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Subject: Comment letter--Delta Air Lines, Inc--Federal Speculative Position Limits
Attach: Stawick, David-Commodity Futures 4-26-10.pdf

Dear Mr. Stawick:

Please accept for filing the comment letter of Delta Air Lines, Inc. on the Commodity Futures Trading Commission's notice of proposed rulemaking entitled, "Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations; Proposed Rule."

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Richard B. Hirst
Senior Vice President & General Counsel

April 26, 2010

VIA E-MAIL: secretary@cftc.gov

David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: "Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations; Proposed Rule," 75 Fed. Reg. 4144 (January 26, 2010).

Dear Mr. Stawick:

Delta Air Lines, Inc. ("Delta") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("Commission") Notice of Proposed Rulemaking entitled, "Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations; Proposed Rule," 75 Fed. Reg. 4144 (January 26, 2010) ("Notice"). The Notice proposes to implement speculative position limits for certain, specified energy contracts.¹ The Notice also proposes several related exemptions.

Delta Air Lines, Inc.

Delta is the world's largest airline both in terms of passenger traffic and fleet size. It offers service to more than 170 million passengers annually to 382 destinations in 69 different countries on every continent of the world, except Antarctica. Delta employs over 70,000 people worldwide.

Delta consumes approximately four billion gallons of jet fuel annually, making it the second largest consumer of jet fuel in the world, next to the U.S. government. Delta's business has been, and continues to be, dramatically impacted by volatility in the oil markets. The purchase of jet fuel is Delta's largest expense, consuming 40 per cent or more of Delta's total revenues. Movements in the price of oil directly affect the viability of Delta's operations and its levels of service and employment. The 2007-2008 price bubble in oil caused a 10 percent reduction in Delta's capacity and the elimination of nearly 10,000 jobs. Oil price volatility beginning in 2007, with prices peaking in 2008 and then dropping precipitously cost Delta approximately \$8 billion, including \$1.7 billion in hedge losses and premiums, compared with what Delta's cost of jet fuel would have been had the price of oil remained at \$60 per barrel.

¹ Specifically, these include futures and options contracts and significant price discovery contracts traded on an exempt commercial market on specified energy commodities.

There is no question that speculation in oil futures and options has been a cause of the volatility that has increasingly destabilized prices in the spot market since 2004. No economic model exists which can fully explain movements in oil prices, in part because the data necessary to produce such a model does not exist. However, even Goldman Sachs, a proponent of the view that oil prices are primarily determined by fundamentals, concedes that speculation played a significant role in the 2008 price bubble.² Because it is clear that speculation can be significantly reduced from current levels without affecting liquidity or price discovery, there is no need for regulatory action to await the development of additional information or new economic analyses. The risks to the economy of regulatory inaction, in the form of oil price volatility induced by excessive speculation, plainly outweigh any risks of acting on the basis of what is known about these markets today.

Delta's continuing ability to operate its business is dependent upon a futures market regulatory structure that effectively addresses a) excessive speculation and the price volatility that it causes and b) the participation of speculators who do not aid fundamental price discovery, which participation results in artificial upward pressure on prices. As explained in this comment letter, the Commission can achieve these goals by adopting an overall limit on the open interest held by speculators, based on the estimated number of contracts held by speculators and their counterparties in the period of 2000-2003. Delta applauds the Commission for its courage in taking the first step to curb excessive speculation in the energy futures markets by proposing to adopt position limits applicable to individual traders. However, without an overall cap on speculative interest, these limits will be ineffective in controlling excessive speculation.

Statutory purpose of speculative position limits

Organized futures trading, which first developed in the United States in the later part of the 19th century, can fulfill the economic need for a means to shift risk in the merchandizing of agricultural and other commodities. In addition, when properly structured, futures trading on organized exchanges provides a means for discovering prices and for price basing, improving the transparency of commodity markets. As markets evolved in the 19th and 20th centuries, it became clear that along with these great benefits came glaring abuses, including price manipulations, market corners and extreme and sudden price fluctuations on the organized exchanges. These costly aberrations created repeated demands for legislative action to prohibit or comprehensively regulate futures trading. In response to these abuses, Congress enacted the Commodity Exchange Act of 1936³ to comprehensively regulate the futures markets.⁴

² See Jeffrey Currie, Allison Nathan, David Greely and Damien Courvalin, *Commodity Prices and Volatility: Old Answers to New Questions*, Global Economics Paper No: 194, (Goldman Sachs Global Economics, Commodities and Strategy Research), March 20, 2010, at page 7, (stating "Accordingly, speculators also contributed to the extreme price movements over the last two years. For example, new data suggests that speculators increased the price of oil by \$9.50/bbl on average during the 2008 run-up.")

³ Commodity Exchange Act of 1936, ch. 545 §5, 49 Stat. 1494 (codified as amended at 7 U.S.C. §§1-27).

⁴ However, the first regulation of the grain futures markets is even earlier, dating from the 1920's. See Grain Futures Act of 1922, ch. 369, 42 Stat. 998 (1922) (current version at 7 U.S.C. §§1-27)(2006).

Section 3 of the Commodity Exchange Act, 7 U.S.C. §1 *et seq.* (“Act”), provides that,

transactions subject to the Act . . . are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities. . . . To foster these public interests, it is further the purpose of this Act to deter and prevent price manipulation or any other disruptions to market integrity”⁵

As evidenced by section 3 of the Act, the purpose behind regulation of the futures markets was and is to encourage and preserve the public benefits of futures trading—its use for hedging and price discovery—while at the same time minimizing any disruptive effects upon the economy.⁶

Section 4a of the Act restates and builds upon this legislative purpose, finding that

excessive speculation in futures contracts traded on designated contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the prices of such commodity is an undue and unnecessary burden on interstate commerce.⁷

Based upon that finding, section 4a directs the Commission to “fix such limits on the sale of such commodity for future delivery on or subject to the rules of any contract market . . . or on any electronic trading facility with respect to a significant price discovery contract, as the Commission finds are necessary to diminish, eliminate, or prevent such burden.”⁸

⁵ 7 U.S.C. §5. Section 3 of the Act was amended in 2000. The current, amended version strongly echoes Section 3 as it was incorporated into the Act in 1936, which read:

Transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as “futures” are affected with a national public interest. Such futures transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and byproducts thereof. . . . The prices involved in such transactions are generally quoted and disseminated through the United States and in foreign countries as a basis for determining the prices to the producer and the consumer. . . . The transactions and prices of commodities on such boards of trade are susceptible to excessive speculation and can be manipulated, controlled, cornered or squeezed, to the detriment of the producer or the consumer. . . .

⁶ Accordingly, designation of contract markets under the Act has traditionally been grounded in their use for hedging and price discovery. *See* “Conference Report,” H.R. Rep. No. 93-1383, 93rd Cong., 2d Sess., 36 (1974).

⁷ This finding was incorporated in the Act in 1936, and reiterated with the creation of the Commission. *See* S. Rep. No. 93-1131, 93d Cong., 2d Sess., 18-19 (1974).

⁸ 7 U.S.C §4a.

The Commission and its predecessor agency have repeatedly fulfilled this statutory mandate by imposing position limits on speculation. As the Commission noted, as of 1975, speculative position limits were in effect for almost all actively traded contracts.⁹

In 1981, the Commission reaffirmed the importance of speculative position limits as an effective prophylactic measure, mandating that all futures markets shall have speculative position limits. The Commission took this action based upon its conclusion that

the prevention of abrupt price movements which are attributable to extraordinarily large speculative positions is a Congressionally endorsed regulatory objective of the Commission. Further, it is the Commission's view that this objective is enhanced by speculative position limits since it appears that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions; i.e., the capacity of the market is not unlimited.¹⁰

The Commission determined that under this rule, speculative position limits would be appropriately set based upon "the historical distributions of speculative positions considering, among other things, recent trends in position patterns, the frequency of positions occurring at different levels and the levels at which occur the preponderance of speculative positions normally observed in the market."¹¹ Thus, Commission Rule 1.61 provided that contract markets shall base their speculative position limits on "such factors as position sizes customarily held by speculative traders on such market for a period of time selected by the contract market, which shall not be extraordinarily large relative to total open positions for such period."¹² This remains one of the bases for setting speculative limits today.¹³

Periodically, in reaction to market events, the Commission has revisited the need for speculative position limits as a prophylactic measure to address unwarranted price movements caused by excessive speculation in the futures markets. Each time, the Commission has reaffirmed the wisdom of the Congressional mandate to fix appropriate speculative position limits.

Dramatic increase in total open interest in the oil futures markets starting in 2004

The oil futures market has experienced dramatic changes since 2004. There has been a substantial increase in total open interest, which has been accompanied by increased price volatility. During this period, however, oil supplies remained stable, as

⁹ Speculative Position Limits, 45 Fed. Reg. 79831, 79832 (December 2, 1980).

¹⁰ 1981 Notice, *supra* note 34 at 50940.

¹¹ *Id.* at 50940.

¹² *Id.* at 50945; *See also* 17 C.F.R. §150.5.

