UNITED STATES OF AMERICA

Before the

COMMODITY FUTURES TRADING COMMISSION

Motion of ISDA and SIFMA for a Stay of the Effective Date of the Position Limits Rule

ORDER

Upon consideration of the December 12, 2011 motion of ISDA and SIFMA ("Movants") for a stay of the effective date of the Position Limits Rule pending judicial review, the Commission having considered Movants' request for a stay under 5 U.S.C. § 705 and the standard set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008), the Commission denies the motion.*

Issued in Washington, DC, this 3rd day of January, 2012

by the Commission

David A. Stawick

Secretary of the Commission

^{*} Commissioners Sommers and O'Malia dissent from the denial of the motion.

COMMODITY FUTURES TRADING COMMISSION POSITION LIMITS FOR FUTURES AND SWAPS FINAL RULE AND INTERIM FINAL RULE

RIN 3038-AD17 76 Fed. Reg. 71,626 (Nov. 18, 2011)

MOTION FOR STAY OF FINAL RULE AND INTERIM FINAL RULE BY INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

The International Swaps and Derivatives Association ("ISDA") and Securities Industry and Financial Markets Association ("SIFMA") respectfully request that the Commodity Futures Trading Commission stay the effective date of its final rule and interim final rule establishing position limits, including all provisions of new Part 151 of the regulations and all changes to Part 1. *See* Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 Fed. Reg. 71,626 (Nov. 18, 2011). Petitioners do not, however, seek a stay of the rule's amendments to 17 C.F.R. § 150.2, made in response to the petition by CME Group. *See* 76 Fed. Reg. at 71,642, 71,673, 71,684.

Petitioners request this stay pending the resolution of challenges they filed on December 2, 2011, in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit. *See Int'l Swaps & Derivatives Ass'n v. CFTC*, No. 1:11-cv-2146 (D.D.C.); *Int'l Swaps & Derivatives Ass'n v. CFTC*, No. 11-1469 (D.C. Cir.). A stay is warranted because it would have no adverse effects and yet would reduce the risk that the rule would impose significant, unnecessary costs on the markets, market participants, and the public while under review by the courts. Last year, the U.S. Securities and Exchange Commission stayed its "proxy access" rule in response to a request similar to the one Petitioners make here. A stay is even more appropriate in the unusual circumstances of this rulemaking, where a majority of the Commissioners to consider the rulemaking record concluded that the rule

was unwise, even as a majority also concluded that the rule was legally required by the plain language of the statute. Having discharged its (perceived) statutory responsibility, the Commission should now exercise its discretion to stay the rule so the courts may resolve the underlying questions of "plain" statutory meaning, a province that is uniquely the courts' own. As the courts deliberate, there will be no harm to the public from the Commission staying a rule that the majority of Commissioners to consider the question found to be problematic. A stay will also evidence to the courts, and to the public, a thoughtful, balanced stewardship on the part of the Commission toward this rule and implementation of the Dodd-Frank Act.

ISDA and SIFMA respectfully request an answer to this motion by no later than Monday, December 19, 2011, so that they promptly may seek such judicial relief as is necessary. If a stay is granted, Petitioners will join the Commission in seeking expedited judicial review.

Dated: December 12, 2011

Respectfully submitted,

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COMMODITY FUTURES TRADING COMMISSION POSITION LIMITS FOR FUTURES AND SWAPS FINAL RULE AND INTERIM FINAL RULE

RIN 3038-AD17 76 Fed. Reg. 71,626 (Nov. 18, 2011)

BRIEF IN SUPPORT OF MOTION FOR STAY OF FINAL RULE AND INTERIM FINAL RULE BY INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

