Deutsche Bank

March 28, 2011

Via email: Secretary@Commission.gov

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

Re: **Position Limits for Derivatives and Associated Regulations, RIN Nos. 3038-AD15 and 3038-AD16 (76 Federal Register 4752 (CFTC, January 26, 2011)) (the "*Proposal*")**

Dear Mr. Stawick:

Deutsche Bank AG (***"Deutsche Bank"*** or ***"DB"***) welcomes the opportunity to submit this letter in response to the Commodity Futures Trading Commission's ("***CFTC***" or "***Commission***") request for comments in respect of the Proposal.

Deutsche Bank, a banking company incorporated under the laws of the Federal Republic of German, is the largest bank in Germany and one of the largest financial institutions in Europe and the world, offering banking, financial, and investment products and services to private individuals, corporate entities and institutional clients around the world through its three group divisions:

- The Corporate & Investment Bank, which includes two divisions: (i) Corporate Banking & Securities, providing mergers and acquisitions and general corporate finance advisory services, equity and debt financing, and risk management and structuring services to corporate clients, financial institutions, financial sponsors, governments and sovereigns, and (ii) Global Transaction Banking, providing commercial banking products and services to corporate clients and financial institutions, including trade finance, cash management, and trust, agency, depositary, custody and related services.

- Private Clients and Asset Management, which includes two divisions: (i) Asset and Wealth Management, offering a range of products, including mutual funds and structured products, across many asset classes; management of real estate and infrastructure investments and private equity funds of funds; specialist advisory and portfolio management services to insurers and re-insurers globally; and investment solutions across both traditional and alternative strategies to all other (non-insurance) institutional clients, such as pension funds, endowments and corporates; and (ii) Private and Business Clients, offering a similar range of banking products and services throughout Europe and Asia, including portfolio/fund management and brokerage services, loan and deposit services, as well as traditional current accounts, savings accounts and time deposits; and

- Corporate Investments, which manages DB's global principal investment activities, including certain credit exposures, private equity and venture capital investments, private equity fund investments, corporate real estate investments, industrial holdings and other non-strategic investments, and holds certain private equity type investments that have been transacted both on behalf of clients and for DB's own account, directly and through private equity funds, including venture capital opportunities and leveraged buy-out funds.

As of December 31, 2010, DB operated in 74 countries through 3,083 branches, subsidiaries and representative offices worldwide.

General Comments

The futures markets serve a vital role in the health of our economic system: they provide a critical price discovery mechanism, enable hedgers to offset risks, allow speculators to express their views on price movements in the various futures contracts (whether up or down) and, via passive index funds, permit investors to hedge against inflation and diversify their investment portfolios. DB supports the Commission's efforts to maintain fair and orderly markets and welcomes the opportunity to provide its comments in an effort to assist the Commission in promulgating the best possible rules.[1]

A. Positions of affiliated entities that have independent trading strategies and decision making and have the proper procedures in place to wall off information should not be aggregated. The Commission should adopt rules that would permit a complex financial institution to disaggregate positions taken by its separately operated business units upon demonstrating that it employs policies, procedures, and physical barriers that separate management and flow of information.

[1] Deutsche Bank AG is a member of a number of industry groups that either have submitted or will be submitting comment letters on the Proposal, including the Futures Industry Association, the International Swaps and Derivatives Association, and the Financial Institutions Energy Group. We agree generally with the comments offered by those groups, but we would like to take this opportunity to re-emphasize certain of the arguments raised in their comments.

Effect of proposed rules. Proposed rule 151.7(b) provides that positions in any account in which a trader owns a 10% or greater equity interest will be aggregated with the trader's other positions. This would require holding company structures that have separate business units that may be spread across the world and that trade for various proprietary and customer accounts to aggregate their holdings across their various business units.