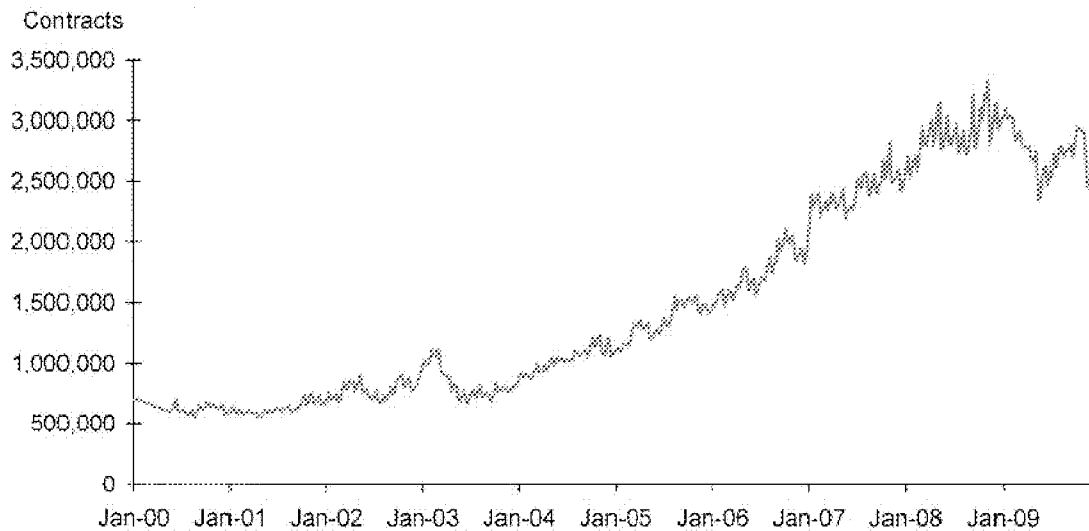
¹³ *See*, 17 C.F.R. §150.5(c)(2). The alternative for setting speculative position limits on the non-spot months is a formula based on open interest. *Id.*

oil consumption decreased in the developed countries while it increased in the developing regions of the world.¹⁴

- From 2000 through 2003, open interest in the New York Mercantile Exchange West Texas Intermediate (“NYMEX WTI”) crude oil contracts was relatively stable, growing modestly from 690,000 futures and options contracts to 822,000 contracts.
- During 2004-2009, the rate of growth accelerated and since then open interest has remained at historically high levels.
- At its peak in 2008, total futures and options open interest was 529% of open interest in 2000, having increased from about 630,000 contracts to 3,330,000 contracts.

The following chart illustrates this growth.

**Total Open Interest in NYMEX WTI Crude Oil Futures and Options
2000 – 2009**



Note: Data are from weekly Commission Commitment of Traders (“COT”) reports.

¹⁴ Data from the Energy Information Administration (“EIA”) show that from 2004 to 2007, the average annual petroleum consumption of developed countries declined from 49.43 million to 49.16 million barrels per day, while the average annual petroleum consumption in developing countries increased from 33.02 million to 36.98 million barrels per day over the same period.

Bona fide hedging has been relatively constant

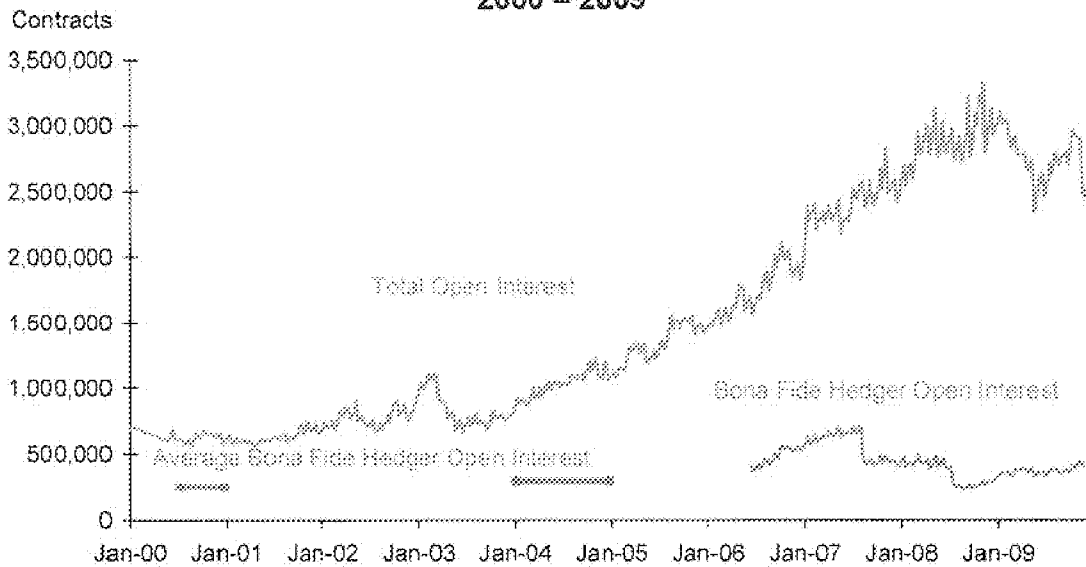
In contrast to the dramatic increases in total open interest over this period, trading by bona fide hedgers¹⁵ grew relatively little and, for a time, dipped below its level in 2000.

- Bona fide hedger open interest averaged 249,840 futures and options contracts in 2000. We arrived at this figure by subtracting the number of contracts held by swap dealers from the total open interest in the Commission's "commercial" category of its Commitments of Traders ("COT") Reports.¹⁶ The remaining open interest was composed of swap dealers, non-commercial traders and non-reportable traders.
- In June 2006, when the Commission first started to report separate trading by bona fide hedgers, they had an open interest of 409,913 contracts.
- On August 26, 2008, bona fide hedgers had open interest of 236,933. Thus, their total open interest was lower in absolute terms than it is estimated to have been in 2000 and their percentage of total open interest declined to less than a quarter of what it had been in 2000.
- On December 29, 2009, bona fide hedgers open interest was 424,122 contracts.
- The following charts illustrate the open interest of bona fide hedgers in contracts and as a percentage of open interest.

¹⁵"Bona fide hedgers" include oil producers, manufacturers, dealers and merchants and refers to Producer/Merchant/Processor/User category in Commission disaggregated COT reports.

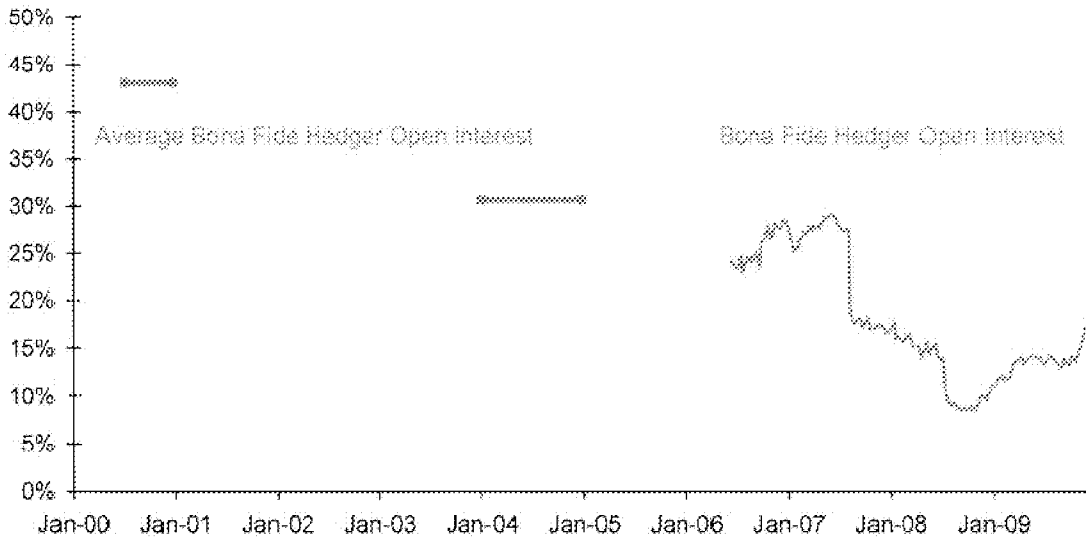
¹⁶ Swaps dealers generally are included in the CFTC's COT Reports as "commercial" traders. We were able to estimate the amount of open interest of bona fide hedgers based on internal CFTC data included in a scholarly paper. See Bahattim Buyuksahin, et al., *Fundamentals, Trader Activity and Derivative Pricing*, (December 4, 2008) (working paper) ("Buyuksahin 2008"), included as Appendix 1. However, as explained below, a significant amount of swap dealer open interest must be added to the above amount in order to capture all hedging open interest.

**Bona Fide Hedger and Total Open Interest
in NYMEX WTI Crude Oil Futures and Options
2000 – 2009**



Note: Total open interest data are from weekly Commission COT reports. Bona fide hedger open interest data are from Buyuksahin 2008 and Commission disaggregated COT reports.

**Bona Fide Hedger Open Interest as a Percent of Total Open Interest
in NYMEX WTI Crude Oil Futures and Options
2000 – 2009**



Note: 2006 – 2009 data are from weekly Commission disaggregated COT reports. 2000 and 2004 data are from Buyuksahin 2008.

In addition to the bona fide open interest totals reported by the Commission, total hedging open interest also includes that portion of swap dealer positions which manage the dealer's risk of over-the-counter transactions that are entered into by a swap counterparty for bona fide hedging purposes. These must be added to the above bona fide hedger open interest for an accurate picture of the percentage of open interest that represents total hedging open interest. Similarly, in order to obtain a true picture of the open interest held by speculators, an estimate must be made of the percentage of swaps transactions that are speculative in purpose. When these adjustments are made, as discussed below, it remains clear that the dramatic increase in market open interest since 2004 is due to an unprecedented influx of speculative trading.

