From: Jon_Hixson@cargill.com
Sent: Monday, April 26, 2010 4:30 PM
To: secretary <secretary@CFTC.gov>
Cc: Sue_Cochran@cargill.com
Subject: Cargill Comments - Position Limits
Attach: Stawick Letter_001.pdf

Dear Secretary Stawick –
Attached are Cargill Incorporated's comments on the Commodity Futures Trading Commission's Notice of Proposed Rulemaking, Federal Speculative Position Limits for Reference Energy Contracts and Associated Regulations.
Thanks,
-Jon

Jon Hixson
Cargill
1101 15th Street, NW - Ste 1000
Washington, DC 20005
202-530-8166 direct
202-641-6564 cell

"This message is intended only for the named recipient and may contain confidential, proprietary or legally privileged information. All rights to the information contained herein which have not been expressly granted, are expressly reserved. Unauthorized individuals or entities are not permitted access to this information. Any dissemination, distribution, or copying of this information is strictly prohibited. If you have received this message in error, please advise the sender by reply e-mail, and delete this message and any attachments. Thank you."

April 26, 2010

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

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

Dear Secretary Stawick:

Cargill is an international provider of food, agricultural, and risk management products and services. Cargill is also an active participant in the energy markets. As a merchandiser, processor and exporter of commodities, Cargill relies heavily upon efficient and well-functioning futures markets and over-the-counter derivatives markets. Cargill is pleased to submit these comments in response to the Notice of Proposed Rulemaking ("Proposed Rules") of the Commodity Futures Trading Commission ("Commission" or "CFTC") that was published in the Federal Register on January 26, 2010.

The Proposed Rule contains a fundamental flaw in its construction. According to the CFTC's September 2008 Report on Commodity Swap Dealers and Index Traders, there were 18 incidents identified where noncommercial traders held aggregated positions across exchange-traded and over-the-counter derivatives markets that would have been above a speculative limit or accountability limit. Unfortunately, the Proposed Rule seeks to focus on commercial firms and swaps dealers, rather than to simply aggregate positions at the level of the noncommercial trader. As such, the Proposed Rule will have little impact on the noncommercial traders exceeding speculative or accountability limits like those cited in the report.

The September 2008 CFTC Report included a relatively straightforward suggestion, noted as recommendation #5. This recommendation outlined risk management exemptions for swaps dealers conditioned upon:

1. An obligation to report to the CFTC when noncommercial swap clients reach certain position levels in related exchange traded contracts, and/or

Law
Linda L. Cutler
Vice President, Assistant Secretary and

15407 McGinty Road West
Wayzata, MN 55391-2399
P.O. Box 5624
Minneapolis, MN 55440-5624

Tel: (952) 742-6377
Fax: (952) 404-6334
Linda_Cutler@cargill.com

2) A certification that none of the swap dealer's noncommercial clients exceed specified position limits relative to related exchange traded contracts.

As noted in this initial recommendation, this proposal would be a "practicable way of ensuring that noncommercial counterparties are not purposefully evading the oversight and limits of the CFTC and exchanges.

The principle action that swap dealers can take is to report to the CFTC. That is the most important recommendation from the 2008 Staff Report. The value of the certification by a swaps dealer is limited by the fact that a dealer would not know if a customer is utilizing multiple dealers and a dealer is not likely to know the limit for a specific customer.

Enforcement of overall position limits is the role of the regulator, who can aggregate the reported information. However, even with these limitations, the September 2008 recommendation stands in stark contrast to the complexity of the CFTC's current proposal, and the fact that at its core, the current Proposed Rule would not address the incidents where position limits were exceeded.

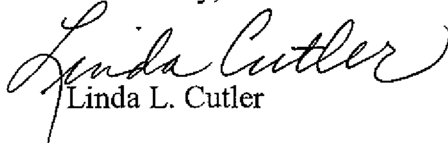
The Proposed Rule would unduly restrict legitimate hedging. The Proposed Rule could also damage necessary speculation that is needed to provide liquidity. The Proposed Rule may inhibit price discovery and create the unintended risk of markets failing to solve the physical imbalances that often exist in the petroleum supply chain. These new risks will be created through the new rule, without achieving the Commission's regulatory objective of preventing excessive speculation.

In the attached Appendix A and B, we offer further comments in detail on the Proposed Rule and provide answers to the questions proposed by the agency. However, we would reiterate that the more straightforward alternative recommended September 2008 is far better public policy.

