emissions. Under this view, for example, it would not be appropriate to sell offsets based on a project (*e.g.*, capturing methane from a landfill) implemented to comply with existing environmental regulations because any greenhouse gas reductions would have occurred without the sale of the offsets. The practical application of the ''additionality'' concept to specific fact scenarios has raised a large number of questions and produced a variety of opinions among industry members and other stakeholders.

III. Issues and Questions for Discussion at the Workshop

As discussed above, the Commission's public workshop will explore advertising claims for carbon offsets and RECs, as well as advertising claims based on the purchase of those products. We have identified several possible issues for discussion at the workshop: (1) Trends in marketing carbon offsets and RECs, (2) the nature of the commodities in question (*i.e.*, the property rights transferred from seller to buyer through the sale of offsets and RECs), (3) product marketing based on offset or REC purchases, (4) consumer perception of carbon offset and REC claims, (5) potential market problems such as double-counting and other forms of fraud, (6) third-party certification and other standard-setting programs, (7) the issue of ''additionality'' for carbon offsets and its relationship to potential consumer deception, (8) the use of RECs as a basis for carbon offset claims, (9) the state of substantiation for offsets and REC claims, and (10) the need for additional FTC guidance in these areas.

In addition to considering these possible topics, the Commission invites written comments on any or all of the following questions regarding the consumer protection aspects of the carbon offset and REC market. The Commission requests that responses to these questions be as specific as possible, including a reference to the question being answered, and reference to empirical data or other evidence wherever available and appropriate.

(1) What express claims are sellers making for carbon offsets and RECs? What claims, if any, are implied by that advertising? How do consumers interpret these claims? Please provide any supporting evidence. What evidence constitutes a reasonable basis to support these claims? What challenges do offset and REC sellers face in substantiating their claims? Is there evidence that any claims in the current marketplace are unsubstantiated or otherwise deceptive?

(2) What express claims are companies making for their products and services based on their purchase of carbon offsets or RECs (*e.g.*, ''our product is made with renewable energy'')? What claims, if any, are implied by that advertising? How do consumers interpret these claims? Please provide any supporting evidence. What evidence constitutes a reasonable basis to support these claims? Is there evidence that any claims in the current marketplace are unsubstantiated or otherwise deceptive?

(3) When consumers purchase carbon offsets or RECs, what property rights do they acquire?

(4) When consumers purchase carbon offsets or RECs, what do they think they are buying? Please provide any supporting evidence.

(5) What impact do consumers believe their carbon offset purchases will have on the future quantities of greenhouse gasses in the atmosphere? Please provide any supporting evidence.

(6) Do consumers understand that some activities supported by carbon offset programs do not result in immediate carbon emission reductions? If so, when do consumers expect such offset programs will have an impact? Please provide any supporting evidence.

(7) What is the relationship between the concept of ''additionality'' in carbon offset markets and the FTC's standard for deception under the FTC Act?

(8) Please identify state laws that specifically address consumer protection issues in the carbon offset and REC markets. Please explain how the laws address these issues and whether they are effective.

(9) Please identify third-party and self-regulatory programs that address consumer protection issues in the carbon offset and REC markets. Please explain how the programs address these issues and whether they are effective.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E7–23006 Filed 11–26–07; 8:45 am]

BILLING CODE 6750–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 150

RIN 3038–AC40

Risk Management Exemption From Federal Speculative Position Limits

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Section 150.2 of the Commodity Futures Trading Commission's (''Commission'') regulations imposes limits on the size of speculative positions that traders may hold or control in futures and futures equivalent option contracts on certain designated agricultural commodities named therein. Section 150.3 lists certain types of positions that may be exempted from these Federal speculative position limits. The Commission is proposing to provide an additional exemption for ''risk management positions.'' A risk management position would be defined as a futures or futures equivalent position, held as part of a broadly diversified portfolio of long-only or short-only futures or futures equivalent positions, that is based upon either: A fiduciary obligation to match or track the results of a broadly diversified index that includes the same commodity markets in fundamentally the same proportions as the futures or futures equivalent position; or a portfolio diversification plan that has, among other substantial asset classes, an exposure to a broadly diversified index that includes the same commodity markets in fundamentally the same proportions as the futures or futures equivalent position. The exemption would be subject to conditions, including that the positions must be passively managed, must be unleveraged, and may not be carried into the spot month.