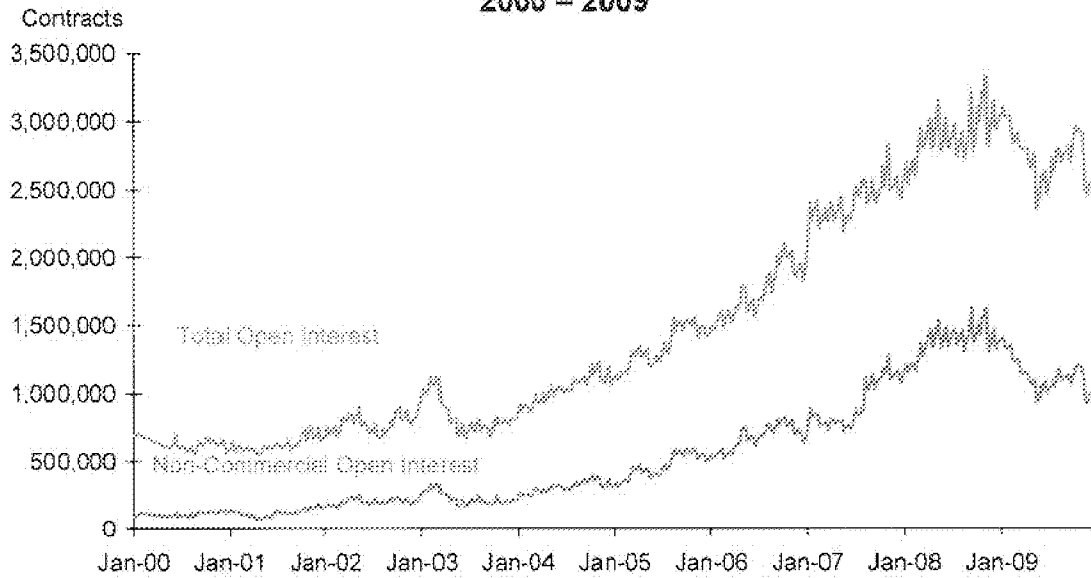
Growth in open interest is disproportionately speculative activity

The dramatic increase in open interest since 2004 has been caused by an influx of speculative traders.¹⁷

- At its peak on September 16, 2008, non-commercial traders' open interest in futures and options was 1,440% of their 2000 annual average, growing from approximately 113,428 contracts to 1,633,534 contracts.
- On December 29, 2009 non-commercial open interest was 815% of their 2000 annual average.
- Non-commercial traders' positions as a percent of total open interest more than doubled from, from slightly under 15% of the market at the beginning of 2000 to 38% by the end of 2009.
- The percentage of speculative open interest would be even higher if, as they should be, swap dealers engaging in speculative transactions were included with non-commercials.
- Investment in commodity index funds during this period, which are heavily weighted toward the purchase of long oil futures contracts and as a consequence do not contribute to informed price discovery, increased from around \$15 billion in 2003 to around \$200 billion in mid-2008.
- The following charts illustrate the growth of the open interest of non-commercial traders in contracts and as a percentage of open interest.

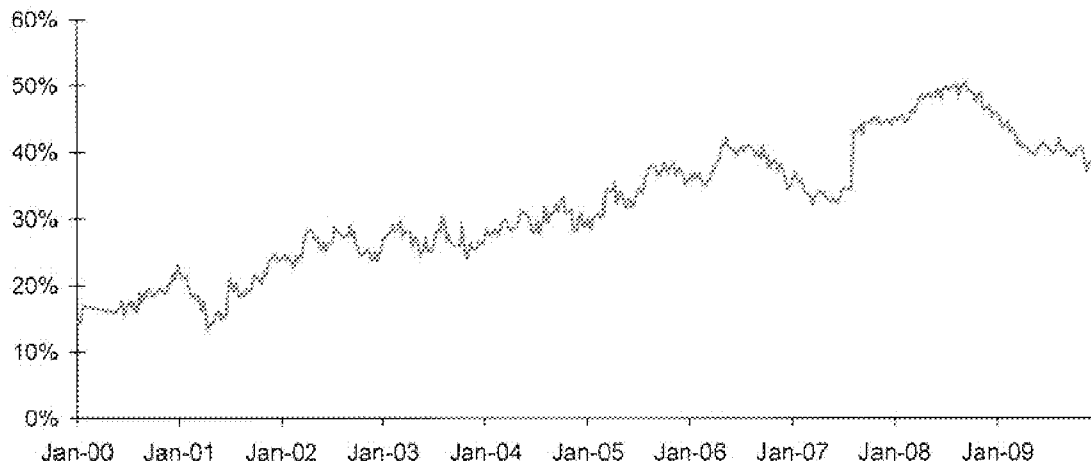
¹⁷ The "non-commercial traders" category from the Commission COT reports is used as a proxy for speculative traders. However, if swap dealer positions were included, as they should be, speculative open interest would be significantly higher both as an absolute number of contracts and as a percentage of open interest.

**Non-Commercial and Total Open Interest
in NYMEX WTI Crude Oil Futures and Options
2000 – 2009**



Note: Data are from weekly Commission COT reports. Non-commercial open interest is the spread position plus the average of long and short positions.

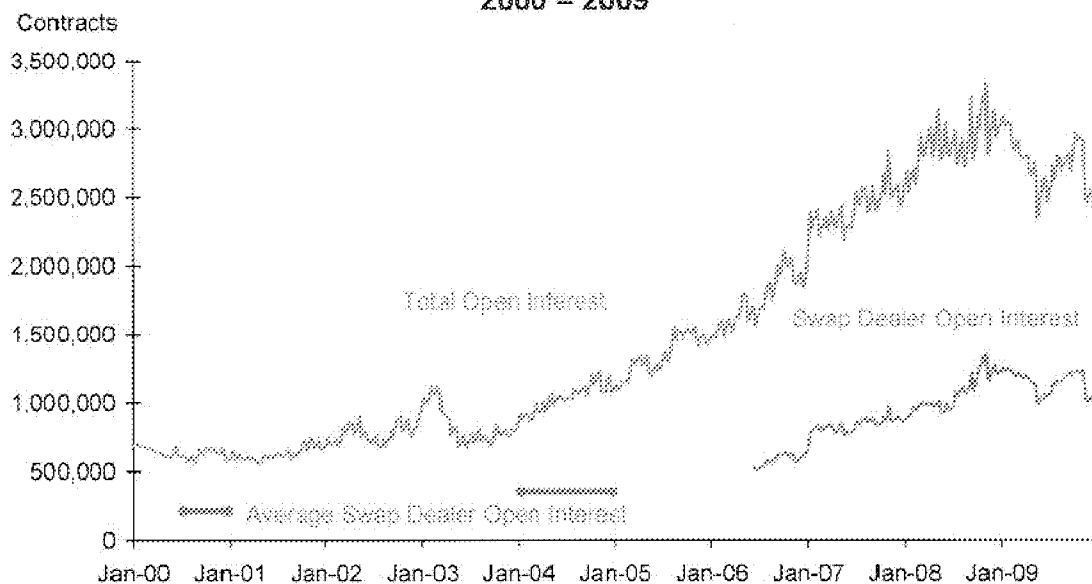
**Non-Commercial Open Interest as a Percent of Total Open Interest
in NYMEX WTI Crude Oil Futures and Options
2000 – 2009**



Note: Data are from weekly Commission COT reports.

To obtain a complete picture of speculative activity in the market, speculative swaps transactions must be added to the reported speculative interest of non-commercial traders. Such transactions, for example, manage the swap dealer's risk of entering into over-the-counter transactions with speculator counterparties, such as hedge funds. As the following charts illustrate, swap dealers held, and hold, somewhat over 35% of the total open interest.¹⁸

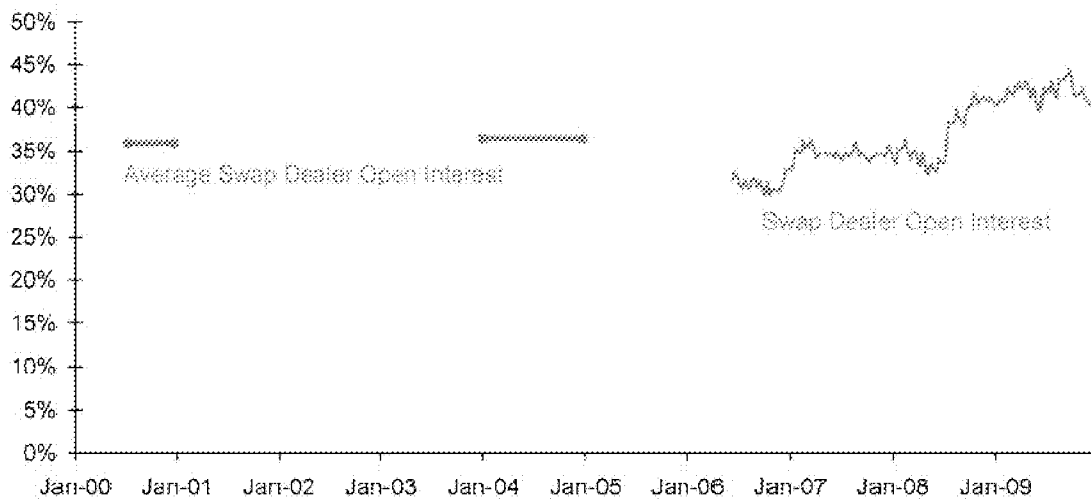
**Swap Dealer and Total Open Interest
in NYMEX WTI Crude Oil Futures and Options
2000 – 2009**



Note: Total open interest data are from weekly Commission COT reports. Swap dealer open interest data are from Buyuksahin 2006 and Commission disaggregated COT reports.

¹⁸ Data for June 2006 and later are from the Swap Dealer category in Commission disaggregated COT reports. Data prior to 2006 are from Buyuksahin 2008.

**Swap Dealer Open Interest as a Percent of Total Open Interest
in NYMEX WTI Crude Oil Futures and Options
2000 – 2009**



Note: 2006 – 2009 data are from weekly Commission disaggregated COT reports. 2000 and 2004 data are from Buyuksahin 2008.

