fact, which is why  
19 we actually provided this option, because we recognized  
20 that this is a very real-world scenario where  
21 oftentimes there are sudden and unforeseen increases in  
22 bona fide hedging needs.

1                   COMMISSIONER BERKOVITZ: In that regard, do  
2 you anticipate -- because elsewhere, I forget exactly  
3 where in the document, you said the Commission  
4 indicates that we expect this type of circumstance to  
5 be rare and granted only occasionally. Do we state a  
6 view or is there a view as to whether this sudden and  
7 unforeseen is a very rare circumstance, or is it, no,  
8 we actually mean it to be very useful and actually  
9 quite common and frequent that somebody would be able  
10 to take advantage of a sudden and unforeseen  
11 circumstance? Is it a broad interpretation or a narrow  
12 interpretation, is what I'm trying to get at.

13                   MS. CURTIS: It's a broad interpretation,  
14 Commissioner Berkovitz. This is Jeanette. I will also  
15 defer to my colleague, Harry Hild, after this. But the  
16 reason why we even proposed this option is because we  
17 think it will be very useful. That's the underlying  
18 purpose.

19                   What we do say is that generally we expect  
20 that reliance on the non-enumerated bona fide hedge  
21 process relative to other exemption requests that are  
22 being made under the enumerated processes, we expect

1 that people will only be relying on the non-enumerated  
2 processes in rare circumstances and we don't expect  
3 we'll be inundated with these types of requests,  
4 especially given the increased limits that we are in  
5 the process of finalizing, as well as in light of the  
6 expanded enumerated hedges that we are in the process  
7 of finalizing.

8 I just want to pause and see if Harry has  
9 anything that he wants to add.

10 MR. HILD: I guess I could add a little bit  
11 of flavor for the history that we've had in the non-  
12 enumerated processes, mostly for unique and special  
13 things that are very few and far between. But that  
14 said, we are broadening the list of commodities subject  
15 to the federal limits quite a bit. We just don't know  
16 what is out there.

17 I would just say that the uniqueness here  
18 would tend to be very rare, and I don't expect that we  
19 would be inundated based on past experience. Sometimes  
20 there could be an unforeseen situation with respect to  
21 a shock to supply where a particular hedger may have  
22 lost some capacity or some physical marketing channel



1 changes. Again, those are very unique, very few and  
2 far between, and very specialized.

3           COMMISSIONER BERKOVITZ: Are we talking about  
4 here a quantitative unforeseen -- in other words, they  
5 got their hedge application and they're allowed a hedge  
6 up to a certain number, and then there's some  
7 unforeseen circumstance that they have to go from 3,000  
8 to 4,000? Or is there some other actually  
9 qualitatively different type of practice, like they  
10 have some fixed price contract that doesn't fit within  
11 any of the fixed price contracts in the hedging  
12 treatment that we provided in the rule and they say,  
13 oh, I need this wholly different type of hedge that you  
14 haven't given permission for?

15           Is it a quantitative exception, or is it also  
16 qualitative, that we think we have this novel type of  
17 hedging practice? It would seem that the latter, what  
18 you just described, Harold, that would be rare, but  
19 quantitatively maybe it's more frequent. Does it cover  
20 both, or one or the other?

21           MR. HILD: I would think there are situations  
22 where it certainly could be quantitative. We've talked

1 with a lot of the commercial participants, and they  
2 always are advocating for flexibility. I think this is  
3 another way for us to provide flexibility to the extent  
4 that they do suddenly have some extra needed capacity  
5 that was unforeseen.

6 COMMISSIONER BERKOVITZ: Okay. Now, either  
7 this retrospective application -- I think that's five  
8 days, right? They have five days after putting on the  
9 position to apply, right?

10 MS. CURTIS: That's correct.

11 COMMISSIONER BERKOVITZ: There's also these  
12 retroactive -- it was mentioned in a previous Q&A, I  
13 think, or in the staff presentation, that ultimately if  
14 this is denied by the Commission, either this or the  
15 prospective one where you go to the exchange, not the  
16 retrospective application but prospectively, under the  
17 10-day review the exchange approves it and then you put  
18 it on after the exchange approves it, before we approve  
19 it, and we deny it -- in either case, if there's a  
20 denial by the Commission at the end of the road and the  
21 position is on and we tell them to get down in a  
22 commercially reasonable time, there's a statement in

1 there that says that we won't enforce the violation.

2 Is that correct?

3 MS. CURTIS: That's correct.

4 COMMISSIONER BERKOVITZ: There still  
5 technically is a violation. When they have a position  
6 on, either a retrospective application or -- what the  
7 exchange is authorizing is -- they go to the exchange  
8 and the exchange says yes, what the exchange is saying  
9 is under our rules you can do this, and then it gets  
10 kicked over to us. But until we say it's okay, either  
11 we say it's okay or we don't say it's not okay, they're  
12 still in violation; right?

13 MS. CURTIS: That's correct. It would be a  
14 violation of federal limits. However, what we're  
15 saying is the Commission is in the process of voting on  
16 the fact that it will, in its prosecutorial discretion,  
17 decide not to pursue an enforcement violation in those  
18 circumstances so long as the application was filed in  
19 good faith, and also so long as the person reduces  
20 their position within a commercially reasonable time.

21 COMMISSIONER BERKOVITZ: In this context, the  
22 good-faith condition that I'm most familiar with in our

1 regulations and generally -- for example, we have swap  
2 dealer compliance -- as long as you're in good faith  
3 trying to comply with the swap dealer procedures. We  
4 also have control person liability, which is actually a  
5 statutory good-faith exception, that the control person  
6 is not liable -- a person who controls another person  
7 in a corporation is liable for the actions of the  
8 person that reports to them, except if they had good-  
9 faith procedures to try to ensure compliance or they  
10 weren't actively encouraging them.

11           So there's a good-faith exception to control  
12 person liability, and we have good faith in our swap  
13 dealers and other instances where we have exercised  
14 prosecutorial discretion when somebody was trying to  
15 comply with the law but didn't make it.

16           In this situation, what's confusing to me is  
17 they know they're out of compliance, and they think  
18 that they should be allowed a type of hedge that we  
19 have not yet approved, and they say we interpret the  
20 Commodity Exchange Act Regulation 150.2(b), I think is  
21 the citation, the definition of bona fide hedge, we  
22 think it should be interpreted this way, but they're in

1 violation. Until we agree with that interpretation,  
2 they're in violation. So it's like a good-faith belief  
3 as to what the law should be rather than what the law  
4 is. They're not trying to comply. They're trying to  
5 get the law changed to recognize it.

