

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**U.S. COMMODITY FUTURES
TRADING COMMISSION,**

Plaintiff,

v.

**KRAFT FOODS GROUP, INC. and
MONDELÉZ GLOBAL LLC,**

Defendants,

Civil Action No: 15-2881

Hon. John Robert Blakey

**CFTC'S MEMORANDUM OF LAW IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT
ON COUNT III (SPECULATIVE POSITION LIMITS)
AND COUNT IV (WASH SALES)**

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I. INTRODUCTION

In late 2011, Kraft executives concocted a scheme to stand for delivery on 3,000 futures contracts representing 15 million bushels of wheat they neither needed nor wanted. Instead, as the CFTC will prove at trial, their purpose was to send the market a signal they believed would narrow the spread (or “carry”) between the December 2011 and deferred-month wheat futures contracts, thereby making it less profitable for sellers in Toledo to store wheat in warehouses and encouraging the market to sell cash wheat to Kraft at lower prices. Kraft also sold 3,000 contracts in the deferred contracts, establishing a speculative “bullspread” position designed to profit from just such a narrowing of the spreads.

Mark Haar, the architect of the scheme and Kraft’s head of wheat procurement, knew it would only work if Kraft sent a big signal to the market. In October 2011, James Kehoe (Kraft’s senior vice president for finance) expressed concern that spending \$90 million to implement the plan would be “[REDACTED]” [SOF, ¶ 39]. Another executive proposed spreading the scheme over two contract expirations, reducing the December cash outlay. [SOF, ¶ 39]. But Mr. Haar resisted diluting the plan:

“[REDACTED]”

[SOF, ¶ 39]. This made it clear that the huge size of the position Kraft carried into the delivery period—which far exceeded CFTC and Chicago Board of Trade (“CBOT”) speculative position limits in effect during the spot month—was central to and enabled Kraft’s manipulative scheme.

While Kraft’s intent in executing its manipulative and deceptive scheme is an inherently factual question, Kraft’s position limit violation has no intent element and is established by the undisputed facts. It is undisputed that: (a) Kraft’s long position in excess of 3,000 contracts in the

expiring December 2011 futures contract exceeded the 600-contract spot month position limit; (b) Kraft had no active hedge exemption on December 2, 5, 6, 7, 8, and 9, 2011, and therefore was not entitled to exceed the limit. Kraft may argue that its failure to obtain a hedge exemption after December 1 was an oversight, or that a CME employee's communications with Kraft suggested it had an exemption. Neither argument is a defense to a position limit violation. Furthermore, it is undisputed that Kraft was not engaged in bona fide hedging, rendering it ineligible to exceed the spot month limit irrespective of whether it had an exemption on file.

It is further undisputed that Kraft engaged in thirty-three Exchange of Futures for Physical ("EFP") transactions between 2010 and 2012 that constituted wash sales and caused non-bona fide prices to be reported.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A genuine dispute of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To determine whether an issue of fact exists, the court must evaluate the proof as presented in depositions, answers to interrogatories, admissions, and affidavits in the record. Fed. R. Civ. P. 56 & advisory committee's notes. The moving party bears the initial burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In response, the nonmoving party must present evidence to identify specific material facts that demonstrate a genuine issue for trial. *Id.* at 324; *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir. 2000). A bare contention that an issue of fact exists is insufficient to create a factual dispute. *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000).

III. THE CFTC AND EXCHANGE SPOT MONTH POSITION LIMITS

A. CFTC Spot Month Position Limits

Congress recognized that excessive speculation in futures contracts is an undue burden on interstate commerce and directed the CFTC to fix limits on the size of positions that an individual or firm can hold. 7 U.S.C. § 6a(a).¹ Speculative position limits are intended to prevent excessive speculation, deter and prevent market manipulation, squeezes and corners, ensure liquidity for bona fide hedgers, and ensure that the price discovery function of the market is not disrupted. *Id.* § 6a(a)(3).

Pursuant to 7 U.S.C. § 6a(a), the CFTC enacted Regulation 150.2, 17 C.F.R. § 150.2 (2011), which, among other things, provided that no person may hold or control a net long or short position in CBOT wheat futures in excess of 600 contracts in the spot month.² Exceeding the limit is a violation of the Act. 7 U.S.C. § 6a(b)(2).

A person may only exceed CFTC position limits if its positions are bona fide hedging transactions or positions (or other specified conduct not at issue here). 7 U.S.C. § 6a(c)(1); 17 C.F.R. § 150.3 (2011). Regulation 1.3(z), 17 C.F.R. § 1.3(z) (2011), defines bona fide hedging:

(1) General definition. Bona fide hedging transactions and positions shall mean any [futures contract], where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel, and where they are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, and where they arise from:

- (i) The potential change in the value of assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising, [...]

¹ An appendix of relevant provisions of the Commodity Exchange Act (the “Act”), CFTC Regulations, and CBOT Rules is attached as Appendix A.

² “Spot month” means “the futures contract next to expire during that period of time beginning at the close of trading on the trading day preceding the first day on which delivery notices can be issued to the clearing organization of a contract market.” 17 C.F.R. § 150.1(a) (2011).

(iv) Notwithstanding the foregoing, no transactions or positions shall be classified as bona fide hedging unless their purpose is to offset price risks incidental to commercial cash or spot operations and such positions are established and liquidated in an orderly manner in accordance with sound commercial practices [...].

CFTC Regulations apply additional restraints on bona fide hedging. A participant may hedge up to “[t]welve months’ unfilled anticipated requirements of the same cash commodity for processing [...], provided that such transactions and positions in the five last trading days of [the futures contract] do not exceed the person’s unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month.” 17 C.F.R. § 1.3(z)(2)(ii)(C) (2011). And no person may avail himself of a bona fide hedge exemption under Regulation 1.3(z)(2)(ii)(C) unless he gives the CFTC notice of its intent to establish such a position 10 days before the speculative position limit becomes effective, providing detailed support for the appropriateness of the position. 17 C.F.R. § 1.48 (2011); *see also* 17 C.F.R. § 1.47 (2011).³

B. CBOT Spot Month Position Limits

The Act permits each exchange to establish its own position limits. 7 U.S.C. § 6a(e). The CBOT limit for wheat futures, like the CFTC’s, is 600 contracts in the spot month. CBOT Rule 559 and Position Limit Table. It is a violation of exchange rules to maintain a position in excess of position limits. *Id.*; CBOT Rule 562; CBOT Rule 14102.E. It is also a violation of the Act to violate an exchange position limit, if such limit was approved by the CFTC. 7 U.S.C. § 6a(e); *see also In re Rough Rice Commodity Litig.*, No. 11 C 618, 2012 WL 473091, at *5 (N.D. Ill. Feb. 9, 2012). The CFTC approved the wheat futures limit at issue. [SOF, ¶ 11].

A market participant cannot exceed CBOT limits unless it is engaging in bona fide

³ A 2011 CFTC rulemaking removed and reserved Regulations 1.47 and 1.48. *Position Limits for Futures and Swaps*, 76 Fed. Reg. 71,626 (Nov. 18, 2011). However, the effective date for the rulemaking was January 17, 2012; leaving Regulations 1.47 and 1.48 in effect during the December 2011 wheat futures expiration. The CFTC’s 2011 rulemaking was vacated by the decision in *ISDA v. CFTC*, 887 F. Supp. 3d 529 (D.D.C. Sept. 28, 2012). Accordingly Regulations 1.47 and 1.48 remain in effect today.

hedging activity (or other specified conduct not at issue here). CBOT Rule 559. Bona fide hedgers can apply to the exchange for a speculative position limit exemption, called a “hedge exemption,” based on a demonstration of bona fide hedging needs.⁴ [SOF, ¶ 16]. If approved, the exchange issues a letter setting out the specific additional limit it has approved for the entity.⁵ Hedge exemptions are valid for one calendar year and are renewable only by submitting a new application to the Market Regulation Department. [SOF, ¶ 16]. CBOT Rule 559 states: “A person who has received written authorization from the Market Regulation Department to exceed position limits must annually file an updated application not later than one year following the approval date of the most recent application. *Failure to file an updated application will result in expiration of the exemption.*” (Emphasis supplied).

It is a violation of the CBOT Rule to exceed position limits without an active hedge exemption. CBOT Rule 559 (“A person intending to exceed position limits, including limits established pursuant to a previously approved exemption, must file the required application and receive approval from the Market Regulation Department prior to exceeding such limits.”).⁶

The CFTC is not required to establish intent to violate position limits in order to prove a violation. *In re Rough Rice Commodity Litig.*, No. 11 C 618, 2012 WL 473091, at *5 (N.D. Ill. Feb. 9, 2012) (*citing Saberi v. CFTC*, 488 F.3d 1207, 1212 n.4 (9th Cir. 2007) and *CFTC v. Hunt*, 591 F.2d 1211, 1218 (7th Cir.1979)). No proof of scienter is required to establish a

⁴ See 17 C.F.R. § 150.5(d)(2) (“Traders must apply to the contract market for an exemption from its speculative position limit rules.”); CBOT Rule 559 (“[a] person seeking an exemption from position limits must apply to the Market Regulation Department on forms provided by the Exchange.”).

⁵ While the CBOT maintains rules applicable to futures trading of wheat, the “Market Regulation Department” of the CME Group (the holding company for the CBOT) conducts surveillance and compliance activities related to CBOT trading [SOF, ¶ X], including reviewing hedge exemption applications and granting exemptions.

⁶ The Market Regulation Department may grant hedge exemptions retroactively, but only when the market participant files the required application within five business days after assuming the position in excess of the applicable position limit. CBOT Rule 559. That did not occur here.

violation of 7 U.S.C. §§ 6a(b) or 6a(e) or the relevant exchange rules. *Id.*

IV. KRAFT EXCEEDED POSITION LIMITS ON NINE DAYS

The “spot month” for the December 2011 wheat futures contract began November 29, 2011. [SOF, ¶ 12]. On that date, the CFTC and CBOT 600-contract spot month position limits became effective. It is undisputed that Kraft’s long position in the December 2011 wheat futures contract exceeded the limit on nine days during the spot month: November 29 and 30, and December 1, 2, 5, 6, 7, 8, and 9. [SOF, ¶¶ 13, 14].

V. KRAFT VIOLATED POSITION LIMITS BECAUSE IT HAD NO ACTIVE HEDGE EXEMPTION STARTING DECEMBER 2, 2011

In October 2010, the Market Regulation Department granted Kraft a hedge exemption for wheat futures contracts effective December 1, 2010 to December 1, 2011 (the “2010-2011 Hedge Exemption”). [SOF, ¶ 17]. Stated in bold in the notification letter Kraft received, Kraft was required to submit a renewal application by December 1, 2011, or its exemption would expire. [SOF, ¶ 17]. On October 24, 2011, Market Regulation Department reminded Kraft that its renewal application was due by December 1, 2011. [SOF, ¶ 18]. But Kraft did not submit a renewal application until well into 2012. [SOF, ¶ 24]. Thus, Kraft’s hedge exemption expired on December 1, 2011. [SOF, ¶ 24]. By exceeding the 600-contract CBOT position limit without a valid hedge exemption on December 2, 5, 6, 7, 8, and 9, 2011, Kraft violated CBOT Rule 559 and 562, and thus the Act, 7 U.S.C. § 6a(e). *In re Rough Rice Commodity Litig.*, 2012 WL 473091, at *5.

Kraft may argue that its communications with CME Group Market Surveillance Analyst Michael Joubert on November 29 and December 7, 2011 amounted to an extension of Kraft’s 2010-2011 Hedge Exemption. [See SOF, ¶¶ 20, 25]. This is false. Mr. Joubert had no authority to grant hedge exemptions or extensions on application deadlines. [SOF, ¶¶ 21, 22, 23]. At no time

in 2010 or 2011 did Mr. Joubert grant Kraft a hedge exemption or an extension to file its renewal application. [SOF, ¶ 23]. In fact, Mr. Joubert did not know whether Kraft had an active hedge exemption when he communicated with Kraft. [SOF, ¶ 25]. Finally, Kraft's subjective interpretation of Mr. Joubert's e-mails is irrelevant for this non-scienter claim.⁷

Kraft may point to a December 20, 2011 CME and CBOT Market Regulation Notice temporarily waiving annual renewal filing requirements for all market participants through May 31, 2012, due to then-impending changes to the regulatory regime governing position limits. [SOF, ¶ 26]. This blanket waiver was of no help to Kraft, however, because it became effective December 20, 2011—nineteen days after Kraft's hedge exemption expired without it filing a renewal application—and only waived renewals for then-current hedge exemptions. [SOF, ¶ 26]. Nothing in the blanket waiver retroactively cured Kraft's—or anyone else's—failure to file a timely renewal application. [SOF, ¶ 26]. Kraft's 2010-2011 Hedge Exemption had expired on December 1, 2011; on December 20, 2011, Kraft had no active exemption in place to renew.

VI. KRAFT VIOLATED POSITION LIMITS BECAUSE IT WAS NOT ENGAGING IN BONA FIDE HEDGING

Whether or not Kraft had an active hedge exemption, it could only exceed the CFTC and CBOT spot-month position limits if it was engaging in bona fide hedging. The undisputed facts show that Kraft's Delivery Strategy plainly did not qualify because it did not reduce Kraft's price risk for wheat and involved a futures position that dwarfed Kraft's actual needs. Kraft exceeded the CFTC and CBOT 600-contract limit without engaging in bona fide hedging on November 29 and 30 and December 2, 5, 6, 7, 8, and 9, 2011 and therefore violated 7 U.S.C. § 6a(b) and (e) and 17 C.F.R. § 150.2 on all of those days.