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December 12, 2011

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INTRODUCTION

On November 18, 2011, by a vote of 3 to 2, the Commodity Futures Trading Commission ("Commission" or "CFTC") adopted a final rule and interim final rule establishing position limits on derivatives contracts tied to twenty-eight different commodities. *See* Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 Fed. Reg. 71,626 (Nov. 18, 2011) ("Position Limits Rule" or "Rule"). The International Swaps and Derivatives Association ("ISDA") and the Securities Industry and Financial Markets Association ("SIFMA") (collectively, "Petitioners"), challenged the Position Limits Rule in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit. *See Int'l Swaps & Derivatives Ass'n v. CFTC*, No. 1:11-cv-2146 (D.D.C. 2011); *Int'l Swaps & Derivatives Ass'n v. CFTC*, No. 11-1469 (D.C. Cir. 2011). They now respectfully request that the Commission stay the effective date of the Rule, including all provisions of new Part 151 of the regulations and all changes to Part 1.2

Petitioners filed challenges in both courts in light of the D.C. Circuit's guidance in *Investment Company Institute v. Board of Governors of the Federal Reserve*, 551 F.2d 1270, 1280 (D.C. Cir. 1977), that "[i]f any doubt as to the proper forum exists, careful counsel should file suit in both the court of appeals and the district court"

A stay of *all* of Part 151 and all changes to Part 1 is essential because all those provisions are under challenge and are inextricably intertwined. If the Commission were to stay only some of the provisions, the resulting piecemeal implementation could have particularly harmful, unintended effects. If, for example, the new position limits (Section 151.4) were stayed without staying the other provisions, traders would be subject to the new, more limited bona fide hedging and other exemptions for Referenced Contracts (Section 151.5) and the strict new aggregation requirements (Section 151.7), without the ability to offset their positions in futures and options contracts subject to Section 150.2 with their positions in swaps, as permitted by Part 151's position-limits regime. *See* 76 Fed. Reg. at 71,672 (explaining that under new Part 151 "market participants can net their physical delivery and cash-settled futures contracts with their swaps transactions for purposes of complying with the non-spotmonth limit"); *see also id.* at 71,637 ("[A] trader may hold positions up to the spot-month (Continued on next page . . .)

As explained below, a stay would promote the public interest by avoiding unnecessary costs and confusion for the markets, market participants, and the public—and would have no countervailing disadvantages. Last year, the U.S. Securities and Exchange Commission cited similar considerations in granting a request to stay a rule that had been adopted pursuant to another provision of the Dodd-Frank Act. *See* U.S. Securities and Exchange Commission Release Nos. 9149 *et al.* (Oct. 4, 2010) (staying newly adopted Rule 14a-11 pending judicial review in order to "avoid[] potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rules were to become effective during the pendency of a challenge to their validity"). With much to gain and nothing to lose, there is ample reason to stay the effective date of the Position Limits Rule pending the orderly disposition of Petitioners' challenge. If a stay is granted, Petitioners will join the Commission in seeking expedited judicial review.

DISCUSSION

A. The Interests Of Justice Weigh Strongly In Favor Of A Stay Because A Stay Could Avert Enormous And Potentially Unnecessary Expenses To The Markets, Market Participants, And The Public At No Countervailing Cost.

Under the Administrative Procedure Act ("APA"), an agency may stay its own action pending judicial review when the "agency finds that justice so requires." 5 U.S.C. § 705; see also Nat'l Treasury Emps, Union v. Fed. Labor Relations Auth., 712 F.2d 669, 676 n.15 (D.C.

^{(...}continued from previous page)

limit in the physical-delivery contracts, as well as positions up to the applicable spot-month limit in cash-settled contracts (i.e., cash-settled futures and swaps) ").

Petitioners do not seek to stay the Rule's distinct amendments to 17 C.F.R. § 150.2 (see 76 Fed. Reg. at 71,642, 71,673, 71,684), which increase preexisting position limits in response to a proposal by CME Group. Petitioners have not challenged these amendments in their recently filed litigation (since Petitioners support the relaxing of position limits); those changes operate separately from the other provisions drawn into question by the litigation and may be implemented independently, without regard to the outcome of the legal challenge before the courts.