DATES: Comments must be received on or before January 28, 2008.

ADDRESSES: Comments should be submitted to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments also may be sent by facsimile to (202) 418–5521, or by electronic mail to *secretary@cftc.gov*. Reference should be made to ''Proposed Risk Management Exemption from Federal Speculative Position Limits.'' Comments may also be submitted by connecting to the Federal eRulemaking Portal at *http://www.regulations.gov* and following comment submission instructions.

FOR FURTHER INFORMATION CONTACT: Donald Heitman, Senior Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, telephone (202) 418–5041, facsimile number (202) 418–5507, electronic mail *dheitman@cftc.gov*; or John Fenton, Director of Surveillance, Division of Market Oversight, telephone (202) 418–5298, facsimile number (202) 418–5507, electronic mail *jfenton@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Framework

Speculative position limits have been a tool for the regulation of the U.S. futures markets since the adoption of the Commodity Exchange Act of 1936. Section 4a(a) of the Commodity Exchange Act (''Act''), 7 U.S.C. 6a(a), states that:

> Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets or derivatives transaction execution facilities causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity.

Accordingly, section 4a(a) of the Act provides the Commission with the authority to:

> Fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility as the Commission finds are necessary to diminish, eliminate, or prevent such burden.

This longstanding statutory framework providing for Federal speculative position limits was supplemented with the passage of the Futures Trading Act of 1982, which acknowledged the role of exchanges in setting their own speculative position limits. The 1982 legislation also provided, under section 4a(e) of the Act, that limits set by exchanges and approved by the Commission were subject to Commission enforcement.

Finally, the Commodity Futures Modernization Act of 2000 (''CFMA'') established designation criteria and core principles with which a designated contract market (''DCM'') must comply to receive and maintain designation. Among these, Core Principle 5 in section 5(d) of the Act states:

> Position Limitations or Accountability—To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, the board of trade shall adopt position limitations or position accountability for speculators, where necessary and appropriate.

B. Regulatory Framework

The regulatory structure based upon these statutory provisions consists of three elements, the levels of the speculative position limits, certain exemptions from the limits (for hedging, spreading/arbitrage, and other positions), and the policy on aggregating commonly owned or controlled accounts for purposes of applying the limits. This regulatory structure is administered under a two-pronged framework. Under the first prong, the Commission establishes and enforces speculative position limits for futures contracts on a limited group of agricultural commodities. These Federal limits are enumerated in Commission regulation 150.2, and apply to the following futures and option markets: Chicago Board of Trade (''CBOT'') corn, oats, soybeans, wheat, soybean oil, and soybean meal; Minneapolis Grain Exchange (''MGE'') hard red spring wheat and white wheat; ICE Futures U.S. (formerly the New York Board of Trade) cotton No. 2; and Kansas City Board of Trade (''KCBOT'') hard winter wheat. Under the second prong, individual DCMs establish and enforce their own speculative position limits or position accountability provisions (including exemption and aggregation rules), subject to Commission oversight and separate authority to enforce exchange-set speculative position limits approved by the Commission. Thus, responsibility for enforcement of speculative position limits is shared by the Commission and the DCMs.[1]

Commission regulation 150.3, ''Exemptions,'' lists certain types of positions that may be exempted from (and thus may exceed) the Federal speculative position limits. For example, under § 150.3(a)(1), *bona fide* hedging transactions, as defined in § 1.3(z) of the Commission's regulations, may exceed the limits. The Commission has periodically amended the exemptive rules applicable to Federal speculative position limits in response to changing conditions and practices in futures markets. These amendments have included an exemption from speculative position limits for the positions of multi-advisor commodity pools and other similar entities that use independent account controllers,[2] and an amendment to extend the exemption for positions that have a common owner but are independently controlled to include certain commodity trading advisors.[3] In 1987, the Commission also issued an agency interpretation clarifying certain aspects of the hedging definition.[4] The Commission has also issued guidance with respect to exchange speculative limits, including guidelines regarding the exemption of risk-management positions from exchange-set speculative position limits in financial futures contracts.[5] However, the last significant amendment to the Commission's exemptive rules was implemented in 1991.

