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COMMENT
CL-08302

From: Parker, Christine T. <Parkerc@sullcrom.com>
Sent: Monday, April 26, 2010 2:12 PM
To: secretary <secretary@CFTC.gov>
Cc: Raisler, Kenneth <Raislerk@sullcrom.com>; Funderburk, Kelly L. (kelly_funderburk@ml.com)
Subject: Proposed Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations
Attach: MLCI - CFTC 4-26-2010.pdf

Please see attached comments on behalf of Merrill Lynch Commodities, Inc., with regard to the Proposed Rule on Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations.

Thank you,
Christine

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Bank of America Merrill Lynch
GLOBAL CORPORATE & INVESTMENT BANKING

April 26, 2010

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

Re: Proposed Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations

Dear Mr. Stawick:

This letter is submitted on behalf of Merrill Lynch Commodities, Inc. ("MLCI") in response to the proposed rule issued by the Commodity Futures Trading Commission (the "CFTC" or the "Commission") regarding whether the CFTC should directly impose speculative position limits on futures and option contracts in four energy commodities[1] and whether to create a limited risk management exemption, administered by the CFTC for swap dealers holding positions outside the spot month (the "Proposed Rule"). MLCI, the principal entity through which Bank of America and Merrill Lynch conducts its commodity activities, is supportive of measures that diminish, eliminate or prevent excessive speculation causing sudden or unreasonable fluctuations in the price of a commodity. However, MLCI has serious concerns regarding specific mechanics set forth in the Proposed Rule, including provisions that address the aggregation of positions under common ownership for the purpose of applying the limits, as well as the "crowding out" provisions.

Introduction

Following Bank of America's acquisition of Merrill Lynch, the integration of the commodity activities of Bank of America and Merrill Lynch ("BAC/ML") was consolidated into a single business unit, MLCI. MLCI is engaged in a wide range of

[1] Henry Hub natural gas, light sweet crude oil (such as West Texas Intermediate or WTI), New York Harbor No. 2 heating oil and New York Harbor gasoline blendstock.

Merrill Lynch Commodities, Inc. is a subsidiary of Bank of America Corporation and is not covered by the FDIC or SIPC.

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commodity activities with its clients, including physical and financial transactions involving natural gas (including liquified natural gas), power, coal, natural gas liquids and emissions allowances, and financial transactions involving commodity indices (including agricultural indices).

MLCI maintains a global book for the BAC/ML commodities business in relation to financial risks relating to physical and financial transactions in crude oil and refined products. MLCI also provides energy management services and asset management services to customers in the gas and power sectors, and structures certain commodity-linked notes (including hedging the commodity price exposures related to such notes) issued to customers by certain BAC/ML and third-party entities.

We are pleased to share our comments on and concerns with the CFTC on the Proposed Rule.

Elimination of the Independent Account Controller Exemption

Under the Proposed Rule, the CFTC would aggregate the positions for accounts in which any person has an ownership or equity interest of 10% or more at both the account owner and control level for the referenced energy contracts. This provision would eliminate the independent account controller exemption for position limits that currently exists in CFTC Regulation 150.3(a)(4), which has been extensively relied on by market participants, including BAC/ML. This provision would require MLCI to aggregate its holdings in energy commodities with the holdings of the various independent business units trading for all of BAC/ML's proprietary and customer servicing accounts. In addition, MLCI would be required to aggregate its positions with any equity investment above the 10% threshold made by any business unit within BAC/ML in a third-party business that holds positions in any of the referenced energy commodities. This provision will require various independent entities, including MLCI and other affiliates that hold these positions, to disclose their energy commodity positions to unrelated entities within and even outside of BAC/ML.