Cir. 1983) (noting cases "in which a federal agency, *in its discretion*... undertakes to stay execution of ... agency action" (emphasis added)). An agency need not weigh the four factors that ordinarily are considered by courts to conclude that a stay is appropriate. Thus, for example, the U.S. Securities and Exchange Commission stayed its "proxy access" rule after concluding that a stay was "consistent with what justice requires" in light of the "potentially unnecessary costs, regulatory uncertainty, and disruption" that would occur if the rule were implemented while under judicial review. U.S. Securities and Exchange Commission Release Nos. 9149 *et al.* (Oct. 4, 2010); *see also Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

A stay is appropriate in this case because, as the Commission and commenters alike acknowledge, work that companies will have to undertake in preparation for implementing the Rule is certain to impose immediate and significant costs on market participants—costs that would prove unnecessary in the event that Petitioners' challenge succeeds. *See, e.g.*, 76 Fed. Reg. at 71,665. Among a host of other expenses, "market participants will incur costs associated with developing, implementing and maintaining a method to ensure compliance with the position limits and its attendant requirements (*e.g.*, bona fide hedging exemptions and aggregation standards)." *Id.* As the Commission observed in the rule release and as discussed in greater detail below, the Rule will require market participants to redesign trading strategies and to develop new infrastructure and mechanisms to ensure compliance. *Id.* at 71,677. Financial institutions and other affected entities will immediately need to re-evaluate and, in some instances, reorganize their corporate structures in response to the Rule's aggregation provisions. These and other costly steps must be taken well in advance of the Rule's effective date, because

of the length of time they will take to complete.³ It does not comport with justice or sound stewardship of the U.S. financial markets to force companies to undertake such transitional measures while a bona fide question exists whether the Rule will be upheld in its current form. In addition, the Commission itself would incur costs and burdens, which may prove unnecessary, in modifying its own infrastructure to monitor compliance with the Rule.

More broadly, if the new position limits become fully effective while under judicial review, there is substantial evidence that they will reduce liquidity, impair the price discovery function of the markets, increase price volatility, drive investment to overseas commodity markets, and (ultimately) raise prices for consumers. These costs will be compounded by the uncertainty and confusion created by the possibility that the Rule will be vacated by a court at any time.

On the other hand, there is no evidence that postponing the Rule's effective date would have any detrimental effects. Rather, former-Commissioner Dunn, whose vote in favor of the Rule was necessary for its adoption, observed that "no one . . . presented this agency any reliable economic analysis to support either the contention that excessive speculation is affecting the market we regulate or that position limits will prevent the excessive speculation." Tr. of Open Meeting on Two Final Rule Proposals Under the Dodd-Frank Act (Oct. 18, 2011) ("Oct. 18 Tr."), at 13. The two dissenting Commissioners concurred. *See* 76 Fed. Reg. at 71,669 (Sommers, Comm'r, dissenting); *id.* at 71,702 (O'Malia, Comm'r, dissenting). Even supposing

The earliest date that the material portions of the Commission's Rule will take effect is 60 days after the Commission defines "swap" pursuant to a joint rulemaking with the Securities and Exchange Commission. See 76 Fed. Reg. at 71,687–71,688. Petitioners nonetheless request a stay at this time because efforts companies must undertake now in anticipation of the Rule's implementation will impose irreversible costs, and because without a stay the Rule will take effect before the conclusion of this litigation.

the Dodd-Frank Act required adoption of the new Rule—and Petitioners and two of the Commission's members dispute that—Congress took no step to constrain the discretion all agencies have to stay the effective date of their actions pending judicial review. The Commission should exercise that discretion here.

In short, implementing the compliance regime and the corporate reorganizations and divestitures potentially required by the Rule would inflict significant and potentially unnecessary costs on market participants and consumers, including transition costs that could prove unnecessary if the Rule is vacated, whereas postponing its effective date in deference to the judicial process will have no adverse effects. This Rule was adopted not because a majority of Commissioners believed position limits were necessary or appropriate—a majority concluded otherwise—but because a bare majority of Commissioners believed that the Rule was statutorily required. While that legal proposition (and others) are examined in the courts, it is appropriate that the Commission stay this costly rule of doubtful necessity.