C. Changes in Trading Practices

The intervening 16 years have seen significant changes in trading patterns and practices in derivatives markets, thus prompting the Commission to reassess its policies regarding exemptions from the Federal speculative position limits. These changes primarily involve trading strategies and programs based on commodity indexes. In particular, pension funds and other investors (including individual investors participating in commodity index-based funds or trading programs) have become interested in taking on commodity price exposure as a way of diversifying portfolios that might otherwise be limited to stocks and interest rate instruments. Financial research has shown that the risk/return performance of a portfolio is improved by acquiring uncorrelated or negatively correlated assets, and commodities (including agricultural commodities) generally perform that role in a portfolio of other financial assets.[6]

The components of a commodity index-based investment might include energy commodities, metals (both precious metals and industrial metals), agricultural commodities that are subject to exchange limits (including coffee, sugar, cocoa, and orange juice, as well as livestock and meat), and those agricultural commodities named above that are subject to Federal speculative position limits (grains, the soybean complex and cotton). With respect to agricultural commodities subject to Federal limits, the Commission has responded to various instances where

[1] Provisions regarding the establishment of exchange-set speculative position limits were originally set forth in CFTC regulation 1.61. In 1999, the Commission simplified and reorganized its rules by relocating the substance of regulation 1.61's requirements to part 150 of the Commission's rules, thereby incorporating within part 150 provisions for both Federal speculative position limits and exchange-set speculative position limits (see 64 FR 24038, May 5, 1999). With the passage of the Commodity Futures Modernization Act in 2000 and the Commission's subsequent adoption of the Part 38 regulations covering DCMs in 2001 (66 FR 42256, August 10, 2001), Part 150's approach to exchange-set speculative position limits was incorporated as an acceptable practice under DCM Core Principle 5—Position Limitations and Accountability. Section 4a(e) provides that a violation of a speculative position limit set by a Commission-approved exchange rule is also a violation of the Act. Thus, the Commission can enforce directly violations of exchange-set speculative position limits as well as those provided under Commission rules.

[2] 53 FR 41563 (October 24, 1988).

[3] 56 FR 14308 (April 9, 1991).

[4] 52 FR 27195 (July 20, 1987).

[5] 52 FR 34633 (September 14, 1987).

[6] The argument has also been made that commodities act as a general hedge of liability obligations that are linked to inflation.

index-based positions in such commodities exceed (or might grow to exceed) the Federal speculative position limits. In certain cases, the Commission has granted exemptive or no-action relief from Federal speculative position limits. In granting such relief, the Commission has included conditions to protect the market from the potential for the sudden or unreasonable fluctuations or unwarranted changes in prices that speculative limits are designed to prevent.

For example, in 1991, the Commission received a request from a large commodity merchandising firm that engaged in commodity related swaps[7] as a part of a commercial line of business. The firm, through an affiliate, wished to enter into an OTC swap transaction with a qualified counterparty (a large pension fund) involving an index based on the returns afforded by investments in exchange-traded futures contracts on certain non-financial commodities meeting specified criteria. The commodities making up the index included wheat, corn and soybeans, all of which were (and still are) subject to Federal speculative position limits. As a result of the swap, the swap dealing firm would, in effect, be going short the index. In other words, it would be required to make payments to the pension fund counterparty if the value of the index was higher at the end of the swap payment period than at the beginning. In order to hedge itself against this risk, the swap dealer planned to establish a portfolio of long futures positions in the commodities making up the index, in such amounts as would replicate its exposure under the swap transaction. By design, the index did not include contract months that had entered the delivery period and the swap dealer, in replicating the index, stated that it would not maintain futures positions based on index-related swap activity into the spot month (when physical commodity markets are most vulnerable to manipulation and attendant unreasonable price fluctuations). The result of the hedge was that the composite return on the futures portfolio would offset the net payments the swap dealer would be required to make to the pension fund counterparty.

