

Statement of  
Craig S. Donohue  
Chief Executive Officer of CME Group Inc.  
Before the  
Commodity Futures Trading Commission

Hearing on Energy Position Limits and Hedge Exemptions

July 28, 2009

I am Craig Donohue, Chief Executive Officer of CME Group Inc. (“CME Group”). CME Group, on behalf of its four designated contract markets (“CME Group Exchanges,” “Exchanges” or “DCMs”), appreciates the opportunity to provide its views to the Commodity Futures Trading Commission (the “CFTC” or “Commission”) in conjunction with the Commission’s review of its approach to speculative position limits in energy contracts and hedge exemptions from such limits.

CME Group is the world’s largest and most diverse derivatives marketplace. We operate four separate Exchanges, including Chicago Mercantile Exchange Inc. (“CME”), the Board of Trade of the City of Chicago, Inc. (“CBOT”), the New York Mercantile Exchange, Inc. (“NYMEX”) and the Commodity Exchange, Inc. (“COMEX”). The CME Group Exchanges offer the widest range of benchmark products available across all major asset classes, including futures and options on futures based on interest rates, equity indexes, foreign exchange, energy, metals, agricultural commodities, and alternative investment products.

We also operate CME Clearing, one of the largest central counterparty clearing services in the world, which provides clearing and settlement services for exchange-traded contracts, as well as for over-the-counter (“OTC”) derivatives contracts through CME ClearPort®. Using the CME ClearPort® service, eligible participants can execute an OTC swap transaction, which can be transformed into a futures or options contract that is subject to the full range of Commission and exchange-based regulation and reporting. The ClearPort® service mitigates counterparty credit risks, provides transparency to OTC transactions and brings to bear the exchange’s market surveillance monitoring tools.

The CME Group Exchanges serve the hedging, risk management and trading needs of our global customer base by facilitating transactions through the CME Globex® electronic trading platform, our open outcry trading facilities in New York and Chicago, as well as through privately negotiated transactions.

The theory that speculators in futures markets cause unwarranted price volatility and excessively high and low prices is not new; Congress has been repeating that notion since the latter 1800s. Farmers and their legislative representatives have called for the elimination of speculators on futures exchanges. The Commodity Exchange Act (“CEA”), however, does not limit speculation, but only “excessive speculation.” This is an implicit recognition that futures markets cannot operate without the participation of speculators.

The so-called “speculators,” such as index funds and swap dealers, who are the focus of recent intense criticism, are not engaged in traditional speculative activity, *i.e.*, trying to beat the market. Rather, swap dealers use futures markets to facilitate the hedging of more complex and specific risks accepted in connection with swap transactions with commercial customers and others. Denying or limiting their access to the futures markets will simply impede hedging activity by commercial market participants. Index funds aggregate the buying and selling decisions of many thousands of investors, most of whom are doing what they have been taught for decades to do: diversifying their investment portfolios and hedging inflation risks to their investment returns in order to maximize their retirement savings and their individual wealth.

The debate regarding controlling excessive speculation in the energy markets by means of position limits or otherwise needs to be informed by two facts: first, it is rare for speculators, index traders and/or swap dealers to have control of a large share of the open interest in any futures contract, and second, efforts to control price or volatility by position limits is a failed strategy.

Position limits are not a costless palliative to appease angry farmers or gasoline or heating oil buyers. Position limits, when improperly calibrated and administered, can easily distort markets, increase the costs to hedgers and effectively increase costs to consumers. Unfortunately, many demands for speculative limitations assume that severe limits on speculation will bring prices to some favored level. On the contrary, position limits on futures contracts will not and do not control cash market prices. There is a complete disconnect between the

implied promise to drive prices down or up, whichever the most vocal constituency desires, and the ability of position limits to deliver on that promise.

We have taken a very strong position in the past and in the answers to your questions today respecting the value of additional hard position limits in the NYMEX energy complex. We employ position limits during the last three days of trading before the delivery period begins and position accountability levels at other times to avoid congestion and other market disrupting events that may flow from excessive concentrations of positions. Nothing we have heard or read discredits the principles on which that policy was built. Although our administration of accountability levels in the energy complex may not be broadly understood by the public, it is certainly understood by the Commission's Division of Market Oversight ("DMO"), as it is routinely subject to rule enforcement review by DMO.

Notwithstanding the success of our existing accountability regime, we recognize that others have concerns respecting the role of index funds and swap dealers in the futures market, and in particular, the impact that their participation in the markets might have on energy prices. We are prepared to respond to those concerns by adopting a hard limit regime for those products, including single-month and all-months combined limits in addition to the current limits that apply during the last three trading days of the expiration month. This modified regime will include the administration of tailored hedge exemptions for swap dealers and index funds, and as whole, should alleviate external concerns that positions held by these investors and hedgers will increase price volatility or artificially inflate or deflate prices.

We are prepared to lead. We strongly believe that any steps taken to impose hard position limits must support the national policy of enhancing transparent markets and central counter party clearing — which was reaffirmed by Congress in its amendments to the CEA just last year — and prevent market participants from moving away from the best regulated, most transparent, safest marketplace to less regulated or even completely unregulated markets that *are* and *will continue to be* beyond the control of the Commission and Congress. To be sure, position limits that are imprecise or wrongly administered will merely drive trading away from transparent markets and regulated clearing. While the Commission might be able to obtain jurisdiction over the OTC market for purposes of imposing position limits, the market for energy products is global and there is nothing to prevent market activity from migrating to those platforms that are beyond the Commission's and Congress' reach, including foreign markets. This diversion into dark pools and

uncontrolled credit risks clearly contravenes the goals of the Administration and Congress to limit systemic risk and enhance the regulatory regime.

We believe that CME Group is in the best position to impose and administer position limits and hedge exemptions regarding the energy commodities, and are therefore prepared to act in the near term, before the Commission or Congress. As described below, CME Group's ability to establish position limits that will not have severe adverse consequences to its markets and to administer those limits fairly and rigorously is well-established.

It is important to include a brief word on the value of indexing. Index investing in commodity futures is an efficient means for thousands of small traders to gain the benefit of asset diversification or to hedge inflation risks. Contrary to the picture painted by a few witnesses at recent Congressional hearings, index funds are not monoliths where a single speculator, who controls a large block of capital, stays long against all odds and logic. The individual investors in the index buy and sell as any other individual investor and the fund's holdings vary accordingly.