DB is a multi-faceted financial institution and has numerous affiliates organized in many jurisdictions worldwide. A great number of these affiliates have different business purposes and conduct their operations independently from each other. To that end, these affiliates have implemented appropriate informational and other barriers between the units. Specifically with respect to trading in referenced contracts, DB engages in such activities as a (i) commodity pool operator that administers passive index-tracking funds;[2] (ii) issuer of commodity linked notes; (iii) swap dealer hedging the exposure assumed in the course of providing swaps to its customers; (iv) fiduciary asset manager; (v) hedge counterparty, hedging the exposure assumed in the course of engaging in its physical commodities marketing and trading business; and may also (vi) trade for its own account. All of these activities are conducted independently from one another and there is no centralized source (other than the risk management and compliance groups) that has access to trading information across separate, distinct business lines within the organization that has the power to control or influence trading decisions across all of these entities. In addition, a majority of these entities are bound by either regulation or fiduciary duty not to disclose information about their trading positions to third parties, including affiliated entities within DB.

In order to aggregate positions in referenced contracts across all affiliates, as would be required under the proposed rules, these separate financial entities would have to disclose their positions to other affiliated entities within the DB umbrella. This is because the DB entities would now be forced to coordinate any sale or purchase of additional referenced contracts to ensure that DB as a whole stays under the aggregate position limit. Similarly, the DB entities would be forced to coordinate their holdings of referenced contracts going forward.

In addition to the operational challenges for large financial institutions such as DB in implementing these unprecedented aggregation requirements, the Proposal will require such institutions to break down well-established informational and institutional barriers. In addition to potentially violating the entities' regulatory or fiduciary obligations, the result would restrict the aggregate positions that may be held by financial entities in the markets, which will further reduce liquidity and raise the cost of risk management for all market participants, including non-financial entities.

---

[2] For a more detailed discussion about the implications of the Proposal with respect to our CPO business, please see separate comment letter submitted by DB Commodity Services LLC (the "***DBCS Letter***"). The DBCS Letter also sets forth certain comments regarding the Proposal generally (see, for instance, paragraphs (8) through (11) therein) that Deutsche Bank AG supports but does not repeat herein.

In summary, DB strongly believes that removing the disaggregation of independent and physically separate businesses for position limit purposes would force them to coordinate position taking in a manner which must surely be counter to the Commission's intent.

Recommendations. We respectfully submit the following recommendations to the Commission, presented in the order of priority.

1. We encourage the Commission to consider adopting a responsible disaggregation policy for a multifaceted financial institution.[3] In this regard, we recommend that the Commission add a new section to proposed part 151 to responsibly permit disaggregation of a financial holding company's affiliates' positions, and we offer the following draft proposed rule for the Commission's consideration:

"Proposed Rule 151.7(h) – **Aggregation Exemption for Financial Institutions**

(a) Positions which may exceed limits. The position limits set forth in § 150.2 and § 151.4 of this part may be exceeded to the extent such positions are:

* * *

(h) Financial Institution.

(i) Carried by (a) an Independent Trading Unit (as defined herein) of a financial institution (as defined in section 1a(15) of the Act) in the separate account or accounts of the financial institution controlled by an Independent Trading Unit of the financial institution or (b) any commodity pool organized as a separate legal entity or separate series of a separate legal entity where trading is controlled by such Independent Trading Unit, in each case where each Independent Trading Unit of the financial institution has, and enforces, written procedures to preclude other Independent Trading Units from having knowledge of, gaining access to, or receiving data about, trades of the other ("Disaggregation Procedures"). Such Disaggregation Procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities; *provided, however,* that such Disaggregation Procedures may provide for the disclosure of information which is reasonably necessary for a financial institution to maintain the level of control consistent with its fiduciary responsibilities and necessary to fulfill its duty to supervise diligently the trading done on its behalf or through the Independent Trading Units, including disclosures to legal, compliance, internal audit and risk management departments and other similar independent control functions

[3] We also refer the Commission to the DBCS Letter for comments by DBCS regarding aggregation of positions of CPOs with those of a CPO Parent.

of a financial institution that may be common to all Independent Trading Units. The financial institution must file with the Commission a notice of eligibility that:

(a) describes and confirms the implementation of the Disaggregation Procedures;

(b) designates an office of the financial institution responsible to coordinate the Disaggregation Procedures;

(c) provides an organizational chart that includes the name, main business address, main business telephone number, main facsimile number and main email address of the financial institution, each Independent Trading Unit, and if applicable, any separate legal entity whose trading is controlled by such Independent Trading Unit;

(d) provides the names of pertinent staff of each Independent Trading Unit (trading, operations, compliance, clerical, and risk management) and their work locations;

(e) provides a description of all information sharing systems, bulletin boards, and common email addresses;

(f) provides an explanation of the financial institution's risk management system and staff structure and a description of the overall structure and operations of the relevant staff;

(g) provides an explanation of how and to whom the trade data and position information is distributed for each Independent Trading Unit, including which officers receive reports for all Independent Trading Units and their respective titles; and

(h) is signed by a representative duly authorized to bind the financial institution.

As used in this rule, the term "Independent Trading Unit" means a branch, office, profit center, affiliated commodity pool operator, passive commodity pool tracking an index, or affiliate of the financial institution that complies with the Disaggregation Procedures and is listed in the notice of eligibility.

(ii) The notice of eligibility will be effective upon filing, provided the notice is materially complete. The notice of eligibility must be refiled within 45 days of January 1 of each year following the initial filing."

* * *

2. We recommend that the Commission retain the independent account controller exemption (the "IAC exemption") from Part 150.3(a)(4), that currently applies for position limits for agricultural commodities. The IAC exemption is premised on the fact that accounts that are under separate management need not be aggregated because they have no combined effect on the market. The elimination of the IAC exemption is unnecessary and will be disruptive to a wide variety of market participants that have relied upon the exemption to operate efficiently in the commodity markets. In its discussion of the Proposal, the Commission staff describes the various situations in which the current rules permit disaggregation of financial affiliates, and generally remarks that such arrangements could be incompatible with the proposed Federal position limit framework as they could be used to circumvent its requirements. However, the Proposal does not offer examples of potential abuses, or any explanation as to how that view was reached. In fact, it is difficult to imagine how such arrangements could be abused if the appropriate information and management controls are in place at a financial institution and are regularly demonstrated to the Commission staff or to a SRO. On the other hand, as discussed above, numerous good reasons exist to continue to permit responsible disaggregation of discrete businesses within a financial institution in the forms of the IAC exemption and the sample proposed disaggregation rule we offer herein.

   Consistent with this view, we ask that the Commission clarify that the IAC exemption, once restored, would qualify to disaggregate various trading desks within an "eligible entity" without requiring them to be organized as separate legal entities. We believe this is supported by the text of the current regulations.

3. The Commission should broaden the owned non-financial entity exemption in proposed rule 151.7(f) to include financial entities. We see no reason, nor has the Commission articulated such a rationale, why positions of a financial entity that is part of a multi-faceted financial institution and that can demonstrate the independence required under the proposed rule 151.7(f), should not be disaggregated with its affiliates' positions. There is no principled reason to discriminate against financial companies, especially since, owing to applicable regulatory requirements, they have superior experience in implementing informational barriers within affiliates.

B. Swap dealers' positions, entered into to hedge the dealers' exposure in the course of providing services to clients, should be exempt regardless of whether the client is a bona fide hedger or not.

Effect of proposed rules. We read proposed rule 151.5(a)(1)(iv) to allow a swap dealer to exclude from its quota only those positions assumed to reduce the risk of swaps entered into opposite a *bona fide* hedger. Consequently, a swap dealer would be forced to count towards its limit all of its positions in referenced contracts entered into to hedge its swap dealing activities opposite of counterparties that cannot qualify under the *bona fide* hedging exemption.