Because the futures positions the swap dealer would have to establish to hedge its exposure on the swap transaction would be in excess of the speculative position limits on wheat, corn and soybeans, it requested, and was granted, a hedge exemption for those positions. The swap transaction allowed the pension fund to add commodities exposure to its portfolio indirectly, through the OTC trade with the swap dealer—something it could have done directly, but only in a limited fashion.[8]

Similar hedge exemptions were subsequently granted in other cases where the futures positions clearly offset risks related to swaps or similar OTC positions involving both individual commodities and commodity indexes. These non-traditional hedges were all subject to specific limitations to protect the marketplace from potential ill effects. The limitations included: (1) The futures positions must offset specific price risk; (2) the dollar value of the futures positions would be no greater than the dollar value of the underlying risk; and (3) the futures positions would not be carried into the spot month.

The Commission's Division of Market Oversight (''Division'' or ''DMO'') has also recently issued two no-action letters involving another type of index-based trading.[9] Both cases involved trading that offered investors the opportunity to participate in a broadly diversified commodity index-based fund or program (''index fund''). The futures positions of these index funds differed from the futures positions taken by the swap dealers described above. The swap dealer positions were taken to offset OTC swaps exposure that was directly linked to the price of an index. For that reason, the Division granted hedge exemptions to these swap dealer positions. On the other hand, in the index fund positions described in the no-action letters, the price exposure results from a promise or obligation to track an index, rather than from holding an OTC swap position whose value is directly linked to the price of the index. The Division believed that this difference was significant enough that the index fund positions would not qualify for a hedge exemption. Nevertheless, because the index fund positions represented a legitimate and potentially useful investment strategy, the Division granted the index funds no-action relief, subject to certain conditions, described below, that were intended to protect the futures markets from potential ill effects.

II. Proposed Amendment

A. Introduction

In light of the changing trading practices and conditions described above, the Commission is now considering whether to amend its Part 150 regulations to create a new exemption from Federal speculative position limits. In addition to the above-described policy of granting index-based hedge exemptions to swap dealers, which policy would remain in effect, the proposal would create an additional risk management exemption. That exemption would apply to positions held by: (1) Intermediaries, such as index funds, who pass price risks on to their customers; and (2) pension funds and other institutional investors seeking to diversify risks in portfolios by including an allocation to commodity exposure. As noted above, pension funds can already benefit from a hedge exemption indirectly, by entering into an OTC position with a swap dealer who, in turn, puts on an offsetting futures position in reliance on the existing hedge exemption policy. The proposed rules would allow a pension fund to receive an exemption directly, by putting on a futures position itself pursuant to the new risk management exemption provision.

In determining whether the new risk management exemption proposed herein is appropriate, it is important to recall that the purpose of position limits, as specified in Section 4a(a) of the Act, is to diminish, eliminate, or prevent sudden or unreasonable fluctuations or unwarranted changes in the prices of commodities. Within this constraint, it is appropriate that the Commission (and the exchanges) not unduly restrict trading activity. A position limit is a means to an end, not an end in itself. Accordingly, to the extent that a type of trading activity can be identified that is unlikely to cause sudden or unreasonable fluctuations or unwarranted changes in prices, it is a good candidate to qualify for an exemption from position limits. Commodity index-based trading has characteristics that recommend it on that score: (1) It is generally passively managed, so that positions tend not to be changed based on market news or short-term price volatility; (2) it is generally unleveraged, so that financial considerations should not cause rapid liquidation of positions; and (3) it is inherently diversified, in that futures positions are normally held in many

[7] A swap is a privately negotiated exchange of one asset or cash flow for another asset or cash flow. In a commodity swap, at least one of the assets or cash flows is related to the price of one or more commodities.

[8] The pension fund would have been limited in its ability to take on this commodities exposure directly, by putting on the long futures position itself, because the pension fund—having no offsetting price risk incidental to commercial cash or spot operations—would not have qualified for a hedge exemption with respect to the position. (*See* § 1.3(z) of the Commission's regulations.)