B. The Traditional Judicial Factors For Preliminary Relief Uniformly Support A Stay.

The Commission need not apply the traditional four-factor judicial test for granting preliminary relief. Rather, it appropriately may conclude that, as a matter of responsible stewardship of the financial markets in a fragile American economy, the Rule should be stayed pending answers from the courts that will provide guidance for this Rule and other, future rulemakings. Nonetheless, each factor of the four-factor test weighs strongly in favor of a stay. As explained below, implementing the Rule during the pendency of this litigation would irreparably harm market participants, including Petitioners' members. The public interest favors a stay, which would reduce the risk of harm to countless non-parties. And, there are legitimate and serious questions to be raised about the Rule, many of which were publicly voiced by a majority of the Commissioners. At minimum, Petitioners have demonstrated that a stay is

warranted by raising "serious legal questions going to the merits, so serious, substantial, and difficult as to make them a fair ground of litigation." *Pan Am Flight 73 Liaison Group v. Dave*, 711 F. Supp. 2d 13, 37 (D.D.C. 2010), *aff'd* 639 F.3d 1102 (D.C. Cir. 2011) (internal quotation marks and alteration omitted).

1. Failure To Grant A Stay Would Cause Irreparable Injury.

Generally, a stay is appropriate when failure to grant it would impair a court's ability to grant an effective remedy. See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, Federal Practice and Procedure § 2948.1 (2d ed. 2011). Because the government cannot be made to pay damages as compensation for economic harm, in this context economic harm is "irreparable per se." Feinerman v. Bernardi, 558 F. Supp. 2d 36, 51 (D.D.C. 2008).

The Commission acknowledged that "the final rules establishing position limits and related provisions will result in costs to market participants." 76 Fed. Reg. at 71,665. As catalogued by the Commission, those costs include fashioning "market participation and trading strategies . . . to take into account" the Rule, as well as developing and implementing new compliance infrastructure, which will impose costs "related to the monitoring of positions . . . , filing, reporting, and recordkeeping requirements, and . . . changes to information technology systems." *Id.* The provisions of the Rule under challenge here will take effect 60 days after the issuance of the new joint CFTC/SEC rule defining "swap," which is expected in the next 2–3 months. A decision by the Court of Appeals cannot be expected before the summer of 2012, even if that Court grants expedited review. If the case proceeds initially in the District Court rather than the Court of Appeals, a final decision in the litigation might not issue before 2013. Without a stay, market participants would be forced throughout this period to incur substantial, unnecessary, and unrecoverable transition costs.

Even more troubling, market participants faced with the strict new aggregation requirements will have to consider reorganizing their corporate structures to comply with the Rule. For example, as Commissioner O'Malia explained, "[t]he practical effect" of the new aggregation rules is that "holding companies who do not meet any of the . . . limited specified exemptions will be forced to aggregate on a 100% basis the positions of any operating company in which it holds a ten percent or greater equity interest in order to determine compliance with position limits," 76 Fed. Reg. at 71,704 (O'Malia, Comm'r, dissenting). That will compel holding companies to divest their shares in other companies in circumstances where, absent divestiture, the aggregation limits would be exceeded. Indeed, legal and informational barriers may in some instances force divestment simply as a practical matter: An investing company with a 10% or more ownership interest in other companies cannot be certain it is complying with the aggregation requirements without acquiring information from those companies about their positions. Yet, in some instances, fiduciary duties regarding confidentiality will prohibit sharing such information. If the investing party is unable to obtain the necessary information for any reason other than that providing it would, in the opinion of counsel, violate federal law, see 76 Fed. Reg. at 71,693, then the company would have no choice but to divest its ownership interest in the other companies. See, e.g., id. at 71,704 (O'Malia, Comm'r, dissenting) (criticizing the Rule for its "operationally-impracticable solution to the problem of imp[u]ting ownership absent control"). The process of assessing and implementing this solution will be costly and timeconsuming—and must be commenced immediately. To complete this process for the potentially hundreds of affected companies and relationships before the Rule's anticipated effective date is a practical impossibility.