6           So what is good faith? As long as I get a  
7 letter from a law firm saying this is a reasonable  
8 interpretation of 150, the definition of bona fide  
9 hedge, even though the Commission has disagreed in the  
10 past, we think it's reasonable?

11           So what is good faith, is my question, under  
12 these circumstances?

13           MS. CURTIS: Thank you, Commissioner  
14 Berkovitz. This is Jeanette again.

15           So, what we say about good faith and this  
16 standard is that we apply a reasonableness standard.  
17 So what we say in the preamble is so long as the person  
18 has a good-faith basis for applying for this bona fide  
19 hedge and analyzing it and determining that their  
20 position comports with the bona fide hedge definition,  
21 then effectively they have met this particular factor.  
22 And so to your point about at the end of the day there

1 being sort of a stand-off between someone saying, well,  
2 this should be a bona fide hedge versus us saying no,  
3 it's not a bona fide hedge, ultimately the Commission  
4 has the final say and the final determination about  
5 what is or is not a bona fide hedge. And again, we've  
6 decided that we're allowing some flexibility here in  
7 withholding enforcement action under these  
8 circumstances or exercising our prosecutorial  
9 discretion to not pursue those particular enforcement  
10 violations.

11           But what I will say is that this is not some  
12 fuzzy standard where we're shooting in the dark here.  
13 The bona fide hedge definition as it's outlined in  
14 Section 150.1 of the rule is very clear in terms of the  
15 criteria that it sets forth for types of positions that  
16 meet the bona fide hedge definition. So once the  
17 applicant actually does his own analysis and says we  
18 think this is a bona fide hedge, it doesn't stop there.  
19 It goes to the exchange where we have exchanges that  
20 have tremendous experience in analyzing positions to  
21 determine if they meet certain essential criteria, and  
22 the exchange is also conducting an analysis about

1 whether or not this position meets the bona fide hedge  
2 definition.

3           So at the end of the day, we are permitting  
4 this flexibility under the rule. It is a policy  
5 decision to withhold our prosecutorial efforts to  
6 pursue these particular violations, but we are granting  
7 some flexibility in using this reasonableness standard  
8 about filing the application.

9           CHAIRMAN TARBERT: Commissioner Berkovitz, I  
10 think your line is muted.

11           COMMISSIONER BERKOVITZ: Oh, thank you.  
12 Sorry. Thank you.

13           I appreciate that. I might have drawn the  
14 line a little differently, not that we shouldn't have  
15 prosecutorial discretion under these circumstances, not  
16 that every -- if you have a process where they can  
17 submit it retroactively, if you're going to prosecute  
18 it every time you deny it, it may have a determined  
19 effect and it may not be a retroactive process.

20           On the other hand, if you say every time  
21 we're never going to enforce it, or under this good-  
22 faith standard, whatever that means, you may be letting

1 in too much. So I would entrust our Division of  
2 Enforcement and the Commission to make the appropriate  
3 call on a case-by-case basis, which is traditionally  
4 how we do these things.

5 I would point out in this regard that the one  
6 comment that we sort of really didn't follow fully is  
7 CME. Under the CME process, for the current  
8 retroactive application process that CME has, they have  
9 this retroactive process. They commented to us -- and  
10 I want to be accurate. In the proposal we said neither  
11 the CME nor the CFTC will prosecute violations so long  
12 as they were submitted in good faith, even if they're  
13 denied. CME commented and wrote back and said no, we  
14 want the ability to go after certain violations in this  
15 regard. Let me just read you what CME said.

16 "Further, proposed rule" -- and I'll omit all  
17 the parens and cites and whatever -- "provides that a  
18 DCM or the Commission would not consider a person to  
19 have violated a position limit in the event that the  
20 application for a retroactive exemption is denied. CME  
21 Group disagrees with this approach. Today at the  
22 exchange level, CME Group considers firms to be in



1 violation of a position limit if they exceed the limit  
2 and the exemption application is denied. We believe  
3 the Commission should implement this standard rather  
4 than permitting the proposed grace period for denials  
5 of exemption applications. Otherwise, market  
6 participants with excessively large speculative  
7 positions could exploit the grace period, attempting an  
8 application for an exemption and intentionally go over  
9 the explicit limits without consequences, all the while  
10 disrupting orderly market applications. In our  
11 experience, the prospect of having an application  
12 denied and being found in violation of position limits  
13 has worked to deter market participants from attempting  
14 to exploit the retroactive exemption process.”

15           So, do you believe that the good-faith  
16 exemption could accommodate all the concerns, or how we  
17 interpret the good-faith exemption and the discretion  
18 that we retain?

19           Let me put it this way: Do we retain  
20 sufficient discretion in how we apply the good-faith  
21 exemption to address the problem that CME has  
22 identified, that you shouldn't just give out blanket

1 passes to people who violate limits when their  
2 retroactive applications are denied? Does the good-  
3 faith exception still give us flexibility to have this  
4 deterrent effect?

5 MS. CURTIS: Thank you, Commissioner  
6 Berkovitz. This is Jeanette again.

7 So, you know, there are two things I want to  
8 say here. The first is in analyzing whether or not the  
9 application was filed in good faith, this is something  
10 that the Commission will ultimately determine. So,  
11 yes, we do retain sufficient authority on that front to  
12 make that determination and to still have some  
13 prosecutorial discretion as to whether or not we will  
14 pursue that particular enforcement violation.

15 The other thing that I want to say is that we  
16 received CME's comment and it was very helpful to us,  
17 and we took their points very well, which is why in the  
18 final rule one of the changes that we're making to the  
19 proposal is that in Section 150.5, which deals with  
20 exchange-set limits and exemptions therefrom, we are  
21 now allowing exchanges to, in their discretion, pursue  
22 these types of violations if they see fit. In the

1 proposal we had a blanket statement that neither the  
2 Commission nor exchanges would pursue position limit  
3 violations. But per CME's comment, which we thought  
4 was very helpful again, we're allowing exchanges to  
5 continue to have discretion to pursue those violations  
6 as they see fit. So, it does address the CME comment.

7 COMMISSIONER BERKOVITZ: Okay, I appreciate  
8 that. I think the approach, if we're going to have  
9 this good-faith exemption, that it be interpreted in a  
10 manner that would not enable what CME has identified as  
11 potentially going over the limit without consequences;  
12 if there are disruptions and if they exploit the  
13 retroactive process, that we still have enforcement  
14 discretion, flexibility, to go after a violation under  
15 those circumstances, that it's not a blanket get-out-  
16 of-jail-free card if you do this retroactively. So I  
17 appreciate the answer on that.