⁷ See Part III.B., *supra*.

A. Undisputed Facts Relevant to Kraft's Delivery Strategy

In August of 2011, Mr. Haar and his superior Jack Bienkowski began discussing a strategy to stand for delivery of soft red winter ("SRW") wheat from the December 2011 futures contract. [SOF, ¶ 29].⁸ Kraft bought the 3,000 long wheat futures contracts that comprised the Delivery Strategy, representing 15 million bushels of wheat, between September 12 and 16, 2011. [SOF, ¶ 31].⁹ By this time, Kraft's non-Delivery Strategy futures positions had fully covered Kraft's exposure to the price of SRW wheat for the remainder of 2011 and the first half of 2012. [SOF, ¶ 33]. Accordingly, Kraft had no flat price risk in wheat to hedge with the 3,000 long futures contracts in the Delivery Strategy.¹⁰

Mr. Haar and Mr. Bienkowski presented the Delivery Strategy to management not as a hedging strategy, but as an "inventory build" in which Kraft purportedly would acquire 15 million bushels of SRW wheat from the futures delivery mechanism, all in December 2011. [SOF, ¶ 36]. They represented that this amount was intended to cover the Toledo mill's needs through July or August 2012. [SOF, ¶ 37]. But this amount dwarfed Kraft's actual needs for wheat. In fact, Kraft had no immediate need to acquire any wheat from the December futures expiration: a week before the spot month began, Kraft already had [REDACTED] bushels of SRW wheat in store or purchased, enough to run the mill through [REDACTED]. [SOF, ¶ 42].

Further, while Mr. Haar and Mr. Bienkowski presented the strategy as covering the mill's needs for seven months, the mill actually uses less than 15 million bushels of SRW wheat *per*

⁸ We use the shorthand "Delivery Strategy" to refer to this strategy.

⁹ Simultaneously, Kraft established a 3,000-contract short position in the deferred months: (a) -2,000 contracts in the March 2012 contract, and (b) -1,000 contracts in the May 2012 contract. *Id.* This type of position (being "long" in the nearby contract and "short" in the deferred months) is called a "bullspread" position, which gains in value as the spread between the contracts narrows. [SOF, ¶ X].

¹⁰ The "flat price" is the absolute price level of the commodity. For instance, when wheat is selling for \$6/bushel, \$6 is the flat price. For end users like Kraft, flat price risk is the risk that the price of a bushel of wheat will increase.

year. [SOF, ¶ 43]. Because of the purchases it had made already, by the end of November 2011, Kraft needed to buy only ████████ bushels of SRW wheat to run the mill through August 2012. [SOF, ¶ 44]. Yet, Kraft stood for delivery of futures contracts representing 15 million bushels—more than twice as much wheat. [SOF, ¶¶ 13, 31]. Finally, Kraft senior management conditioned its approval of the Delivery Strategy on Kraft reducing its ownership of nearly half of the position it required (\$40 million of the \$90 million position) by the end of December 2011 [SOF, ¶ 40], further demonstrating that Kraft had no need for the futures wheat.

B. Kraft’s Delivery Strategy Was Not Risk-Reducing

A bona fide hedge must be “economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise” and as relevant to Kraft’s use of wheat futures, “arise from . . . [t]he potential change in the value of assets” the person processes. 17 C.F.R. § 1.3(z)(1); 7 U.S.C. § 6a(c)(2)(A)(ii). To constitute a bona fide hedge, Kraft’s long futures position must therefore reduce Kraft’s exposure to the potential increase in the price of wheat that Kraft anticipates processing: Kraft’s flat price risk. 17 C.F.R. § 1.3(z)(1)(i); 7 U.S.C. § 6a(c)(2)(A)(iii). As Kraft’s flat price risk was already fully hedged before it put the Delivery Strategy in place [SOF, ¶ 33], it fails this primary test.

Perhaps recognizing this, Kraft’s expert instead argues the strategy was intended to eliminate “basis risk.” (Overdahl Report, ¶ 144).¹¹ He argues that if the Delivery Strategy had gone as planned, Kraft would have bought the wheat it needed for many months all at once, extinguishing its basis risk. (*Id.*) Even accepting the premise that the Delivery Strategy was designed to acquire wheat,¹² market participants cannot claim basis risk as the justification for a

¹¹ The Revised Expert Report of Dr. James Overdahl, Kraft’s expert, appears as Exhibit 2 to his Aug. 15, 2018 deposition testimony and is included in the materials supporting the CFTC’s Statement of Facts.

¹² At trial, the CFTC will prove that the Delivery Strategy was not intended to source wheat, but rather was a deceptive and manipulative strategy designed to manipulate the futures and cash markets.

bona fide hedge. Bona fide hedges must “offset price risks,” 17 C.F.R. § 1.3(z)(1)(iv), which here is the potential increase in the cost of wheat that Kraft anticipates processing. The CFTC has specifically rejected requests that it expand the “economically appropriate” test to “include more than just price risk,” as doing so would be inconsistent with the language and purpose of the Act. *Position Limits for Derivatives*, 81 Fed. Reg. 96,704, 96,746 (Dec. 30, 2016) (Reproposed rule) (“[T]o satisfy the economically appropriate test and the change in value requirement of CEA section 4a(c)(2)(A)(iii), the purpose of a bona fide hedging position must be to offset price risks incidental to a commercial enterprise’s cash operations.”).¹³

Market participants like Kraft typically buy wheat at a premium (or discount) to a futures contract.¹⁴ This premium (or discount) is the “basis” the seller charges and reflects transaction-specific items, such as quality considerations and transportation costs. The CFTC considers “basis risk” to be a type of “operational risk” faced by companies, and has stated that allowing companies to exceed position limits to address such risks would “broaden the scope of a bona fide hedging position beyond the CFTC’s historical interpretation and may have adverse impacts that are inconsistent with the policy objectives of limits in CEA section 4a(a)(3)(B).” 81 Fed. Reg. at 96,749-50. No authority supports the extreme proposition that standing for delivery of more than a year’s worth of wheat solely to mitigate “basis risk” qualifies as a bona fide hedge.

C. Kraft’s Delivery Strategy Was Not Anticipatory Hedging

CFTC regulations permit a person to buy futures to hedge “[t]welve months’ unfilled

¹³ See also *Position Limits for Derivatives*, 78 Fed. Reg. 75,680, 75,702-03 (Dec. 12, 2013) (Notice of proposed rulemaking) (“The core of the Commission’s approach to defining bona fide hedging over the years has focused on transactions that offset a recognized physical price risk.”). An agency interpretation in a proposed rule at least “warrants respectful consideration” by the Court. *Wis. Dept. of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002).

¹⁴ Sophisticated buyers and sellers like Kraft typically have their price risk fully hedged in the futures market, so they are indifferent to the price of a bushel of wheat. Instead, Kraft’s contracts specify a particular basis value. For example, Kraft might agree today to buy one million bushels of SRW wheat to be delivered in Q1 2019 at 20 cents above the March 2019 wheat futures contract.

anticipated requirements” for a cash commodity until the last five trading days of the contract, at which point the person can hedge even less. 17 C.F.R. § 1.3(z)(2)(ii)(C).¹⁵ Kraft has not claimed that the Delivery Strategy qualifies under this provision, and for good reason.

First, no person may avail himself of a bona fide hedge exemption under this provision without giving the CFTC notice of its intent to establish the position 10 days before the position limit becomes effective. 17 C.F.R. § 1.48 (2011).¹⁶ It is undisputed that Kraft did not provide such a notice to the CFTC. [SOF, ¶ 27].

Second, the purpose of this provision is to permit an end user such as Kraft to lock in the price of wheat it has not yet purchased. By December 2011, Kraft had already hedged its unfilled anticipated requirements with long futures positions that were not part of the Delivery Strategy. [SOF, ¶ 33]. Thus, Kraft had no risk for the Delivery Strategy to hedge under this provision.

Third, Kraft’s December 2011 futures position on November 29 was 3,150 contracts, representing 15.75 million bushels of SRW wheat. [SOF, ¶ 13]. It is undisputed that Kraft uses less than 15 million bushels of wheat a year in its Toledo mill and, as of the week before, had at least ██████ bushels of SRW wheat in store or purchased. [SOF, ¶¶ 42, 43]. It was therefore impossible for Kraft to have had in excess of 15 million bushels in unfilled anticipated needs over the next twelve months.

D. Using Futures to Pursue a Speculative Sourcing Strategy Does Not Exempt Kraft from Position Limits

Last, Kraft’s expert has suggested that since Kraft was purportedly using the futures contract to source wheat, spot month position limits do not apply. (Overdahl Report, ¶ 141). However, there is no “sourcing” exception to the position limit rules. In fact, in recent guidance,

¹⁵ See Part III.A, *supra*.

¹⁶ See Part III.A, *supra*.

the CFTC rejected the notion that entering into a futures position with the intention to take delivery should exempt it from position limits. 81 Fed. Reg. at 96,750 (reasoning that such a position would “appear[] to fail the temporary substitute test, since such market participant is not using the derivative contract as a substitute for a position taken or to be taken in the physical marketing channel.”) In other words, bona fide hedging transactions must be a “substitute for transactions to be made ... at a later time in the physical marketing channel.” 17 C.F.R.

§ 1.3(z)(1). If a market participant intends to use the futures contract to source grain, the position is no longer a “substitute” for a later physical transaction—it *is* the physical transaction.

Furthermore, as discussed above,¹⁷ the size of the position represented by the Delivery Strategy was at least double Kraft’s actual needs for wheat through August 2012. This demonstrates that the strategy was speculative in nature and not narrowly tailored to source the wheat Kraft needed to run its mill. Kraft can cite no authority or precedent that such a strategy has ever, or could ever, be deemed a bona fide hedge.

VII. KRAFT ENGAGED IN WASH SALES AND NONCOMPETITIVE TRADING

The Act makes it “unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction” involving a futures contract that “is, is of the character of, or is commonly known to the trade as, a ‘wash sale,’” that “is a fictitious sale,” or that “is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.” 7 U.S.C. § 6c(a)(1), (2). “[A] wash sale is one in which market risk is reduced ‘to a level that has no practical impact on the transaction at issue’ and in which the customer has ‘the intent not to make a genuine, bona fide trading transaction.’” *Piasio v. CFTC*, 54 F. App’x 702, 705 (2d Cir. 2002) (citations omitted). Wash sales “are considered harmful because they create illusory price

¹⁷ See Part III.A, *supra*.

movements in the market.” *Wilson v. CFTC*, 322 F.3d 555, 560 (8th Cir. 2003). They occur if “the transaction at issue achieved a wash result,” with: (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or similar) price.” *Id.* at 559.

Regulation 1.38(a), 17 C.F.R. § 1.38(a) (2011), requires all purchases and sales of futures contracts to “be executed openly and competitively,” with an exception for “transactions which are executed noncompetitively in accordance with written rules of the contract market which have been submitted to and approved by the [CFTC], specifically providing for the noncompetitive execution of such transactions.” CBOT Rule 538 allows for noncompetitive Exchange of Futures for Physical (“EFP”) transactions that feature the simultaneous execution of a futures contract and a corresponding physical transaction involving the cash commodity underlying the futures contract. CBOT Rule 538. However, the rule permits EFPs only between independently controlled accounts, and they further require the actual transfer of the underlying cash commodity and maintenance of proper supporting documentation, including all documents customarily generated in accordance with relevant market practices and any documents reflecting payment and transfer of title. CBOT Rule 538.

“EFPs that are equal and offsetting in price, where the same entity, or beneficial owner or controller is on both sides of the transactions, constitute ‘wash sales’ within the meaning of [7 U.S.C. § 6c(a)].” *In re SG Americas Sec., LLC, as successor to Newedge USA, LLC*, CFTC No. 16-33, 2016 WL 5682204, at *3 (Sept. 28, 2016); *see also In re Noble Americas Corp.*, CFTC No. 10-12, 2010 WL 1803817, at *3 (May 3, 2010) (finding wash sales in violation of 7 U.S.C. § 6c(a) where respondent “prearranged and structured purchases and sales of the same delivery month of the same futures contract (and EFPs) at the same or similar price to avoid a bona fide transaction using accounts with the same beneficial owner”).

It is undisputed that from February 25, 2010 to August 13, 2012, Kraft maintained six trading accounts at Newedge, ending in [REDACTED]. [SOF, ¶ 46]. Prior to each of the five annual delivery periods for SRW wheat futures during that time period, Kraft transacted EFPs in various pairs of those accounts, with the short position held in one half of the pair precisely offset by the long position held in the other half. [SOF, ¶ 48]. These EFP transactions, totaling thirty-three over this time period, were cleared through the exchange as EFPs and designated as EFPs on all account statements Kraft received from Newedge. [SOF, ¶¶ 51, 52].