As such, we do not recommend that the Commission move forward with the Proposed Rule.

As an active commercial participant in the markets, Cargill appreciates the Commission's attention to the issues raised in its Proposed Rule, and looks forward to working with the Commission in analyzing and resolving these issues.

Yours truly,



Linda L. Cutler

LLC:jp
2869085

Appendix A

The following provisions in the Proposed Rule, are inconsistent with current regulatory practices and, if adopted, would unduly restrict the activities of legitimate market users.

1. The arbitrary cap on hedging by swap dealers, which would limit them to two times the otherwise applicable speculative limit.

2. The "crowding out" provisions whereby a company like Cargill, which is both a commercial hedger and a swap dealer, would be precluded from hedging its swap obligations if its commercial hedging exceeded the proposed arbitrary cap on hedging of swap obligations, and would also be precluded from taking a speculative position if its hedge position exceeded the speculative limit.

3. The elimination of the independent account controller exemption from aggregation.

The arbitrary cap on hedging by a swap dealer should not be adopted. Such an arbitrary limit on hedging would be unprecedented, and would prevent legitimate hedging. Rather than prudently identify excessive speculation, the adoption of this provision would merely result in swap counterparties spreading their swap transactions across numerous swap dealers, and the amount of the offsetting trades made on the exchanges by these swap dealers collectively would remain the same.

An accountability level of two times the speculative limit, might help provide oversight information for the Commission, but there is no rational basis for arbitrarily capping hedges of swap obligations at two times the speculative limit.
The Commission should not adopt the crowding out provisions, because they would prevent legitimate hedging and speculation, without achieving any valid regulatory purpose. These provisions would prevent a commercial hedger from hedging swap obligations if the trader's commercial hedging exceeded the arbitrary cap on hedging of swap obligations, and would also prevent a commercial hedger from engaging in separate speculative trading. Diversified companies may be engaged in many activities including commercial hedging, speculation, and hedging of swap obligations.

The current procedure is fully consistent with the Commission's objective of preventing excessive speculation, because a hedger who also speculates is limited to speculative trading within the same limit as other speculative traders.

The crowding out provisions would also make the administration of a hedging program for both swap obligations and commercial hedges impossible in certain cases. For example, a swap dealer with a combination of commercial hedges and hedges of swap obligations could be at or close to the arbitrary cap when it incurred a need for greater commercial hedging. The only way it could conduct that commercial hedging would be to liquidate all its hedges on its swap obligations, leaving those obligations uncovered and greatly increasing its risk. In order to avoid this result, the swap dealer would have to forego hedging of swap obligations entirely, as any

hedge of a swap obligation would act to limit all hedging to the amount of the arbitrary cap. This would be an unreasonable and unworkable policy which could increase risk and volatility in the energy sector, and it should therefore not be approved.

The independent account controller exemption should not be eliminated for the energy contracts that are the subject of the Proposed Rule. Elimination of this provision would unduly restrict trading by independently controlled traders in accounts with common beneficial ownership where the trading is conducted independently. Where trading is truly independently controlled, the beneficial owner may not have the legal or contractual right to manage the overall position limits that would be imposed under the Proposed Rule.

If this exemption were eliminated for energy contracts, the amount of speculation in these contracts would not necessarily decrease, as energy traders could simply disperse to numerous smaller entities that would each be entitled to a speculative limit. In the meantime, trading strategies and programs would be disrupted, because independently controlled accounts which are now trading futures on energy and other commodities, within the terms of the exemption, would no longer be able to trade energy contracts on the same scale as the other contracts, which would continue to be entitled to the exemption.

The Commission established this exemption in 1988, and favorable experience with the exemption has led the Commission to expand its coverage over the years. The Commission acknowledged the effectiveness of this provision when it expanded the definition in 1999: Commission rule 150.3 generally has worked well. It has provided flexibility to the markets, accommodating the continuing trend toward professional management of speculative trading accounts, while at the same time protecting the markets from the undue accumulation of large speculative positions owned by a single person or entity in the spot month.
See Revision of Federal Speculative Position Limits and Associated Rules, 64 Fed. Reg. 24038 (May 5, 1999).

In cases where the requirements of the independent account controller exemption have been satisfied, there is no valid regulatory reason to require aggregation. The reason for aggregating accounts on the basis of ownership alone is that ownership carries with it the ability to exert control. Under the terms of the independent account controller exemption, requirements must be met that prevent the passive owner from exercising control. When these requirements have been satisfied, there is no need for aggregation, and therefore no valid reason to require it.