At the same time that total speculative open interest has been growing at a disproportionately high rate, the amount of passive, long-only speculative investors has also been growing. As discussed below, between 2003 and mid-2008, the value of investment in commodity index funds increased over 1,200%, from around \$15 billion to \$200 billion. These index funds generally are weighted heavily in their trading toward the energy futures markets. Moreover, individual passive, long-only funds may have very substantial positions in particular energy contracts.¹⁹

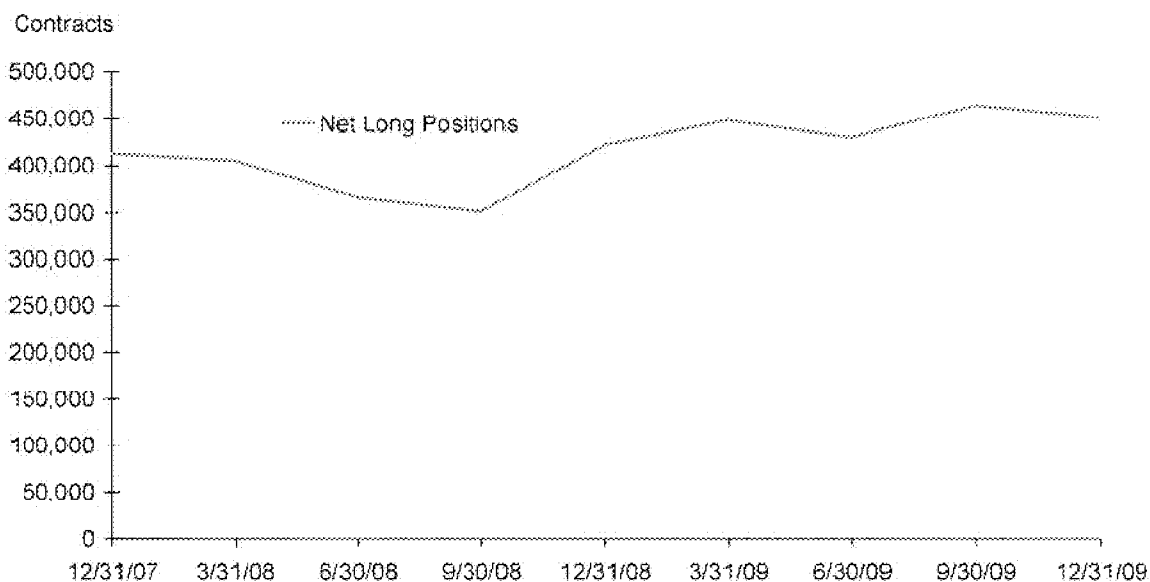
Commission data with respect to the amount of open interest held by passive, long-only traders in energy contracts or for such traders through their over-the-counter transactions is limited, especially prior to 2008. Nevertheless, some conclusions about the overall importance of passive, long-only traders to the market can be made. According to Commission data for 2008-2009, passive, long-only traders held a long position equivalent to 351,000-464,000 WTI oil futures contracts, or 12-19% of total long open interest in futures and options during 2008-2009 (see graphs below). These positions are generally held by swaps dealers and thus are not reflected in the Commission's reports of non-commercial trading activity.

As the following graph illustrates, passive, long-only trader positions, measured in contracts or as a percentage of open interest, fell in the third quarter of 2008.

¹⁹ For example, the position of the U.S. Natural Gas Fund during the summer of 2009 would have exceeded the proposed aggregate single month speculative position limit in natural gas of 88,500 contracts. See "Meeting on Energy Position Limits and Hedge Exemptions," Commodity Futures Trading Commission, (January 14, 2010)("CFTC Hearing") (Statement of Steve Sherrod at p. 10).

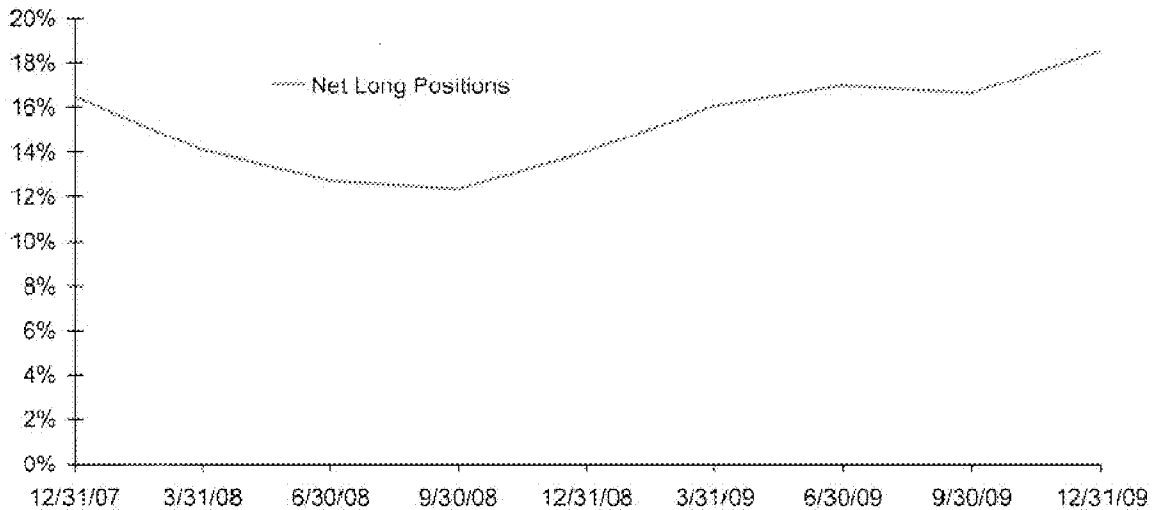
However, passive, long-only positions have since rebounded and now exceed the levels seen in the first half of 2008. According to Commission data, passive, long-only positions at the end of 2009 were 23% greater than at the end of June 2008, growing from the equivalent of 366,000 to 451,000 futures contracts. This corresponded to a growth in passive, long-only positions from the equivalent of 13% of total long open interest at the end of June 2008 to 19% at the end of 2009.

Commodity Index Investment in WTI Crude Oil Futures and Options Contracts 2008 – 2009



Note: Data are quarterly from the Commission Index Investment Data.

**Commodity Index Investment in WTI Crude Oil Futures and Options as a
Percent of Total Open Interest
2008 – 2009**



Note: Commodity index investment data are quarterly from the Commission Index Investment Data. Total open interest in WTI futures and options data are from weekly Commission COT reports.

High volatility accompanies growth of speculative open interest

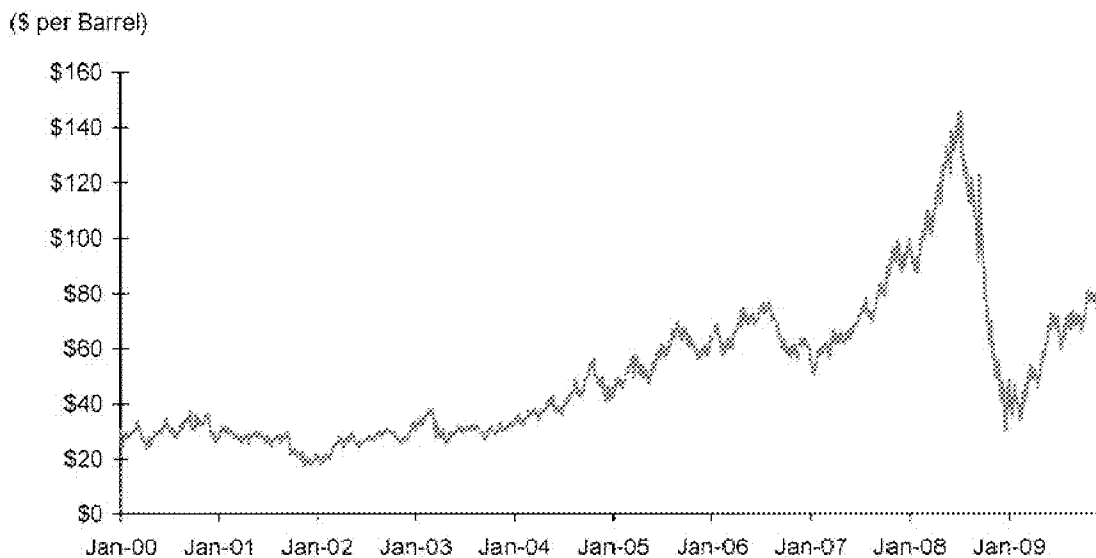
The marked rate of growth of open interest in the futures and options markets, most particularly by non-bona fide hedgers, corresponds to a period of very high price volatility.

- During the period 2005-2008 the yearly variance in the price of a barrel of oil was \$52, compared with an annual variance of \$16 during the 5-year period of 1999-2004.
- In 2004, daily volatility was generally less than \$1. During 2008, daily volatility of \$3 or more was the norm.
- On June 6, 2008, the price of crude oil increased \$10.75.²⁰

The following chart illustrates the increased volatility in oil prices beginning in 2004.

²⁰ CFTC Hearing, *supra* (testimony of the Air Transport Association of America, Inc. at p. 3.)

WTI Crude Oil Spot Price 2000 – 2009



Note: Data are from the EIA for Cushing, OK.