These thirty-three EFPs ran afoul of CBOT rules. First, they were not transacted between independently controlled accounts. [SOF, ¶¶ 48, 49]. Instead, it is undisputed that Mr. Haar and one other Kraft wheat procurement employee controlled the trading in all six accounts in which Kraft transacted EFPs. [SOF, ¶ 49]. Further, Kraft's finance department determined the price level at which each of these transactions would be done. [SOF, ¶ 50]. Second, no physical wheat was transferred in any of the EFP transactions. [SOF, ¶ 53] Third, Kraft failed to create or maintain any documents relating to the physical wheat side of the transactions, including those that ordinarily accompany the sale of the physical side of the transaction. [SOF, ¶ 54].

Kraft's EFP transactions were equal and offsetting and conducted by a common controller. Accordingly, they achieved a wash result, and were used to cause prices to be reported that were not true and bona fide prices. Kraft therefore violated 7 U.S.C. § 6c(a)(1), (2) and 17 C.F.R. § 1.38(a).

VIII. CONCLUSION

The undisputed facts demonstrate that Kraft exceeded the 600-contract spot month limit for wheat futures contracts without an active hedge exemption on December 2, 5, 6, 7, 8, and 9,

2011, and without engaging in bona fide hedging on November 29 and 30 and December 1, 2, 5, 6, 7, 8, and 9, 2011. They further show that Kraft engaged in 33 EFP transactions that constituted wash sales and caused non-bona fide prices to be reported.

For the foregoing reasons, the court should grant the CFTC's Motion for Summary Judgment on Count III (speculative position limit violations in violation of 7 U.S.C. § 6a(b), (e) and 17 C.F.R. § 150.2) and Count IV (wash sales, fictitious sales, and noncompetitive trading in violation of 7 U.S.C. § 6c(a)(1), (2) and 17 C.F.R. § 1.38(a)). Following entry of judgment for liability on those counts, the CFTC will make the appropriate application to the Court for entry of an order providing for the relief requested in the Complaint, including civil monetary penalties for Kraft's violations.

Date: September 14, 2018

Respectfully submitted,

ATTORNEYS FOR PLAINTIFF U.S.
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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I caused the foregoing Memorandum of Law in Support of the CFTC's Motion for Summary Judgment to be served on all counsel for Defendants who have appeared in this matter via the Court's electronic filing system.

/s/ Michael Frisch

Appendix A

**2011 Versions of CEA Provisions,
CFTC Regulations, and CBOT Rules**

COMMODITY EXCHANGE ACT PROVISIONS

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 1. Commodity Exchanges (Refs & Annos)

7 U.S.C.A. § 6a

§ 6a. Excessive speculation

Effective: July 21, 2010

[Currentness](#)

(a) Burden on interstate commerce; trading or position limits

(1) In general

Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets or derivatives transaction execution facilities, or swaps that perform or affect a significant price discovery function with respect to registered entities causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person, including any group or class of traders, under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, or swaps traded on or subject to the rules of a designated contract market or a swap execution facility, or swaps not traded on or subject to the rules of a designated contract market or a swap execution facility that performs a significant price discovery function with respect to a registered entity, as the Commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the Commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or for different number of days remaining until the last day of trading in a contract, or different trading limits for buying and selling operations, or different limits for the purposes of paragraphs (1) and (2) of subsection (b) of this section, or from exempting transactions normally known to the trade as “spreads” or “straddles” or “arbitrage” or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word “arbitrage” in domestic markets shall be defined to mean the same as “spread” or “straddle”. The Commission is authorized to define the term “international arbitrage”.

(2) Establishment of limitations

(A) In general

In accordance with the standards set forth in paragraph (1) of this subsection and consistent with the good faith exception cited in subsection (b)(2), with respect to physical commodities other than excluded commodities as

defined by the Commission, the Commission shall by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.

(B) Timing

(i) Exempt commodities

For exempt commodities, the limits required under subparagraph (A) shall be established within 180 days after July 21, 2010.

(ii) Agricultural commodities

For agricultural commodities, the limits required under subparagraph (A) shall be established within 270 days after July 21, 2010.

(C) Goal

In establishing the limits required under subparagraph (A), the Commission shall strive to ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits and that any limits to be imposed by the Commission will not cause price discovery in the commodity to shift to trading on the foreign boards of trade.

(3) Specific limitations

In establishing the limits required in paragraph (2), the Commission, as appropriate, shall set limits--

(A) on the number of positions that may be held by any person for the spot month, each other month, and the aggregate number of positions that may be held by any person for all months; and

(B) to the maximum extent practicable, in its discretion--

(i) to diminish, eliminate, or prevent excessive speculation as described under this section;

(ii) to deter and prevent market manipulation, squeezes, and corners;

(iii) to ensure sufficient market liquidity for bona fide hedgers; and

(iv) to ensure that the price discovery function of the underlying market is not disrupted.

(4) Significant price discovery function

In making a determination whether a swap performs or affects a significant price discovery function with respect to regulated markets, the Commission shall consider, as appropriate:

(A) Price linkage

The extent to which the swap uses or otherwise relies on a daily or final settlement price, or other major price parameter, of another contract traded on a regulated market based upon the same underlying commodity, to value a position, transfer or convert a position, financially settle a position, or close out a position.

(B) Arbitrage

The extent to which the price for the swap is sufficiently related to the price of another contract traded on a regulated market based upon the same underlying commodity so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the swaps on a frequent and recurring basis.

(C) Material price reference

The extent to which, on a frequent and recurring basis, bids, offers, or transactions in a contract traded on a regulated market are directly based on, or are determined by referencing, the price generated by the swap.

(D) Material liquidity

The extent to which the volume of swaps being traded in the commodity is sufficient to have a material effect on another contract traded on a regulated market.

(E) Other material factors

Such other material factors as the Commission specifies by rule or regulation as relevant to determine whether a swap serves a significant price discovery function with respect to a regulated market.

(5) Economically equivalent contracts

(A) Notwithstanding any other provision of this section, the Commission shall establish limits on the amount of positions, including aggregate position limits, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to swaps that are economically equivalent to contracts of sale for future delivery or to options on the contracts or commodities traded on or subject to the rules of a designated contract market subject to paragraph (2).

(B) In establishing limits pursuant to subparagraph (A), the Commission shall--

(i) develop the limits concurrently with limits established under paragraph (2), and the limits shall have similar requirements as under paragraph (3)(B); and

(ii) establish the limits simultaneously with limits established under paragraph (2).

(6) Aggregate position limits

The Commission shall, by rule or regulation, establish limits (including related hedge exemption provisions) on the aggregate number or amount of positions in contracts based upon the same underlying commodity (as defined by the Commission) that may be held by any person, including any group or class of traders, for each month across--

(A) contracts listed by designated contract markets;

(B) with respect to an agreement contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on a registered entity, contracts traded on a foreign board of trade that provides members or other participants located in the United States with direct access to its electronic trading and order matching system; and

(C) swap contracts that perform or affect a significant price discovery function with respect to regulated entities.

(7) Exemptions

The Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits.

(b) Prohibition on trading or positions in excess of limits fixed by Commission

The Commission shall, in such rule, regulation, or order, fix a reasonable time (not to exceed ten days) after the promulgation of the rule, regulation, or order; after which, and until such rule, regulation, or order is suspended, modified, or revoked, it shall be unlawful for any person--

(1) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets, or swap execution facility or facilities with respect to a significant price discovery contract, to which the rule, regulation, or order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the Commission in such rule, regulation, or order for or with respect to such commodity; or

(2) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market or swap execution facility with respect to a significant price discovery contract in excess of any position limit fixed by the Commission for or with respect to such commodity: *Provided,*

That such position limit shall not apply to a position acquired in good faith prior to the effective date of such rule, regulation, or order.

(c) Applicability to bona fide hedging transactions or positions

(1) No rule, regulation, or order issued under subsection (a) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions as such terms shall be defined by the Commission by rule, regulation, or order consistent with the purposes of this chapter. Such terms may be defined to permit producers, purchasers, sellers, middlemen, and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs for that period of time into the future for which an appropriate futures contract is open and available on an exchange. To determine the adequacy of this chapter and the powers of the Commission acting thereunder to prevent unwarranted price pressures by large hedgers, the Commission shall monitor and analyze the trading activities of the largest hedgers, as determined by the Commission, operating in the cattle, hog, or pork belly markets and shall report its findings and recommendations to the Senate Committee on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture in its annual reports for at least two years following January 11, 1983.

(2) For the purposes of implementation of subsection (a)(2) for contracts of sale for future delivery or options on the contracts or commodities, the Commission shall define what constitutes a bona fide hedging transaction or position as a transaction or position that--

(A)(i) represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel;

(ii) is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; and

(iii) arises from the potential change in the value of--

(I) assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(II) liabilities that a person owns or anticipates incurring; or

(III) services that a person provides, purchases, or anticipates providing or purchasing; or

(B) reduces risks attendant to a position resulting from a swap that--

(i) was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction pursuant to subparagraph (A); or

(ii) meets the requirements of subparagraph (A).

(d) Persons subject to regulation; applicability to transactions made by or on behalf of United States

This section shall apply to a person that is registered as a futures commission merchant, an introducing broker, or a floor broker under authority of this chapter only to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. This section shall not apply to transactions made by, or on behalf of, or at the direction of, the United States, or a duly authorized agency thereof.

(e) Rulemaking power and penalties for violation

Nothing in this section shall prohibit or impair the adoption by any contract market, derivatives transaction execution facility, or by any other board of trade licensed, designated, or registered by the Commission or by any electronic trading facility of any bylaw, rule, regulation, or resolution fixing limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of any commodity for future delivery traded on or subject to the rules of such contract market or derivatives transaction execution facility or on an electronic trading facility, or under options on such contracts or commodities traded on or subject to the rules of such contract market, derivatives transaction execution facility, or electronic trading facility or such board of trade: *Provided*, That if the Commission shall have fixed limits under this section for any contract or under [section 6c](#) of this title for any commodity option, then the limits fixed by the bylaws, rules, regulations, and resolutions adopted by such contract market, derivatives transaction execution facility, or electronic trading facility or such board of trade shall not be higher than the limits fixed by the Commission. It shall be a violation of this chapter for any person to violate any bylaw, rule, regulation, or resolution of any contract market, derivatives transaction execution facility, or other board of trade licensed, designated, or registered by the Commission or electronic trading facility with respect to a significant price discovery contract fixing limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of any commodity for future delivery or under options on such contracts or commodities, if such bylaw, rule, regulation, or resolution has been approved by the Commission or certified by a registered entity pursuant to [section 7a-2\(c\)\(1\)](#) of this title: *Provided*, That the provisions of [section 13\(a\)\(5\)](#) of this title shall apply only to those who knowingly violate such limits.

CREDIT(S)

(Sept. 21, 1922, c. 369, § 4a, as added June 15, 1936, c. 545, § 5, 49 Stat. 1492; amended July 24, 1956, c. 690, § 1, 70 Stat. 630; [Pub.L. 90-258](#), §§ 2 to 4, Feb. 19, 1968, 82 Stat. 26, 27; [Pub.L. 93-463, Title IV, §§ 403, 404](#), Oct. 23, 1974, 88 Stat. 1413; [Pub.L. 94-16](#), § 4, Apr. 16, 1975, 89 Stat. 78; [Pub.L. 97-444, Title II, § 205](#), Jan. 11, 1983, 96 Stat. 2299; [Pub.L. 102-546, Title IV, § 402\(1\)\(A\), \(2\)](#), Oct. 28, 1992, 106 Stat. 3624; [Pub.L. 106-554](#), § 1(a)(5) [Title I, § 123(a)(4)], Dec. 21, 2000, 114 Stat. 2763, 2763A-407; [Pub.L. 110-234, Title XIII, §§ 13105\(a\), 13203\(g\)](#), May 22, 2008, 122 Stat. 1434, 1439; [Pub.L. 110-246](#), § 4(a), Title XIII, §§ 13105(a), 13203(g), June 18, 2008, 122 Stat. 1664, 2196, 2201; [Pub.L. 111-203, Title VII, § 737\(a\)](#) to (c), July 21, 2010, 124 Stat. 1722.)

[Notes of Decisions \(35\)](#)

7 U.S.C.A. § 6a, 7 USCA § 6a

Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-233 to 115-238. Title 26 current through P.L. 115-238.

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 1. Commodity Exchanges (Refs & Annos)

This section has been updated. Click [here](#) for the updated version.

7 U.S.C.A. § 6c

§ 6c. Prohibited transactions

Effective: [See Text Amendments] to April 3, 2012

(a) In general

(1) Prohibition

It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction described in paragraph (2) involving the purchase or sale of any commodity for future delivery (or any option on such a transaction or option on a commodity) or swap if the transaction is used or may be used to--

(A) hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity;

(B) determine the price basis of any such transaction in interstate commerce in the commodity; or

(C) deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.

(2) Transaction

A transaction referred to in paragraph (1) is a transaction that--

(A)(i) is, of the character of, or is commonly known to the trade as, a “wash sale” or “accommodation trade”; or

(ii) is a fictitious sale; or

(B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.

(3) Contract of sale

It shall be unlawful for any employee or agent of any department or agency of the Federal Government who, by virtue of the employment or position of the employee or agent, acquires information that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, and which information has not been disseminated by the department or agency of the Federal Government holding or creating the information in a manner which makes it generally available to the trading public, or disclosed in a criminal, civil, or administrative hearing, or

in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, to use the information in his personal capacity and for personal gain to enter into, or offer to enter into--

(A) a contract of sale of a commodity for future delivery (or option on such a contract);

(B) an option (other than an option executed or traded on a national securities exchange registered pursuant to [section 78f\(a\) of Title 15](#); or

(C) a swap.