Traders performing the function of swap dealers are analogous to futures commission merchants ("FCMs"), who act as intermediaries between their customers and the futures markets, and therefore should be treated similarly with respect to position limits. FCMs are not limited in the amount of trading they can transact on the exchanges on behalf of customers, as long as the customers themselves abide by their own position limits. Similarly, traders acting as swap dealers should not be prevented from entering into swaps and offsetting the swap liabilities on the futures markets as hedges, as long as their swap counterparties are within their limits.

Position limits could be better enforced by imposing a reporting requirement on the swap dealers who enter into futures contracts to hedge their swap obligations. These swap dealers could be required to report on their transactions with counterparties that are being offset on the exchanges, and these reports could trigger a call for additional information from the counterparties themselves.

A similar procedure is currently followed with FCMs, which are required to identify large traders on their books, and the Commission then follows up with requests for information to the traders themselves. In addition, Part 19 of the Commission's Regulations requires hedgers to file series '04 reports concerning physical positions that are held in certain commodities, and this reporting requirement could be expanded to include swaps that are being hedged. If a counterparty to an off-exchange transaction failed to provide the requested information, the Commission could prohibit the swap dealer from offsetting its obligations to that counterparty in the futures markets.

Cargill urges the Commission not to approve the Proposed Rule and instead to extend the coverage of the current position limits to the off-exchange counterparties whose transactions with swap dealers are being hedged in the futures markets. Existing account control and aggregation procedures also work well and should not be changed as considered in the Proposed Rule.

Appendix B

Cargill's Answers to Questions of CFTC in Notice of Proposed Rulemaking pertaining to Federal Speculative Limits for Referenced Energy Contracts and Associated Regulations

1. Are Federal speculative position limits for energy contracts traded on reporting markets necessary to ``diminish, eliminate, or prevent" the burdens on interstate commerce that may result from position concentrations in such contracts?
Comment: No. The current regulation of position limits, with coverage extended to off-exchange counterparties whose transactions are hedged on the futures markets, would better achieve this goal.

2. Are there methods other than Federal speculative position limits that should be utilized to diminish, eliminate, or prevent such burdens?
Comment: Yes. The CFTC can require those who enter into off-exchange transactions that are hedged on the regulated futures markets to abide by the limits set by the exchanges.

3. How should the Commission evaluate the potential effect of Federal speculative position limits on the liquidity, market efficiency and price discovery capabilities of referenced energy contracts in determining whether to establish position limits for such contracts?

Comment: The Commission should first expand the applicability of exchange position limits to off-exchange counterparties whose transactions are hedged on the futures markets, and should then conduct a study to determine whether further changes are needed.

4. Under the class approach to grouping contracts as discussed herein, how should contracts that do not cash settle to the price of a single contract, but settle to the average price of a sub-group of contracts within a class be treated during the spot month for the purposes of enforcing the proposed speculative position limits?

Comment: No comment.

5. Under proposed regulation 151.2(b)(1)(i), the Commission would establish an all-months-combined aggregate position limit equal to 10% of the average combined futures and option contract open interest aggregated across all reporting markets for the most recent calendar year up to 25,000 contracts, with a marginal increase of 2.5% of open interest thereafter. As an alternative to this approach to an all-months-combined aggregate position limit, the Commission requests comment on whether an additional increment with a marginal increase larger than 2.5% would be adequate to prevent excessive speculation in the referenced energy contracts. An additional increment would permit traders to hold larger positions relative to total open positions in the referenced energy contracts, in comparison to the proposed formula. For example, the Commission could fix the all-months-combined aggregate position limit at 10% of the prior year's average open interest up to 25,000 contracts, with a marginal increase of 5% up to 300,000 contracts and a marginal increase of 2.5% thereafter. Assuming the prior year's average open interest equaled 300,000 contracts, an all-months-combined aggregate position limit would be fixed at 9,400 contracts under the proposed rule and 16,300 contracts under the alternative.

Comment: The Commission should require off-exchange counterparties whose transactions are hedged on the futures markets to be subject to the exchange position limits and not set federal limits on energy contracts.