18 I want to turn now to another aspect of this  
19 process, and that's the time limit for Commission  
20 review. Under the processes that are outlined here,  
21 the 10- and 2-day review, the first time the Commission  
22 is notified that either somebody is over the limit or

1 basically that somebody is seeking to go over the limit  
2 or has actually gone over the limit under the exchange-  
3 based process, which is 150.5 and 150.9, is when the  
4 exchange grants or denies their application. So in  
5 both instances it goes to the exchange first. The  
6 application goes to the exchange first, and then it  
7 comes to us after that. Is that correct?

8 MS. CURTIS: That's correct.

9 COMMISSIONER BERKOVITZ: And for prospective  
10 we get 10 days, and retrospective we get 2 days;  
11 correct?

12 MS. CURTIS: That's correct.

13 COMMISSIONER BERKOVITZ: In the current  
14 process we get 30 days, right? Under the non-  
15 enumerated bona fide hedge, we get 30 days?

16 MS. CURTIS: That is correct.

17 COMMISSIONER BERKOVITZ: Okay. So my concern  
18 is that this 10 days is incredibly short, particularly  
19 if you have to think about, which we would have to do  
20 under this process if we decide to deny it -- if the  
21 Commission wants to deny it, we have to give the  
22 applicant notice and opportunity to respond; correct?

1 MS. CURTIS: That's correct.

2 COMMISSIONER BERKOVITZ: And if we do  
3 nothing, if we can't get our act together, so to speak,  
4 if that period lapses without Commission action, it's  
5 approved? The action is approved if we just don't say  
6 anything? Is that correct?

7 MS. CURTIS: Yes. The application is being  
8 approved after the review period expires, the  
9 Commission is not necessarily required to make a final  
10 determination during that review period. The  
11 Commission also has the authority to stay the  
12 application if it needs additional time to review the  
13 application. But at the expiration, if we haven't said  
14 anything, you're correct, the application has been  
15 approved.

16 COMMISSIONER BERKOVITZ: And a stay requires  
17 an affirmative Commission action? You'd need three  
18 votes to do a stay?

19 MS. CURTIS: That's correct.

20 COMMISSIONER BERKOVITZ: Okay. So my concern  
21 is the shortness of this period. So as we were  
22 discussing the rule we had this discussion, and I

1 appreciate the discussion. Maybe we can get this  
2 information sooner. Why can't we get it at the same  
3 time the exchange gets the application? If we got the  
4 application -- let me put it, again, foundationally.  
5 When the exchange makes its decision under the rule as  
6 drafted, it sends us the application as part of the  
7 materials as to their decision, and they also send the  
8 application to us; correct? That becomes our record at  
9 that point, right?

10 MS. CURTIS: That's correct.

11 COMMISSIONER BERKOVITZ: So the question is  
12 why can't we get the application sooner? If they're  
13 going to apply to the exchange, we get a heads-up and  
14 say, oh, this is coming down the pike, there's a  
15 possibility we may have to deal with this down the  
16 road, let's get the DMO staff, let's get people  
17 thinking about this thing because we're going to have  
18 this really compressed review timeframe, and if we got  
19 this application in earlier, all the better for us to  
20 be prepared and be able to get this up to the  
21 Commission rather than this cramped 10 days. I think  
22 anything in this manner, even if it's five days, we're

1 increasing our time by 50 percent, whatever it is. So  
2 we could double or triple the time. We could really  
3 use this time well. And also retrospectively, two  
4 days, I don't know how we can do anything like that in  
5 two days. So anything that will give us more  
6 information sooner to give the DMO staff the  
7 opportunity to think it over, to prepare, basically,  
8 would be helpful.

9           Also, to tell you the truth, I think it would  
10 be extremely valuable for DMO and the Market  
11 Intelligence Branch on these retroactive applications,  
12 or some of these more prospective -- if somebody is  
13 over the limit, we ought to know it immediately. That  
14 seems to me -- our enforcement capabilities and our  
15 surveillance is now good enough that we can spot  
16 violations in real time, and I believe we've had recent  
17 enforcement cases where we've done that. We spot these  
18 in real time.

19           So if our surveillance people are watching  
20 these markets and spotting violations, if they see a  
21 violation, they can call up the exchange and say do you  
22 know that so-and-so is over? They call up the person

1 and say, you know, you've got to get down. They say,  
2 well, we've got an application already to the exchange  
3 for exceeding the limit. That sort of wastes our time  
4 and our resources for MIB or the Division of  
5 Enforcement to be monitoring and trying to spot these  
6 things in real time. When somebody's gone over and  
7 they've got the waiver or whatever, the non-enforcement  
8 thing, I think it's really beneficial and can serve our  
9 monitoring resources if we know when people are going  
10 to go over. We've got to be concerned about what the  
11 effect of their position on the market is. So the  
12 earlier we get the information, the better.

13 I think maybe this is the appropriate time to  
14 offer an amendment, Mr. Chairman or Mr. Secretary,  
15 procedurally. I have an amendment to the text of the  
16 preamble to request the voluntary current submission of  
17 non-enumerated bona fide hedge applications to the  
18 Commission at the same time they are submitted to the  
19 exchange. The amendment would actually ask the  
20 exchanges to provide the information to the Commission.

21 For those listening, let me just read it. I  
22 think it's important. "Furthermore, the Commission



1 would consider it to be a reasonable and helpful  
2 practice if exchanges elect to provide information to  
3 the Commission on non-enumerated bona fide hedge  
4 applications for the exchanges considering such  
5 applications. That is, the Commission would find it  
6 helpful to receive an advance courtesy copy of any  
7 150.9 application that the exchange received. The  
8 exchange, however, is not required to provide such  
9 advance copies and would not be required to obtain an  
10 opinion on such applications from the Commission before  
11 making its determination. Rather, providing such  
12 application information as the exchange receives could  
13 facilitate a more rapid Commission evaluation of 150.9  
14 applications. This would help facilitate regulatory  
15 certainty for market participants and would aid the  
16 Commission in its review of applications under 150.9.”

17 CHAIRMAN TARBERT: I think -- go ahead. I  
18 was going to ask -- go ahead.

19 COMMISSIONER BERKOVITZ: Am I in order to  
20 talk about this yet, or do I have to --

21 CHAIRMAN TARBERT: I think what we have to  
22 do, what I would suggest we do is I ask whether there's

1 a second for the motion to amend, and then if there's a  
2 second, then we'll open up the floor for you to just  
3 explain a little bit more your rationale for it, and  
4 then I will open it up to the other Commissioners. And  
5 then we will take successive votes, I think, on the  
6 amendment, and then on the final rule.