(4) Nonpublic information

(A) Imparting of nonpublic information

It shall be unlawful for any employee or agent of any department or agency of the Federal Government who, by virtue of the employment or position of the employee or agent, acquires information that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, and which information has not been disseminated by the department or agency of the Federal Government holding or creating the information in a manner which makes it generally available to the trading public, or disclosed in a criminal, civil, or administrative hearing, or in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, to impart the information in his personal capacity and for personal gain with intent to assist another person, directly or indirectly, to use the information to enter into, or offer to enter into--

(i) a contract of sale of a commodity for future delivery (or option on such a contract);

(ii) an option (other than an option executed or traded on a national securities exchange registered pursuant to [section 78f\(a\) of Title 15](#); or

(iii) a swap.

(B) Knowing use

It shall be unlawful for any person who receives information imparted by any employee or agent of any department or agency of the Federal Government as described in subparagraph (A) to knowingly use such information to enter into, or offer to enter into--

(i) a contract of sale of a commodity for future delivery (or option on such a contract);

(ii) an option (other than an option executed or traded on a national securities exchange registered pursuant to [section 78f\(a\) of Title 15](#); or

(iii) a swap.

(C) Theft of nonpublic information

It shall be unlawful for any person to steal, convert, or misappropriate, by any means whatsoever, information held or created by any department or agency of the Federal Government that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, where such person knows, or acts in reckless disregard of the fact, that such information has not been disseminated by the department or agency of the Federal Government holding or creating the information in a manner which makes it generally available to the trading public, or disclosed in a criminal, civil, or administrative hearing, or in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, and to use such information, or to impart such information with the intent to assist another person, directly or indirectly, to use such information to enter into, or offer to enter into--

(i) a contract of sale of a commodity for future delivery (or option on such a contract);

(ii) an option (other than an option executed or traded on a national securities exchange registered pursuant to [section 78f\(a\) of Title 15](#); or

(iii) a swap, provided, however, that nothing in this subparagraph shall preclude a person that has provided information concerning, or generated by, the person, its operations or activities, to any employee or agent of any department or agency of the Federal Government, voluntarily or as required by law, from using such information to enter into, or offer to enter into, a contract of sale, option, or swap described in clauses ¹ (i), (ii), or (iii).

(5) Disruptive practices

It shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that--

(A) violates bids or offers;

(B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or

(C) is, is of the character of, or is commonly known to the trade as, “spoofing” (bidding or offering with the intent to cancel the bid or offer before execution).

(6) Rulemaking authority

The Commission may make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to prohibit the trading practices described in paragraph (5) and any other trading practice that is disruptive of fair and equitable trading.

(7) Use of swaps to defraud

It shall be unlawful for any person to enter into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap as part of a device, scheme, or artifice to defraud any third party.

(b) Regulated option trading

No person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as, an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty”, or “decline guaranty”, contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe. Any such order, rule, or regulation may be made only after notice and opportunity for hearing, and the Commission may set different terms and conditions for different markets.

(c) Regulations for elimination of pilot status of commodity option transactions; terms and conditions of options trading

Not later than 90 days after November 10, 1986, the Commission shall issue regulations--

(1) to eliminate the pilot status of its program for commodity option transactions involving the trading of options on contract markets, including any numerical restrictions on the number of commodities or option contracts for which a contract market may be designated; and

(2) otherwise to continue to permit the trading of such commodity options under such terms and conditions that the Commission from time to time may prescribe.

(d) Dealer options exempt from subsections (b) and (c) prohibitions; requirements

Notwithstanding the provisions of subsection (c) of this section--

(1) any person domiciled in the United States who on May 1, 1978, was in the business of granting an option on a physical commodity, other than a commodity specifically set forth in [section 2\(a\)](#) of this title prior to October 23, 1974, and was in the business of buying, selling, producing, or otherwise using that commodity, may continue to grant or issue options on that commodity in accordance with Commission regulations in effect on August 17, 1978, until thirty days after the effective date of regulations issued by the Commission under clause (2) of this subsection: *Provided*, That if such person files an application for registration under the regulations issued under clause (2) of this subsection within thirty days after the effective date of such regulations, that person may continue to grant or issue options pending a final determination by the Commission on the application; and

(2) the Commission shall issue regulations that permit grantors and futures commission merchants to offer to enter into, enter into, or confirm the execution of, any commodity option transaction on a physical commodity subject to the provisions of subsection (b) of this section, other than a commodity specifically set forth in [section 2\(a\)](#) of this title prior to October 23, 1974, if--

(A) the grantor is a person domiciled in the United States who--

(i) is in the business of buying, selling, producing, or otherwise using the underlying commodity;

(ii) at all times has a net worth of at least \$5,000,000 certified annually by an independent public accountant using generally accepted accounting principles;

(iii) notifies the Commission and every futures commission merchant offering the grantor's option if the grantor knows or has reason to believe that the grantor's net worth has fallen below \$5,000,000;

(iv) segregates daily, exclusively for the benefit of purchasers, money, exempted securities (within the meaning of [section 78c\(a\)\(12\) of Title 15](#)), commercial paper, bankers' acceptances, commercial bills, or unencumbered warehouse receipts, equal to an amount by which the value of each transaction exceeds the amount received or to be received by the grantor for such transaction;

(v) provides an identification number for each transaction; and

(vi) provides confirmation of all orders for such transactions executed, including the execution price and a transaction identification number;

(B) the futures commission merchant is a person who--

(i) has evidence that the grantor meets the requirements specified in subclause (A) of this clause;

(ii) treats and deals with all money, securities, or property received from its customers as payment of the purchase price in connection with such transactions, as belonging to such customers until the expiration of the term of the option, or, if the customer exercises the option, until all rights of the customer under the commodity option transaction have been fulfilled;

(iii) records each transaction in its customer's name by the transaction identification number provided by the grantor;

(iv) provides a disclosure statement to its customers, under regulations of the Commission, that discloses, among other things, all costs, including any markups or commissions involved in such transaction; and

(C) the grantor and futures commission merchant comply with any additional uniform and reasonable terms and conditions the Commission may prescribe, including registration with the Commission.

The Commission may permit persons not domiciled in the United States to grant options under this subsection, other than options on a commodity specifically set forth in [section 2\(a\)](#) of this title prior to October 23, 1974, under such additional rules, regulations, and orders as the Commission may adopt to provide protection to purchasers that are substantially the equivalent of those applicable to grantors domiciled in the United States. The Commission may

terminate the right of any person to grant, offer, or sell options under this subsection only after a hearing, including a finding that the continuation of such right is contrary to the public interest: *Provided*, That pending the completion of such termination proceedings, the Commission may suspend the right to grant, offer, or sell options of any person whose activities in the Commission's judgment present a substantial risk to the public interest.

(e) Rules and regulations

The Commission may adopt rules and regulations, after public notice and opportunity for a hearing on the record, prohibiting the granting, issuance, or sale of options permitted under subsection (d) of this section if the Commission determines that such options are contrary to the public interest.

(f) Nonapplicability to foreign currency options

Nothing in this chapter shall be deemed to govern or in any way be applicable to any transaction in an option on foreign currency traded on a national securities exchange.

(g) Oral orders

The Commission shall adopt rules requiring that a contemporaneous written record be made, as practicable, of all orders for execution on the floor or subject to the rules of each contract market or derivatives transaction execution facility placed by a member of the contract market or derivatives transaction execution facility who is present on the floor at the time such order is placed.

CREDIT(S)

(Sept. 21, 1922, c. 369, § 4c, as added June 15, 1936, c. 545, § 5, 49 Stat. 1494; amended Oct. 23, 1974, [Pub.L. 93-463](#), Title I, § 103(a), Title IV, § 402, 88 Stat. 1392, 1412; Sept. 30, 1978, [Pub.L. 95-405](#), § 3, 92 Stat. 867; Jan. 11, 1983, [Pub.L. 97-444](#), Title I, § 102, Title II, § 206, 96 Stat. 2296, 2301; Nov. 10, 1986, [Pub.L. 99-641](#), Title I, § 102, 100 Stat. 3557; Oct. 28, 1992, [Pub.L. 102-546](#), Title II, § 203(a), Title IV, § 402(4), 106 Stat. 3600, 3624; Dec. 21, 2000, [Pub.L. 106-554](#), § 1(a)(5) [Title I, §§ 109, 123(a)(6)], 114 Stat. 2763, 2763A-383, 2763A-407; [Pub.L. 111-203](#), Title VII, §§ 741(b)(2), 746, 747, July 21, 2010, 124 Stat. 1731, 1737, 1739.)

EFFECTIVE DATE OF 2010 AMENDMENT

<Unless otherwise provided, amendment by subtitle A (Secs. 711-754) of Title VII of [Pub.L. 111-203](#), effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see 2010 Amendment notes and 2010 Effective and Applicability Provisions notes set out under this section.>

Footnotes

¹ So in original. Probably should be "clause".

7 U.S.C.A. § 6c, 7 USCA § 6c

Current through P.L. 115-223. Also includes P.L. 115-225 to 115-231 and 115-233 to 115-238. Title 26 current through P.L. 115-238.

CFTC REGULATIONS

§ 1.3

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(w) *Secretary of Agriculture*. This term means the Secretary of Agriculture or any person to whom authority has heretofore lawfully been delegated or to whom authority may hereafter lawfully be delegated to act in his stead.

(x) *Floor trader*. This term means any person who, in our surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged, purchases or sells solely for such person's own account, or has been authorized by a contract market to purchase or sell for such person's own account, any commodity for future delivery on or subject to the rules of any contract market and shall include any person required to register as a floor trader under the Act by virtue of part 33 of this chapter or by rule or regulation of the Commission pertaining to the operation of an electronic trading system.

(y) *Proprietary account*. This term means a commodity futures or commodity option trading account carried on the books and records of an individual, a partnership, corporation or other type association (1) for one of the following persons, or (2) of which ten percent or more is owned by one of the following persons, or an aggregate of ten percent or more of which is owned by more than one of the following persons:

(i) Such individual himself, or such partnership, corporation or association itself;

(ii) In the case of a partnership, a general partner in such partnership;

(iii) In the case of a limited partnership, a limited or special partner in such partnership whose duties include:

(A) The management of the partnership business or any part thereof,

(B) The handling of the trades or customer funds of customers or option customers of such partnership,

(C) The keeping of records pertaining to the trades or customer funds of customers or option customers of such partnership, or

(D) The signing or co-signing of checks or drafts on behalf of such partnership;

(iv) In the case of a corporation or association, an officer, director or owner of ten percent or more of the capital stock, of such organization;

(v) An employee of such individual, partnership, corporation or association whose duties include:

(A) The management of the business of such individual, partnership, corporation or association or any part thereof,

(B) The handling of the trades or customer funds of customers or option customers of such individual, partnership, corporation or association,

(C) The keeping of records pertaining to the trades or customer funds of customers or option customers of such individual, partnership, corporation or association, or

(D) The signing or co-signing of checks or drafts on behalf of such individual, partnership, corporation or association;

(vi) A spouse or minor dependent living in the same household of any of the foregoing persons;

(vii) A business affiliate that directly or indirectly controls such individual, partnership, corporation or association.

(viii) A business affiliate that, directly or indirectly is controlled by or is under common control with, such individual, partnership, corporation or association. *Provided, however,* That an account owned by any shareholder or member of a cooperative association of producers, within the meaning of sections 5(5) and 6a of the Act, which association is registered as a futures commission merchant and carries such account on its records, shall be deemed to be an account of a customer or option customer and not a proprietary account of such association, unless the shareholder or member is an officer, director or manager of the association.

(z) *Bona fide hedging transactions and positions*—(1) *General definition*. Bona fide hedging transactions and positions shall mean transactions or positions in a contract for future delivery on any contract market, or in a commodity option, where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel, and where they are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, and where they arise from:

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(i) The potential change in the value of assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising,

(ii) The potential change in the value of liabilities which a person owns or anticipates incurring, or

(iii) The potential change in the value of services which a person provides, purchases, or anticipates providing or purchasing.

Notwithstanding the foregoing, no transactions or positions shall be classified as bona fide hedging unless their purpose is to offset price risks incidental to commercial cash or spot operations and such positions are established and liquidated in an orderly manner in accordance with sound commercial practices and, for transactions or positions on contract markets subject to trading and position limits in effect pursuant to section 4a of the Act, unless the provisions of paragraphs (z) (2) and (3) of this section and §§1.47 and 1.48 of the regulations have been satisfied.

(2) *Enumerated hedging transactions.* The definitions of bona fide hedging transactions and positions in paragraph (z)(1) of this section includes, but is not limited to, the following specific transactions and positions:

(i) *Sales* of any commodity for future delivery on a contract market which do not exceed in quantity:

(A) Ownership or fixed-price purchase of the same cash commodity by the same person; and

(B) Twelve months' unsold anticipated production of the same commodity by the same person provided that no such position is maintained in any future during the five last trading days of that future.

(ii) *Purchases* of any commodity for future delivery on a contract market which do not exceed in quantity.

(A) The fixed-price sale of the same cash commodity by the same person.