Effect of passive, long-only investors

The performance of the crude oil futures market to accurately discover prices reflecting fundamental supply and demand conditions is also being affected by the holdings of passive, long-only traders. Every month, holding everything else constant, the price of an oil futures contract must be sufficiently high to induce other traders to sell the equivalent of 12 to 19% of total open interest to passive, long-only traders beyond the amounts other traders already demand in the market. If there is not sufficient interest to sell this percentage of total open interest, the price must rise until enough sellers are willing to enter into these trades. This estimated 12 to 19% of total open interest may be even larger during roll periods. Thus, prices may need to rise to bring sellers into the market and induce them to assume the risk that the price of oil might increase still further, which would cause a loss on the position. This can create structural upward pressure on prices.²¹

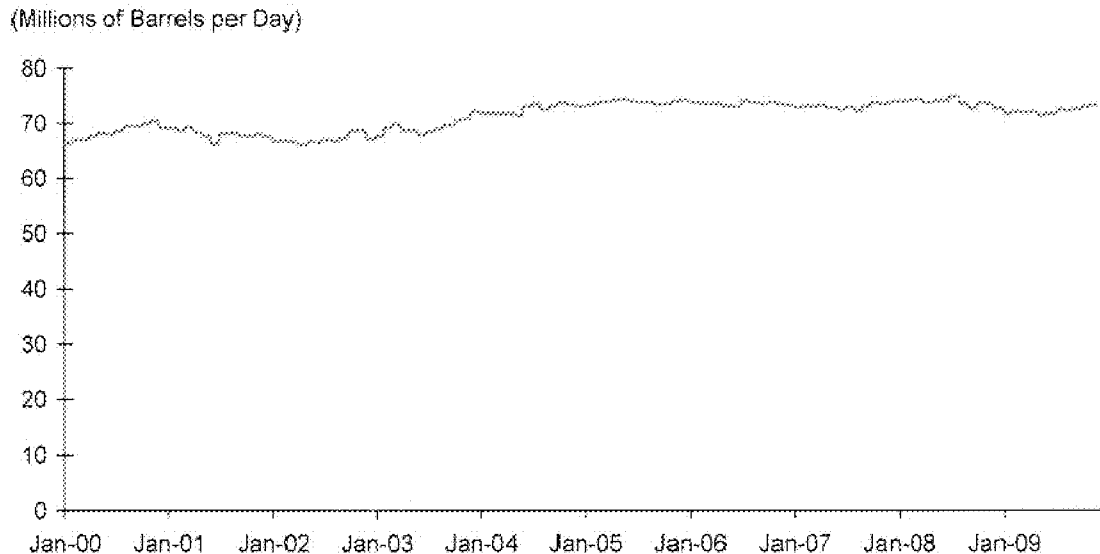
Volatility not caused by changes in the cash market; supply and demand remained stable

The sharp increases in open interest in the oil futures and options market contrasts to the steady level of crude oil production over this period, keeping available supplies

²¹ Most passive, long-only traders hold primarily the front and second month contracts, rolling into the next month out as the front month contract expiration approaches. Thus, most passive longs purchase their holdings every month. Depending on how the holdings are purchased - physical delivery futures contract, financial futures contract, or over-the-counter contract - passive longs may also sell their holdings every month.

stable over this ten year period. As the following chart illustrates, throughout the period production hovered around 70,000,000 barrels a day.

World Crude Oil Production 2000 – 2009



Note: Data are monthly from the EIA.

During this period, economic growth in the developing world caused developing world demand for oil to grow.²² However, as noted above, this growth was offset in part through dampened demand in the economically developed countries.²³ Numerous commentators have concluded that the increase in price of crude oil in the first half of 2008 and the fall in the second half materially diverged from the increase and decrease necessary to balance supply and demand.²⁴

The Commission's proposal

²² For example, see Hamilton, James D., "Causes and Consequences of the Oil Shock of 2007-08," *Brookings Papers on Economic Activity*, Spring 2009 ("Hamilton 2009"), pp. 10-11; and Saporta, Victoria and Matt Trott, "What Can Be Said about the Rise and Fall in Oil Prices?" *Bank of England Quarterly Bulletin*, 2009 Q3 ("Saporta 2009"), p. 218.

²³ Hamilton 2009, p. 11.

²⁴ For example, see Saporta 2009, p. 222 "Based on news about the balance of demand and supply in 2008, therefore, it seems that one can justify neither the rise in prices in the first half of 2008, nor the fall in prices in the second half." *See also* Hamilton 2009, p. 16: "But the speed and magnitude of the price collapse leads one to give serious consideration to the alternative hypothesis that this episode represents a speculative price bubble that subsequently popped." *See also Ibid.* p. 23: "With hindsight, it is hard to deny that the price rose too high in July 2008, and that this miscalculation was influenced in part by the flow of investment dollars into commodity futures contracts."

The Commission is responding to these profound changes in the oil market and to the recent price bubble in oil by proposing to adopt individual trader position limits that are aggregated across markets, using a formula based on total open interest. That formula would result in the all-months speculative position limit in crude oil being 98,000 contracts and the single month limit being 65,400 contracts. The Commission has not proposed any regulations addressing the role of passive, long-only traders, also known as index traders, under its framework of energy speculative position limits. Rather, it asks for comment on whether the Commission should propose regulations addressed to the unique issues posed by the recent influx into the market of index traders. Nor has the Commission proposed an overall cap on the level of speculation in the market.

The proposed levels are so high that they will not achieve the statutory mandate

Unfortunately, the position limits proposed by the Commission, if adopted, will have no effect on excessive speculation or oil price volatility. Section 4a of the Act directs the Commission to “fix such limits on the sale of such commodity for future delivery on or subject to the rules of any contract market . . . or on any electronic trading facility with respect to a significant price discovery contract, as the Commission finds are necessary to diminish, eliminate, or prevent” sudden or unreasonable fluctuations or unwarranted price changes caused by excessive speculation.

The Commission is proposing a formula that would result in the all-months combined speculative position limit in crude oil being 98,000 contracts and, the single month limit being 65,400 contracts. In addition, in contrast to the non-spot month speculative position limits which apply across markets, the proposal would set the spot-month speculative position limit separately by market and separately for physically and financially-settled contracts.²⁵

- The proposed all-months limit is approximately five times the NYMEX all-months position accountability level for crude oil of 20,000 contracts²⁶ and 50% higher than the proposed speculative position limit for crude oil recommended by the Chicago Mercantile Exchange.²⁷

²⁵ Under Proposed Rule 151.2, no person may hold a position in the spot month which exceeds the limit for that “class” of contract. A contract “class” is defined as either a physically or financially settled contract on a single market. In contrast, proposed rule 151.2(b)(1)(i) and (ii) sets an aggregate all-months combined or single month limit across markets in a referenced energy contract. “Reference energy contract” includes both physically or financially settled contracts on the same underlying commodity. Notice, *supra* at 4167-4168.

²⁶ In June, 2001, NYMEX certified amendments to the Commission replacing its speculative position limit in crude oil which was 20,000 contracts all-months or any single month with position accountability rules set at the same level. Subsequently, in 2007, NYMEX reduced the single month limit in crude oil contracts to 10,000. See CFTC Hearing (statement of Dan M. Berkovitz, General Counsel, at p. 7).

²⁷ The Chicago Mercantile Exchange in a concept release recommended that the Commission propose an all-months speculative position limit of 65,000 contracts. See Notice, *supra* at 4162. It is striking that the self-regulatory organization on which oil futures contracts are traded recommended a limit lower than that which the Commission proposed. This alone should act as a warning to the Commission that its proposal should be reconsidered.

- At these proposed levels, the limits will not be a meaningful constraint on excessive speculation. Commission staff has estimated that as proposed the limits would have affected a maximum of three traders in the NYMEX oil futures market²⁸ and only ten traders in *all* energy contracts during the period January 1, 2008 to December 31, 2009.²⁹
- As proposed, a single speculator could hold contracts equaling the entire available deliverable supply by holding both physically and financially settled contracts on two different exchanges (four contract “classes,” each with its own spot month limit of one-quarter the available deliverable supply).
- As proposed, a speculative trader in financially settled contracts might be able to hold a spot month position on a single market that is 15 times the spot month limit for physically settled contracts (five times the spot month limit—the proposed expanded spot month limit for financially-settled contracts— for each of three delivery days).³⁰
- Investment in commodity index funds during this period which are heavily weighted toward the purchase of long oil futures contracts increased from around \$15 billion in 2003 to around \$200 billion in mid-2008.

The reason that proposed speculative position limits for the back-months are so high and would affect so few speculators is that they appear to be designed to prevent market manipulation by individual traders, rather than excessive levels of overall speculation in the market. This focus is reflected in the use of deliverable supply to calculate the spot month limit levels, but setting very expansive back-month limits based on a percentage of open interest. This design may work well in deterring market manipulation, particularly with respect to the agricultural markets for which this model was developed initially by the Commission. However, this framework does not address excessive speculative activity that in the aggregate may have an unwarranted effect on prices. Since 2004, open interest has been inflated by an influx of speculative activity. Using this inflated open interest as a measure against which to set speculative position limits cannot possibly curb the very excesses in speculative activity that the Commission is directed to limit.

In the spot month, the Commission has proposed separate limits by market and by type of contract (financially or physically-settled) which in practice permits a single speculative trader to hold positions that are multiples of the spot-month limit. The Commission has recognized that,

²⁸ CFTC Hearing, *supra* (statement of Steve Sherrod, Acting Director of Surveillance at p. 7).

²⁹ *Id.*

³⁰ The Commission notes that “the spot-month for the major energy contracts generally is three days in duration.” Notice, *supra* at 4159.

applying a speculative position . . . without consideration of other directly or highly related contracts could result in applying a position limit only to a very limited segment of a broader regulated market.³¹

This reasoning is equally true for spot month positions,³² particularly in light of the Commission's conclusion that concerns with respect to excessive speculative trading are heightened during the spot month.³³

Finally, the Commission has not made any proposal to address the issue of the effect of passive, long-only traders in the market. Any effective speculative limit framework must address this issue. In recent years, index traders have grown rapidly in both absolute and relative terms. It is of paramount importance that the Commission address this issue in light of that growth, the Commission's finding in 1981 that the markets' capacity to absorb speculative interest is not unlimited, and the danger that the rapidly growing presence and activities of index traders is impairing the functioning of the market. Futures market regulation is based upon the ability of the markets and their participants to provide public benefits in the form of hedging and price basing opportunities. Passive, long-only traders, unlike typical speculators that trade on the basis of a view of market direction--whether informed by market fundamentals or technical analysis--do not contribute to the aggregation of market information. Moreover, the market behavior of index traders is unlike that of any other trader and their uniform presence affects the market, creating conditions for market congestion, particularly during roll periods. As the Commission has concluded, the capacity of a market to absorb the establishment and liquidation of large speculative positions in an orderly manner is not unlimited.³⁴ More generally, but of equal concern, passive, long-only traders, by holding positions that are uniformly long, exert an upward bias in the prices of the commodities that they hold.