7 COMMISSIONER BERKOVITZ: Okay, okay. Sounds  
8 good to me.

9 CHAIRMAN TARBERT: So, is there a second for  
10 the motion to amend?

11 COMMISSIONER BEHNAM: Second.

12 CHAIRMAN TARBERT: Okay. The motion to amend  
13 has been made and seconded, so it is now before the  
14 Commission for discussion, along with the original  
15 motion, the final rule as unamended.

16 So, Commissioner Berkovitz, would you like to  
17 go ahead and speak first? And then I will open it up  
18 to the other Commissioners.

19 COMMISSIONER BERKOVITZ: As I said, this is  
20 simply a request to the exchanges to provide us with  
21 this information voluntarily. I discussed this issue  
22 with the staff, and without revealing internal

1 deliberations unnecessarily, I said we should get these  
2 applications at the same time. So in working with my  
3 office to develop language, one of the aspects that was  
4 pointed out to me is that this is a request for  
5 information, and there are some Paperwork Reduction Act  
6 requirements. It wasn't in the proposal, and it wasn't  
7 in the Paperwork Reduction Act evaluation, and whether  
8 this was an information collection requirement, if we  
9 require them to provide it, whether it's an information  
10 collection requirement subject to the Paperwork  
11 Reduction Act.

12           To avoid that potential issue, this is  
13 drafted in the request language, not "the exchange  
14 shall," but "please, exchange, hand it to us as soon as  
15 you get it, it will make our life a lot easier to help  
16 the process go smoother. You don't have to, but it's  
17 certainly going to help us out a lot." And I'm  
18 confident, based on our excellent working relationships  
19 with the exchanges that we have regarding this and  
20 other things, that we don't need the heavy hand of the  
21 "thou shall," just please help us out here and give it  
22 to us, we'll get the job done.

1           So I'm confident the language will work in  
2 practice, even though if you read it it's somewhat  
3 stilted coming from a regulator to a regulated entity.  
4 But it is the way it is for just the procedural thing  
5 of getting it in this rule.

6           So I think it would be helpful for us to get  
7 the information as early as possible, save our  
8 resources in trying to spot these violations or  
9 excesses when they occur. If people can tell us, we  
10 have a general policy that people should tell us when  
11 they're violating, so why shouldn't this be in there?

12           So I would hope that we could adopt this  
13 amendment to just facilitate this review process, which  
14 is under an extraordinarily tight timeframe.

15           CHAIRMAN TARBERT: Thank you, Commissioner  
16 Berkovitz.

17           So now I'll open the floor. I'll do so in  
18 seniority. But if it's all right, I want to hear what  
19 my fellow Commissioners have to say about this, and I  
20 may say something at the end before we have the vote,  
21 the two votes.

22           Commissioner Quintenz?

1                   COMMISSIONER QUINTENZ: Thank you, Mr.  
2 Chairman. This is the first time since I've been on  
3 the Commission in three years where we've had an  
4 amendment to a final rule. So, Mr. Chairman, if I  
5 could just ask you what the protocol is for considering  
6 this. You're just going to go through seniority order  
7 of the remaining Commissioners, and then you'll call  
8 for a vote? Is that correct?

9                   CHAIRMAN TARBERT: Yes. I think we've come  
10 to the end of our position limits second round, but now  
11 there's another motion before us, so I think we want  
12 everyone to get a chance to talk about this motion, and  
13 then we will go ahead and vote on this motion. If this  
14 motion fails, then we'll go ahead and vote on the  
15 position limits rule as introduced. Or if this motion,  
16 the motion to amend, passes, then this will amend the  
17 final rule, and then we will vote on the final rule as  
18 amended.

19                   COMMISSIONER QUINTENZ: Okay. Thank you.

20                   Let me start by saying I have great respect  
21 for all my colleagues, including, of course,  
22 Commissioner Berkovitz, and I believe he's offering

1 this amendment with the best of intentions, as he  
2 describes. His office did forward this language to my  
3 office and, I believe, the other Commissioners last  
4 evening, so I appreciate the opportunity to have a  
5 little bit of lead time to look at it.

6           However, best intentions aside, to me, while  
7 it's cloaked in reasonableness, I believe sincerely  
8 that this could actually be something very detrimental  
9 to the rule and to the process. I strongly disagree  
10 with it. And again, it's not because of anyone's  
11 intentions. I'm speaking to the potential impact of  
12 this, as opposed to the intention of it.

13           I think it's completely unnecessary, I think  
14 it's highly inappropriate, and I think it has the  
15 potential to be very harmful. But from an unnecessary  
16 perspective, I think we've already built into this rule  
17 the idea that if the staff feels like they need more  
18 time, there is a stay provision that would allow the  
19 Commission to extend the review period by up to 45  
20 days.

21           I don't know why that's insufficient, and I  
22 think that point, combined with the many other points

1 I'm going to make, I think makes a pretty compelling  
2 case against this. I know that if I was on the  
3 Commission and staff asked for more time to review the  
4 appropriateness of a very complicated hedge, a non-  
5 enumerated bona fide hedging request, I would be happy  
6 to vote for that. And that is why the process exists  
7 for a stay as opposed to some other work-around to "get  
8 a head start" that I don't believe has enough  
9 guardrails around it or is guaranteed to be used with  
10 integrity going forward.

11           From an inappropriate perspective, I can't  
12 remember another time in a rule where in the preamble  
13 we suggested it would be helpful for a registrant  
14 (inaudible) to do something, but yet we're not  
15 requiring it in the text. The function of a preamble  
16 of any rule is meant to speak or interpret the rule  
17 text, and that is it. It's not meant as a place for  
18 the Commission to make unrequired requests to entities  
19 or create a wish list for information, and nowhere is  
20 there discussion in the rule text of a requirement for  
21 exchanges to submit this information.

22           So while it's only phrased as a

1 recommendation, I think we all agree that the  
2 Commission is not a consulting firm. We don't make  
3 recommendations. We pass rules, we pass regulations,  
4 and we pass interpretations of that rule text. If the  
5 Commission needs more time to review, either they  
6 should have contemplated that in this final rule, which  
7 it deliberately did not, or we can subsequently use the  
8 stay provision going forward.

9 I'd also like to point out that, the  
10 criticism of this process aside, in the 2016 proposal  
11 that was passed under a Democrat chairman, the exchange  
12 was given unilateral authority without any oversight by  
13 the Commission or express approval or rejection by the  
14 Commission to grant non-enumerated hedges. So this  
15 actually goes much more beyond that by allowing for a  
16 Commission review process.