(B) The quantity equivalent of fixed-price sales of the cash products and by-products of such commodity by the same person; and

(C) Twelve months' unfilled anticipated requirements of the same cash commodity for processing, manufac-

turing, or feeding by the same person, provided that such transactions and positions in the five last trading days of any one future do not exceed the person's unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month.

(iii) Offsetting sales and purchases for future delivery on a contract market which do not exceed in quantity that amount of the same cash commodity which has been bought and sold by the same person at unfixed prices basis different delivery months of the contract market, provided that no such position is maintained in any future during the five last trading days of that future.

(iv) Sales and purchases for future delivery described in paragraphs (z)(2)(i), (ii), and (iii) of this section may also be offset other than by the same quantity of the same cash commodity, provided that the fluctuations in value of the position for future delivery are substantially related to the fluctuations in value of the actual or anticipated cash position, and provided that the positions in any one future shall not be maintained during the five last trading days of that future.

(3) *Non-enumerated cases.* Upon specific request made in accordance with §1.47 of the regulations, the Commission may recognize transactions and positions other than those enumerated in paragraph (z)(2) of this section as bona fide hedging in such amount and under such terms and conditions as it may specify in accordance with the provisions of §1.47. Such transactions and positions may include, but are not limited to, purchases or sales for future delivery on any contract market by an agent who does not own or who has not contracted to sell or purchase the offsetting cash commodity at a fixed price, *provided* That the person is responsible for the merchandising of the cash position which is being offset.

(aa) *Associated person.* This term means any natural person who is associated in any of the following capacities with:

(1) A futures commission merchant as a partner, officer, or employee (or any natural person occupying a similar

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dates when such securities or property were received, the identity of the depositories or other places where such securities or property are segregated, the dates such securities or property were returned to the member, or otherwise disposed of, together with the facts and circumstances of such other disposition including the authorization therefor.

(Approved by the Office of Management and Budget under control numbers 3038-0007 and 3038-0024)

[46 FR 54522, Nov. 3, 1981, as amended at 46 FR 63035, Dec. 30, 1981; 48 FR 8435, Mar. 1, 1983; 75 FR 55422, Sept. 10, 2010]

§ 1.37 Customer's or option customer's name, address, and occupation recorded; record of guarantor or controller of account.

(a)(1) Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a contract market shall keep a record in permanent form which shall show for each commodity futures, retail forex or option account carried or introduced by it the true name and address of the person for whom such account is carried or introduced and the principal occupation or business of such person as well as the name of any other person guaranteeing such account or exercising any trading control with respect to such account. For each such commodity option account, the records kept by such futures commission merchant, introducing broker, and member of a contract market must also show the name of the person who has solicited and is responsible for each option customer's account or assign account numbers in such a manner to identify that person.

(2) Each futures commission merchant who receives a customer's election not to have the customer's funds separately accounted for and segregated, in accordance with § 1.68, shall keep a record in permanent form that indicates such customer's election. The record of such a customer election may be indicated on the record required by paragraph (a)(1) of this section.

(b) As of the close of the market each day, each futures commission merchant which carries an account for another futures commission merchant,

foreign broker (as defined in § 15.00 of this chapter), member of a contract market, or other person, on an omnibus basis shall maintain a daily record for each such omnibus account of the total open long contracts and the total open short contracts in each future and, for commodity option transactions, the total open put options purchased, the total open put options granted, the total open call options purchased, and the total open call options granted for each commodity option expiration date.

(c) Each designated contract market shall keep a record in permanent form, which shall show the true name, address, and principal occupation or business of any foreign trader executing transactions on the facility or exchange. In addition, upon request, a designated contract market shall provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such foreign trader.

(d) Paragraph (c) of this section shall not apply to a designated contract market on which transactions in futures or option contracts of foreign traders are executed through, or the resulting transactions are maintained in, accounts carried by a registered futures commission merchant or introduced by a registered introducing broker subject to the provisions of paragraph (a) of this section.

(The information collection requirements contained in § 1.37 were approved by the Office of Management and Budget under control numbers 3038-0007 and 3038-0024; and in paragraph (b) under control number 3038-0009)

[46 FR 54523, Nov. 3, 1981, as amended at 46 FR 63035, Dec. 30, 1981; 48 FR 35289, Aug. 3, 1983; 58 FR 28501, May 14, 1993; 66 FR 20744, Apr. 25, 2001; 66 FR 42269, Aug. 10, 2001; 75 FR 55422, Sept. 10, 2010]

§ 1.38 Execution of transactions.

(a) *Competitive execution required; exceptions.* All purchases and sales of any commodity for future delivery, and of any commodity option, on or subject to the rules of a contract market shall be executed openly and competitively by

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open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity or commodity option: *Provided, however*, That this requirement shall not apply to transactions which are executed non-competitively in accordance with written rules of the contract market which have been submitted to and approved by the Commission, specifically providing for the non-competitive execution of such transactions.

(b) *Noncompetitive trades; exchange of futures, etc.; requirements.* Every person handling, executing, clearing, or carrying trades, transactions or positions which are not competitively executed, including transfer trades or office trades, or trades involving the exchange of futures for cash commodities or the exchange of futures in connection with cash commodity transactions, shall identify and mark by appropriate symbol or designation all such transactions or contracts and all orders, records, and memoranda pertaining thereto.

(Approved by the Office of Management and Budget under control numbers 3038-0007 and 3038-0022)

[46 FR 54523, Nov. 3, 1981, as amended at 46 FR 63035, Dec. 30, 1981]

§ 1.39 Simultaneous buying and selling orders of different principals; execution of, for and between principals.

(a) *Conditions and requirements.* A member of a contract market who shall have in hand at the same time both buying and selling orders of different principals for the same commodity for future delivery in the same delivery month or the same option (both puts or both calls, with the same underlying contract for future delivery or the same underlying physical, expiration date and strike price) may execute such orders for and directly between such principals at the market price, if in conformity with written rules of such contract market which have been approved by the Commission, and:

(1)(i) When trading is conducted in a trading pit or ring, such orders are

first offered openly and competitively by open outcry in such trading pit or ring (A) by both bidding and offering at the same price, and neither such bid nor offer is accepted, or (B) by bidding and offering to a point where such offer is higher than such bid by not more than the minimum permissible price fluctuation applicable to such futures contract or commodity option on such contract market, and neither such bid nor offer is accepted; or

(ii) When in nonpit trading in contracts of sale for future delivery, bids and offers are posted on a board, such member (A) pursuant to such buying order posts a bid on the board and, incident to the execution of such selling order, accepts such bid and all other bids posted at prices equal to or higher than the bid posted by him, or (B) pursuant to such selling order posts an offer on the board and, incident to the execution of such buying order, accepts such offer and all other offers posted at prices equal to or lower than the offer posted by him;

(2) Such member executes such orders in the presence of an official representative of such contract market designated to observe such transactions and, by appropriate descriptive words or symbol, clearly identifies all such transactions on his trading card or other similar record, made at the time of execution, and notes thereon the exact time of execution and promptly presents said record to such official representative for verification and initialing;

(3) Such contract market keeps a record in permanent form of each such transaction showing the transaction date, by whom executed, the exact time of execution, quantity, and, as applicable, underlying commodity, contract for future delivery or physical, price or premium, whether a put or a call, and strike price; and

(4) Neither the futures commission merchant receiving nor the member executing such orders has any interest therein, directly or indirectly, except as a fiduciary.

(b) *Large Order Execution Procedures.* A member of a contract market may

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floor broker error accounts, and purchases or sales identified as errors at the time they are assigned to an account that contains other purchases or sales not identified as errors and held in that account (“error trades”), provided that:

(i) Each error trade does not offset another error trade held in the same account;

(ii) Each error trade is offset by open and competitive means on or subject to the rules of a contract market by not later than the close of business on the business day following the day the error trade is discovered and assigned to an error account or identified as an error trade, unless at the close of business on the business day following the discovery of the error trade, the relevant market has reached a daily price fluctuation limit and the trader is unable to offset the error trade, in which case the error trade must be offset as soon as practicable thereafter; and

(iii) No error trade is closed out by transferring such an open position to another account also controlled by that same trader.

(e) The statements required by paragraph (a) of this section may be furnished to the customer or the person described in §1.33(d) by means of electronic transmission, in accordance with §1.33(g).

(Approved by the Office of Management and Budget under control number 3038-0007)

(Secs. 4g, 5, 42 Stat. 1000, 49 Stat. 1496; 7 U.S.C. 6g, 7; secs. 4g, 5, 8a; 7 U.S.C. 6g, 7, 12a)

[41 FR 3194, Jan. 21, 1976]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §1.46, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 1.47 Requirements for classification of purchases or sales of contracts for future delivery as bona fide hedging under § 1.3(z)(3) of the regulations.

(a) Any person who wishes to avail himself of the provisions of §1.3(z)(3) of the regulations and to make purchases or sales of any commodity for future delivery in any commodity in excess of trading and position limits then in effect pursuant to section 4a of the Act shall file statement with the Commis-

sion in conformity with the requirements of this section. All or a specified portion of the transactions and positions described in these statements shall not be considered as bona fide hedging if such person is so notified by the Commission:

(1) Within 30 days after the Commission is furnished the information required under paragraph (b) of this section, or

(2) Within 10 days after the Commission is furnished with the information required under paragraph (c) of this section.

The Commission may request the person notified to file specific additional information with the Commission to support a determination that all, or the specified portion, of the transactions and positions be considered as bona fide hedging transactions and positions. In such cases, the Commission shall consider all information so filed and, by notice to such person, shall specify the extent to which the Commission has determined that the transactions and positions may be classified as bona fide hedging. In no case shall transactions and positions described be considered as bona fide hedging if they exceed the levels specified in paragraph (d) of this section.

(b) *Initial statement.* Initial statements concerning the classification of transactions and positions as bona fide hedging pursuant to §1.3(z)(3) shall be filed with the Commission at least 30 days in advance of the date that such transactions or positions would be in excess of limits then in effect pursuant to section 4a of the Act. Such statements shall:

(1) Describe the transactions and positions for future delivery and the offsetting cash positions;

(2) Set forth in detail information which will demonstrate that the purchases and sales are economically appropriate to the reduction of risk exposure attendant to the conduct and management of a commercial enterprise;

(3) Contain, and upon request of the Commission be supplemented by, such other information which is necessary to enable the Commission to make a determination whether the particular purchases and sales for future delivery

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fall within the scope of those described in section 1.3(z)(1) of the regulations;

(4) Include a statement concerning the maximum size of positions for future delivery (both long and short) which will be acquired any time during the next fiscal year or marketing season of the person filing or on whose behalf the filing is made.

(5) In addition: statements filed by an agent, concerning a futures position which would offset a cash position which the agent does not own or has not contracted to buy or sell, shall contain information describing all contractual arrangements between the agent filing and the person who owns the commodity or holds the cash market commitment being offset;

(6) Statements concerning futures positions to be acquired against unsold anticipated production or unfilled anticipated requirements for manufacturing, processing or feeding shall also include the information required under §1.48 of the regulations.

(c) *Supplemental reports.* Whenever the purchases or sales which a person wishes to classify as bona fide hedging shall exceed the amount provided in the person's most recent filing pursuant to this section or the amount previously specified by the Commission pursuant to paragraph (a) of this section, such person shall file with the Commission a statement which updates the information provided in the person's most recent filing and provides the reasons for this change at least ten days in advance of the date that person wishes to exceed those amounts.

(d) *Maximum purchases and sales.* Purchases and sales for future delivery considered bona fide hedging pursuant to §1.3(z)(3) of the regulations shall at no time exceed the lesser of:

(1) The value fluctuation equivalent (in terms of the commodity for future delivery) of the current cash position described in the information most recently filed pursuant to this section, or

(2) The maximum level of long or short open positions provided in the information most recently filed pursuant to this section or most recently specified by the Commission pursuant to paragraph (a) of this section.

(e) *Updated reports.* Reports updating the information required pursuant to

this section also shall be filed with the Commission upon specific request.

(Approved by the Office of Management and Budget under control number 3038-0013)

[42 FR 42751, Aug. 8, 1977, as amended at 46 FR 63035, Dec. 30, 1981]

§ 1.48 Requirements for classification of sales or purchases for future delivery as bona fide hedging of unsold anticipated production or unfilled anticipated requirements under § 1.3(z)(2) (i)(B) or (ii)(C) of the regulations.

(a) Any person who wishes to avail himself of the provisions of §1.3(z)(2) (i)(B) or (ii)(C) of the regulations and to make sales or purchases for future delivery in any commodity in excess of trading and position limits then in effect pursuant to section 4a of the Act for the purposes of bona fide hedging shall file statements with the Commission in conformity with the requirements of this section. All or a specified portion of the unsold anticipated production or unfilled anticipated requirements described in these statements shall not be considered as offsetting positions for bona fide hedging transactions and positions if such person is so notified by the Commission within ten days after the Commission is furnished with the information required under paragraphs (b) or (c) of this section. The Commission may request the person notified to file specific additional information with the Commission to support a determination that the statement filed accurately reflects unsold anticipated production or unfilled anticipated requirements for manufacturing, processing or feeding. In such cases, the Commission shall consider all additional information so filed and, by notice to such person, shall specify its determination as to what portion of the production or requirements described constitutes unsold anticipated production or unfilled anticipated requirements for the purposes of bona fide hedging. In no case shall such transactions and positions which offset unsold anticipated production or unfilled anticipated requirements be considered bona fide hedging if they exceed the levels specified in paragraph (d) of this section of the regulations.