6. Should customary position sizes held by speculative traders be a factor in moderating the limit levels proposed by the Commission? In this connection, the Commission notes that current regulation 150.5(c) states contract markets may adjust their speculative limit levels ``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 * * *"

Comment: Pursuant to the current regulation, this factor should continue to be considered by the exchanges, but the Commission should not set position limits.

7. Reporting markets that list referenced energy contracts, as defined by the proposed regulations, would continue to be responsible for maintaining their own position limits (so long as they are not higher than the limits fixed by the Commission) or position accountability rules. The Commission seeks comment on whether it should issue acceptable practices that adopt formal guidelines and procedures for implementing position accountability rules.

Comment: The position limits and position accountability rules should be left to the exchanges as they are currently.

8. Proposed regulation 151.3(a)(2) would establish a swap dealer risk management exemption whereby swap dealers would be granted a position limit exemption for positions that are held to offset risks associated with customer initiated swap agreements that are linked to a referenced energy contract but that do not qualify as bona fide hedge positions. The swap dealer risk management exemption would be capped at twice the size of any otherwise applicable all-months-combined or single non-spot-month position limit. The Commission seeks comment on any alternatives to this proposed approach. The Commission seeks particular comment on the feasibility of a ``look-through" exemption for swap dealers such that dealers would receive exemptions for positions offsetting risks resulting from swap agreements opposite counterparties who would have been entitled to a hedge exemption if they had hedged their exposure directly in the futures markets. How viable is such an approach given the Commission's lack of regulatory authority over the OTC swap markets?

Comment: Following the CFTC's, "Recommendation #5," in the 2008 Staff Report, the Commission should use its authority to place conditions on a limited risk management exemption for swaps dealers that would require appropriate reporting. With proper implementation of this recommendation, there is no need for an arbitrary cap on a swap dealer's hedge exemption. A swap dealer's own hedge exemption for swap obligations should not be limited, as long as the dealer's counterparties are within their own speculative and hedging limits, which can be accurately enforced by the CFTC.

9. Proposed regulation 20.02 would require swap dealers to file with the Commission certain information in connection with their risk management exemptions to ensure that the Commission can adequately assess their need for an exemption. The Commission invites comment on whether these requirements are sufficient. In the alternative, should the Commission limit these filing requirements, and instead rely upon its regulation 18.05 special call authority to assess the merit of swap dealer risk management exemption requests?

Comment: The reporting requirements of proposed Regulation 20.02 could be expanded to require swap dealers to report the information necessary for the Commission and exchanges to determine whether the swap dealer's counterparties are within their own limits. Special calls may be used when a special need arises, but should not be a regular practice.

10. The Commission's proposed part 151 regulations for referenced energy contracts would set forth a comprehensive regime of position limit, exemption and aggregation requirements that would operate separately from the current position limit, exemption and aggregation requirements for agricultural contracts set forth in part 150 of the Commission's regulations. While proposed part 151 borrows many features of part 150, there are notable distinctions between the two, including their methods of position limit calculation and treatment of positions held by swap dealers. The Commission seeks comment on what, if any, of the distinctive features of the position limit framework proposed herein, such as aggregate position limits and the swap dealer limited risk management exemption, should be applied to the agricultural commodities listed in part 150 of the Commission's regulations.

Comment: The Commission should retain current policies applicable to agricultural commodities, namely, those providing for the independent account controller exemption, exemptions for persons acting as swap dealers, and for hedgers to be able to separately trade speculatively up to the speculative limit. In addition, the Commission should adopt a look-through provision whereby a swap dealer's counterparties would be required to comply with their own hedging exemptions and speculative limits. The expansion of Part 19 of the Commission's regulations to require additional traders to file '04 reports concerning physical positions that are held in certain commodities would help in oversight and enforcement.

11. The Commission is considering establishing speculative position limits for contracts based on other physical commodities with finite supply such as precious metal and soft agricultural commodity contracts. The Commission invites comment on which aspects of the current speculative position limit framework for the agricultural commodity contracts and the framework proposed herein for the major energy commodity contracts (such as proposed position limits based on a percentage of open interest and the proposed exemptions from the speculative position limits) are most relevant to contracts based on other physical commodities with finite supply such as precious metal and soft agricultural commodity contracts.

Comment: If Commission-set limits are extended to other commodities, the agricultural framework should be used as it relates to the availability of the independent account controller exemption, unlimited hedging exemptions for persons acting as swap dealers, and allowing hedgers to separately trade speculatively up to the speculative limit. In addition, the Commission

should add a look-through provision which would require a swap dealer's counterparties to comply with their own hedging exemptions and speculative limits.