The Rule therefore poses significant barriers to efficient investments over the long run, and in the near term—well before a court decision can be expected—will force some companies into costly, inefficient divestments that likely will be impossible to reverse even if the Rule ultimately is vacated by a court. *Cf. F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001) (preliminary injunctive relief is appropriate to prevent corporate reorganization that would be difficult or impossible to undo). At a time when a recovering U.S. economy demands capital investment in American businesses, the Rule will discourage investment in companies that are active in the commodity markets and are an important source of American jobs, including energy producers and utilities. That significant hurdle to a resurgent economy should not be erected before the courts determine the Rule to be lawful.

The two dissenting Commissioners recognized the immense costs that the Rule would impose on the markets and market participants. Commissioner Sommers emphasized that the Rule "has the potential to *irreparably harm*" markets in commodity derivatives, potentially inflicting "the greatest harm on bona fide hedgers—that is, the producers, processors, manufacturers, handlers and users of physical commodities." *Id.* at 71,699–71,700 (emphasis added); *see also id.* at 71,703 (O'Malia, Comm'r, dissenting) (explaining that the narrower definition of bona fide hedging "will negatively impact the cash commodity markets and the physical commodity marketplace by eliminating certain legitimate derivatives risk management strategies, most notably anticipatory hedging"). According to Commissioner O'Malia, based on data provided to the Commission, "this rule will have an annual effect on the economy of more than \$100 million." *Id.* at 71,705. A substantial portion of these costs relate to establishing the basic compliance infrastructure. The Commission, for example, estimated that compliance with

the bona fide hedging reporting requirements would impose "\$27.5 million in annualized capital and start-up costs and annual total operating and maintenance costs." *Id.* at 71,677.

"Start-up costs" and other costs to establish a "compliance infrastructure" are costs that by definition must be incurred before the effective date of the Rule. Yet, if the Rule ultimately is overturned by the courts, those significant sunk costs (which will be even greater than estimated by the Commission) will have been incurred needlessly.

2. A Stay Would Promote The Public Interest And Would Not Harm Third Parties.

If the challenged provisions are stayed, the public interest will be served and third parties will incur no harm. There is no urgent need for the Rule to go into effect. As Commissioner Dunn put it, position limits are "at best a cure for a disease that does not exist" and "[a]t worst... may harm the very markets we're intending to protect" by leading to "higher prices for commodities that we consume on a daily basis." Oct. 18 Tr., at 13–14. The Commission did not conclude that position limits are necessary to curb excessive speculation or that position limits will have any other beneficial effect on the markets. To the contrary, academics, experts, the Government Accountability Office, the International Monetary Fund, the Organization for Economic Cooperation and Development, the European Commission, and the CFTC itself (as part of an interagency task force) agree that position limits are not necessary to curb excessive speculation. CME Group Comment (Mar. 28, 2011), at 4; see also Coalition of Physical Energy Companies Comment (Mar. 28, 2011), at 3; BlackRock Comment (Mar. 28, 2011), at 3; ISDA and SIFMA Comment (Mar. 28, 2011), at 5.

Indeed, the public will be harmed when the Rule takes effect. As Commissioner Sommers observed, the Rule "will make hedging more difficult, more costly, and less efficient, all of which, ironically, can result in increased food and energy costs for consumers." 76 Fed.

Reg. at 71,699. Commissioner O'Malia echoed this concern, warning that "our action could negatively affect the liquidity and price discovery function of our markets." Id. at 71,706. Commenters pointed to a "wealth of empirical evidence supporting the view that the proposed hard position limits . . . would actually be counterproductive by decreasing liquidity in the CFTC-regulated markets which, in turn, would likely increase both price volatility and the cost of hedging," CME Group Comment, at 2. And, the Colorado Public Employees Retirement Association stated that it was "concerned that . . . the Commission's choice to proceed with the position limits proposal could be deleterious to institutional investors." Colorado Public Employees Retirement Association Comment (Mar. 28, 2011), at 2; see also Morgan Stanley Comment (Mar. 28, 2011), at 3 (expressing concern that the Rule will "compromise the price discovery function of U.S. markets, increase transaction costs, and potentially lead to higher commodity prices for consumers"); ISDA and SIFMA Comment, at 6 (noting that "loss of liquidity alone may increase volatility in the markets, which is precisely what the Commission seeks to avoid"). Onerous position limits also threaten to drive investment to foreign commodity markets, which in turn would reduce liquidity in the U.S. markets and compound the harm to their effective operation. See 76 Fed. Reg. at 71,658.