17 From a potential to be harmful aspect of  
18 this, which is hard for me to say because I don't want  
19 to impugn the staff in any way because I have such  
20 faith and confidence in them and I see all the good  
21 work they do and believe that they are honest brokers,  
22 I think that there is always a chance that information



1 that is passed to the Commission in advance of an  
2 exchange's determination could be used to allow the  
3 staff, at the direction of a future DMO director or at  
4 the direction of a future chairman or chairwoman, to  
5 express a view to the exchange about what they should  
6 do. And that's why in good faith, to me, abusing the  
7 exchange's expertise in this process and only reviewing  
8 those cases that are so significant that it requires a  
9 Commission vote to overturn.

10           From an APA perspective, I have some problems  
11 with this. The 10-day period in the text is described  
12 as a review period. It is not described as a decision  
13 period. So if we're giving staff additional time to  
14 review an application, does that accelerate the 10-day  
15 period, or does that conflict with the idea that a  
16 review has to be completed within 10 days?

17           It is called a review period specifically; it  
18 is not called a decision period. It would seem to me  
19 that the reg text intends for the review and potential  
20 action of the Commission to be conducted within a  
21 certain timeframe, and I think Commissioner Berkovitz  
22 recognizes, because it's not in the proposal, that no

1 one has been given a chance to comment on this.

2           So for a lot of reasons, I would hate to see  
3 something like this, while it could be used positively  
4 and beneficially for the staff, and there is language  
5 in here that would -- let me see if I can read it, that  
6 while the exchange would not be required to obtain an  
7 opinion on such applications, there's nothing that  
8 precludes the Commission from expressing a view to the  
9 exchange in advance of the exchange making its own  
10 determination.

11           The language at the beginning says, "The  
12 Commission would consider it to be reasonable and  
13 helpful practice that the exchanges are likely to  
14 provide information to the Commission as the exchange  
15 is considering applications." I would hope that would  
16 mean that an exchange could do that, it's not being  
17 considered unreasonable and unhelpful. So I think the  
18 opposite of this language would suggest that.

19           Lastly, this says that this would help  
20 facilitate additional regulatory certainty for market  
21 participants, and that providing such application  
22 information that the exchange receives could facilitate

1 a more rapid Commission evaluation. So a more rapid  
2 evaluation only impacts an end user, someone that has  
3 been granted a non-enumerated hedging application by  
4 the exchange if the Commission acts to overturn it.

5           So are we saying that this would be  
6 beneficial to the marketplace because we could more  
7 quickly overturn the exchanges? I have some trouble  
8 with that language.

9           And I think, just back on a prior point I  
10 made about the safeguards around this, if it's possible  
11 I'd like to ask Dorothy DeWitt, our DMO director, a few  
12 questions. I don't want to put you on the spot here,  
13 but if it's possible to answer either yes or no the  
14 best you can, that would be great.

15           Would you as the DMO director either use this  
16 information or direct your staff to use the information  
17 that would be provided by an exchange under this  
18 amendment to communicate with the exchange in advance  
19 of their own decision to either influence it or  
20 describe a potential recommendation that the staff  
21 would make to the Commissioners if the exchange granted  
22 the exemption?

1 MS. DEWITT: I am the current DMO director,  
2 and I believe that the decision-making processes are  
3 separate. The exchange makes its decision, and then in  
4 the time period, 10 days as extended or 2 days, the  
5 Commission reviews and makes its decision. But as you  
6 mentioned, I'm here now, and there may be other people  
7 at other times in the future that may have a different  
8 point of view.

9 COMMISSIONER QUINTENZ: Thank you. So I  
10 assume that if there was that kind of level of  
11 communication, it would seem to be inconsistent with  
12 the intent of our rule, which, as you described,  
13 creates independent processes. So I guess my final  
14 question would be -- which is something I know the  
15 answer to, and I think you just said it -- I don't  
16 think you're in a position to guarantee me that every  
17 future DMO director or chairman or chairwoman would  
18 take the same approach as you. And if that's the case,  
19 I think this language gives me enough pause that I  
20 would rather any discussions that need to happen with  
21 exchanges happen outside of any implied requirement  
22 that is being described as a request.

1           I guess the last thing, Mr. Chairman, since  
2 this is the only amendment that we are addressing  
3 today, which I think is significant that this is the  
4 only issue which we are considering changing the final  
5 rule, if it happens to pass, I would hope that means  
6 that the people that vote for this would embrace this  
7 process and that this is being offered to move this  
8 process to a place where it can be fully supported.

9           So with that I'll yield back, and I will be  
10 respectfully voting against it. Thank you.

11           CHAIRMAN TARBERT: Thank you, Commissioner  
12 Quintenz.

13           I'll just go through, and if you don't have  
14 any comments, that's fine.

15           Commissioner Behnam?

16           COMMISSIONER BEHNAM: Thanks, Mr. Chairman.  
17 I'm happy to support this, and I thank Mr. Berkovitz  
18 for bringing this up as an amendment. Maybe I'm  
19 looking at this too simplistically, but it is  
20 voluntary, and in my view I look at it from the lens of  
21 the exchange and in the process of reviewing non-  
22 enumerated bona fide hedges and an opportunity for the

1 exchange and the market participant who is  
2 participating in our markets to have an opportunity to  
3 create more clarity and certainty in the process. This  
4 is not going to be in the rule text. This is going to  
5 be in the preamble, so it's not subject to any APA  
6 issues as far as I know, but I welcome if anyone from  
7 OGC wants to comment on that if I'm wrong.

8           Again, emphasizing the voluntary nature of  
9 this, if I'm an exchange and I have this 10-day period  
10 and there's the possibility that there's a non-  
11 enumerated bona fide hedge that is unique and bespoke  
12 and they feel like giving the Commission a little bit  
13 of advanced notice so that they can begin the review  
14 process, I think that's a positive thing for both the  
15 market and ultimately the end user who is trying to  
16 create certainty for their risk management program.

17           So again, thanks to Commissioner Berkovitz.  
18 I'm happy to support this.

19           CHAIRMAN TARBERT: Thank you, Commissioner  
20 Behnam.

21           Commissioner Stump?

22           COMMISSIONER STUMP: Thank you, Mr. Chairman.

1           I feel some responsibility here to point out  
2 that there were two issues of most importance to me. I  
3 have many issues within this rule that I care about but  
4 two of particular importance, and that was, in fact,  
5 how we were going to define the parameters around what  
6 is a bona fide hedge. The Commodity Exchange Act says  
7 we cannot apply position limits to things that are bona  
8 fide hedging transactions or positions.