For example, a review of the U.S. Oil Funds open positions shows that it was liquidating positions while oil prices were rising (contrary to the view of those same favored Congressional witnesses) and taking additional positions when oil prices were falling (again contradicting common expectations). In fact, the CFTC staff's 2008 report entitled "*Commodity Swap Dealers & Index Traders with Commission Recommendations*"<sup>1</sup> contained a number of findings, including that index traders were reducing their positions in the OTC crude oil "futures equivalent" swap substitutes at the same time that the price was escalating. Indeed, the net reduction in the futures-equivalent swap positions constituted an 11% decline over the first six months of 2008. The staff's analysis parallels the conclusions of many other economists who have also studied the issue of causation in the context of speculators and commodity futures prices, none of which have found a causal link between speculative trading and an increase in commodity

---

<sup>1</sup> Commodity Futures Trading Commission, *Commodity Swap Dealers & Index Traders with Commission Recommendations*, (Sept. 11, 2008) (hereafter, "Staff Report"), available at <http://www.cftc.gov/stellent/groups/public/@newsroom/documents/file/cftcstaffreportonswapdealers09.pdf>.

prices.<sup>2</sup> In the intervening time between the publication of the Staff Report and these hearings, not a single reliable study has contradicted such findings.

It has been suggested that our pecuniary interests create a conflict of interest in respect to setting our own limits. The theory is that the revenue generated from the index funds and swap dealers may compromise our desire to act to protect markets. This is simply not true<sup>3</sup>; index funds and swap dealers hedging their net exposure

---

<sup>2</sup> See, e.g., Antoshin and Samiei's analysis of the IMF research on the direction of the "causal arrow" between speculation and commodity prices in "Has Speculation Contributed to Higher Commodity Prices?" in World Economic Outlook (September 2006):

On the other hand, the simultaneous increase in prices and in investor interest, especially by speculators and index traders, in commodity futures markets in recent years can potentially magnify the impact of supply-demand imbalances on prices. Some have argued that high investor activity has increased price volatility and pushed prices above levels justified by fundamentals, thus increasing the potential for instability in the commodity and energy markets.

What does the empirical evidence suggest? A formal assessment is hampered by data and methodological problems, including the difficulty of identifying speculative and hedging-related trades. Despite such problems, however, a number of recent studies seem to suggest that speculation has not systematically contributed to higher commodity prices or increased price volatility. For example, recent IMF staff analysis (September 2006 World Economic Outlook, Box 5.1) shows that speculative activity tends to respond to price movements (rather than the other way around), suggesting that the causality runs from prices to changes in speculative positions. In addition, the Commodity Futures trading Commission has argued that speculation may have reduced price volatility by increasing market liquidity, which allowed market participants to adjust their portfolios, thereby encouraging entry by new participants.

Similarly, James Burkhard, managing director of Cambridge Energy Research Associates testified to the Senate Energy Committee on April 3, 2008 that:

In a sufficiently liquid market, the number and value of trades is too large for speculators to unilaterally create and sustain a price trend, either up or down. The growing role of non-commercial investors can accentuate a given price trend, but the primary reasons for rising oil prices in recent years are rooted in the fundamentals of demand and supply, geopolitical risks, and rising industry costs. The decline in the value of the dollar has also played a role, particularly since the credit crisis first erupted last summer, when energy and other commodities became caught up in the upheaval in the global economy. To be sure, the balance between oil demand and supply is integral to oil price formation and will remain so. But 'new fundamentals'—new cost structures and global financial dynamics—are behind the momentum that pushed oil prices to record highs around \$110 a barrel, ahead of the previous inflation-adjusted high of \$103.59 set in April 1980.

<sup>3</sup> The CME Group Exchanges take their responsibilities under the Core Principles seriously. The Exchanges face both financial and reputational risk if one of their markets were the target of a successful manipulation, unwarranted price movements or volatility caused by "excessive

(cont'd)

are low volume traders who generally are entitled to member's rates. The revenue impact of the loss of a hedge exemption for those classes of traders, in an appropriately established hard limits regime, is immaterial to CME Group. Our primary concern is the impact of the loss of liquidity on commercial hedgers and the overall safety and soundness issues that arise from driving business off-exchange.

---

*(cont'd from previous page)*

speculation” or if their customers became the target of fraud or other abuse. A look at the resources devoted to these efforts should make clear how seriously the exchanges take their self-regulatory responsibility.

- U.S. futures exchanges spent between \$5 and \$6 million dollars in each of the past two years upgrading the computer systems used to catch abuses and detect attempts to manipulate or otherwise distort prices or volatility. These systems allow analysts to find patterns of trading suggestive of rule violations, to maintain a detailed trade warehouse to examine the prior activity of traders being investigated, and to not only find suspicious activity from days, weeks or months in the past, but to detect suspicious trading as it is occurring. The systems include position data on all “big” traders, *i.e.*, those with positions above some critical reporting threshold. This allows the analysts to watch for attempts to manipulate or otherwise improperly affect prices.
- U.S. futures exchanges have a 2009 operating budget of \$29.9 million devoted to market surveillance, market compliance and audit functions.
- During 2007 and 2008, U.S. futures exchanges opened 3,651 investigations of potential rule violations, including front running, wash trades, trading against a customer order, disclosure of customer orders, prearranged trading, inequitable allocation of trades, improper out-trade resolution, manipulation, position limit violations, rogue trading, and improper block and EFP trades. It should be noted that the overwhelming majority of investigations result from the electronic surveillance systems the exchanges have in place and only a small proportion arise from complaints and tips.
- During 2007 and 2008 US futures exchanges took disciplinary actions in 1,334 cases, levying fines and restitutions of \$10.3 million, suspending traders for a total of 3,414 days and barring 22 traders from trading at the exchange for at least a year and in some cases permanently.

*See Michael Gorham, The Exchange-Traded Derivatives Market: A Light in the Current Financial Darkness, June 9, 2009, at 14-15. Gorham notes that these figures were arrived at by quantifying the regulatory activity of CME Group, the Kansas City Board of Trade and MGEX, which account for 98% of the trading volume on futures exchanges.*

***1. Applying position limits consistently across all markets and participants, including index traders, managers of Exchange Traded Funds, and issues of Exchange Traded Notes.***

Last year, fuel prices bounced to levels that were painful to consumers and the economy. While prices later subsided significantly, we understand the impact those price levels had on the daily lives of U.S. consumers. Unfortunately, the pressure to reverse rising prices has led some to look for a simple causal agent that can easily be neutralized. The favored culprit is the traditional villain in futures markets going back more than 100 years – speculators. Economic research and analysis overwhelmingly supports the conclusion that speculators have not had a significant impact on the direction of energy futures prices. Thus, while we appreciate that last year’s high prices had an impact on consumers, the simple truth is that the case has yet to be made for sweeping measures to impose further restrictions on regulated markets.