Past iterations of the hedging exemption (see the January 2010 proposed position limits on energy contracts) included provisions that allowed dealers to exclude, for purposes of determining compliance with position limit, those positions entered into for risk management purposes, regardless of whether the counterparty was a *bona fide* hedger. That proposal, even though riddled with considerable deficiencies[4] is preferable to the current proposal. In the Proposal, the Commission offers no explanation as to why positions entered into by a swap dealer to reduce risks attendant to its core business and not for speculation should be treated differently from the activities of any other hedgers.

A swap dealer that is offsetting its risk under swaps entered into in the course of regular business is acting as a financial intermediary and is not assuming a position that expresses a view on the market. This is true regardless of whether the swap dealer's counterparty is a *bona fide* hedger or not. To illustrate, consider a very simplified scenario where a speculator enters into a commodity swap with a swap dealer through which the speculator assumes long synthetic exposure equal to 100 contracts. The swap dealer hedges its short exposure by buying 100 futures contracts. Under the Proposal, this transaction would result in a long swap position being attributed to the speculator, and (i) a short swap position and (ii) a long futures position being attributed to the swap dealer.[5] Under our view, this transaction should only result in a net long position attributable to the speculator. The true owner and controller of this position is the speculator while the swap dealer is entering into transactions in order to neutralize its exposure to the position and provide dealing services to the counterparty.

Recommendation. We recommend that the Commission use its broad exemptive power under new Section 4a(a)(7) of the Commodity Exchange Act ("*CEA*") to adopt a workable risk management exemption from position limits for swap dealers that tracks the January 2010 proposal with respect to position limits for energy commodities but without the unnecessary restraints mentioned in footnote 4.

C. The presence of an intermediary in a chain transaction should not remove a swap dealer's ability to rely on the status of the initial *bona fide* hedger.

Effect of proposed rules. Proposed rule 151.5(a)(1)(iv) appears to require that in order to rely on this exemption, the swap dealer's immediate counterparty must be a *bona fide* hedger. However, it is not uncommon in the market to have at least one intermediary interposed in the chain of transactions that constitute a *bona fide* hedging transaction.

---

4 We specifically refer to the "crowding out" feature, which denied to the dealer with even one speculative position the benefit of the risk management exemption, the cap of twice the speculative position limits and the exclusion of spot month positions.

5 We realize that netting may apply to reduce the position of the swap dealer that would ultimately count against the swap dealer's position limit. For a discussion of issues related to netting, please see section D of this letter.

For example, a producer or consumer of physical commodities may enter into an initial hedging transaction, that qualifies under the *bona fide* hedging exemption, with a small regional bank. The regional bank may in turn enter into an offsetting swap with a swap dealer. It would appear that the existence of the intermediary in this example, the regional bank, would prevent the swap dealer from relying on the exemption. As a result, the swap dealer's hedge of its swap exposure to the regional bank, would count against the dealer's position limit even though the position, when considered in its totality should qualify for the *bona fide* hedging exemption. This approach ignores the reality that the swaps marketplace is quite complex, and market participants often hedge their risk through multiple and differing combinations of market intermediaries that vary depending upon, among other things, industries, products, and geographic regions, and would surely severely reduce market liquidity, especially for commercial hedgers as they would find it more difficult and costly to hedge risks inherent in their business operations.

Recommendation. We recommend that the Commission clarify that for the purposes of the *bona fide* hedging exemption for swap dealers, the entire transaction will be considered to determine if the swap dealer is reducing risks attendant to a *bona fide* hedging transaction, regardless of the presence of any intermediaries in the transaction chain.

D. A trader's positions should be netted across classes for the purposes of the class and aggregate position limits.

Effect of proposed rule. Proposed rule 151.4(f)(3) provides that a "trader's position in contracts of the same class shall be combined and the net resulting position shall be applied towards the trader's class single month and all-months combined position." We are concerned that this may result in a swap dealer exceeding the class position limits even though its net position across all referenced contracts is below the limit.