In any event, this stay request does not present the choice between some regulation and none at all. If a stay is granted, market participants still will be subject to the position limits set forth in Section 150.2 as well as position limits and position accountability rules established by designated contract markets. Thus, setting aside the merits of position limits, substantial regulation will remain in place pending judicial review.

The balance of harms therefore militates in favor of a stay. Granting a stay will cause no harm to the public at all. Against this, withholding a stay will impose significant—and

potentially unnecessary and unrecoverable—costs on market participants and consumers, and may impair the public interest in the effective operation of the commodity markets.

3. Petitioners Are Substantially Likely To Prevail On The Merits.

This rulemaking is exceptional—indeed, potentially unique—in that a majority of the Commissioners to consider the rulemaking record, the Rule, and its effects concluded in their expert judgment that it would be best if the Rule were *not* adopted. Commissioners Sommers and O'Malia each submitted statements vigorously dissenting from the Rule's adoption. *See* 76 Fed. Reg. at 71,699–71,706. And although Commissioner Dunn cast the decisive vote in favor of the Rule, he stated that "position limits may harm the very markets we're intending to protect," leading to "higher prices for commodities that we consume on a daily basis." Oct. 18 Tr., at 13–14. He voted to approve the Rule because he believed that Congress compelled the Commission to promulgate new position limits; had he viewed the Commission's discretion otherwise, the Rule presumably would have been rejected by the Commission. With their court fillings, Petitioners have now put before the courts the concerns expressed by the Commissioners, as well as additional arguments that raise genuine questions about the Rule's legitimacy.

With this request for a stay, Petitioners do not ask the Commission to concede that this legal challenge is legally correct. Just last year, the U.S. Securities and Exchange Commission stayed the proxy access rule and then proceeded to mount a vigorous legal defense. Rather, it is sufficient for a stay for the Commission to recognize (in deference, in part, to the strongly held views of the dissenting Commissioners) that "a serious legal question is presented." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). And in the unusual circumstance presented here, a stay is the most appropriate response to the division of opinion among the Commissioners: The Commission adopted this Rule with a majority believing that the Rule was unwise, but with a majority also concluding that the Rule was

required by the plain language of the governing statute. Determining the "plain meaning" of statutes is ultimately the responsibility of the courts, however, not agencies. *See Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). Therefore, having discharged its perceived statutory responsibility, the Commission should exercise its expertise and inherent discretion to stay this dubious Rule while the courts resolve the questions of statutory duty at the heart of the dispute.

The arguments Petitioners will present to the courts are, <u>first</u>, and as explained in the complaint filed in U.S. District Court, that the Commission failed to find the Rule to be necessary and appropriate. The plain text of the Commodity Exchange Act ("CEA") permits the CFTC to adopt position limits only "as the Commission finds are necessary to diminish, eliminate, or prevent" "an undue and unnecessary burden on interstate commerce" caused by "[e]xcessive speculation." 7 U.S.C. § 6a(a)(1). Furthermore, the Commission is permitted to establish position limits only if it finds them "appropriate." *Id.* § 6a(a)(2)(A), (a)(5)(A). As Commissioner O'Malia put it, "Congress could not be more clear in its directive to the Commission . . . to ensure that such limits are essential and suitable to combat the actual or potential threats to commodity prices due to excessive speculation." 76 Fed. Reg. at 71,700. Yet, the Commission made no such findings.