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(b) *Initial statement.* Initial statements concerning the classification of transactions and positions as bona fide hedging pursuant to §1.3(z)(2) (i)(B) or (ii)(C) shall be filed with the Commission at least ten days in advance of the date that such transactions or positions would be in excess of limits then in effect pursuant to section 4a of the Act. Such statements shall set forth in detail for a specified operating period not in excess of one year the person's unsold anticipated production or unfilled anticipated requirements for processing or manufacturing or feeding and explain the method of determination thereof, including, but not limited to, the following information:

(1) For unsold anticipated production:

(i) Annual production of such commodity for the three complete fiscal years preceding the current fiscal year;

(ii) Anticipated production of such commodity for a specified period not in excess of one year;

(iii) Fixed-price forward sales of such commodity;

(iv) Unsold anticipated production of such commodity for a specified period not in excess of one year.

(2) For unfilled anticipated requirements:

(i) Annual requirements of such commodity for processing or manufacturing or feeding for the three complete fiscal years preceding the current fiscal year;

(ii) Anticipated requirements of such commodity for processing or manufacturing or feeding for a specified operating period not in excess of one year;

(iii) Inventory and fixed-price forward purchases of such commodity, including any quantity in process of manufacture and finished goods and byproducts of manufacture or processing (in terms of such commodity);

(iv) Unfilled anticipated requirements of such commodity for processing or manufacturing or feedings for a specified operating period not in excess of one year.

(3) Additional information: Persons hedging unsold anticipated production or unfilled anticipated requirements which are not the same quantity or are not the same commodity as the commodity to be sold or purchased for fu-

ture delivery shall furnish this information both in terms of the actual commodity produced or used and in terms of the commodity to be sold or purchased for future delivery. In addition, such persons shall explain the method for determining the ratio of conversion between the amount of the actual unsold anticipated production or unfilled anticipated requirements and the amount of commodity to be sold or purchased for future delivery. Persons hedging unfilled annual feeding requirements for livestock and poultry shall provide the number of cattle, hogs, sheep, or poultry expected to be fed during the specified period, not to exceed one year, and the derivation of their annual requirements based upon these numbers. Persons filing as an agent shall furnish this information on the basis of the fiscal or operating year of the person on whose behalf the filing is made.

(c) *Supplemental reports.* Whenever the sales or purchases which a person wishes to consider as bona fide hedging of unsold anticipated production or unfilled anticipated requirements shall exceed the amounts described by the figures for requirements furnished in the most recent filing pursuant to this section or the amounts determined by the Commission to constitute unsold anticipated production or unfilled anticipated requirements pursuant to paragraph (a) of this section, such person shall file with the Commission a statement which updates the information provided in the person's most recent filing and supplies the reason for this change at least ten days in advance of the date that person wishes to exceed these amounts.

(d) *Maximum sales and purchases.* Sales or purchases for future delivery considered as bona fide hedges pursuant to §1.3(z)(2) (i)(B) or (ii)(C) shall at no time exceed the lesser of:

(1) A person's unsold anticipated production of unfilled anticipated requirements as described by the information most recently filed pursuant to this section or determined by the Commission pursuant to paragraph (a) of this section; or

(2) A person's actual unsold anticipated production or current unfilled anticipated requirements for the

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length of time specified in the information most recently filed pursuant to this section.

(e) *Updated reports.* Reports updating the information required pursuant to this section shall also be filed with the Commission upon specific request.

(Approved by the Office of Management and Budget under control number 3038-0013)

[42 FR 42752, Aug. 8, 1977, as amended at 46 FR 63035, Dec. 30, 1981]

§ 1.49 Denomination of customer funds and location of depositories.

(a) *Definitions.* For purposes of this section:

(1) *Money center country.* This term means Canada, France, Italy, Germany, Japan, and the United Kingdom.

(2) *Money center currency.* This term means the currency of any money center country and the Euro.

(b) *Permissible denominations of obligations.* (1) Subject to the terms and conditions set forth in this section, a futures commission merchant's obligations to a customer shall be denominated:

(i) In the United States dollar;

(ii) In a currency in which funds were deposited by the customer or were converted at the request of the customer, to the extent of such deposits and conversions; or

(iii) In a currency in which funds have accrued to the customer as a result of trading conducted on a designated contract market or registered derivatives transaction execution facility, to the extent of such accruals.

(2)(i) A futures commission merchant shall prepare and maintain a written record of each transaction converting customer funds from one currency to another.

(ii) A written record prepared under paragraph (b)(2)(i) of this section must include the date the transaction was executed, the currencies converted, the amount converted, and the resulting amount.

(iii) The information required under paragraph (b)(2)(ii) of this section must be provided to the customer upon the customer's request.

(c) *Permissible locations of depositories.* (1) Unless a customer provides instructions to the contrary, a futures commission merchant or a derivatives

clearing organization may hold customer funds:

(i) In the United States;

(ii) In a money center country; or

(iii) In the country of origin of the currency.

(2) A futures commission merchant or derivatives clearing organization may hold customer funds outside the United States, in a jurisdiction that is not a money center country, or the country of origin of the currency only to the extent authorized by the customer, *provided*, that the futures commission merchant or derivatives clearing organization must make and maintain a written record of such authorization. Notwithstanding the foregoing, in no event shall a futures commission merchant or a derivatives clearing organization hold customer funds in a restricted country subject to sanctions by the Office of Foreign Assets Control of the U.S. Department of Treasury.

(d) *Qualifications for depositories.* (1) To hold customer funds required to be segregated pursuant to the Act and §§1.20 through 1.30, 1.32 and 1.36, a depository must provide the depositing futures commission merchant or derivatives clearing organization with the appropriate written acknowledgment as required under §§1.20 and 1.26.

(2) A depository, if located in the United States, must be:

(i) A bank or trust company;

(ii) A futures commission merchant registered as such with the Commission; or

(iii) A derivatives clearing organization.

(3) A depository, if located outside the United States, must be:

(i) A bank or trust company:

(A) That has in excess of \$1 billion of regulatory capital; or

(B) Whose commercial paper or long-term debt instrument or, if a part of a holding company system, its holding company's commercial paper or long-term debt instrument, is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization;

(ii) A futures commission merchant that is registered as such with the Commission; or

(iii) A derivatives clearing organization.

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days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §149.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making

the final determination may not be delegated to another agency.

[51 FR 22889, 22896, June 23, 1986, as amended at 51 FR 22889, June 23, 1986; 60 FR 49336, Sept. 25, 1995]

PART 150—LIMITS ON POSITIONS

Sec.

150.1 Definitions.

150.2 Position limits.

150.3 Exemptions.

150.4 Aggregation of positions.

150.5 Exchange-set speculative position limits.

150.6 Responsibility of contract markets.

AUTHORITY: 7 U.S.C. 6a, 6c, and 12a(5), as amended by the Commodity Futures Modernization Act of 2000, appendix E of Pub. L. 106-554, 114 Stat. 2763 (2000).

SOURCE: 52 FR 38923, Oct. 20, 1987, unless otherwise noted.

§ 150.1 Definitions.

As used in this part—

(a) *Spot month* means the futures contract next to expire during that period of time beginning at the close of trading on the trading day preceding the first day on which delivery notices can be issued to the clearing organization of a contract market.

(b) *Single month* means each separate futures trading month, other than the spot month future.

(c) *All-months* means the sum of all futures trading months including the spot month future.

(d) *Eligible entity* means—

A commodity pool operator, the operator of a trading vehicle which is excluded or who itself has qualified for exclusion from the definition of the term “pool” or commodity pool operator,” respectively, under §4.5 of this chapter; the limited partner or shareholder in a commodity pool the operator of which is exempt from registration under §4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:

(1) Which authorizes an independent account controller independently to control all trading decisions for positions it holds directly or indirectly, or

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on its behalf, but without its day-to-day direction; and

(2) Which maintains:

(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or

(ii) If a limited partner or shareholder of a commodity pool the operator of which is exempt from registration under §4.13 of this chapter, only such limited control as is consistent with its status.

(e) *Independent account controller* means a person—

(1) Who specifically is authorized by an eligible entity, as defined in paragraph (d) of this section, independently to control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity;

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

(3) Who trades independently of the eligible entity and of any other independent account controller trading for the eligible entity;

(4) Who has no knowledge of trading decisions by any other independent account controller; and

(5) Who is registered as a futures commission merchant, an introducing broker, a commodity trading advisor, an associated person or any such registrant, or is a general partner of a

commodity pool the operator of which is exempt from registration under §4.13 of this chapter.

(f) *Futures-equivalent* means an option contract which has been adjusted by the previous day's risk factor, or delta coefficient, for that option which has been calculated at the close of trading and published by the applicable exchange under §16.01 of this chapter.

(g) *Long* position means a long call option, a short put option or a long underlying futures contract.

(h) *Short* position means a short call option, a long put option or a short underlying futures contract.

(i) For the following commodities, the first delivery month of the "crop year" is as follows:

Commodity	Beginning delivery month
corn	December.
cotton	October.
oats	July.
soybeans	September.
soybean meal	October.
soybean oil	October.
wheat (spring)	September.
wheat (winter)	July.

[52 FR 38923, Oct. 20, 1987, as amended at 53 FR 41571, Oct. 24, 1988; 56 FR 14315, Apr. 9, 1991; 57 FR 44492, Sept. 28, 1992; 58 FR 17981, Apr. 7, 1993; 64 FR 24046, May 5, 1999]

§ 150.2 Position limits.

No person may hold or control positions, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon, in excess of the following:

SPECULATIVE POSITION LIMITS

[In contract units]

Contract	Spot month	Single month	All months
Chicago Board of Trade			
Corn and Mini-Corn ¹	600	13,500	22,000
Oats	600	1,400	2,000
Soybeans and Mini-Soybeans ¹	600	6,500	10,000
Wheat and Mini-Wheat ¹	600	5,000	6,500
Soybean Oil	540	5,000	6,500
Soybean Meal	720	5,000	6,500
Minneapolis Grain Exchange			
Hard Red Spring Wheat	600	5,000	6,500

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SPECULATIVE POSITION LIMITS—Continued
[In contract units]

Contract	Spot month	Single month	All months
New York Board of Trade			
Cotton No. 2	300	3,500	5,000
Kansas City Board of Trade			
Hard Winter Wheat	600	5,000	6,500

¹ For purposes of compliance with these limits, positions in the regular sized and mini-sized contracts shall be aggregated.

[70 FR 24706, May 11, 2005]

§ 150.3 Exemptions.

(a) Positions which may exceed limits. The position limits set forth in §150.2 of this part may be exceeded to the extent such position are:

(1) *Bona fide* hedging transactions as defined in §1.3(z) of this chapter;

(2) [Reserved]

(3) Spread or arbitrage positions between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spot month, in the same crop year; *provided however*, That such spread or arbitrage positions, when combined with any other net positions in the single month, do not exceed the all-months limit set forth in §150.2; or

(4) Carried for an eligible entity as defined in §150.1(d), in the separate account or accounts of an independent account controller, as defined in §150.1(e), and not in the spot month if there is a position limit which applies to individual trading months during their expiration; *Provided, however*, That the overall positions held or controlled by each such independent account controller may not exceed the limits specified in §150.2.

(i) Additional Requirements for Exemption of Affiliated Entities. If the independent account controller is affiliated with the eligible entity or another independent account controller, each of the affiliated entities must:

(A) Have, and enforce, written procedures to preclude the affiliated entities from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include document routing and other procedures or security arrangements, including separate physical locations,

which would maintain the independence of their activities; *provided, however*, That such procedures may provide for the disclosure of information which is reasonably necessary for an eligible entity to maintain the level of control consistent with its fiduciary responsibilities and necessary to fulfill its duty to supervise diligently the trading done on its behalf;

(B) Trade such accounts pursuant to separately-developed and independent trading systems;

(C) Market such trading systems separately; and

(D) Solicit funds for such trading by separate Disclosure Documents that meet the standards of §4.24 or §4.34 of this chapter, as applicable, where such Disclosure Documents are required under part 4 of this chapter.

(ii) [Reserved]

(b) *Call for information*. Upon call by the Commission, the Director of the Division of Market Oversight or the Director's delegee, any person claiming an exemption from speculative position limits under this section must provide to the Commission such information as specified in the call relating to the positions owned or controlled by that person; trading done pursuant to the claimed exemption; the futures, options or cash market positions which support the claim of exemption; and the relevant business relationships supporting a claim of exemption.

[53 FR 41571, Oct. 24, 1988, as amended at 56 FR 14315, Apr. 9, 1991; 57 FR 44492, Sept. 28, 1992; 58 FR 17982, Apr. 7, 1993; 60 FR 38193, July 25, 1995; 67 FR 62353, Oct. 7, 2002]

§ 150.4 Aggregation of positions.

(a) *Positions to be aggregated*. The position limits set forth in §150.2 of this

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part shall apply to all positions in accounts for which any person by power of attorney or otherwise directly or indirectly holds positions or controls trading or to positions held by two or more persons acting pursuant to an expressed or implied agreement or understanding the same as if the positions were held by, or the trading of the position were done by, a single individual.