For example, consider a swap dealer that enters into a commodity swap with a counterparty. The dealer has long exposure in the swap and hedges with a short futures position. Depending on the accuracy of its hedge, the dealer's net position in "referenced contracts" should cancel out or be very close to zero exposure. However, if the dealer is unable to net its swaps and futures exposure, it may end up with a long position in swaps and a short position in futures, each of which would count towards the swap and the futures class limits.

Because the Proposal contemplates that class position limits and the aggregate position limits will be the same number, we are concerned that the lack of ability to net across classes will cause swap dealers to quickly exceed the class position limits. This will severely impact market liquidity, result in increased costs and affect the ability of all market participants to hedge their market exposures.

Recommendation. We recommend that the Commission amend the Proposal to provide that netting across classes will be used to calculate the class as well as aggregate position limits. Similarly, the Commission should increase the class limits to allow swap dealers the freedom to chose the most efficient hedging instrument without concern that

they may violate the class limits if prudent hedging strategies favor a certain class. The aggregate position limit, which allows netting across futures and swaps, would ensure that the dealers' true market position is within the prescribed limits.

E. The legacy position limits for agricultural commodities should be increased from proposed levels and based on a percentage of open interest.

Effect of proposed rules. Proposed rule 151.4(d)(3) provides that non-spot month limits, currently in place for agricultural commodities under Part 150.2, will continue to apply. These limits were last fixed in 2005 and have not changed since, despite the considerable growth in trading and open interest with respect to agricultural commodities. In addition, the legacy limits were set with respect to the futures markets only and yet the changes imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("***Dodd-Frank***") will subsume the equivalent swap market, which is roughly seven times the size of the futures market,[6] under the same unchanged limit.

This is inconsistent with the approach taken for non-agricultural commodities, where the position limits are calculated as percentages of open interest that includes futures and swaps. For those other commodities, the limits would increase with the increase in open interest while for agricultural commodities, it would be fixed.

We believe that if the percentage of open interest is appropriate for non-agricultural commodities, then it should be appropriate for agricultural commodities as well. Agricultural limits were allocated when the agricultural markets were smaller. Failure to adjust agricultural position limits to reflect existing open interest and liquidity levels will restrict the ability of commercial hedgers to effectively hedge their exposure due to decreased liquidity.

Recommendation. We recommend that the Commission apply to referenced contracts in agricultural commodities the same formula used to determine position limits for non-agricultural commodities. In the alternative, we support the position limits recommended by the Chicago Board of Trade, as we believe that they would better protect the liquidity and price discovery function of the agricultural commodity markets than the current limits.

F. Interim spot-month limits should be set for each trading venue separately and not apply across all trading venues.

---

[6] In discussing the swap market recently, Chairman Gensler said that "the Dodd-Frank Act tasks us with taking on a market about seven times the size of the futures markets and that is more complex because of the role that bilateral swaps play." *see* remarks of Chairman Gary Gensler on implementing the Dodd-Frank Act at the Futures Industry Association's Annual International Futures Industry Conference held at Boca Raton, Florida on March 16, 2011, available at http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-73.html.

Effect of proposed rules. The Proposal states that "[i]n the first transitional phase the Commission proposes to establish spot-month position limits at the levels currently imposed by DCMs." It appears that the Commission does not intend to establish spot-month position limits separately across trading venues but rather adopt a single position limit that will apply to contracts traded across any applicable venue.

In addition, as stated in the Proposal, "[i]n regulation 151.4, the Commission proposes spot-month limits, for not only referenced contracts that are futures but also referenced contracts that are economically equivalent swaps, that would, during the initial implementation period, be set at the spot-month limit levels determined by DCMs to be equal to 25 percent of estimated deliverable supply."

We believe that these proposals will reduce liquidity and impede the price discovery function of these relevant futures and swaps markets for the following reasons.