Second, and related, the Commission proceeded in the mistaken belief that it was under an inexorable statutory command to adopt position limits, with no discretion to withhold costly regulations if, in its expert judgment, it believed regulations to be unnecessary and inappropriate. The Commission concluded that "Congress directed [it] to impose position limits"—and thus "did not give the Commission a choice"—based on Congress's use of the verb "shall" in Section 6a. 76 Fed. Reg. at 71,628. This reading of the statute, however, overlooked the fact that "shall"

is modified by "as appropriate"—language that expressly directs the Commission to exercise its discretion in imposing position limits. 7 U.S.C. § 6a(a)(2)(A), (a)(5)(A); see also 76 Fed. Reg. at 71,701–71,702 (O'Malia, Comm'r, dissenting) ("[B]y directing the Commission to establish limits 'as appropriate,' Congress intended to provide the Commission with . . . discretion."). The Commission appears to have appreciated this discretion, at least in part, in deciding to set position limits only for some of the contracts within its jurisdiction. See 76 Fed. Reg. at 71,629, 71,665. Moreover, Section 6a(e) of the CEA confirms that the Commission could impose no position limits at all. See 7 U.S.C. § 6a(e) (setting condition to apply "if the Commission shall have fixed limits under this section" (emphasis added)).

Third, the Commission did not conduct the cost-benefit analysis required by the CEA.

7 U.S.C. § 19(a); see also 76 Fed. Reg. at 71,705 (O'Malia, Comm'r, dissenting) (criticizing the Commission's cost-benefit analysis). Before a rule is promulgated, "[t]he costs and benefits of the proposed [rule] shall be evaluated in light of—(A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations." 7 U.S.C. § 19(a).

Despite this mandate, the Commission did not seriously consider evidence demonstrating that the Rule is unnecessary and would have significant adverse effects on the markets and consumers.

See, e.g., 76 Fed. Reg. at 71,663–71,664 (describing this evidence but ultimately disregarding it).

The Commission also failed to collect data, including data on swaps, that would enable it to evaluate the costs of the Rule. See, e.g., id. at 71,665.

Fourth, the Commission fell short of the APA's requirement to articulate a rational connection between the facts it found and certain decisions it made. For example, the

Commission did not set forth a reasoned explanation for establishing a position limit of 25% of deliverable supply for cash-settled contracts; for rejecting a broader measure of deliverable supply proposed by Petitioners; for declining to exempt traders from the aggregation rules when compliance with those rules might require them to violate state law or the law of foreign jurisdictions; nor for restricting legitimate, long-practiced hedging activity.

Fifth, the Commission did not sufficiently afford "interested persons an opportunity to participate in the rule making." 5 U.S.C. § 553(c). For example, without notice or adequate explanation, the Commission removed the owned non-financial entity exemption set forth in the notice of proposed rulemaking. See 76 Fed. Reg. at 71,653–54; see also id. at 71,679 n.496. Moreover, the one-page discussion of the Rule's costs and benefits in the notice of proposed rulemaking did not fairly apprise members of the public of the empirical data and reasoning on which the Commission would rely. Therefore, the public had no reasonable opportunity to evaluate and critique the Commission's justification for the Rule. Nor did the notice of proposed rulemaking give any notice of the severability clause or provisions circumscribing the scope of the hedging exemptions. The public thus lacked a meaningful opportunity to evaluate and comment on these provisions and their effects on the Rule as a whole.

These serious concerns about the Position Limits Rule—voiced by the Commissioners and public alike—weigh heavily in favor of a stay, even if the Commission disagrees that Petitioners' challenge is likely to prevail. *See*, e.g., *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 844 ("An order maintaining the status quo [a stay] is appropriate when a serious legal question is presented . . . whether or not movant has shown a mathematical probability of success."). Thus, the interests of justice would be served by postponing the effective date of the Rule to determine whether the Commission correctly interpreted its statutory obligations.

CONCLUSION

For the foregoing reasons, Petitioners request that the Commission grant their stay

motion.

Dated: December 12, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2011, true and correct copies of the foregoing Motion for Stay of Final Rule and Interim Final Rule and Brief In Support of Motion for Stay of Final Rule and Interim Final Rule were served via courier on the following:

The Honorable Eric H. Holder Jr. Attorney General of the United States United States Department of Justice Room 4400 950 Constitution Avenue, N.W. Washington, D.C. 20530

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