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COMMENT

Mr. David A. Stawick
Secretary to the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Concept Release on Whether to Eliminate the Bona Fide Hedge Exemption for Certain Swap Dealers and Create a New Limited Risk Management Exemption From Speculative Position Limits ("Concept Release").

Dear Mr. Stawick:

Dechert LLP appreciates the opportunity to submit these comments in response to the Commodity Futures Trading Commission's ("Commission's") request for public comment on its Concept Release concerning the treatment, for speculative position limit purposes, of futures positions held by certain swap dealers.[1] The Concept Release addresses several issues relevant to our clients, who represent a broad range of participants in the investment management industry, including leading fund managers of registered investment companies, advisers to pension plans, investment managers for hedge funds, commodity pools and other pooled investment vehicles, and advisers to institutional and individual client accounts.

1. The Public Benefits of Commodity-Indexed Investments

Since the advent of commodity index investments in the 1970's, the benefits of diversifying stock portfolios with commodity investments have become widely recognized. Financial experts now generally recommend that investors, whether large or small, consider allocating some of their investment assets to commodity index investments, which offer diversification benefits, a hedge against inflation and a counter-balance to stock and bond market declines. Retirement plans, college endowments, charitable foundations and millions of small investors now derive these important benefits from commodity index investments. For many small investors, mutual funds and other passively managed investment vehicles that seek to track

1 Concept Release on Whether To Eliminate the Bona Fide Hedge Exemption for Certain Swap Dealers and Create a New Limited Risk Management Exemption From Speculative Position Limits, 74 Fed. Reg. 12,282 (Mar. 24, 2009) [hereinafter, Concept Release].

broad commodity indexes are the most efficient, cost-effective and accessible means of achieving the diversification, stock and bond market offset and inflation hedging benefits of commodity investments. The Concept Release recognizes these important uses of commodity index investments as well as the fact that for some market participants, swaps are the preferable means of obtaining commodity exposure because swaps "offer the ability to customize contracts to match particular hedging or price exposure needs."[2]

2. The Commission's Rules Should Facilitate the Use of Commodity Index Strategies

As the Concept Release reflects, the Commission and its staff have proceeded cautiously in addressing the application of speculative position limits to commodity index strategies. It has granted a small number of narrow exemptions and issued no-action letters in contexts in which the use of futures was undertaken, whether by a swap dealer or directly by an index fund, to offset or to obtain an exposure tied directly to specific price risks arising from passively managed commodity index-based funds. We believe that these carefully crafted positions represent a prudent accommodation of the market-protective purposes of speculative position limits and the legitimate investment purposes underlying commodity index strategies.

To enable broad segments of the public to enjoy the benefits of diversification obtained through commodity-indexed investments, fund managers and investment advisers must be able to obtain commodity exposure through the derivatives markets. These investments typically are made through highly-regulated, transparent investment vehicles, such as investment companies registered under the Investment Company Act of 1940 and retirement plans governed by the Employee Retirement Income Security Act of 1974. Further, as codified in the no-action relief granted to date by the Commission staff, these investments are made in a manner that significantly limits their potential impact upon the futures markets. The Commission staff has conditioned relief upon the commodity index strategy being hedged (in the case of the swap dealer position) or pursued directly (in the case of commodity index funds obtaining direct commodity exposure in the futures markets) and being a long, passive, unleveraged strategy, with no positions being carried into the delivery month. In addition such relief included a modified position limit for the trader receiving relief, among other conditions.[3]

2 Concept Release, 74 Fed. Reg. at 12,284.

3 The Commission staff's no-action relief also was conditioned upon the commodity index fund futures market activity meeting the following conditions: (1) the futures positions must be passively managed; (2) they must be unleveraged (so that financial conditions should not trigger rapid liquidations); and (3) the positions must not be carried into the delivery month (when physical delivery markets are most vulnerable to manipulation or congestion). In addition, the Commission staff emphasized the transparency of the strategy in disclosures

a. How Should the Commission's Rules Define A Commercial Client and Should the Rules Distinguish Among a Swap Dealer's Non-Commercial Clients? (Question 7)

The Commission has requested comment concerning the appropriate definition of "commercial clients" and whether index funds, if characterized as non-commercial clients, should be distinguished from other types of non-commercial clients. Commodity index investors are similar to commercial hedgers in the purpose and manner of their trading, and that their strategies strongly support a hedging or risk management exemption. Commercial hedgers tend to be consistently either net long or short a contract and use the futures markets to offset risks inherent in, for example, production or processing of a commodity. Commodity index investors tend to be consistently net long and use the futures markets as a buffer against the risks to retirement assets and other savings created by stock and bond price fluctuations and inflation. In granting no-action relief to index investors, the Commission staff recognized that such investors employ it in passively managed strategies that are designed to protect against specific inflation and market risks. We believe that the relief structured by the Commission's staff provides a reasonable template for a more general risk management exemption that should be made available for investment vehicles engaged in passively managed, fully collateralized index strategies, consistent with the exemptive and no-action criteria developed to date.

b. How Would a Swap Dealer Satisfy the Commission that the Fund is Made Up of Many Participants and is Passively Managed? (Question 8)

The Commission has also asked how, if a swap dealer were granted an exemption from speculative position limits for futures positions taken to hedge against swaps exposure opposite index fund counterparties, the dealer would satisfy the Commission that the fund is made up of many participants and is passively managed. In particular, the Commission asks whether a certification by the dealer or fund would be sufficient or whether the dealer or fund should be required to identify the fund's largest clients. We believe that a certification by the dealer based upon reasonable diligence in reviewing the client's account should suffice. Further information could be obtained by the Commission upon request. Normal due diligence by swap dealers includes review of investment objectives of funds and in the case of registered investment funds, publicly available data would establish the manner in which a fund is managed, the size of the fund and the general composition of its participants.

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to investors. *See* DB Commodity Services LLC, CFTC No-Action Letter No. 06-09 (May 5, 2006); CFTC No-Action Letter No. 06-19 (Sept. 6, 2006).

3. How Should the Two Index Traders Granted No-Action Relief Be Treated in the New Regulatory Scheme? (Question 14)

We also believe that the Commission should make the no-action relief previously granted to index traders generally available to other market participants that meet the relevant criteria. As the Concept Release reflects, in issuing the two 2006 no-action letters, the Commission staff recognized that permitting a commodity index fund to exceed speculative position limits through directly held futures positions rather than through a swap transaction "represented a legitimate and potentially useful investment strategy."[4] The direct commodity index trading activity addressed in the staff's no-action letters involves trading that is substantially equivalent to the swap dealer transactions discussed in the Concept Release — futures positions are not carried into the spot month, are unleveraged and implements a passive investment strategy that enables numerous investors to achieve diversification and risk management benefits on a flow-through basis.

We appreciate the opportunity to share our views with the Commission on this important topic. Please contact Brendan C. Fox at 202.261.3381 if we can provide any additional information that may assist the Commission.

Sincerely,

Dechert LLP

Dechert LLP

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4 Concept Release, 74 Fed. Reg. at 12,284 n. 15.