We are deeply concerned with this provision. In particular, we are concerned that it conflicts with MLCI and BAC/ML's compliance structure under federal banking regulations. We note that Bank of America Corporation is a bank holding company registered under the Bank Holding Company Act of 1956 and a financial holding company under the Gramm-Leach-Bliley Act of 1999. Although MLCI is the primary commodities trading unit within BAC/ML, other business units within BAC/ML may also make direct investments into third-party entities that actively trade in the commodities market. In compliance with various federal banking regulations, MLCI may have no knowledge of and no relationship with the commodity trading activities of entities in which other units within BAC/ML have invested. In fact, for those investments that MLCI is aware, BAC/ML has represented to federal banking regulators that the making, monitoring, management, exit and realization of such investments by designated BAC/ML units will be made outside the on-going activities of MLCI. Because of these limitations, we believe that it will be operationally unworkable for position limits to be aggregated across all BAC/ML positions in the futures markets.

This provision of the Proposed Rule would pose significant additional challenges, as BAC/ML would be required to allocate limited position volume across separate and unrelated entities that previously have had separate position limits. As a result, the trading activity of an investment business unit could affect the ability of MLCI to trade in a particular energy commodity. More troubling, to comply with the aggregated position limit, these separate entities will now have to share proprietary trading information, which may raise concerns over the fiduciary duty of these entities to protect client trading information. The Proposed Rule does not address the conflicts of interest created by the elimination of the independent account controller exemption, and we respectfully urge the CFTC to reconsider this provision.

We also note that this provision would create significant administrative burdens for MLCI back office operations, as we would be required to aggregate our positions in four energy positions, but not for other positions including agricultural positions. This will create significant confusion and administrative burdens to comply with two different aggregation regimes and will require real-time coordination between independent entities, which will be difficult, if not impossible. We are also deeply concerned that as a result of the "crowding out" provision of the Proposed Rule, addressed below, MLCI may be prohibited from hedging or speculating in the referenced energy commodities, even if it conducts its trading operations as a separate business unit that is completely independent. Given compliance constraints related to federal banking regulations, we urge the CFTC to reconsider the elimination of the independent account controller exemption.

"Crowding Out"

The Proposed Rule will severely limit the speculative activity of market participants, including MLCI, by preventing market participants from using hedge exemptions or risk management exemptions, if their combined positions (hedging and/or risk management, and speculative) exceed the applicable position limit. As a result, MLCI will be required to stay below the applicable position limit if we do any speculative transactions, even if we have obtained a hedge exemption and/or a risk management exemption from the CFTC. As a result, once MLCI, or any other commodity trading investment entity with which MLCI aggregates its positions, has exceeded the position limit, regardless of whether MLCI has an exemption from the position limit, MLCI must liquidate all of its speculative holdings or bring its hedging or risk management positions below the position limit.

As discussed above, we believe this provision will be unworkable for MLCI's commodity trading business. The Proposed Rule did not provide any clear guidance as to how the CFTC would determine if a position in one of the referenced energy commodities would be deemed speculative or not. For example, a trade we enter into may be hedging at inception of the trade, but given a rapid change in our underlying energy assets, may later be deemed to be speculative in nature, before the futures contract can be or is liquidated. In addition, holding a bona fide hedging exemption that is greater than twice the speculative position limit will preclude MLCI from also holding a risk management exemption. As a result, MLCI will be permitted to hedge its physical

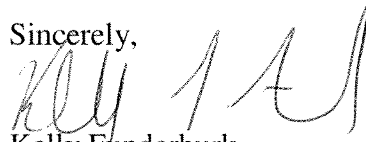
energy assets, but depending on the size of our hedge exemption, we may not be able to provide our clients with the risk management services we have provided in the past. Requiring MLCI (or any other similarly situated market participant) to choose between hedging our physical risk and providing risk management services to our clients will severely limit trading in the energy futures market, reducing market liquidity for all market participants, including commercial producers.

The Proposed Rule effectively eliminates the benefits of higher position limits from risk management and/or hedge exemptions for any market participant, including MLCI, which may have any speculative positions, however minimal. As a result, the crowding out of speculative trading will reduce the volume and liquidity in the futures markets, impairing their stability and price formation function, especially in the outer contract months.

Conclusion

MLCI supports the goal of eliminating unreasonable and unwarranted fluctuation in the commodities markets and appreciates the opportunity to comment on the Proposed Rule. We would be pleased to offer our assistance to the Commission in elaborating on any of the issues addressed in this letter.

Sincerely,



Kelly Funderburk
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Merrill Lynch Commodities, Inc.