Futures markets perform two essential functions — creating a venue for price discovery and permitting low cost hedging of risk. Futures markets depend on short and long term speculators to make markets and provide liquidity for hedgers. Futures markets could not operate effectively without speculators and speculators will not use futures markets if artificial barriers or tolls impede their access.

Blaming speculators for high prices diverts attention from the real causes of rising prices and does not contribute to a solution. The publicly available data has been relatively consistent over time in demonstrating that speculators in crude oil futures contracts have been relatively balanced as between buy and sell positions in the market. The weight of the evidence and informed opinion also confirms that the high prices are a consequence of normal supply and demand factors. The Wall Street Journal surveyed a significant cross section of 53 economists who agreed that: “The global surge in food and energy prices is being driven primarily by fundamental market conditions, rather than an investment bubble . . . .”<sup>4</sup>

---

<sup>4</sup> Phil Izzo, *Bubble Isn’t Big Factor in Inflation*, WALL ST. J., May 9, 2008, at A2.

The academic work and the contemporaneous explanations of price movements in commodities markets have been largely ignored by a few vocal critics, who have gained an undue share of attention by making sensational claims. For example, Michael Masters' claim that buy and hold index traders poured more than \$60 billion into the major commodity indices in January through May of 2008, resulting in the purchase of approximately 187 million barrels of WTI crude oil futures causing WTI crude prices to soar by nearly \$33 per barrel as a result of this buying pressure, was proved false in every material respect by serious scholars last year.

Mr. Masters' claims were not true in relation to actual futures positions held by index traders. Moreover, it bears repeating that the CFTC 2008 Staff Report contained a number of findings, including that index traders were reducing their positions in the OTC crude oil "futures equivalent" swap substitutes at the same time that the price was escalating. Indeed, the net reduction in the futures-equivalent swap positions constituted an 11% decline over the first six months of 2008. As previously noted, the staff's analysis parallels the conclusions of many other economists who have also studied the issue of causation in the context of speculators and commodity futures prices.

Moreover, in January 2009, the U.S. Government Accountability Office issued a report titled, "*Report to Committee on Agriculture regarding Issues Involving the Use of the Futures Markets to Invest in Commodity Indexes*," which analyzed the available data respecting any causal relationship between speculation and commodity prices generally (the "GAO Report"),<sup>5</sup> and effectively concurred with these studies. The staff identified eight empirical studies and three qualitative studies analyzing the impact that index traders and other futures speculators have had on commodity prices. The staff found that, unlike the empirical studies, the qualitative studies did not use experimental or statistical controls to evaluate the causal relationship between speculative trading and commodity prices and do not provide a systematic way to assess the empirical veracity of the causal relationship. Importantly, the eight empirical studies reviewed "generally found limited statistical evidence of a causal relationship between speculation in the futures markets and changes in commodity prices — regardless of whether the studies focused on index traders, specifically, or speculators, generally."<sup>6</sup>

---

<sup>5</sup> U.S. Government Accountability Office, *Issues Involving the Use of the Futures Markets to Invest in Commodity Indexes*, (Jan. 30, 2009), available at <http://www.gao.gov/new.items/d09285r.pdf>.

<sup>6</sup> *Id.* at 5.

The GAO Report further explained that “all of the empirical studies we reviewed generally employed statistical techniques that were designed to detect a very weak or even spurious causal relationship between futures speculators and commodity prices. As result, the fact that the studies generally did not find statistical evidence of such a relationship appears to suggest that such trading is not significantly affecting commodity prices at the weekly or daily frequency.”<sup>7</sup>

Neither the countless studies nor reference to the supply/demand factors driving the market has calmed the critics who demand an easy solution to high prices, which they claim can be mandated without cost or consequence. This group — which does not include any competent energy economists — insists that driving index funds and/or speculators from the markets will bring prices back to the correct level.

The proponents of mandated position limits do not understand the role of speculation, do not understand that there are speculators on both the buy and sell sides of the market and fail to grasp that imposing artificial costs and constraints on speculation in markets regulated by the CFTC is likely to drive prices to artificial levels, which can distort future production decisions and cause costly misallocation of resources of production. Such constraints also may well result in the shift of activity to less regulated and transparent markets abroad, which could shift this activity off the CFTC’s radar screen.

As Chairman Gensler himself acknowledged in his recent Congressional testimony before the Senate Permanent Subcommittee on Investigations and as we discuss below in response to a later topic, in view of the various exclusions and exemptions from CFTC authority available for transactions executed in OTC market, the CFTC does not currently have authority to impose federally mandated position limits that would extend to the traditional bilateral OTC market. Consequently, our concern is that new CFTC-imposed restrictions on fully regulated designated contract markets would have the predictable and inevitable effect of simply shifting price discovery activity from regulated and transparent derivatives markets to unregulated, nontransparent derivatives markets. We fail to

---

<sup>7</sup> *Id.* at 5-6.

understand how this result would serve the public interest or current efforts by the Administration and Congress to limit systemic risk in the financial system.<sup>8</sup>

## ***2. The effect of position limits on market function, integrity, and efficiency.***

Futures markets provide price discovery and a means to hedge economic risk. Futures markets make it possible for those who want to manage price risk — hedgers — to transfer some or all of that risk to those who are willing to accept it — speculators. The terms and conditions of each futures contract are unique and are specifically designed based on an exchange's perception of market need.

Position limits in the futures markets are a tool used to promote liquidation and ensure orderly delivery in physically delivered contracts. If position limits are not being used for these purposes and are thus set at arbitrary levels, they artificially restrict access to markets and liquidity and are consequently likely to prevent prices from reaching a true market equilibrium, thus undermining the price discovery process.

Exchanges have a continuing responsibility respecting position limits under the CEA.<sup>9</sup> The exchanges' obligations in this regard are set forth in the Commission's Core Principle 5 for DCMs, which requires boards of trade to adopt position limits or position accountability where necessary and appropriate, and the Commission, in evaluating a contract market's speculative limit program, considers the specific limit levels, aggregation policies, the types of exemptions allowed, and the methods for monitoring and enforcing compliance with the limits.

Many proponents of position limits underestimate the positive impact of speculation and do not account for the fact that there are speculators on both the

---

<sup>8</sup> This result also would seem contrary to the legislative intent underlying last year's legislation imposing new CFTC oversight on certain contracts traded on the essentially unregulated exempt commercial markets. Congress undertook this action after witnessing the results of the Amaranth experience.