9           So I spent a great deal of time trying to  
10 ensure that the definition or the elements of things  
11 that might be considered to be bona fide hedges in the  
12 enumerated list would be updated and account for things  
13 that are fairly common hedging practices within the  
14 markets that we regulate.

15           So my hope is that in the event we need to  
16 rely upon the exchanges to help us in considering non-  
17 enumerated bona fide hedges, that we've narrowed that  
18 universe. But nonetheless, it is going to happen.  
19 There will be instances where the list of enumerated  
20 hedges do not cover things that are legitimate hedging.  
21 So the exchange will initially review that and make a  
22 determination, and subsequent to that the Commission

1 will review what the exchange has -- what decision  
2 they've arrived at. But ultimately the responsibility  
3 still resides with the Commission.

4           So even though we've worked hard to narrow  
5 the universe of things that will be required to be  
6 designated as non-enumerated bona fide hedges, when we  
7 proposed this rule, the second element that I spent a  
8 great deal of time working on was the 10/2-day review  
9 process, and I was somewhat critical. I had expressed  
10 the concern that the 10/2-day review period for non-  
11 enumerated bona fide hedges was both too long and too  
12 short: too long for market participants who have  
13 immediate hedging needs, and too short for the  
14 Commission to conduct the requisite review.

15           It's a real challenge, and there really is no  
16 perfect solution. In an attempt to minimize the "too  
17 long" predicament, the wait time for hedgers, the final  
18 rule before us has been modified to provide an option  
19 of utilizing the exchange's approval of the non-  
20 enumerated hedge exemption during the limited  
21 Commission review period, albeit, as some have pointed  
22 out, there are risks associated with that -- that we



1 may require them to get out of those positions if at  
2 some point we disagreed with the exchange's  
3 determination.

4           In my view, Commissioner Berkovitz' amendment  
5 seems designed to address the other concern I expressed  
6 of the Commission review period being "too short" --  
7 too short to consider the relevant circumstances  
8 related to the exchange's recognition of the  
9 applicant's request.

10           I would have preferred to have adopted a path  
11 forward similar to what was in the 2016 proposal, where  
12 the exchange made the determination and we oversaw the  
13 exchange through our normal course. But that is not  
14 where we are, and I'm not going to argue that point any  
15 longer. We are where we are. We have a 10/2-day  
16 review process of a narrow universe, I hope, of non-  
17 enumerated hedging strategies.

18           So in my opinion, Commissioner Berkovitz'  
19 amendment would facilitate the review by encouraging  
20 early notice from the exchanges. And I think it  
21 complements the changes we've made to addressing the  
22 concern with regard to hedgers needing to have

1 immediate access to these hedging exemptions upon  
2 approval by the exchange.

3 I want to just frame this in a certain  
4 context. It's the way in which I view many things.  
5 The exchanges and the CFTC have a long history of an  
6 open dialogue. We talk every single day where position  
7 limits are concerned and many other things, and I  
8 believe this amendment serves to further such  
9 coordination going forward, and I will support it.  
10 Thank you.

11 CHAIRMAN TARBERT: Thank you very much,  
12 Commissioner Stump.

13 Now that all of the Commissioners except for  
14 myself have had a chance to weigh in, I do appreciate  
15 in particular -- well, I appreciate everyone's  
16 comments. They all make sense to me. I guess  
17 Commissioner Quintenz' concerns I think are probably  
18 the most reflective of my own point of view. But that  
19 said, I guess I want to ask a much more simple question  
20 to you, Dorothy.

21 Let's suppose that it is really helpful that  
22 from time to time staff gets information in advance,

1 noting very clearly that you said that staff should not  
2 use that information to somehow insert themselves in  
3 the exchange process, but really the point of having  
4 the Commission look at it after the exchange has made  
5 its decision is to keep those processes separate.

6           That said, it may be helpful every now and  
7 again for our staff to know that something is coming  
8 down the pike, to be able to think about it and then  
9 present this Commission with a decision.

10           Is there anything in our rules that would  
11 actually prevent you, knowing that you talk to the  
12 exchanges every single day, or at least DMO staff does,  
13 from saying, hey, if you guys see a non-enumerated  
14 hedge application come down the pike and you're likely  
15 to grab it, meaning it's going to be before this  
16 Commission, would you mind sending us a copy of that  
17 when it's ready so we have a few extra days in advance  
18 so we can prepare for when it does come to the  
19 Commission and there's that separate process, that  
20 we'll be better informed? Is there anything preventing  
21 you from doing that in our final rule?

22           MS. DEWITT: There is not.

1                   CHAIRMAN TARBERT: Okay, all right. So I  
2 guess where I stand is some of the concerns -- well,  
3 the concerns that Commissioner Quintenz raised, I'm  
4 very sympathetic to those, but I also don't necessarily  
5 see why this is necessary if ultimately we're going to  
6 say, hey, this would be helpful. I think that can be  
7 done by our DMO staff in the normal course of things.

8                   But that said, I do appreciate the  
9 discussion. And I'll ask the question, is there any  
10 Commissioner not prepared to vote?

11                   (No response.)

12                   CHAIRMAN TARBERT: Okay. So we will then  
13 have two successive votes, one on the amendment, and  
14 then the second on the final rule depending on what  
15 happens with the vote on the amendment.

16                   So, Mr. Kirkpatrick, would you first please  
17 call the roll for the amendment offered by Commissioner  
18 Berkovitz and seconded by Senator -- Commissioner  
19 Behnam on the final rule, for the amendment to the  
20 final rule?

21                   MR. KIRKPATRICK: Thank you, Mr. Chairman.

22                   The motion now before the Commission is on

1 the approval of the amendment as offered by  
2 Commissioner Berkovitz to the position limits final  
3 rule.

4 Commissioner Berkovitz?

5 COMMISSIONER BERKOVITZ: Senator -- I mean  
6 Commissioner Berkovitz votes aye.

7 MR. KIRKPATRICK: Commissioner Berkovitz  
8 votes aye.

9 Commissioner Stump?

10 COMMISSIONER STUMP: Commissioner Stump votes  
11 aye.

12 MR. KIRKPATRICK: Commissioner Stump votes  
13 aye.

14 Commissioner Behnam?

15 COMMISSIONER BEHNAM: Commissioner Behnam  
16 votes aye.

17 MR. KIRKPATRICK: Commissioner Behnam votes  
18 aye.

19 Commissioner Quintenz?

20 COMMISSIONER QUINTENZ: Commissioner Quintenz  
21 votes no.

22 MR. KIRKPATRICK: Commissioner Quintenz votes

1 no.