Delta's suggested framework for speculative position limit

The purpose of the futures markets, as determined by Congress in the Commodity Exchange Act, is two-fold: they are intended to provide a means for producers and end users of commodities to manage price risks and discover prices.³⁵ Thus, the public interest in the regulation of futures markets is in their utility as a vehicle for hedging and price discovery. They were not, and are not, intended to create a vehicle for investment.

³¹ Notice, *supra* at 4153.

³² "Excessive Speculation in the Natural Gas Market," Report of the Senate Permanent Subcommittee on Investigations, (2007) ("PSI Report"). A recent report of the Senate's Permanent Subcommittee on Investigations ("PSI Report") made a number of findings relating to excessive speculation and its effect on pricing in an energy commodity. The PSI Report concluded, in part, that, "[t]he data analyzed show that prices on one exchange affect the prices on the other." *Id.* at 3. The PSI Report recommended that in order to prevent excessive speculation from causing unwarranted price changes, the Commission must conduct oversight "over a broader market." That conclusion remains valid with respect to enforcement of spot month speculative position limits.

³³ Notice, *supra* at 4159.

³⁴ "Establishment of Speculative Position Limits," 46 Fed. Reg. 50939, 50940 ("1981 Notice").

³⁵ Section 3 of the Act, 7 U.S.C. §5.

except to the limited extent necessary to perform these two functions.³⁶ Speculative position limits should, first and foremost, be set to ensure that the market can perform its hedging and priced discovery functions. In this context, excessive speculation can be viewed as that speculative trading activity that is in excess of the trading necessary to provide liquidity to hedgers or which contributes to informed price discovery.

With this in mind, Delta recommends that the Commission set individual speculative position limits based upon a target amount of speculative open interest *aggregated across all speculative traders*. The aggregate target amount of speculative activity would be set in reference to the most recent period when the market fulfilled its intended hedging and price discovery functions, before being affected by excessive levels of speculative activity. This corresponds to the period between 2000 and 2003 (the “base period”). This aggregate target amount would be adjusted annually to reflect the growth in bona fide hedging activity in the market. The following example illustrates this calculation, using data for 2000.³⁷

During 2000, the average open interest of non-commercials, as reported, was 121,800 futures and options contracts. Total speculative open interest would also include that portion of swap dealer open interest that offset dealers’ risk of transactions with speculator counterparties. Because the data does not separate swap dealer activity into its hedging and speculative components, we have assumed that one-half of the average swap dealer open interest during 2000 (104,319) was associated with speculator counterparties. Thus, we estimate the total average speculative open interest (non-commercials plus one-half swap dealer open interest) during the base period at 226,119 contracts.

Similarly, bona fide hedging interest would be calculated by adding the bona fide hedger open interest to the amount of swap dealer activity that is associated with hedging transactions by the swap dealer counterparties. We have assumed that the remaining one-half of swap dealer open interest is associated with bona fide hedging activity. The average hedging open interest during 2000 was 354,159 futures contracts (249,840 bona fide hedging open interest plus 104,319, which is one-half swap dealer open interest). Thus, in 2000, hedging interest was 61% of total open interest and speculative interest was 39% of total open interest.

By contrast, using the same methodology, in 2009, average hedging interest was only 35% of total open interest and speculative interest 62% of open interest, with non-

³⁶ Although the desire of investors to diversify their portfolios is understandable, investors seeking to diversify their portfolios over different asset classes have many opportunities to do so without creating the unintended and adverse social costs that are a consequence of attempting to invest in futures as another form of asset class. See e.g., *The Great Mutual Fund Trap: An Investment Recovery Plan*, by Gensler and Baer. Broadway Books (2002)

³⁷ Delta only has bona fide hedger and swap trader position data available for the year 2000 during the base period. This data is from Buyuksahin 2008. The Commission would have available to it, or be able to obtain, data for the entire base period. Although the calculations are performed using only data from 2000, we believe that the overall results would be very similar using data for all four years of the base period.

reporting traders making up the remainder. The ratio of hedging to speculative open interest has flipped.³⁸

The target amount of aggregate speculative open interest (the “Speculative Open Interest Target”) would be set to maintain an approximate 61%-39% ratio of hedging to speculative interest. The Speculative Open Interest Target would be adjusted annually to reflect changes in the total open interest of hedgers in the market. For example, average hedging open interest during 2009 was 951,451 (378,124 contracts bona fide hedging plus 573,328, which is one-half the swap dealer open interest). For this 951,451 hedging open interest to be 61% of total market interest, the Speculative Open Interest Target amount would be 608,260 contracts.

Adjusting the base period Speculative Open Interest Target amount in this manner ensures that there is sufficient growth in the aggregate target amount of speculative activity for the current period to continue to meet the liquidity needs of hedgers. This adjustment maintains the same ratio between hedging and speculative trading in the current period as prevailed during the base period.

The aggregate target amount of speculative open interest would then be translated to a limit that would apply to individual traders. The Commission would set this number taking into account the size of the aggregate target, the number of speculative traders in the market, and the distribution of size of individual positions. One method for translating the aggregate target to individual speculative position limits would be simply to divide the aggregate target limit by the number of speculative traders. However, this would likely result in an unnecessarily restrictive limit because many traders are unlikely to approach a limit based on a simple average calculation. A better method for translating the aggregate target to individual speculative position limits would make use of the Commission’s large trader data. Using that data, each reportable trader in the market would be enumerated and ranked by open interest. Those amounts would be summed in order of ranking from smallest to largest, using an iterative process to find the individual speculative position limit.³⁹

³⁸ Average hedging open interest during 2009 was 951,451 (378,124 contracts bona fide hedging plus 573,328, which is one-half the swap dealer open interest). Average speculative open interest during 2009 was 1,695,767 (1,122,439 contracts non-commercial interest plus 573,328, which is one-half the swap dealer open interest). Total open interest was 2,740,266.

³⁹ By way of illustration, after all traders are enumerated and ranked by open interest, starting from the trader with the smallest open interest, the open interest of all traders with an open interest less than or equal to the aggregate target limit divided by the number of speculative traders would be summed. This summed open interest of smaller traders would be subtracted from the aggregate target amount of speculative open interest, and the corresponding number of smaller traders would be subtracted from the total number of traders. The remaining target amount would be divided by the remaining number of traders to identify the individual speculative position limit. This process could be iterated using the new speculative position limit. The position limit would rise slightly with each iteration until the increase caused no additional traders to hold a position less than the updated limit. This would be the final limit.

The Commission currently sets a limit for long and short positions, rather than an open interest limit. While not identical, the aggregate open interest limit number could also be used as the aggregate limit on short and long positions.

The target amount of speculative open interest is not intended to be, and would not act as, an absolute limit on overall speculative open interest. Rather, it is intended to be a guide and measure to be used in setting the levels of speculative position limits. In any given year, total speculative open interest might very well exceed the Speculative Open Interest Target amount for that year. For example, if there were an influx of speculative traders in one year, or if the number of speculative traders stayed constant but individual speculators began to assume much larger than their customary positions, the overall target amount would be exceeded even though each individual trader remained within the applicable speculative position limit. Thus, the target amount would not act as a hard and fast cap on market activity and would allow considerable flexibility for traders to respond to changing market conditions. However, the Commission would use that data in adjusting the speculative position limit for the following year, restoring the market to its approximate base period composition and maintaining a healthy balance between hedging and speculative activity.

The target amount methodology offers a meaningful method of correcting for the anomaly of incorporating into the calculation of position limits the influx of speculative activity that entered the market starting in 2004, and based on historical precedent, this level of speculative activity should provide an adequate amount of liquidity to bona fide hedgers in the market and would constrain only excessive speculative activity. The target amount methodology, unlike the Commission's methodology, does not rely on a percentage of total open interest as a measure for setting speculative open interest.

This proposed framework for establishing speculative position limits reflects the growth in open interest in the crude oil futures market of bona fide hedgers and maintains a sufficient opportunity for speculative trading to provide adequate liquidity to hedgers and robust price discovery, but without unbridled and excessive speculative activity, and by doing so, more closely meet Congress' direction to set limits on excessive speculation.

Delta's approach is informed by Commission precedent. The formula used by the Commission which yields the unreasonably high speculative position limits is only one of two alternative methods under which exchanges may determine the appropriate levels for exchange-set speculative position limits under Commission rule 150.5(c)(2), 17 C.F.R. §150.5(c)(2). That rule provides that speculative position limits may also "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." Delta believes that in light of the pronounced influx of speculative activity to the oil market during the recent period marked by extreme price volatility, using customary position sizes will yield a speculative position limit that more closely adheres to the statutory goals of section 4a of the Act. Delta believes that in order to set position limits based on customary size of positions, the Commission must determine a base period prior to the recent and unprecedented influx of speculative open interest. Delta believes that in light of the drastic recent changes in the composition of the oil futures market, the most appropriate measure for determining customary size of positions is based on the change in size of hedger's positions using a base period preceding 2004, when the market appeared to function well and without the recent unprecedented price volatility.

With respect to the spot-month speculative position limit, Delta agrees that a formula of one-quarter of the available deliverable supply is an appropriate measure, but only if strictly applied as a unified limit across markets and type of contract. No speculative trader should be able to exceed that amount by dividing his or her position between different markets or by holding his or her position either entirely or partially in financially settled contracts.

Separate sub-limit for aggregate positions of passive, long-only speculators

Using this as a general framework, Delta would also establish an overall target limit for passive, long-only traders within the larger target for all speculative traders. Delta strongly recommends that the Commission propose setting a speculative position limit applicable to passive, long-only traders ensuring that such traders, as a group, (including swap dealers covering the risk of over-the-counter transactions with such counterparties) do not exceed a stated proportion of speculative open interest. This limit would be adjusted periodically to reflect changes in market composition and in total open interest.