Using the market surveillance tool of position accountability levels, NYMEX staff members determined to direct Amaranth in August 2006 to reduce its open positions in the first two nearby contract months based upon what they believed to be a significant concentration in NYMEX markets in Natural Gas futures. However, this prudent regulatory action by the regulated futures exchange simply resulted in a shift of positions by Amaranth from NYMEX to ICE, an unregulated exempt commercial market, which was undetectable at that time both by NYMEX and the CFTC.

<sup>9</sup> 46 Fed. Reg. 50938, 50939.

buy and sell sides of the market. We cannot, however, be insensitive to the consequences of imposing artificial costs and constraints on speculation. A recent study examining the role of speculators and index traders on commodity prices explained the adverse consequences that would result from artificially restricting speculators' participating in the futures market:

Speculators drive prices only to the extent that the market believes that informed views on the forward supply and demand fundamentals drive the speculators. Consequently, if one were to remove speculators from the commodity futures market, one would simply force the market to function with less informed views, degrading the price discovery mechanism. The fact is, a well-functioning physical commodity market needs to bring a view of future supply and demand fundamentals to its inventory management. Restricting the market participants that inform that view or eliminating the markets in which information on the future is assembled does not eliminate the need for a view on the future. The decisions would simply have to be based on a less informed view, with the risk falling squarely on the physical producers and consumers who may not be best equipped to manage that risk.<sup>10</sup>

This is particularly the case in the oil market. Before the successful introduction of futures trading in 1983, the oil market had migrated through a series of non-competitive and non-transparent mechanisms for price determination. Before World War II, the Texas Railroad Commission oversaw production and price determination within the State of Texas. After the war, a corporate oligarchy — “the seven sisters” — organized a system for pricing based largely on netbacks to geographic points. In the early 1970s, OPEC, which was established in 1960, successfully asserted itself to take control of price determination. Though these three mechanisms were independent of each other, they shared two significant characteristics: prices were determined non-competitively and each process lacked transparency.

---

<sup>10</sup> David Greely and Jeffrey Currie, “Speculators, Index Investors and Commodity Prices” at 18 (June 2008), *available at* <http://www.classiccmp.org/transputer/finengineer/%5BGoldman%20Sachs%5D%20Speculators,%20Index%20Investors,%20and%20Commodity%20Prices.pdf>.

Futures trading which overlaid the commercial delivery mechanism referenced above was introduced in 1983. Despite the severe and unstable conditions that have persisted and continue to persist in the world oil market outside the U.S., the U.S. energy futures market has achieved an undaunted record of price convergence and reliable performance during its entire existence. This period of time has witnessed a litany of the most extreme world market conditions conceivable including:

- 3 wars in the world's largest supply region
- An on-going active major supply cartel (which is completely beyond the reach and authority of the U.S. Government)
- Severe price drops from significant (and deliberate) increased production by the world's largest producer
- Severe volatility in the underlying unit of account (the dollar)
- Most of the world's supplies come from either non-democracies or weak-democracies, many of whom are openly inimical to the U.S.

Even as large as the commercial market for oil is, it does not have either the transparency or liquidity that is available in the futures market. In the absence of the futures market, the oil market would be subject to historic pressures allowing a lack of transparency and liquidity to influence transactions and price determination. Given the size and macroeconomic importance of the oil market, it is sound, even essential, policy to support the price discovery mechanism that provides transparency and liquidity – the foundation blocks for competitive price determination.

Thus, it is essential to avoid artificially constraining participation in the futures market for oil. For the past 26 years dating back to the initial launch of energy futures contracts on U.S. markets, the U.S. energy futures market and the commercial market mechanism that underlies it have successfully worked to sufficiently offset the obstacles to transparency and competition that persist outside the U.S. The result has been transparency, competitive price determination, and reliable mechanisms to successfully manage risk.

Imposing federal position limits for political purposes will have unintended adverse consequences on the markets, as did the ban on short-selling imposed by the Securities Exchange Commission (“SEC”) last year. In fact, even former SEC Commissioner Christopher Cox subsequently acknowledged that the ban “had

several unintended market consequences,”<sup>11</sup> and ultimately publicly expressed regret over implementing the ban: “While the actual effects of this temporary action will not be fully understood for many more months, if not years, knowing what we know now, I believe on balance the commission would not do it again. The costs appear to outweigh the benefits.”<sup>12</sup>

### ***3. The effect of position limits on facilitating the risk management of clearinghouses.***

The use of position limits, if properly calibrated and administered, ensures orderly settlement and delivery and enhances market integrity of those contracts. However, position limits do not have a significant effect on facilitating the risk management of clearing houses. Clearing houses employ their own sophisticated, well-functioning risk management program. At the CME Group, information on individual participant’s open positions in relation to the position limits set by our respective Exchanges is submitted to the risk team to be factored into their overall analysis. Position limits, however, are only one fairly small type of data factored into our comprehensive risk management program. For example, CME’s Clearing House places considerably greater emphasis on the concentration risks of market participants as assessed against the overall size and liquidity of the relevant market. Moreover, in terms of pro-active response, the risk team would consider requesting that a Clearing Member deposit additional margin, or maintain additional capital or possibly increase its contribution to the guaranty fund. By contrast, the risk team generally would not be seeking a reduction in positions of individual participants being carried by a Clearing Member.

### ***4. Whether the CFTC needs additional authority to implement such limits.***

Section 4a(a) of the CEA authorizes the Commission to impose daily trading limits and speculative position limits for the purpose of “diminishing, eliminating or preventing” the burdens of “excessive speculation.”<sup>13</sup> The statute defines “excessive speculation” as that which causes “sudden or unreasonable fluctuations

---

<sup>11</sup> Rachele Younglai, *SEC Chief Has Regrets Over Short-Selling Ban*, Reuters, Dec. 31, 2008, available at <http://www.reuters.com/article/newsOne/idUSTRE4BU3GG20081231>.

<sup>12</sup> *Id.*

<sup>13</sup> 7 U.S.C. §6a(a).

or unwarranted changes” in the price of a regulated futures contract.<sup>14</sup> Pursuant to this authority, the Commission historically has set speculative position limits for enumerated agricultural commodities. With respect to all other commodities, however, the Commission has delegated the authority to set position limits to designated contract markets.

This delegation of authority took place in 1981 when the Commission adopted former Regulation 1.61, which required exchanges to impose speculative position limits.<sup>15</sup> In setting forth its reasoning for requiring exchanges to take such action, the Commission emphasized that Section 4a(a) “should not be read in a vacuum,” explaining that when the CEA “is read as a whole, it is apparent that Congress envisioned cooperative efforts between the self-regulatory organizations and the Commission. Thus, the exchanges, as well as the Commission, have a continuing responsibility in this matter under the Act.”<sup>16</sup> The Commission went on to note that former Regulation 1.61 “merely effectuates completion of a regulatory philosophy the industry and the Commission appear to share,” referencing the fact that the exchanges had already been imposing position limits on certain contracts.<sup>17</sup>

To ensure that no doubt remained as to the exchanges’ role with respect to speculative position limits, the Commission further explained that CEA Section 8a(7)<sup>18</sup> “underscores the fact that Congress affirmatively contemplated a regulatory system whereby the exchanges would act *in the first instance* to adopt rules which would protect persons producing, handling, processing or consuming any

---

<sup>14</sup> *Id.*

<sup>15</sup> 46 Fed. Red. 50939.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 50940.