First, the Commission intends to adopt current DCM limits that apply only to futures contracts and make them applicable to futures and swaps without any adjustment for the broader coverage. This will result in a drastic constriction in traders' allowable spot-month positions and the Commission has not made it clear why such a drastic departure from the current position limits regime is necessary. We realize that under proposed rule 151.4(a)(2), most swaps may fall under the conditional spot-month position limit applicable to cash-settled referenced contracts, which may alleviate some of the concern. However, and as discussed below, the fact that the conditional spot month position limit is unavailable to a trader holding at least one physical delivery contract severely restricts the remedial effect of this provision.

Second, we are concerned that the interim spot-month limits will reduce liquidity in cleared swap contracts, as the interim position limits will aggregate across trading venues, as opposed to providing a separate limit for each trading venue. Consequently, a much greater number of positions will be subject to the imposed limits which, in turn, will have a significant restrictive effect on liquidity.

Recommendations. We recommend that the Commission adjust the interim spot-month position limits implemented during phase one to account for the inclusion of swaps as well as futures. If the Commission intends to adopt the current limits determined by the DCMs, it should aggregate the limits of each relevant DCM to reach a position limit that equals the sum of all currently applicable DCM limits.

G. Holding a physically deliverable position should not prevent a market participant that also has cash-settled contracts from relying on conditional spot-month limits for cash-settled contracts.

Effect of proposed rules. Proposed rule 151.4(a)(2)(ii) disqualifies a trader from relying on the cash-settled limit if it holds or controls "positions in the physical delivery referenced contract based on the same commodity that is in such contract's spot month."

Traders with large cash-settled positions do not present meaningful risk of manipulating the market simply by virtue of having positions in physical delivery contracts. We do not see any principled reason to negate the conditional spot-month limit to traders holding a physically-settled position. The rule would create an incentive for traders to move to financially-settled contracts in the spot month and exit their physically-settled positions. Such a concerted move out of physically-settled contracts in the spot month is likely to create market disruptions and price distortions. We believe that this limitation will reduce liquidity and the price discovery functions of the physical markets, harming price discovery and the price integrity of the contracts at settlement.

Recommendation. We recommend that the Commission amend proposed rule 151.4(a)(2)(ii) and allow traders holding physically settled positions to avail themselves of the conditional spot-month position limit for their cash-settled positions.

H. The requirement to file form 404S filing is onerous.

Effect of proposed rules. Proposed rule 151.5(d) requires swap dealers to file form 404S no later than 9 am on the business day following the entry into a swap to reduce risks of a swap opposite a bona fide hedging counterparty. Form 404S must contain detailed information about the initial swap executed as a *bona fide* hedging transaction as well as the hedging transactions entered into by the swap dealer to offset its risks.

In light of the drastically increased reporting burden under the rules promulgated under Dodd-Frank, the short timeline to comply with this requirement may be difficult to meet.

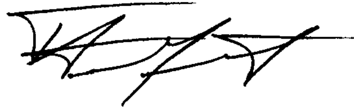
Recommendations. We believe that a weekly reporting deadline, for example, by 9 a.m. on each Monday morning for the transactions entered into during the prior week, would be more manageable, especially in light of the overall increased reporting obligations that will be imposed on swap dealers under Dodd-Frank. If at any time the Commission reasonably determines that it requires daily transparency with respect to a particular swap dealer, it could notify that particular swap dealer of its concern and the specific requirements now necessary for that particular swap dealer. In this way, the Commission will have the flexibility to require more frequent reporting where needed without imposing unnecessary burdens on other market participants.

Finally, with respect to any additional filing requirements, we respectfully request that the Commission allow for a 6 month trial period during which reporting entities would not be subject to sanction for failing to meet filing requirements. This would allow the reporting entities to adapt to the new requirements through the implementation of necessary systems and procedures.

Conclusion

DB appreciates the opportunity to comment on the Proposal and respectfully submits these comments for the Commission's consideration. Please contact Adam E. Wernow at (212) 250-6973, or our outside counsel, Michael Sackheim of Sidley Austin LLP at (212) 8395503, with any questions regarding this letter.

Respectfully submitted,



Troy Martin
Chief Operating Officer, GM Commodities

cc: Adam Wernow
Michael Sackheim