12. As discussed previously, the Commission has followed a policy since 2008 of conditioning FBOT no-action relief on the requirement that FBOTs with contracts that link to CFTC-regulated contracts have position limits that are comparable to the position limits applicable to CFTC-regulated contracts. If the Commission adopts the proposed rulemaking, should it continue, or modify in any way, this policy to address FBOT contracts that would be linked to any referenced energy contract as defined by the proposed regulations?

Comment: The Commission should continue to consider each such situation separately and in each case work with the foreign regulator to determine whether, and if so what, limits should be imposed.

13. The Commission notes that Congress is currently considering legislation that would revise the Commission's section 4a(a) position limit authority to extend beyond positions in reporting market contracts to reach positions in OTC derivative instruments and FBOT contracts. Under some of these revisions, the Commission would be authorized to set limits for positions held in OTC derivative instruments and FBOT contracts. The Commission seeks comment on how it should take this pending legislation into account in proposing Federal speculative position limits.

Comment: The Commission should not take action based on the Congressional proposals, as it is impossible to foresee what, if any, legislation will be enacted. The Commission should wait to see what happens with the Congressional proposals before making any significant changes.

14. Under proposed regulation 151.2, the Commission would set spot-month and all-months-combined position limits annually.

a. Should spot-month position limits be set on a more frequent basis given the potential for disruptions in deliverable supplies for referenced energy contracts?
b. Should the Commission establish, by using a rolling-average of open interest instead of a simple average for example, all-months-combined position limits on a more frequent basis? If so, what reasons would support such action?

Comment: Position limits, both spot and non-spot, should remain stable and not be changed frequently, because frequent changes will create uncertainty for market users, disrupt their trading, and cause price movements unrelated to market fundamentals.

15. Concerns have been raised about the impact of large, passive, and unleveraged long-only positions on the futures markets. Instead of using the futures markets for risk transference, traders that own such positions treat commodity futures contracts as distinct assets that can be held for an appreciable duration. This notice of rulemaking does not propose regulations that would categorize such positions for the purpose of applying different regulatory standards. Rather, the owners of such positions are treated as other investors that would be subject to the proposed speculative position limits.

a. Should the Commission propose regulations to limit the positions of passive long traders?
b. If so, what criteria should the Commission employ to identify and define such traders and positions?
c. Assuming that passive long traders can properly be identified and defined, how and to what extent should the Commission limit their participation in the futures markets?
d. If passive long positions should be limited in the aggregate, would it be feasible for the Commission to apportion market space amongst various traders that wish to establish passive long positions?
e. What unintended consequences are likely to result from the Commission's implementation of passive long position limits?

Comment: Passive longs should be considered, and their activities should be subjected to reporting by swap dealers. The Commission should study the impact of these traders to determine whether, and on what terms, to permit them to hold positions above speculative limits. The guiding principle in determining these limits should be to ensure that the underlying contract continues to effectively perform its price discovery and its risk transfer function.

16. The proposed definition of referenced energy contract, diversified commodity index, and contracts of the same class are intended to be simple definitions that readily identify the affected contracts through an objective and administerial process without relying on the Commission's exercise of discretion.

a. Is the proposed definition of contracts of the same class for spot and non-spot months sufficiently inclusive?
b. Is it appropriate to define contracts of the same class during spot months to only include contracts that expire on the same day?
c. Should diversified commodity indexes be defined with greater particularity?

Comment: No comment.

17. Under the proposed regulations, a swap dealer seeking a risk management exemption would apply directly to the Commission for the exemption. Should such exemptions be processed by the reporting markets as would be the case with bona fide hedge exemptions under the proposed regulations?

Comment: Bona fide hedge exemptions for futures traders and risk management exemptions for swap dealers should be processed by the reporting markets.

18. In implementing initial spot-month speculative position limits, if the notice of proposed rulemaking is finalized, should the Commission:

a. Issue special calls for information to the reporting markets to assess the size of a contract's deliverable supply;

b. Use the levels that are currently used by the exchanges; or
c. Undertake an independent calculation of deliverable supply without substantial reliance on exchange estimates?

Comment: Per prior comments, the Commission should not adopt the Proposed Rule and seek a more straightforward reporting alternative that will allow proper oversight of existing position limits and accountability limits.