[9] CFTC Letter 06–09 (April 19, 2006); CFTC Letter 06–19 (September 6, 2006).

different markets, and its purpose typically is to diversify a portfolio containing assets with different risk profiles.

B. Conditions for the Exemption

To be eligible for an exemption as a ''risk management position'' under the proposed amendments to Part 150, a futures position would need to comply with several conditions designed to protect the futures markets from sudden or unreasonable fluctuations or unwarranted changes in prices. First, § 150.3(a) would be amended to add a requirement that all positions subject to the exemptive provisions must be ''established and liquidated in an orderly manner.'' This requirement already applies to the positions referred to in § 150.3(a)(1), which exempts *bona fide* hedging transactions, by virtue of similar language appearing in the *bona fide* hedging definition (*see* § 1.3(z)(1)). However, the proposed amendment would clarify that the same requirement would apply not only to the risk management positions to be exempted under proposed new § 150.3(a)(2), but also to the spread or arbitrage positions already exempted under current § 150.3(a)(3) and the positions carried in the separate account of an independent account controller already exempted under current § 150.3(a)(4).

Second, the proposed rules would define a ''risk management position'' as a futures or futures equivalent position, held as part of a broadly diversified portfolio of long-only or short-only [10] futures or futures equivalent [11] positions, that is based upon either: (1) A fiduciary obligation to match or track the results of a broadly diversified index that includes the same commodity markets in fundamentally the same proportions as the futures or futures equivalent position; or (2) a portfolio diversification plan that has, among other substantial asset classes, an exposure to a broadly diversified index that includes the same commodity markets in fundamentally the same proportions as the futures or futures equivalent position. The first of these alternatives covers positions held by index funds, such as those that were the subject of the Commission No-action letters discussed above. The second alternative covers positions held directly by pension funds and other institutional investors.

A ''broadly diversified index'' would be defined to limit the weighting of certain agricultural commodities in the index so that commodities subject to Federal speculative position limits would not comprise a disproportionate share of the index. Thus, a ''broadly diversified index'' would mean an index based on physical commodities in which: (1) not more than 15% of the index is composed of any single agricultural commodity named in § 150.2 (for which purposes, wheat shall be regarded as a single commodity, so that positions in all varieties of wheat, on all exchanges, combined, may not exceed 15% of the index, and the soybean complex shall likewise be regarded as a single commodity, so that positions in soybeans, soybean oil and soybean meal, on all exchanges combined, may not exceed 15% of the index); and (2) not more than 50% of the index as a whole is composed of agricultural commodities named in § 150.2. The Commission believes that a narrowly based index could be used to evade speculative position limits. For example, the grains all tend to have similar risk profiles—*i.e,* they tend to respond similarly to common market factors, such as weather. Therefore, the Commission is concerned that an index composed, for example, of 25% each of corn, wheat, oats and soybeans—rather than constituting a means of portfolio diversification—could operate as a mechanism for evading speculative position limits in one or more of those commodities.

Third, the positions subject to the exemption must be passively managed. The proposed rules would define a ''passively managed position'' as a futures or futures equivalent position that is part of a portfolio that tracks a broadly diversified index, which index is calculated, adjusted, and re-weighted pursuant to an objective, predetermined mathematical formula the application of which allows only limited discretion with respect to trading decisions. This definition contemplates a certain limited amount of discretion in the manner in which the futures position tracks the underlying index. For example, index funds generally provide rules or standards for periodically re-weighting the index to account for price changes in the commodities that make up the index, or readjusting the composition of the index to account for changing economic or market factors. Such discretion would be permissible. However, the definition contemplates that the position holder's discretion would not extend to frequently or arbitrarily changing the composition of the index or the weighting of the commodities in the index. Such actions would indicate that the position was being actively managed with a view to taking advantage of short-term market trends. The definition also contemplates that the position holder could exercise some discretion as to when to roll futures positions forward into the next delivery month without violating the ''passively managed'' requirement (provided no positions were carried into the spot month). The Commission believes that limited discretion as to when a position must be rolled forward can mitigate the market impact that might otherwise result from large positions being rolled forward on a pre-determined date and, consequently, help to avoid liquidity problems.