(b) *Ownership of accounts.* For the purpose of applying the position limits set forth in §150.2, except for the ownership interest of limited partners, shareholders, members of a limited liability company, beneficiaries of a trust or similar type of pool participant in a commodity pool subject to the provisos set forth in paragraph (c) of this section, any trader holding positions in more than one account, or holding accounts or positions in which the trader by power of attorney or otherwise directly or indirectly has a 10% or greater ownership or equity interest, must aggregate all such accounts or positions.

(c) *Ownership by limited partners, shareholders or other pool participants.* For the purpose of applying the position limits set forth in §150.2:

(1) A commodity pool operator having ownership or equity interest of 10% or greater in an account or positions as a limited partner, shareholder or other similar type of pool participant must aggregate those accounts or positions with all other accounts or positions owned or controlled by the commodity pool operator;

(2) A trader that is a limited partner, shareholder or other similar type of pool participant with an ownership or equity interest of 10% or greater in a pooled account or positions who is also a principal or affiliate of the operator of the pooled account must aggregate the pooled account or positions with all other accounts or positions owned or controlled by that trader, *provided, however,* that the trader need not aggregate such pooled positions or accounts if:

(i) The pool operator has, and enforces, written procedures to preclude the trader from having knowledge of, gaining access to, or receiving data about the trading or positions of the pool;

(ii) The trader does not have direct, day-to-day supervisory authority or control over the pool's trading decisions; and

(iii) The trader, if a principal of the commodity pool operator, maintains only such minimum control over the commodity pool operator as is consistent with its responsibilities as a principal and necessary to fulfill its duty to supervise the trading activities of the commodity pool;

(3) Each limited partner, shareholder, or other similar type of pool participant having an ownership or equity interest of 25% or greater in a commodity pool the operator of which is exempt from registration under §4.13 of this chapter must aggregate the pooled account or positions with all other accounts or positions owned or controlled by that trader.

(d) *Trading control by futures commission merchants.* The position limits set forth in §150.2 of this part shall be construed to apply to all positions held by a futures commission merchant or its separately organized affiliates in a discretionary account, or in an account which is part of, or participates in, or receives trading advice from a customer trading program of a futures commission merchant or any of the officers, partners, or employees of such futures commission merchant or its separately organized affiliates, unless:

(1) A trader other than the futures commission merchant or the affiliate directs trading in such an account;

(2) The futures commission merchant or the affiliate maintains only such minimum control over the trading in such an account as is necessary to fulfill its duty to supervise diligently trading in the account; and

(3) Each trading decision of the discretionary account or the customer trading program is determined independently of all trading decisions in other accounts which the futures commission merchant or the affiliate holds, has a financial interest of 10% or more in, or controls.

(e) *Call for information.* Upon call by the Commission, the Director of the Division of Market Oversight or the Director's delegatee, any person claiming an exemption under paragraphs (c) or (d) of this section must provide to the

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Commission such information as specified in the call relating to the positions owned or controlled by that person, trading done pursuant to the claimed exemption, or the relevant business relationships supporting a claim of exemption.

[64 FR 24047, May 5, 1999, as amended at 67 FR 62353, Oct. 7, 2002]

§ 150.5 Exchange-set speculative position limits.

(a) *Exchange limits.* Each contract market as a condition of designation under part 5, appendix A, of this chapter shall be bylaw, rule, regulation, or resolution limit the maximum number of contracts a person may hold or control, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon. This section shall not apply to a contract market for which position limits are set forth in §150.2 of this part or for a futures or option contract market on a major foreign currency, for which there is no legal impediment to delivery and for which there exists a highly liquid cash market. Nothing in this section shall be construed to prohibit a contract market from fixing different and separate position limits for different types of futures contracts based on the same commodity, or from fixing different position limits for different futures or for different delivery months, or from exempting positions which are normally known in the trade as “spreads, straddles, or arbitrage,” or from fixing limits which apply to such positions which are different from limits fixed for other positions.

(b) *Levels at designation.* At the time of its initial designation, a contract market must provide for speculative position limit levels as follows:

(1) For physical delivery contracts, the spot month limit level must be no greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed, and for cash settled contracts, the spot month limit level must be no greater than necessary to minimize the potential for manipulation or distortion of the contract’s or the underlying commodity’s price;

(2) Individual nonspot or all-months-combined levels must be no greater than 1,000 contracts for tangible commodities other than energy products;

(3) Individual nonspot or all-months-combined levels must be no greater than 5,000 contracts for energy products and nontangible commodities, including contracts on financial products.

(c) *Adjustments to levels.* Contract markets may adjust their speculative limit levels as follows:

(1) For physical delivery contracts, the spot month limit level must be no greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed, and for cash settled contracts, the spot month limit level must be no greater than necessary to minimize the potential for manipulation or distortion of the contract’s or the underlying commodity’s price; and

(2) Individual nonspot or all-months-combined levels must be no greater than 10% of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year up to 25,000 contracts with a marginal increase of 2.5% thereafter or be based on position sizes customarily held by speculative traders on the contract market, which shall not be extraordinarily large relative to total open positions in the contract, the breadth and liquidity of the cash market underlying each delivery month and the opportunity for arbitrage between the futures market and the cash market in the commodity underlying the futures contract.

(d) *Hedge exemption.* (1) No exchange bylaw, rule, regulation, or resolution adopted pursuant to this section shall apply to bona fide hedging positions as defined by a contract market in accordance with §1.3(z)(1) of this chapter. *Provided, however,* that the contract market may limit bona fide hedging positions or any other positions which have been exempted pursuant to paragraph (e) of this section which it determines are not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.

(2) Traders must apply to the contract market for exemption from its

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speculative position limit rules. In considering whether to grant such an application for exemption, contract markets must take into account the factors contained in paragraph (d)(1) of this section.

(e) *Trader accountability exemption.* Twelve months after a contract market's initial listing for trading or at any time thereafter, contract markets may submit for Commission approval under section 5a(a)(12) of the Act and §1.41(b) of this chapter a bylaw, rule, regulation, or resolution, substituting for the position limits required under paragraphs (a), (b) and (c) of this section an exchange rule requiring traders to be accountable for large positions as follows:

(1) For futures and option contracts on a financial instrument or product having an average open interest of 50,000 contracts and an average daily trading volume of 100,000 contracts and a very highly liquid cash market, an exchange bylaw, regulation or resolution requiring traders to provide information about their position upon request by the exchange;

(2) For futures and option contracts on a financial instrument or product or on an intangible commodity having an average month-end open interest of 50,000 and an average daily volume of 25,000 contracts and a highly liquid cash market, an exchange bylaw, regulation or resolution requiring traders to provide information about their position upon request by the exchange and to consent to halt increasing further a trader's positions if so ordered by the exchange;

(3) For futures and option contracts on a tangible commodity, including but not limited to metals, energy products, or international soft agricultural products, having an average month-end open interest of 50,000 contracts and an average daily volume of 5,000 contracts and a liquid cash market, an exchange bylaw, regulation or resolution requiring traders to provide information about their position upon request by the exchange and to consent to halt increasing further a trader's positions if so ordered by the exchange, *provided, however*, such contract markets are not exempt from the requirement of paragraphs (b) or (c) that they adopt an ex-

change bylaw, regulation or resolution setting a spot month speculative position limit with a level no greater than one quarter of the estimated spot month deliverable supply;

(4) For purposes of this paragraph, trading volume and open interest shall be calculated by combining the month-end futures and its related option contract, on a delta-adjusted basis, for all months listed during the most recent calendar year.

(f) *Other exemptions.* Exchange speculative position limits adopted pursuant to this section shall not apply to any position acquired in good faith prior to the effective date of any bylaw, rule, regulation, or resolution which specifies such limit or to a person that is registered as a futures commission merchant or as a floor broker under authority of the Act except to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. In addition to the express exemptions specified in this section, a contract market may propose such other exemptions from the requirements of this section consistent with the purposes of this section and shall submit such rules Commission review under section 5a(1)(12) of the Act and §1.41(b) of this chapter.

(g) *Aggregation.* In determining whether any person has exceeded the limits established under this section, all positions in accounts for which such person by power of attorney or otherwise directly or indirectly controls trading shall be included with the positions held by such person; such limits upon positions shall apply to positions held by two or more person acting pursuant to an express or implied agreement or understanding, the same as if the positions were held by a single person.

[64 FR 24048, May 5, 1999]

§ 150.6 Responsibility of contract markets.

Nothing in this part shall be construed to affect any provisions of the

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Act relating to manipulation or corners nor to relieve any contract market or its governing board from responsibility under section 5(4) of the Act to prevent manipulation and corners.

[52 FR 38923, Oct. 20, 1987, as amended at 59 FR 5528, Feb. 7, 1993]

PART 155—TRADING STANDARDS

Sec.

155.1 Definitions.

155.2 Trading standards for floor brokers.

155.3 Trading standards for futures commission merchants.

155.4 Trading standards for introducing brokers.

155.5 [Reserved]

155.6 Trading standards for the transaction of business on registered derivatives transaction execution facilities.

155.10 Exemptions.

AUTHORITY: 7 U.S.C. 6b, 6c, 6g, 6j and 12a, unless otherwise noted.

§ 155.1 Definitions.

For purposes of this part, the term *affiliated person* of a futures commission merchant or of an introducing broker means any general partner, officer, director, owner of more than ten percent of the equity interest, associated person or employee of the futures commission merchant or of the introducing broker, and any relative or spouse of any of the foregoing persons, or any relative of such spouse, who shares the same home as any of the foregoing persons.

(Approved by the Office of Management and Budget under control numbers 3038-0007 and 3038-0022)

[46 FR 63036, Dec. 30, 1981, and 48 FR 35304, Aug. 3, 1983]

§ 155.2 Trading standards for floor brokers.

Each contract market shall adopt and submit to the Commission for approval pursuant to section 5a(a)(12)(A) of the Act and § 1.41 of this chapter, a set of rules which shall, at a minimum, with respect to each member of the contract market acting as a floor broker:

(a) Prohibit such member from purchasing any commodity for future delivery, purchasing any call option, or selling any put option, for his own ac-

count or for any account in which he has an interest, while holding an order of another person for the (1) purchase of any future, (2) purchase of any call option, or (3) sale of any put option, in the same commodity which is executable at the market price or at the price at which such purchase or sale can be made for the member's own account or any account in which he has an interest.

(b) Prohibit such member from selling any commodity for future delivery, selling any call option, or purchasing any put option, for his own account or for any account in which he has an interest, while holding an order of another person for the (1) sale of any future, (2) sale of any call option, or (3) purchase of any put option, in the same commodity which is executable at the market price or at the price at which such sale or purchase can be made for the member's own account or any account in which he has an interest.

(c) Prohibit such member from executing any transaction for any account of another person for which buying and/or selling orders can be placed or originated, or for which transactions can be executed, by such member without the prior specific consent of the account owner, regardless of whether the general authorization for such orders or transactions is pursuant to a written agreement, except that orders for such an account may be placed with another member for execution.

(d) Prohibit such member from disclosing at any time that he is holding an order of another person or from divulging any order revealed to him by reason of his relationship to such other person, except pursuant to paragraph (c) of this section or at the request of an authorized representative of the Commission or the contract market.

(e) Prohibit such member from taking, directly or indirectly, the other side of any order of another person revealed to him by reason of his relationship to such other person, except with such other person's prior consent and in conformity with contract market rules approved by the Commission.

(f) Prohibit such member from making any purchase or sale which has been directly or indirectly pre-arranged.

CBOT RULES

538. EXCHANGE FOR RELATED POSITIONS

The following transactions shall be permitted by arrangement between parties in accordance with the requirements of this rule:

Exchange for Physical (“EFP”) - A privately negotiated and simultaneous exchange of an Exchange futures position for a corresponding cash position.

Exchange for Risk (“EFR”) -A privately negotiated and simultaneous exchange of an Exchange futures position for a corresponding OTC swap or other OTC instrument.

Exchange of Options for Options (“EOO”) - A privately negotiated and simultaneous exchange of an Exchange option position for a corresponding OTC option position or other OTC instrument with similar characteristics.

For purposes of this rule, an EFP, EFR or EOO shall be referred to as an Exchange for Related Position (“EFRP”).

538.A. Nature of an EFRP

An EFRP consists of two discrete but related simultaneous transactions. One party to the EFRP must be the buyer of (or the holder of the long market exposure associated with) the related position and the seller of the corresponding Exchange contract. The other party to the EFRP must be the seller of (or the holder of the short market exposure associated with) the related position and the buyer of the corresponding Exchange contract.

However, a member firm may facilitate, as principal, the related position on behalf of a customer, provided that the member firm can demonstrate that the related position was passed through to the customer who received the Exchange contract position as part of the EFRP.

538.B. Related Positions

The related position (cash, OTC swap, OTC option, or other OTC derivative) must involve the commodity underlying the Exchange contract, or must be a derivative, by-product, or related product of such commodity that has a reasonable degree of price correlation to the commodity underlying the Exchange contract.

538.C. Quantity

The quantity covered by the related position must be approximately equivalent to the quantity covered by the Exchange contracts.

538.D. Prices and Price Increments

An EFRP transaction may be entered into in accordance with the applicable price increments or option premium increments set forth in the rules governing the pertinent

Exchange contracts, at such prices as are mutually agreed upon by the two parties to the transaction.