<sup>18</sup> Section 8a(7) of the CEA provides that the Commission is authorized:

to alter or supplement the rules of a registered entity insofar as necessary or appropriate by rule or regulation or by order, if after making the appropriate request in writing to a registered entity that such registered entity effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such registered entity has not made the changes so required, and that such changes are necessary or appropriate for the protection of persons producing, handling, processing, or consuming any commodity traded for future delivery on such registered entity, or the product or byproduct thereof, or for the protection of traders or to insure fair dealing in commodities traded for future delivery on such registered entity.  
7 U.S.C. §12a(7).

commodity traded for future delivery.”<sup>19</sup> Consistent with this approach, the Commission fashioned former Regulation 1.61 to assure that the exchanges would have an opportunity to employ their knowledge of their individual contracts to propose the position limits they believe most appropriate.<sup>20</sup>

With the adoption of former Regulation 1.61, the regulatory structure for speculative position limits was administered under a two-pronged framework, resulting in enforcement of speculative position limits being shared by both the Commission and the DCMs.<sup>21</sup> The Commission explained the parameters of this framework in its 2008 Staff Report:

Under the first prong, the Commission establishes and enforces speculative position limits for futures contracts on a limited group of agricultural commodities. These “Federal limits” are enumerated in Commission regulation 150.2, and apply to the following futures and option markets: CBOT corn, oats, soybeans, wheat, soybean oil, and soybean meal; Minneapolis Grain Exchange (MGX) hard red spring wheat and white wheat; ICE Futures U.S. (formerly the New York Board of Trade) cotton No. 2; and Kansas City Board of Trade (KCBT) hard winter wheat.

Under the second prong, for all other commodities, individual DCMs, pursuant to the core principles under the Act, establish and enforce their own speculative position limits or position accountability provisions (including exemption and aggregation rules), subject to Commission oversight and separate Commission authority to enforce exchange-set speculative position limits as violations of the Act. Thus, responsibility for enforcement of speculative position limits is shared by the Commission and the DCMs.<sup>22</sup>

---

<sup>19</sup> 46 Fed. Reg. 50938, 50940 (emphasis supplied.)

<sup>20</sup> *Id.*

<sup>21</sup> The Commission has consistently endorsed this framework when addressing issues related to speculative limits. *See, e.g.*, 74 Fed. Reg. 12282; 72 Fed. Reg. 66097; 70 Fed. Reg. 12621; 69 Fed. Reg. 33874.

<sup>22</sup> Staff Report, *supra*, at 42. The consequences of violating speculative position limits vary based on whether the limits are set by the Commission or exchanges. For example, violations of exchange-set limits are subject to exchange disciplinary action, whereas violations of exchange speculative limit rules approved by the Commission are subject to enforcement action by the Commission.

In 1999, the Commission simplified and reorganized its rules by relocating the substance of Regulation 1.61's requirements to Part 150 of the Commission's regulations, thereby incorporating within Part 150 provisions for both Federal speculative position limits and exchange-set speculative position limits.<sup>23</sup> With the passage of the Commodity Futures Modernization Act ("CFMA") in 2000 and the Commission's subsequent adoption of its Part 38 regulations covering DCMs in 2001, Part 150's approach to exchange-set speculative position limits was incorporated as an acceptable practice under DCM Core Principle 5 – Position Limitations or Accountability.<sup>24</sup>

Core Principle 5 requires exchanges to adopt position limits or position accountability — by bylaw, rule or regulation — where necessary and appropriate, and the Commission, in evaluating a contract market's speculative limit program, considers the specific limit levels, aggregation policies, the types of exemptions allowed, and the methods for monitoring and enforcing compliance with the limits. *See* Appendix B to Part 38 ("In order to diminish potential problems arising from ***excessively large speculative positions***, and to facilitate orderly liquidation of expiring futures contracts, markets may need to set limits on trader positions for certain commodities.) (emphasis supplied.) The Commission's Core Principles further provide that "position limits are not needed for markets where the threat of market manipulation is non-existent or very low," such as for contracts on major foreign currencies and other financial commodities that have highly liquid and deep underlying cash markets, and that "a contract market may impose position accountability provisions in lieu of position limits for contracts on financial instruments, intangible commodities, or certain tangible commodities, which have large open interest, high daily trading volumes, and liquid cash markets."<sup>25</sup>

As discussed above, the exchanges' authority and responsibility to set position limits in the first instance with respect to the non-enumerated agricultural commodities under the CEA could not be clearer.<sup>26</sup> If, however, the Commission makes a finding — after due notice and opportunity for a hearing — that there is "excessive speculation" (as defined in CEA Section 4a(a)) with respect to a non-enumerated agricultural commodity contract, the Commission may request that

---

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See* Part 38, Appendix B, Core Principle 5(b)(2)-(3).

<sup>26</sup> 46 Fed. Reg. 50938, 50939.

exchanges make necessary changes to their rules and impose speculative limits.<sup>27</sup> However, should an exchange fail to make the requested changes, the Commission has authority under the CEA to impose position limits directly.

To the extent that the Commission seeks to impose position limits in the OTC markets, we do not believe that it currently has authority to do so. CEA Section 4a(a) only applies to “contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility.”<sup>28</sup> We are not aware of any other law that grants the Commission authority to regulate futures markets or contracts through use of federally mandated position limits.

***5-6. What methodology should the Commission use to determine position limit levels for each market; Should the Commission limit the aggregate positions held by one person across different markets.***

An exchange is best suited to police activity in its market, set position limits and assess whether a hedge exemption is appropriately granted to a particular customer. The methodology used to determine position limits for non-enumerated commodities should be determined by the exchange in coordination with the Commission.