Although the Commission has not previously distinguished types of speculative trading strategies in setting speculative position limits, Section 4a of the Act empowers the Commission to do so, providing that,

Nothing in this section shall be construed to prohibit the Commission from fixing different trading or position limits for different commodities, markets, futures . . . or different trading limits for buying and selling operations

Accordingly, Section 4a contemplates that a different speculative position limit could be fixed for a trader that engages exclusively in buying futures with reference to a commodity index.

Refinement of available data

The Commission's collection and publication of its COT Reports has over the years contributed a great deal to scholarly analysis of the markets and is an important public service. However, that data has not kept pace in reporting on the profound changes in market composition. In order to implement the speculative position limit framework that Delta is recommending, supplementation and refinement of Commission data are necessary in order to properly assign swap dealer positions to the bona fide hedge or speculator category.

The data in the COT Reports is produced once a week and provides only a very summary view of the market. The Commission collects large trader reports from every trader over the reportable level, which provides greater detail, enabling more refined analysis of these issues. By not releasing disaggregated account-level information,⁴⁰

⁴⁰ Section 8(a) of the Act prohibits the Commission from releasing information that would separately disclose the business transactions or market positions of any person. Position information could be

commenters are precluded from analyzing the relative distribution of traders with various size positions in the market or from even understanding how many traders might be affected by the limits at the levels proposed by the Commission.

Moreover, the COT Report data has additional inherent limitations. The primary limitation with respect to the COT Reports is the classification scheme in use. The Commission's long-standing classification scheme has divided all market users into two categories—commercial or non-commercial. Swap dealers were classified as commercials. Moreover, all speculators were included within the non-commercial category, including passive, long only traders and index funds, who have a unique footprint in the market.

In response to concerns about the role of swap dealers and passive, long-only traders, Commission staff in 2008 issued a report examining changes in the composition of the markets and the Commission's data as it relates to these two categories of market participant.⁴¹ Based on recommendations in this report, the Commission removed swap dealers from the "commercial" category and began reporting their positions in a separate category. The Commission also began issuing a special quarterly report detailing the positions of index traders as a category.

Delta has analyzed the Commission's COT Reports to understand the changing composition of the oil futures market between hedging and speculative interests. It has used "non-commercial" traders as a proxy for speculative interest. However, this underestimates the amount of speculative interest because it does not include the portion of swap dealer positions which manage the risk of speculative positions.

In analyzing the amount of hedging use of the oil market, Delta has relied upon the Commission's "Disaggregated Commitment of Traders Report" data which removes swap dealers from the commercial category. The revised category includes positions of producers, merchants, processor, and commercial users, which Delta terms "Bona fide hedgers." Because the revised Commission classification only applies to data beginning in 2006, data for periods prior to June 2006 are limited to averages in 2000 and 2004.⁴²

Despite the recent revisions to the COT Reports, however, the problem remains that the new classification of "swap dealer" does not distinguish among the types of positions that the swap dealer may hold. A swap dealer's futures positions may be managing the risk of its counterparties that are entering into over-the-counter transactions for bona fide hedging purposes, as does Delta. The swap dealer also could be managing the risk of its counterparties that are entering into over-the-counter transactions for purely speculative exposure, such as would a hedge fund or an index trader, or the swaps dealer

released without identifying the identity of the person. The Commission should make such position data available, cleansed of any identifying details, in order to assist the public in analyzing and commenting upon these important issues.

⁴¹ See, "Staff Report on Commodity Swap Dealers and Index Traders," available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcstaffreportonswapdealers09.pdf>, (last visited on April 26, 2010).

⁴² Data for periods prior to June 2006 are based on Buyuksahin 2008. See Appendix 1.

may be entering futures positions for its own proprietary speculative exposure. It is not possible to understand the true market composition between hedging and speculative positions without being able to differentiate the swap dealers' positions as representing either bona fide hedging or speculative interests. Delta recommends that the Commission further refine its publicly available data in this manner in order to provide greater transparency on the composition of the market. Such transparency is necessary to implement the framework for speculative position limits that Delta has suggested in this letter. More basic, the Commission's and commenter's very consideration of and public discourse regarding these critical policy matters would be aided by the availability of improved data.

Commission should not delay action

Some have suggested that the Commission delay acting on this proposal pending its ability to impose speculative position limits across all markets, including over-the-counter transactions and over non-U.S. markets providing direct access to U.S. traders.⁴³ Delta strongly supports the application of a unified, aggregate speculative position limit which applies to all economically-linked exchange and over-the-counter derivatives contracts on energy commodities. Delta notes in this regard, that such proposals are under consideration by the Congress as part of the regulatory reform of the financial system.

However, in Delta's view, the fact that the Congress may provide the Commission with additional authorities is not a valid reason for postponing acting within its current authority. Indeed some would argue that the Commission currently is directed by the Act to set speculative position limits when it determines such action is necessary to diminish, eliminate or prevent unwarranted fluctuations in price due to excessive speculation. In 2008, Congress provided the Commission with additional authority over exempt commercial markets with significant price discovery contracts. The current proposed rulemaking responds to Congress' intent that such economically linked contracts be regulated by the Commission. The Commission should exercise its current mandate with the understanding that if Congress expands that mandate, then further action will be appropriate.

Of course, there is always the possibility that a more comprehensive response to a problem can be taken. However, section 4a has been in the Act since 1936 and was exercised by the Commission's predecessor agency, the Commodity Exchange Authority. Some of the same arguments being made now against setting speculative position limits in energy contracts, such as the absence of such limits on foreign markets, have been raised from the earliest days of the Commission.⁴⁴ Those arguments were rejected then and should be now as well.

⁴³ See Notice, *supra* at 4170 (statements of Commissioners Dunn and Sommers).

⁴⁴ In 1981, one commenter suggested that the Commission should refrain from requiring U.S. contract markets to set speculative position limits on futures contracts on international soft commodities because foreign markets did not have such limits. See 1981 Notice, *supra* note 34 at 50940. The Commission responded that it did not believe that "this relieves domestic contract markets from their responsibility to

As noted in this letter, the speculative bubble in oil prices has concrete detrimental consequences for the real economy. Had the Commission acted sooner, it is possible that some of the worst excesses may have been averted. In light of that experience, further delay will only leave open the possibility of a recurrence while the Commission waits for more comprehensive authority. By acting now to limit speculative positions in energy commodities, if Congress provides the Commission with such additional responsibilities over over-the-counter transactions, the Commission will have taken the important step of having established a proper foundation for subsequent action.

* * * * *

By proposing aggregate speculative position limits across energy derivatives markets, the Commission has taken the most important step in addressing the unwarranted price fluctuations of recent years—it has recognized the problem and taken the first step to address it. The price bubble in energy occurred with no significant change in the dynamics of the cash markets. The main arena where this pricing bubble played out was in the derivatives markets and the main effects of this bubble were on persons not in the derivatives markets, including the 10,000 Delta employees who have lost their livelihoods and the many communities that have been hit with reduced service by Delta and its sister air carriers as a result of the energy price bubble.

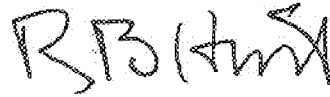
Delta supports this basic tenet of the Commission's proposed rulemaking-- that intervention in energy commodity markets is necessary to address the problem of unwarranted price fluctuations caused by excessive speculative activity. However, if speculative limits are to be effective, they must be set at meaningful levels. Delta in this comment letter has suggested an alternative calculation for determining individual speculative position limit levels based upon a target amount of speculative open interest aggregated across all speculative traders. Delta believes that limit levels set by this methodology would be effective in achieving the intent of section 4a of the Act of diminishing, eliminating or preventing the sudden, unwarranted and unreasonable price fluctuations caused by excessive speculation, and urges the Commission to amend its proposal accordingly.

Delta's responses to the specific questions raised by the Commission in the Notice are appended hereto as Attachment A.

Please contact the undersigned at (404) 715-2830, or our outside counsel, Paul M. Architzel of Alston & Bird, L.L.P. at (202) 756-3492, if you would like to receive the data underlying the graphs in this letter or if we can provide any additional information.

prevent the potential adverse effect which may be caused by extraordinary large speculative positions held on such contract markets. *Id.* The same holds true today.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. B. Hirst". The signature is written in a cursive, somewhat stylized font.

Richard B. Hirst,
General Counsel

Attachments

cc: Chairman Gensler
Commissioner Dunn
Commissioner Chilton
Commissioner Sommers
Commissioner O'Malia
Daniel Berkovitz, General Counsel
Richard A. Shilts, Director DMO
Stephen Sherrod, Acting Director of Surveillance
David VanWagner, Chief Counsel, DMO

ATTACHMENT 1

Response of Delta Airlines, Inc. to CFTC Questions

“Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations; Proposed Rule,” 75 Fed. Reg. 4144 (January 26, 2010).

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?

As Delta discusses in its comment letter at pages 4-15, there has been a recent, sustained price bubble in oil prices. This price bubble occurred at the time of a tremendous and unrestrained influx of speculative trading in the futures markets for this commodity. Speculative positions limits are necessary to diminish, eliminate or prevent the burden caused by this unrestrained speculative activity.

2. Are there methods other than Federal speculative position limits that should be utilized to diminish, eliminate, or prevent such burdens?

Delta in its comment letter at pages 18-22 recommends an alternative framework for setting speculative position limit levels.

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?

Delta at page 19 recommends that the Commission use as a base period for its determination prior to the recent unprecedented influx of speculative trading activity into the energy markets. The futures market in crude oil worked well during the period prior to 2004 and that period should be used to evaluate proposed limits. The market during that time provided hedging opportunities for hedgers and was a good source for price basing. The Commission can evaluate the liquidity that was in the market in that time, compare that to the current level of bona fide hedgers in the market, and determine a level for speculative position limits that would continue to meet the liquidity needs of hedgers in the market.