538.E. Date and Time of Transaction

The date and the time of execution of all EFRP transactions must be denoted on the record of the transaction required to be created pursuant to Rule 536.E. Notwithstanding the preceding sentence, EFRP transactions entered into CME ClearPort do not need a separate record of the transaction or time of execution provided that such transactions are entered immediately after the relevant terms have been determined during hours ClearPort is available, and in no event later than the earlier of the start of the next business day or the end of the permissible posting period for EFRP transactions following the expiration of the underlying futures contract.

538.F. Termination of Trading in Exchange Contracts

EFRP transactions may be permitted after termination of trading in expiring Exchange contracts, as prescribed in the applicable rules governing such Exchange contracts. Such transactions shall not establish new positions.

538.G. Identification and Submission to the Clearing House

Each EFRP transaction shall be designated as such and shall be cleared through the Clearing House. Each such transaction shall be submitted to the Clearing House within the time period and in the manner specified by the Exchange. Clearing member firms are responsible for exercising due diligence as to the bona fide nature of EFRP transactions submitted on behalf of customers.

538.H. Documentation

Parties to any EFRP transaction must maintain all documents relevant to the Exchange contract and the cash, OTC swap, OTC option, or other OTC derivative, including all documents customarily generated in accordance with relevant market practices and any documents reflecting payment and transfer of title. Any such documents must be provided to the Exchange, upon request, and it shall be the responsibility of the carrying clearing member firm to provide such requested documentation on a timely basis.

538.1. Account Requirements

The accounts involved in the execution of an EFRP transaction must be (a) independently controlled accounts with different beneficial ownership; or (b) independently controlled accounts of separate legal entities with the same beneficial ownership, provided that the account controllers operate in separate business units; or (c) independently controlled accounts within the same legal entity, provided that the account controllers operate in separate business units; or (d) commonly controlled accounts of separate legal entities, provided that the separate legal entities have different beneficial ownership.

However, on or after the first day on which delivery notices can be tendered in a physically delivered Exchange futures contract, an EFRP transaction may not be executed for the purpose of offsetting concurrent long and short positions in the expiring

Exchange futures contract when the accounts involved in such transaction are owned by the same legal entity and when the date of the Exchange futures position being offset is not the same as the date of the offsetting transaction.

538.J. Large Trader Requirements for EFRP Transactions

Each clearing member, omnibus account and foreign broker submitting large trader positions in accordance with Rule 561 must submit for each reportable account the EFRP volume bought and sold in the reportable instrument, by contract month, and additionally for EOOs, by put and call strike. The information must be included in the daily Large Trader report to the Exchange.

559. POSITION LIMITS AND EXEMPTIONS

The position limit levels applicable to those contracts with position limits are set forth in the Position Limit, Position Accountability and Reportable Level Table (“Table”) in the Interpretations Section at the end of Chapter 5.

A person seeking an exemption from position limits must apply to the Market Regulation Department on forms provided by the Exchange. In order to obtain an exemption from position limits, a person must:

1. Provide a description of the exemption sought, including whether the exemption is for bona fide hedging positions as defined in CFTC Regulation §1.3 (Bona fide hedging transactions and positions for excluded commodities), risk management positions or arbitrage/spread positions;
2. Provide a complete and accurate explanation of the underlying exposure related to the exemption request;
3. Agree to promptly provide, upon request by the Market Regulation Department, information or documentation regarding the person’s financial condition;
4. Affirm that the requested exemption complies with any applicable CFTC requirements and, for those contracts with Federal limits, that the exemption request has been approved by the CFTC;
5. Agree to comply with all terms, conditions or limitations imposed by the Market Regulation Department with respect to the exemption;
6. Agree that the Market Regulation Department may, for cause, modify or revoke the exemption at any time;
7. Agree to initiate and liquidate positions in an orderly manner;
8. Agree to comply with all Exchange rules; and
9. Agree to promptly submit a supplemental statement to the Market Regulation Department whenever there is a material change to the information provided in the most recent application.

A person intending to exceed position limits, including limits established pursuant to a previously approved exemption, must file the required application and receive approval from the Market Regulation Department prior to exceeding such limits. However, a person who establishes an exemption-eligible position in excess of position limits and files the required application with the Market Regulation Department shall not be in violation of this rule provided the filing occurs within five (5) business days after assuming the position except in circumstances where the Market Regulation Department requires a person to file prior to the fifth business day. In the event the positions in excess of the limits are not deemed to be exemption-eligible, the applicant and clearing firm will be in violation of speculative limits for the period of time in which the excess positions remained open.

The Market Regulation Department shall, on the basis of the application and any requested supplemental information, determine whether an exemption from position limits shall be granted. The Market Regulation Department may approve, deny, condition or limit any exemption request based on factors deemed by the Department to be relevant, including, but not limited to, the applicant's business needs and financial status, as well as whether the positions can be established and liquidated in an orderly manner given characteristics of the market for which the exemption is sought.

Nothing in this rule shall in any way limit (i) the authority of the Exchange to take emergency action; or (ii) the authority of the Market Regulation Department to review at any time the positions owned or controlled by any person and to direct that such position be reduced to the position limit provided for in the Table.

A person who has received written authorization from the Market Regulation Department to exceed position limits must annually file an updated application not later than one year following the approval date of the most recent application. Failure to file an updated application will result in expiration of the exemption.

559.A. Bona Fide Hedging Positions

The Market Regulation Department may grant exemptions from position limits for bona fide hedge positions as defined in CFTC Regulation §1.3.

Approved bona fide hedgers may be exempted from emergency orders that reduce position limits or restrict trading.

559.B. Risk Management Positions

The Market Regulation Department may grant exemptions from the position limits for risk management positions. For the purposes of this rule, risk management positions are defined as futures and options positions which are held by or on behalf of an entity or an affiliate of an entity which typically buys, sells or holds positions in the underlying cash market, a related cash market, or a related over-the-counter market and for which the underlying market has a high degree of demonstrated liquidity relative to the size of the positions and where there exist opportunities for arbitrage which provide a close linkage between the futures or options market and the underlying market in question. Exemptions related to indexed positions in the over-the-counter market may include corresponding commodity index-based futures and options and/or individual commodity futures and options used as components in replicating an index.

559.C. Arbitrage and Spread Positions

The Market Regulation Department may grant exemptions from the position limits for arbitrage, intracommodity spread, intercommodity spread, and eligible option/option or option/futures spread positions.

Spread and arbitrage exemptions from position limits for Corn, Oats, Soybean, Wheat, Soybean Oil and Soybean Meal futures and options contracts traded on the Exchange shall be governed by CFTC Regulation §150.3(a)(3).

559.D. Aggregation of Positions

For the purpose of applying the position limits in the Table, all positions in accounts for which any person, by power of attorney or otherwise, directly or indirectly controls trading or holds a 10 percent or greater ownership or equity interest must be aggregated with the positions held and trading done by such person. For the purpose of determining the positions in accounts for which any person controls trading or holds a 10 percent or greater ownership or equity interest, positions or ownership or equity interests held by, and trading done or controlled by, two or more persons acting pursuant to an expressed or implied agreement or understanding shall be treated the same as if the positions were held by, or the trading were done or controlled by, a single person.

Any person that, by power of attorney or otherwise, holds or controls the trading of positions in more than one account or pool with substantially identical trading strategies, must aggregate all such positions in accordance with the provisions of CFTC Regulation 150.4(a)(2).

559.E. Exemptions from Aggregation

Exemptions from aggregation in all products subject to Exchange position limits must comply with the provisions of CFTC Regulation 150.4(b).

Any person claiming an exemption from Exchange position limits under the provisions of CFTC Regulation 150.4(b)1(ii), (b)(2), (b)(3), (b)(4), or (b)(7) must provide a notice to the Market Regulation Department which sets forth 1) a description of the relevant circumstances that warrant disaggregation and 2) a statement by a senior officer or executive of the entity certifying that the conditions set forth in the applicable CFTC aggregation exemption provision have been met.

Upon request by the Market Regulation Department, any person claiming an exemption from aggregation under this Section E. must provide any requested information that demonstrates the person meets the applicable requirements for the exemption. Market Regulation, in its sole discretion, may amend, suspend, terminate, or otherwise modify a person's exemption from aggregation for failure to comply with the provisions of this Section E. In the event of a material change to the information provided in any notice filed under this Section E., an updated or amended notice must be promptly filed with the Market Regulation Department detailing the material change.

559.F. Violations

Violations of position limits and approved exemption limits are subject to the provisions of Rule 562.

562. POSITION LIMIT VIOLATIONS

Any positions, including positions established intraday, in excess of those permitted under the rules of the Exchange shall be deemed position limit violations.

If a position exceeds position limits as a result of an option assignment, the person who owns or controls such position shall be allowed one business day to liquidate the excess position without being considered in violation of the limits. Additionally, if, at the close of trading, a position that includes options exceeds position limits when evaluated using the delta factors as of that day's close of trading, but does not exceed the limits when evaluated using the previous day's delta factors, then the position shall not constitute a position limit violation.

A clearing member shall not be in violation of this rule if it carries positions for its customers in excess of the applicable position limits for such reasonable period of time as the firm may require to discover and liquidate the excess positions. For the purposes of this rule, a reasonable period of time shall generally not exceed one business day.

A customer who exceeds the position limits as a result of maintaining positions at more than one clearing member shall be deemed to have waived confidentiality regarding his positions and the identity of the clearing members at which they are maintained. A clearing member carrying such positions shall not be in violation of this rule if, upon notification by the Market Regulation Department, it liquidates its pro-rata share of the position in excess of the limits or otherwise ensures the customer is in compliance with the limits within a reasonable period of time.

14102. TRADING SPECIFICATIONS

Trading in wheat futures is regularly conducted in five months – July, September, December, March and May. The number of months open for trading at a given time shall be determined by the Exchange.

14102.A. Trading Schedule

The hours for trading of wheat futures shall be determined by the Exchange. On the last day of trading in an expiring future, the close of the expiring future shall begin at 12 o'clock noon and trading shall be permitted thereafter for a period not to exceed one minute. Quotations made during this one minute period shall constitute the close.

14102.B. Trading Unit

The unit of trading shall be 5,000 bushels of Wheat.

14102.C. Price Increments

The minimum fluctuation for wheat futures shall be $\frac{1}{4}$ cent per bushel (\$12.50 per contract), including spreads.

14102.D. Daily Price Limits

Daily price limits for Wheat futures are reset every six months. The first reset date would be the first trading day in May based on the following: Daily settlement prices are collected for the nearest July contract over 45 consecutive trading days before and on the business day prior to April 16th. The average price is calculated based on the collected settlement prices and then multiplied by seven percent. The resulting number, rounded to the nearest 5 cents per bushel, or 30 cents per bushel, whichever is higher, will be the new initial price limits for Wheat futures and will become effective on the first trading day in May and will remain in effect through the last trading day in October.

The second reset date would be the first trading day in November based on the following: Daily settlement prices are collected for the nearest December contract over 45 consecutive trading days before and on the business day prior to October 16th. The average price is calculated based on the collected settlement prices and then multiplied by seven percent. The resulting number, rounded to the nearest 5 cents per bushel, or 30 cents per bushel, whichever is higher, will be the new initial price limits for Wheat futures and will become effective on the first trading day in November and will remain in effect through the last trading day in next April.

There shall be no trading in Wheat futures at a price more than the initial price limit above or below the previous day's settlement price. Should two or more Wheat

futures contract months within the first five listed non-spot contracts (or the remaining contract month in a crop year, which is the May contract) settle at limit, the daily price limits for all contract months shall increase by 50 percent the next business day, rounded up to the nearest 5 cents per bushel. If no Wheat futures contract month settles at the expanded limit the next business day, daily price limits for all contract months shall revert back to the initial price limit the following business day. There shall be no price limits on the current month contract on or after the second business day preceding the first day of the delivery month.

14102.E. Position Limits, Exemptions, Position Accountability and Reportable Levels

The applicable position limits and/or accountability levels, in addition to the reportable levels, are set forth in the Position Limit, Position Accountability and Reportable Level Table in the Interpretations & Special Notices Section of Chapter 5.

A Person seeking an exemption from position limits for bona fide commercial purposes shall apply to the Market Regulation Department on forms provided by the Exchange, and the Market Regulation Department may grant qualified exemptions in its sole discretion.

Refer to Rule 559 for requirements concerning the aggregation of positions and allowable exemptions from the specified position limits.

14102.F. Limit on Holdings of Registered and Outstanding Shipping Certificates

No person, at any time, shall own or control more than 600 registered and outstanding Wheat Shipping Certificates issued by facilities designated by the Exchange as regular to issue shipping certificates for Wheat. The 600 certificate maximum shall include mini-sized Wheat certificates such that each mini-sized certificate represents the equivalent of one-fifth of a full-sized certificate.

If a person stops Wheat certificates for delivery in a quantity that would cause such person to exceed the 600 certificate limit, the person must cancel, retender or sell the quantity of certificates in excess of 600 not later than the following business day.

14102.G. Termination of Trading

No trades in wheat futures deliverable in the current month shall be made after the business day preceding the 15th calendar day of that month. Any contracts remaining open after the last day of trading must be either:

- (a) Settled by delivery no later than the second business day following the last trading day (tender on business day prior to delivery).

- (b) Liquidated by means of a bona fide Exchange of Futures for Related Position, no later than the business day following the last trading day.