As previously noted by the Commission, exchanges have a continuing responsibility respecting position limits under the CEA.<sup>29</sup> The exchanges’ obligations in this regard are set forth in the Commission’s Core Principle 5 for DCMs, which requires boards of trade to adopt position limits or position accountability where necessary and appropriate, and the Commission, in evaluating a contract market’s speculative limit program, considers the specific limit levels, aggregation policies, the types of exemptions allowed, and the methods for monitoring and enforcing compliance with the limits. At the CME Group, our practice consistently has been to consult closely with CFTC staff before initiating any changes to our exchange rules concerning energy limits or position

---

<sup>27</sup> 7 U.S.C. §12a(7). In this regard, we note that the finding set forth in Section 4a(a) includes a causation standard, which has particular meaning in this context given the longstanding recognition by Congress of the special emphasis that the CFTC as an agency has historically placed on rigorous economic analysis of its markets.

<sup>28</sup> 7 U.S.C. §6a(a).

<sup>29</sup> 46 Fed. Reg. 50938, 50939.

accountability levels. All exchange rules governing position limits and exemptions of course are certified to the Commission for compliance with the CEA and CFTC rules.

For example, CME Group maintains designated contract market status for each of its Exchanges. As such, position limits are required to be in place and established by the Exchanges (subject to the guidance provided by the CFTC) for all commodities (other than those specifically enumerated in Reg. 150.2) for the expiration month, each single month and on an all-months-combined basis; provided that beginning 12 months after the contract's listing, position limits may be replaced by accountability levels for all financial contracts and intangible commodities meeting specified open interest and volume thresholds. With respect to contracts on a tangible commodity, including energy, metals and soft commodities, accountability levels can be put in place for all but the spot month which requires position limits rather than position accountability levels.<sup>30</sup>

Position accountability provisions provide a formal means for an exchange to monitor traders' positions that may threaten orderly trading. A position accountability approach establishes threshold position levels that may be exceeded, but once a trader breaches such accountability levels, the exchange may initiate an inquiry to examine the trader's rationale for holding the large position and whether the position poses a threat of manipulation or could otherwise be disruptive to the market.

A position accountability regime also allows exchange regulatory staff, if warranted, to order a trader with a position in excess of accountability levels not to further increase his position. If a trader fails to comply with a request for information about positions held, provides information that does not sufficiently justify the position, or continues to increase contract positions after a request not to do so is issued by the exchange, the accountability provision in Exchange rules provide authority for the Compliance Department to require the trader to limit or reduce his positions.<sup>31</sup> A failure to do so is deemed a rule violation.

---

<sup>30</sup> The spot month speculative position limit is required to be set at no greater than 25% of the estimated deliverable supply.

<sup>31</sup> Exchange Market Regulation staff has drafted rules that would allow an Exchange's Chief Regulatory Officer additional flexibility to order a reduction of positions above accountability levels or above position limits (pursuant to a hedge exemption) at his discretion.

The CME Exchanges set accountability levels low to obtain an early alert within our Large Trader System and to maximize the scope of our regulatory authority. In fact, we recently lowered accountability levels in our core energy and metals contracts and expanded the scrutiny we apply to a participants position on a futures only basis as well as a futures equivalent basis.

Moreover, we create and maintain a weekly report of all participants that exceed NYMEX/COMEX Position Accountability Levels in all core contracts, through which analysts and Market Surveillance management make real time decisions on actions to be taken respecting market participants' positions. Between June 2008 and July 2009, we took 22 such actions to reduce market participants' positions.

An exemption from exchange set position limits can be granted by the exchange for bona fide hedgers based on physical or swap exposure. Firms wishing to exceed the position limits for the purpose of establishing a hedge of a physical or swap market position must file a hedge notice and obtain approval of the Exchange. The applicant must document that the positions to be held are bona fide hedge positions by providing the company's current, historical, or anticipated exposure in the physical or swap markets, as well as any supplemental information the exchange may require.

Firms wishing to exceed the position limits for the commodities for which the CFTC establishes mandated limits must also submit monthly a Form 204 detailing their cash market exposure. Additionally, swap dealers and processors seeking an exemption in those commodities must apply for an exemption to the CFTC. The CFTC criteria are comparable to the criteria used by the exchange in determining whether an exemption should be granted. The circumstances under which a hedge exemption may be granted are set forth in Regulation 150.3.

In granting hedge exemptions the exchange considers the following criteria: 1) hedge or swap exposure; 2) financial condition and stability of the company; 3) market liquidity; 4) trading history of the company; and 5) internal procedures and controls suitable to oversee the position. The exchange may elect to revoke the hedge exemption in the event the company is unable to meet the above requirements, or if market factors change. Firms exceeding the limits that are unable to demonstrate physical or derivative exposure are in violation of position limit rules and subject themselves and possibly their clearing firms to disciplinary action.

A hard copy summary sheet of all exemptions is regularly and routinely filed with CFTC's DMO in New York. This procedure has been in place for many years. Moreover, CFTC Rule Enforcement Reviews have included PAL inquiries and have affirmatively concluded that when accountability levels are reached, NYMEX responds promptly, almost always on the same day, by contacting the customer to obtain required information and take appropriate additional action when warranted.

The current framework with respect to position limits and exemption therefrom established by the CEA and currently implemented by the Commission and the exchanges is working. Therefore, it is unnecessary for the Commission to impose position limits across all markets and participants, including swap dealers, managers of Exchange Traded Funds, and issuers of Exchange Traded Notes, without the possibility of exemptions. The Commission should continue to allow each exchange, subject to Commission oversight of its compliance with DCM Core Principles, to establish rules consistent with the objectives of reducing the potential threat of market manipulation or problems arising from excessively large speculative position and facilitating orderly trading. Should the Commission wish to adopt broad-based principles governing exchange-set position limits, such as is reflected in Core Principle 5, we would look forward to providing informed comment during any such rulemaking process.

***7. Should exemptions from position limits be permitted for anyone other than bona fide hedgers for the conduct and management of a commercial enterprise.***

***The statute states exemptions should only be granted to bona fide hedgers. What should the qualifying factors be for an entity to meet the definition of a bona fide hedger.***

Exemptions from position limits should be permitted for swap participants and index investors.

Swap dealers are legitimate hedgers that should continue to be allowed to qualify for an exemption from speculative position limits. As the Commission recently explained in the September 2008 Staff Report, swap dealers serve an important function.

The swap dealer, which is often affiliated with a bank or other large financial institution, has emerged as a bridge between the OTC swap market and the futures markets. Swap dealers act as swap counterparties both to

commercial firms seeking to hedge price risks and to speculators seeking to gain price exposure. (Staff Report at p. 1.)

In addition, the products offered by swap dealers play an important role in the financial markets.