2 Chairman Tarbert?

3 CHAIRMAN TARBERT: Chairman Tarbert votes no.

4 MR. KIRKPATRICK: Chairman Tarbert votes no.

5 Mr. Chairman, on this matter of the amendment  
6 to the position limits final rule, the ayes have 3, the  
7 noes have 2.

8 CHAIRMAN TARBERT: Okay. The amendment  
9 hereby passes.

10 Now, Mr. Kirkpatrick, would you please call  
11 the roll for the final position limits rule for  
12 derivatives, as amended?

13 MR. KIRKPATRICK: Thank you again, Mr.  
14 Chairman.

15 The motion now before the Commission is on  
16 the adoption of the final rule, as amended, on position  
17 limits for derivatives.

18 Commissioner Berkovitz?

19 COMMISSIONER BERKOVITZ: Commissioner  
20 Berkovitz votes no.

21 MR. KIRKPATRICK: Commissioner Berkovitz  
22 votes no.

1 Commissioner Stump?  
2 COMMISSIONER STUMP: Commissioner Stump votes  
3 aye.  
4 MR. KIRKPATRICK: Commissioner Stump votes  
5 aye.  
6 Commissioner Behnam?  
7 COMMISSIONER BEHNAM: Commissioner Behnam  
8 votes no.  
9 MR. KIRKPATRICK: Commissioner Behnam votes  
10 no.  
11 Commissioner Quintenz?  
12 COMMISSIONER QUINTENZ: Commissioner Quintenz  
13 votes aye.  
14 MR. KIRKPATRICK: Commissioner Quintenz votes  
15 aye.  
16 Chairman Tarbert?  
17 CHAIRMAN TARBERT: Chairman Tarbert votes  
18 aye.  
19 MR. KIRKPATRICK: Chairman Tarbert votes aye.  
20 Mr. Chairman, on this matter of the final  
21 position limits rule, as amended, the ayes have 3, the  
22 noes have 2.

1           CHAIRMAN TARBERT: Thank you, Mr. Secretary  
2           The ayes have it, and the motion to adopt the  
3 final position limits rule, as amended, is hereby  
4 approved.

5           Now I'd like to give my fellow Commissioners  
6 an opportunity to make closing statements in reverse  
7 seniority order, starting with Commissioner Berkovitz.

8           COMMISSIONER BERKOVITZ: Thank you. Thank  
9 you, Mr. Chairman.

10           I'd like to really start off by acknowledging  
11 all the work of the staff on this rule. It seems like  
12 yesterday -- this is my fourth time -- well, fifth time  
13 if you count the proposal on the position limits rule.  
14 I've been through five of these proceedings now, three  
15 of them from the staff perspective and now two from the  
16 Commissioners' perspective.

17           I have a deep appreciation for all the work  
18 that the staff has put into -- I won't hold it up again  
19 -- the 892-page document, I think it is, and in the  
20 time they did it in. And agree with it or not agree  
21 with it on the policy considerations, I remarked to my  
22 staff the other day that it's a well-written document.



1 I read the document. It adopts the policy arguments  
2 that it does and takes the position that it does at the  
3 direction of the Commission. It's well-executed, let  
4 me put it that way, and so I commend the staff on their  
5 execution of the policy directions as they've been  
6 given. I have some fundamental concerns with that  
7 policy direction, but that should not detract from the  
8 work and the professionalism that has gone into that  
9 document.

10           So I really commend DMO and the Office of the  
11 Chief Economist and the Office of General Counsel, the  
12 Division of Enforcement staff, all the detailees that  
13 went into working on this project, really a cross-  
14 divisional team. They have my highest regards. The  
15 document does what it's intended to do, agree or not  
16 with the policy considerations.

17           I would also express my appreciation to the  
18 Chairman and my fellow Commissioners for the dialogue  
19 on this. This is one of the more contentious issues  
20 that we've had. But, frankly, if contentiousness at  
21 the Commission looks like it did today in terms of the  
22 level and stability of the debate, we're in pretty good

1 shape.

2           So I think we disagreed and we'll move on,  
3 and in that regard I want to say that with all respect,  
4 there may have been unintentionally a question left  
5 hanging in terms of the purpose of the amendment and  
6 what it's intended to do and how it might be executed  
7 in the future.

8           While I disagree with a lot of the policy in  
9 the rule, this rule, as any other rule that the  
10 Commission enacts that I'm entrusted to as a  
11 Commissioner and upholding the oath to enforce, I'm  
12 going to work as hard as I can to make all our rules as  
13 effective as possible, not just at the time of  
14 promulgation but at the time of execution. Although I  
15 may disagree with a provision here or there, once it's  
16 on the books I take my obligation to faithfully execute  
17 the law very seriously.

18           I hope that the amendment that was accepted  
19 today will improve the situation, but in no way is it  
20 intended to be a Trojan horse to undermine the process.  
21 What you see is what you get in terms of my intentions  
22 on that amendment.

1           So going forward, we'll have to work on some  
2 of these processes, as the Chairman has indicated. We  
3 passed the rule, and with so many of the rules we then  
4 go ahead to implement it. New issues will arise, and  
5 old issues are still there, and we'll go ahead and deal  
6 with all those. So in that spirit, I'm looking forward  
7 in the days ahead to addressing the unresolved issues  
8 and implementing our responsibilities.

9           So, I thank all my colleagues, as well. I  
10 think, as I said, to conclude one of the most  
11 contentious issues we faced still in a collegial manner  
12 is a testament to the strength of this Commission, and  
13 I appreciate that, the professionalism of everybody  
14 involved.

15           So, thank you very much, and I look forward  
16 to working together on this and other issues.

17           CHAIRMAN TARBERT: Thank you very much,  
18 Commissioner Berkovitz.

19           Commissioner Stump?

20           COMMISSIONER STUMP: Thank you, Mr. Chairman.  
21 I will make a very short comment.

22           Reasonable people have, for a very long time,

1 debated and sometimes disagreed as to how best to  
2 interpret the policies Congress entrusted us to carry  
3 forward in the Commodity Exchange Act with regard to  
4 position limits. These are very complex and sometimes  
5 divergent responsibilities, and so we have to  
6 acknowledge that there will always be disagreements  
7 with regard to position limits.