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 subgroup of contracts within a class be treated during the spot month for the purposes of enforcing the proposed speculative position limits?

Delta believes that there should be no difference in the framework that applies to the spot month from the framework proposed by the Commission for non-spot month limits. Delta believes that the spot month limit should be aggregated across all markets and all "classes." Where the spot month limit applies on a daily basis, the limit should be applied on both a net and gross basis so that inter-day netting of positions would not be recognized. The Commission has noted that market surveillance concerns are heightened during the spot month. Accordingly, spot month limits should be applied rigorously at one-quarter of available deliverable supplies.

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.

As Delta discusses at pages 16-18 of its letter, the proposed limits based on an open interest formula are fundamentally flawed because the open interest currently incorporates the recent influx of speculators. As Delta points out, this is excessive speculative activity when compared to the open interest of bona fide hedgers. Delta believes that in light of this, the limits as proposed by the Commission are too high to be an effective constraint on excessive speculation in these markets. Delta at pages of its comment letter recommends that the Commission adopt an alternative calculation for determining the appropriate level for speculative position limits.

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 * * *"

As Delta explains in its letter, using customary position size will result in speculative position limits that more clearly will achieve the purpose and mandate of section 4a of the Act. However, it is important that the Commission choose a base period for

determining “customary positions” that is representative of typical market conditions. In this regard, Delta notes that former rule 1.61 recognized that the exchange would have some degree of discretion in choosing the base period examined in setting speculative position limits, providing that, “these factors shall include position sizes customarily held by speculative traders on such market for a period of time selected by the contract market.” 1981 Notice, *supra* at 50945.

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.

Delta is of the view that the Notice sets forth the basis for requiring that hard speculative position limits also be adopted by the individual contract market or exempt commercial market, at a level which will act as a meaningful constraint on excessive speculative trading activity.

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?

As Delta explains at pages 22-24 of its comment letter, Commission data should be enhanced by categorizing swap dealer open interest as hedging or speculative. Delta believes that “looking through” transactions is necessary, at least for data collection purposes.

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?

Delta believes that the Commission should rely on special calls under rule 18.05 only for unforeseen and unusual conditions. Where the need for a report is foreseeable, it should be a routine reporting requirement that is carried out periodically.

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.

Delta takes no position on the application of the proposed framework to agricultural commodities. However, it would note that the issue of passive, long-only traders would apply to all futures markets for tangible commodities. Moreover, the concept of aggregate speculative position limits that apply across markets to different contract "classes" would also apply to all futures contracts on tangible commodities.

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.

Please see the answer to question 10 above.

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?

Delta supports the existing policy. However, the Commission should explore means of enforcing an aggregate limit that would include such foreign markets as it has proposed for domestic markets.

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.

As Delta discusses at pages 24-25 of its comment letter, the Commission should proceed with adopting final rules with the amendments recommended by Delta. If the Congress amends the Act as suggested in the Commission's question, then the Commission could fold such transactions and markets within the speculative position framework.

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?

Generally, Delta would support reviewing and amending speculative position limits no more frequently than annually.

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-only 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?

Please see page 22 of the Delta comment letter.

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 administrative 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?**

Please note that Delta does not support the approach proposed by the Commission of applying separate spot month speculative position limits to different classes of contract.

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?

Delta believes that this authority is best exercised by the Commission, which unlike a market, does not have a commercial incentive for approving exemptions.

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?**

Delta believes that the Commission should retain discretion to take the approach that is administratively most efficient for each commodity. Where data are readily available and publicly available, the Commission should accept such data and permit the exchange to challenge the conclusion. Where data is not publicly available, the exchange should be required to demonstrate the reliability of data that it provides to the Commission for this purpose.

APPENDIX 1

BUYUKSAHIN 2008 DATA

Table 5: Open Interest by Maturity and Trader Category – Annual Averages

	Futures Only					Futures & Futures-equivalent Options					Total	Diff vs. 2000
	0-3 months	3-12 months	1-3 years	3+ years	Total	Panel A: 2000						
						0-3 months	3-12 months	1-3 years	3+ years	Total		
Manufacturers	30,391	13,185	7,658	2,479	53,883	37,601	16,720	7,985	2,479	64,785		
Other Commercials	3,292	1,864	120	-	5,076	3,540	1,810	120	-	5,471		
Producers	11,131	6,733	2,413	899	21,176	15,575	9,947	2,494	899	28,915		
Dealers/Merchants	49,401	37,665	20,068	5,173	112,307	58,100	42,351	20,691	5,173	126,316		
Commodity Swap Dealers	41,155	42,206	49,682	9,090	133,132	68,684	77,563	53,300	5,091	208,637		
Unclassified Commercials	11,715	4,642	1,688	72	18,117	16,267	6,018	1,997	72	24,354		
Non-Registered	9,530	3,602	654	736	14,581	21,891	10,418	728	736	33,774		
Floor Brokers/Traders	5,320	12,250	6,432	443	25,445	22,695	23,063	7,819	443	54,039		
Hedge Funds	16,542	7,278	6,340	595	30,765	18,072	8,244	7,077	595	33,988		
Total	179,535	129,175	86,256	19,487	414,423	262,425	196,155	102,210	19,488	580,278		
Commercial	147,653	106,696	72,836	17,713	343,692	199,757	154,409	86,588	17,713	458,477		
Non-Commercial	32,452	23,080	13,426	1,774	70,731	62,668	41,745	15,623	1,775	121,800		
NonComm + Swap Dealers	73,608	65,286	54,107	10,864	203,863	151,342	119,308	68,923	10,865	330,438		
						Panel B: 2004						
	0-3 months	3-12 months	1-3 years	3+ years	Total	Diff vs. 2000	0-3 months	3-12 months	1-3 years	3+ years	Total	Diff vs. 2000
Manufacturers	27,266	9,533	10,932	1,273	49,004	-9%	34,543	11,756	11,074	1,273	58,646	-9%
Other Commercials	2,031	326	-	1	2,360	-54%	2,935	909	36	1	3,882	-29%
Producers	11,119	2,897	486	1	14,503	-32%	12,463	3,190	501	1	16,155	-44%
Dealers/Merchants	78,364	55,359	25,046	13,683	172,452	54%	99,832	75,068	29,837	13,879	218,615	73%
Commodity Swap Dealers	64,812	78,102	55,763	23,352	222,029	67%	108,535	145,303	75,881	24,810	354,529	70%
Unclassified Commercials	120	539	2	-	661	-96%	126	503	3	-	713	-97%
Non-Registered	20,931	9,060	4,566	3,241	38,188	162%	41,808	25,532	6,879	3,241	77,460	129%
Floor Brokers/Traders	16,130	20,660	8,599	2,460	48,190	89%	58,512	52,444	9,731	2,460	123,146	128%
Hedge Funds	59,220	18,052	7,752	3,525	88,550	168%	74,950	29,117	10,857	3,538	118,463	249%
Total	279,995	194,469	113,935	47,536	635,936	53%	433,704	343,904	144,798	49,202	971,609	67%
Diff vs. 2000	56%	51%	32%	144%	53%		65%	75%	42%	152%	67%	
Commercial	183,713	146,757	92,220	38,310	461,008	34%	258,434	236,811	117,332	39,963	652,539	42%
Non-Commercial	96,282	47,713	21,707	9,226	174,928	147%	175,270	107,093	27,467	9,240	319,059	162%
NonComm + Swap Dealers	161,694	125,814	77,470	32,578	396,957	95%	283,695	252,397	103,348	34,049	673,598	164%
						Panel C: 2008						
	0-3 months	3-12 months	1-3 years	3+ years	Total	Diff vs. 2000	0-3 months	3-12 months	1-3 years	3+ years	Total	Diff vs. 2000
Manufacturers	21,990	8,265	4,978	89	35,423	-34%	26,874	10,069	5,355	189	42,487	-34%
Other Commercials	891	373	170	-	1,404	-72%	1,000	387	170	-	1,556	-72%
Producers	13,233	2,490	386	-	16,109	-24%	15,196	3,261	523	-	18,980	-34%
Dealers/Merchants	86,349	63,208	43,399	9,844	202,800	81%	147,277	118,386	62,819	14,635	343,037	172%
Commodity Swap Dealers	126,363	135,701	128,288	49,876	440,227	231%	217,358	343,346	292,534	94,713	947,952	354%
Unclassified Commercials	-	-	-	-	-	-100%	-	-	-	-	-	-100%
Non-Registered	74,931	41,741	23,672	5,116	147,880	914%	191,023	179,688	52,800	11,414	434,925	1388%
Floor Brokers/Traders	23,018	24,402	2,593	1,103	50,916	160%	139,676	147,703	10,736	1,103	299,218	454%
Hedge Funds	125,066	145,722	76,899	24,692	372,378	1113%	181,590	252,291	137,939	38,314	610,134	1695%
Total	471,830	421,903	279,685	93,820	1,267,137	206%	919,992	1,055,052	562,877	160,169	2,698,289	365%
Diff vs. 2000	163%	227%	224%	381%	206%		251%	438%	451%	723%	355%	
All Commercials	246,795	210,037	177,221	59,909	693,963	102%	407,704	475,369	361,401	109,538	1,354,012	195%
All Non-Commercials	223,034	211,865	102,364	33,911	571,174	708%	512,288	579,682	201,476	60,831	1,344,278	1004%
NonComm + Swap Dealers	349,897	347,566	230,652	83,786	1,011,401	398%	729,646	923,029	494,010	145,545	2,292,230	594%

Notes: Table 5 shows open interest in crude oil futures and options. After averaging the long and short positions of every large trader in any given contract, we add these estimates of open interest appropriately (e.g., for all commercial traders, or for all positions less than 3 months, etc.). We then compute annual averages for each trader category and maturity bucket in 2000 (July-Dec.), 2004 (Jan.-Dec.), and 2008 (Jan.-Aug.). Table 5 is comparable to Figures 5-6.