[F]or many financial entities, the OTC derivatives products offered by swap dealers have distinct advantages relative to futures contracts. While futures markets offer a high degree of liquidity . . . futures contracts are more standardized, meaning that they may not meet the exact needs of a hedger. Swaps, on the other hand, offer additional flexibility since the counterparties can tailor the terms of the contract to meet specific hedging needs.<sup>32</sup>

Swap dealers that assume risks in the OTC market, which are consistent with their legitimate businesses, should be able to transfer the residual market risk from their swap books to the futures markets under current standards for exemptive relief. Increased restrictions on swap dealers' ability to obtain exemptions likely could cause two undesirable affects. First, limiting the hedge exemption for swap dealers could make it more costly for commercial enterprises to execute strategies in the OTC market to meet their hedging needs. Second, swap dealers may well widen spreads in order to internalize risks or attempt to hedge their risk through increased use of OTC instruments rather than exchange-traded futures. Both strategies undercut current efforts by the Administration and Congress to reduce systemic risk by driving OTC-generated risk into a central counterparty clearing context.

Moreover, existing rules presently allow the Commission and the exchanges to limit the hedge exemptions afforded to swap dealers (and other market participants) as necessary and appropriate to protect the market. To the extent that swap dealers merit different treatment, it is effectively addressed by the ability of the Commission and exchanges to impose conditions upon and restrict the size of any exemptions that they grant. For example, the Commission and CBOT presently condition swap-dealer exemptions for contracts with Federal position limits by including requirements that: (1) the futures position offset specific price risk; (2)

---

<sup>32</sup> Staff Report, *supra*, at 16.

the dollar value of the futures position must not exceed the dollar value of the underlying risk; and (3) the futures position not be carried into the spot month.<sup>33</sup>

Furthermore, basing any exemption from position limits for swap dealers on the “conduct and management of a commercial enterprise” or the nature of their clients would be unworkable. The CFTC’s own Staff Report explains that swap dealers do not use the futures markets to hedge price risk associated with specific swap clients or specific OTC transactions.

Since swap dealers are willing to enter into swap contracts on either side of a market at times they will enter into swaps that create offsetting exposures, reducing the swap dealer’s overall market price risk associated with the firm’s individual positions opposite its counterparties. Since it is unlikely, however, that a swap dealer could completely offset the market price risks associated with its swap business at all times, dealers often enter the futures markets to offset the residual market price risk.<sup>34</sup>

Because swap dealers use the futures markets to hedge residual market risk in their swap books, particular futures positions of a dealer cannot be linked to a particular swap client or identified OTC transaction. Therefore, it would be illogical and unworkable to condition a risk management exemption for swap dealers on their ability to show that they are hedging risk arising from an OTC transaction with a client that is a traditional commercial hedger.<sup>35</sup>

In addition, futures markets are used for more sophisticated hedging than “traditional” commercial hedging (*i.e.*, a substitute for transaction to be made or positions to be taken at a later time in a physical marketing channel). For example,

---

<sup>33</sup> See 74 Fed. Reg. 12284. Similarly, in granting no-action relief to index funds, Commission staff has imposed certain conditions, including requirements that: (1) fund positions are passively managed; (2) fund positions are unleveraged, so that financial condition should not trigger rapid liquidations; and (3) fund positions are not carried into the delivery month, when physical delivery markets are most vulnerable to manipulation or congestion. CFTC Letter 06-09 (Apr. 19, 2006); CFTC Letter 06-19 (Sept. 6, 2006).

<sup>34</sup> Staff Report, *supra*, at 48.

<sup>35</sup> The Staff Report also reported that speculators generally were not using swap dealers to evade energy position accountability levels. Indeed, the amount exceeding accountability levels in crude oil was only 2% of total open interest on the long side and only 1% of total open interest on the short side. See Staff Report, *supra*, at 5.

electric utilities may hedge capacity risks associated with weather events by use of degree day unit futures contracts, although that hedge involves no substitute for a transaction in a physical marketing channel. Similarly, insurance companies may hedge hurricane or other weather risks. Enterprises that consume a commodity not used in a physical marketing channel, such as airlines that use jet fuel, generating facilities that use gas and produce electricity, freight companies whose loads depend on geographic pricing differentials and hundreds of other important examples that readily present themselves, are not traditional commercial hedgers with respect to such transactions.

Index investors likewise are critical to the orderly functioning of the futures markets and should be granted an exemption from position limits. Steven Strongin, Managing Director of Goldman, Sachs & Co. recently explained the significance of index investors to the futures markets:

One of the exceptional achievements of the commodity futures markets is the separation of the ownership of commodity price risk from the ownership of the physical commodity. That is, these markets allow participants to buy and sell the commodity price risk without requiring the exchange of the physical commodity.

This separation can create economic benefits. The producer - who by nature must hold the physical commodity - is no longer required to bear all of the risk of price fluctuations, against which it would need to hold expensive equity capital. Instead, the producer can shift this risk off of its balance sheet. This frees up expensive equity capital and allows the producer to focus on its core competency of operating its business, rather than the management of commodity price risk.

Index investors are remarkably well-suited to bear the commodity price risk that producers wish to shed. They are typically long-term investors with diversified portfolios of equities and bonds, such as pension funds and endowments. Commodity futures investments offer these investors an asset with an equity-like rate of return, but one that is not correlated with equity and bond returns, and therefore offers a good source of portfolio diversification. Further, commodity index investments provide greater protection from inflation, although the trade-off is greater exposure to the risk of economic recessions. However, given that these investors have long-term investment

horizons, they are best suited to bear this macroeconomic risk than are other investors.<sup>36</sup>

In other words, “the role of index investors is to supply a pool of stable, passive, unleveraged capital to bear commodity price risk.”<sup>37</sup> In addition, “by allowing commodity producers to transfer their inherent commodity price risk exposure to long-term investors who are better-suited to bear it, the participation of the index investors in the commodity futures markets lowers the cost of capital to commodity producers, and by lowering costs helps to lower commodity prices over the long run.”<sup>38</sup>

Moreover, because index investors lack the wherewithal to make or receive delivery of the physical crude oil, by necessity they must close out and offset their initial long position in a contract month by purchasing a short position in that contract month prior to termination of trading for that contract.<sup>39</sup> Therefore, index investors do not create artificial demand. Those wishing to exclude index investors from the futures markets, however, tend to focus on the alleged market impact of index investors when such traders establish a long position in a contract month but somehow fall strangely silent concerning any possible price impact by index investors when they execute significant sales to liquidate their open long position.

If the Commission were to base any exemption from position limits on the “conduct and management of a commercial enterprise” it would need to ensure that

---

<sup>36</sup> Testimony of Steven H. Strongin, Managing Director, Goldman, Sachs & Co. Before the Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, U.S. Senate (July 21, 2009 ) at 3-4, available at [www.hsgac.senate.gov](http://www.hsgac.senate.gov). (“Strongin Testimony”).