8           That said, I just want to echo the things  
9 that Commissioner Berkovitz said. I do feel very  
10 privileged to work with people who can disagree  
11 respectfully, and I always enjoy having the discussion  
12 even when I may not agree with my colleagues.

13           So thank you all to the Commission and the  
14 team and my team for all of the work that's gone into  
15 getting this across the finish line. Thank you.

16           CHAIRMAN TARBERT: Thank you, Commissioner  
17 Stump.

18           Commissioner Behnam?

19           COMMISSIONER BEHNAM: Thanks, Mr. Chairman.  
20 I'll be brief as well and echo a lot of the comments  
21 that Commissioners Stump and Berkovitz made.

22           Certainly first and foremost, I want to thank

1 the staff, certainly from DMO, Dorothy and her team,  
2 but also OGC and the Chief Economist for all their  
3 work, and others that were involved. This has been a  
4 long process, and as I said in my opening remarks, I  
5 think the Commission should be proud to have finished  
6 this rule.

7           Although I am not in favor of the policy that  
8 we voted on and passed today, I will absolutely -- in  
9 echoing Commissioner Berkovitz' comment, I care about  
10 this very deeply and I think this is something that we  
11 all take very seriously. But the Commission voted to  
12 approve this, and I'll do everything in my power to  
13 follow through and uphold the rules and what I swore as  
14 my duty to fulfill here as a Commissioner on CFTC.

15           So regardless of our differences, it's always  
16 a pleasure to engage and discuss these issues, to have  
17 differences. Like I said earlier, the friction of our  
18 differences will, I think, hopefully produce better  
19 outcomes, and I'll continue working with everyone to  
20 hopefully produce better outcomes as we monitor the  
21 markets and see how this rule works and continue to do  
22 our job going forward.

1                   So thanks again to everyone for their work.

2                   CHAIRMAN TARBERT: Thank you very much,  
3 Commissioner Behnam.

4                   Commissioner Quintenz?

5                   COMMISSIONER QUINTENZ: Thank you, Mr.  
6 Chairman. Let me join my colleagues in thanking them  
7 for the quality of the debate and how privileged I am  
8 to serve at the agency with them and with this staff in  
9 a place where passionate debate is not necessarily --  
10 and I think has never, since I've been here, meant  
11 personal animosity. We debate passionately our views  
12 on policy and believe with integrity in our own  
13 positions, but also believe that the others are acting  
14 with similar integrity in advocating their views, and  
15 today was another great example of that.

16                  Commissioner Stump mentioned this before. I  
17 remember well sitting as a nominee in front of the  
18 Senate Agriculture Committee and was asked a question  
19 about whether or not I would commit to finalizing a  
20 position on this rule, and my quote was short but I  
21 would like to read it because it said, yes, I would  
22 commit to finalizing the position limits rule.

1           I'm very happy to have fulfilled that  
2     commitment today. Making a commitment under oath to a  
3     Senate committee probably is the second most  
4     significant thing I have done besides taking the oath  
5     of office for this role, and I'm very pleased to have  
6     fulfilled that obligation.

7           Mr. Chairman, let me thank you for your  
8     leadership on this issue. It's nothing short of  
9     extraordinary to have gotten a proposal in front of the  
10    Commission in January and then finalized it in even  
11    better form here in October, and so much of that credit  
12    is due to the incredible team that has been working on  
13    this with the number of people you have mentioned, and  
14    my personal thanks to them.

15           Let me, as always, thank my staff -- Kevin  
16    Webb, Margo Bailey, and especially Peter Kals, who has  
17    worked tirelessly on this issue, going through it line  
18    by line, analyzing the provisions, bringing issues to  
19    my attention, allowing us to engage on each of them  
20    with DMO -- and I thank DMO for their conversations --  
21    and fully preparing me for today. Thanks to him,  
22    thanks to the team, and again thanks to you, Mr.

1 Chairman.

2           CHAIRMAN TARBERT: Well, thank you so much,  
3 Commissioner Quintenz. And thank you to all my fellow  
4 Commissioners. And thank you to the CFTC staff. And I  
5 also wanted to acknowledge two individuals on my office  
6 staff, Charlie Thornton and Andrew Ridenour, who have  
7 been working on this literally since they started  
8 working with me here at the CFTC, getting a sense from  
9 stakeholders what would be so important, particularly  
10 those of you in the real economy.

11           I agree with everything my fellow  
12 Commissioners have said about not only the outstanding  
13 preparation and presentation by our staff, but also the  
14 level of discourse at the Commission. I think the CFTC  
15 is really a place that is cutting-edge. As I said  
16 yesterday in an interview, we deal with everything from  
17 corn to crypto. It's really an important agency.

18           But at the same time I think we can  
19 demonstrate to the rest of the world, to the country,  
20 regardless of what's going on outside our agency, that  
21 we truly function like adults in the room. We have  
22 integrity, we have civil discourse, but ultimately,



1 regardless of where we come out, we care about the  
2 country, we care about our derivatives markets, and we  
3 care about our obligations.

4           So I truly believe that today demonstrates  
5 the fact that we really are the global standard for  
6 sound derivatives regulation, our vision statement for  
7 the agency.

8           Before I close and entertain a motion to  
9 adjourn the meeting, two more things. Number one,  
10 there are thousands of people out there either watching  
11 or who were listening earlier today that want to get  
12 their hands on a copy of this final rule as we go  
13 through it. We're going to put that up as soon as we  
14 can. Obviously, it just got amended, so we're going to  
15 put that language in, but my goal is to get it out as  
16 soon as it's ready so everyone can start going through  
17 it and reading it.

18           The second announcement I'll make is we've  
19 had two open meetings this month, so you might say wow.  
20 There were some years when the CFTC just had two open  
21 meetings in the entire year. But guess what? We're  
22 going to have another open meeting next week. And all

1 that I'm going to say about it right now is that this  
2 open meeting will be like no other open meeting the  
3 CFTC has had in its 45 years. That's a teaser.

4 With that, there being no further business, I  
5 would entertain a motion to adjourn this meeting.

6 SPEAKER: So moved.

7 SPEAKER: Second.

8 CHAIRMAN TARBERT: Thank you.

9 Those in favor of adjourning the meeting will  
10 say aye.

11 (Chorus of ayes.)

12 CHAIRMAN TARBERT: Those opposed, no.

13 (No response.)

14 CHAIRMAN TARBERT: The ayes have it.

15 Once again, I'm truly grateful to the CFTC  
16 staff for their outstanding work.

17 This meeting is hereby adjourned. Thank you.

18 (Whereupon, at 3:04 p.m., the meeting was  
19 adjourned.)

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