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.*

<sup>39</sup> As Strongin explained:

In the case of index investors, this selling back of all commodity futures purchased before the time of delivery is built into the mechanical structure of the commodity index itself. . . . This process is called “rolling” the futures positions . . . . [T]his process involves selling futures as their delivery time approaches and then buying new futures farther out on the forward curve. In this manner, index investor maintain their investments in [] futures at a fixed point on the forward curve, much like a bond investor seeking to maintain a constant maturity in his or her bond portfolio. By “rolling” their commodity futures positions in this way, index investors never take physical delivery of the commodity and so cannot be adding to physical demand.” *Id.* at 5.

it neither limits such commercial participants' ability to hedge legitimate commercial risk (either in the same commodity or a substantially related commodity) via a swap, nor limits swap dealers' ability to hedge the residual financial exposure in their swap books. As detailed above, we do not believe that it would be possible to ensure these important objectives. Instead, we strongly believe that such an exercise would be both fundamentally flawed and ultimately futile and would only result in harming both futures and OTC markets.

***8. Finally, if you believe the Commission should not set position limits on energy contracts, please address the inconsistent approach for other commodities with a finite, physically deliverable supply, such as certain agriculture commodities.***

Significant differences do exist between energy contracts and agricultural contracts that bear upon the application of position limits. However, before discussing those differences, it may be useful to review briefly the limited category of agricultural contracts that are currently subject to federally mandated speculative position limits. Federal limits currently apply to the following contracts: Corn and Mini-Corn; Oats; Soybeans and Mini-Soybeans; Wheat and Mini-Wheat; Soybean Oil; Soybean Meal; Hard Spring Wheat; Hard Winter Wheat; and Cotton No. 2. Of this list, the pure grain contracts have all been subject to federal limits since such limits were first imposed by the Commodity Exchange Authority, the CFTC's predecessor agency, in 1938. Moreover, in 1987, federal limits were extended to Soybean Oil and Soybean Meal specifically as a result of a petition made by the CBOT. Given that these soybean products tended to trade in tandem with its Soybean contract, the extension was sought by the CBOT to provide consistent treatment across related products. Consequently, 71 years following the initial imposition of federal limits, the only contract currently subject to federal limits that was not included in the original list of grains and that was not volunteered by an exchange is the Cotton No. 2 contract.

In other words, of the many agricultural products that have been introduced by futures exchanges over the years, federal limits do not apply to livestock contracts, dairy contracts or forestry products and similarly do not apply to cocoa, coffee, orange juice or sugar contracts. But the Cotton No. 2 contract was added to the list in 1940 and remains there today.

We could not identify any instance where the Commission or Commission staff has opined on a qualitative distinction separating the list of agricultural contracts subject to federal speculative limits from the agricultural contracts not

subject to such limits. The fact that most agricultural contracts are not subject to federally mandated limits might be understood as a recognition over time by both Congress and the CFTC that position limits set and monitored by exchanges under the oversight of the CFTC simply constitutes a more effective means of ensuring the market integrity of exchange-traded contracts. However, if we were to engage in conjecture regarding common features applicable to the agricultural contracts currently subject to federal limits, we could note that all of these contracts have seasonal constraints on supply and also have considerable vulnerability to environmental growing conditions such as weather and rainfall.<sup>40</sup>

Given the prominence of crude oil in recent public discussions on speculation, we will focus on crude oil as an example of energy commodities when contrasting it with the agricultural contracts subject to federal limits. As should be clear, crude oil energy production is not noticeably affected by environmental factors such as rain and weather conditions. In addition, crude oil energy production is generally not restricted to seasonal periods but instead tends to occur in a generally continuous manner.

The commercial physical market liquidity at the Cushing delivery point allows for title transfer of a substantial portion of world oil production every day—at least the equivalent of 10% of world physical delivery. There are hundreds of significant commercial entities that directly participate in this market. Thus, the sheer size of the physical market for crude oil is substantially greater than that for the agricultural contracts under federal limits.

In addition, the supply of crude oil can be identified and is thus knowable and dependable. In a technical sense, supply capacity for crude oil is not subject to significant volatility; there are no drought years for crude oil that will restrict available supply. Instead, while the available supply for crude can change over time, that change is largely a function of the price that can be obtained for that commodity, although there can be a lag time because crude exploration and drilling can involve a multi-year process. It should be noted that crude can be subject to commercial decisions affecting supply, such as decisions made by oil cartels.

---

<sup>40</sup> We recognize, however, that seasonal constraints on supply and vulnerability to growing conditions alone are insufficient to explain the different treatment as other commodities, such as coffee and cocoa, are similarly impacted, yet are not subject to federal limits.

With regard to the physical or cash markets for crude and for these agricultural contracts, it is also worth noting that the U.S. is the world's largest consumer of grains (both as feed for livestock and for human consumption) and of crude oil. However, the U.S. is the primary supplier to other markets of grains, but is by contrast a net importer of crude oil.

In addition, there is substantial additional commercial market liquidity in the OTC derivative market that directly references the futures market delivery mechanism for crude oil. It may well have even higher turnover than the underlying commercial physical market. By contrast, the OTC markets for agricultural contracts subject to federal limits are still largely undeveloped.

As noted, the crude oil market is much larger than agricultural markets. In terms of value of annual international turnover (analogous to GNP as a measure of national output), agricultural commodities have been:

- Corn: 2006-7 \$85 billion; 2007-8 \$131 billion; 2008-9 \$126 billion;
- Soybean: 2006-7 \$56 billion; 2007-8 \$82 billion; 2008-9 \$77 billion;
- Wheat: 2006-7 \$93 billion; 2007-8 \$145 billion; 2008-9 \$172 billion;
- In comparison, the annual turnover for crude oil has been: 2006 \$1.87 trillion; 2007 \$2.17 trillion; 2008 \$2.99 trillion.

Commercial markets in crude oil trade in significant multiples of the underlying physical production. The commercial market for oil trades at least 5-10 times the underlying physical supply. Therefore, it is essential not to artificially constrain the overlaying futures market, which provides transparency and liquidity for the commercial market to perform.

Finally, it may be worth noting that crude oil is listed out for trading for much longer than the grain contracts. Specifically, crude oil futures are listed nine years forward using the following listing schedule: consecutive months are listed for the current year and the next five years; in addition, the June and December contract months are listed beyond the sixth year. Additional months will be added on an annual basis after the December contract expires, so that an additional June and December contract would be added nine years forward, and the consecutive months in the sixth calendar year will be filled in. By contrast, grain contracts typically are listed out in consecutive months for three years with certain key or pivot months then listed for the fourth year.