Fourth, the futures trading undertaken pursuant to the exemption must be unleveraged. An unleveraged position would be defined as a futures or futures equivalent position that is part of a portfolio of futures or futures equivalent positions directly relating to an underlying broadly diversified index, the notional value of which positions does not exceed the sum of the value of: (1) Cash set aside in an identifiable manner, or unencumbered short-term U.S. Treasury obligations so set aside, plus any funds deposited as margin on such position; and (2) accrued profits on such position held at the futures commission merchant. Because the futures positions would be fully offset by cash or profits on such positions, financial considerations (e.g., significant price changes) should not cause rapid liquidation of positions, which can cause sudden or unreasonable fluctuations or unwarranted changes in prices.

Finally, positions may not be carried into the spot month, a period during which physical commodity markets are particularly vulnerable to manipulations, squeezes and sudden or unreasonable fluctuations or unwarranted changes in prices.

Entities intending to hold risk management positions pursuant to the exemption in § 150.3(a)(2) would be required to apply to the Commission and receive Commission approval in order to receive an exemption. The applicant would be required to provide the following information:

[10] The long-only or short-only qualification would limit risk management positions to positions offsetting either a long index or portfolio or a short index or portfolio, and thus would not allow for spread or straddle positions. With respect to short-only positions, it should be noted that all the applications for index-based trading relief received by the Commission to date, whether for hedge exemptions or no-action relief, have involved long-only futures positions. However, the proposed rules would also provide for an entity that might offer investors a ''bear market index.'' Such an index would require the offeror to be long opposite its customers. It would, therefore, need to offset that exposure with short futures positions.

[11] For example, a long call option combined with a short put option is equivalent to a long futures contract.

Application for a Risk Management Exemption as Defined in § 150.1(j)

1. Initial application materials:

A. For an exemption related to a ‘‘fiduciary obligation’’.

• A description of the underlying index or group of commodities, including the commodities, the weightings, the method and timing of re-weightings, the selection of futures months, and the timing and criteria for rolling from one futures month to another;

• A description of the ‘‘fiduciary obligation;’’

• The actual or anticipated value of the underlying funds to be invested in commodities within the next fiscal or calendar year and the method for calculating that value, as well as the equivalent numbers of futures contracts in each of the § 150.2 markets for which the exemption is sought;

• A description of the manner in which the funds to be invested in commodities will be set aside;

• A statement certifying that the requirements of this exemption are met and will be observed at all times going forward and that the Commission will be notified promptly of any material changes in this information; and

• Such other information as the Commission may request.

B. For an exemption based upon a ‘‘portfolio diversification plan’’.

• A description of the investment index or group of commodities, including the commodities, the weightings, the method and timing of re-weightings, the selection of futures months, and the timing and criteria for rolling from one futures month to another;

• A description of the entire portfolio, including the total size of the assets, the asset classes making up the portfolio, and a description of the allocation among the asset classes;

• The actual or anticipated value of the underlying funds to be invested in commodities and the method for calculating that value, as well as the equivalent numbers of futures contracts in each of the § 150.2 markets for which the exemption is sought;

• A description of the manner in which the funds to be invested in commodities will be set aside;

• A statement certifying that the requirements of this exemption are met and will be observed at all times going forward and that the Commission will be notified promptly of any material changes in this information; and

• Such other information as the Commission may request.

2. Supplemental Material: Whenever the purchases or sales that a person wishes to qualify under this risk management exemption shall exceed the amount provided in the person's most recent filing pursuant to this section, or the amount previously specified by the Commission pursuant to this section, such person shall file with the Commission a statement that updates the information provided in the person's most recent filing and provides the reasons for this change. Such statement shall be filed at least ten business days in advance of the date that such person wishes to exceed those amounts and if the notice filer is not notified otherwise by the Commission within the 10-day period, the exemption will continue to be effective. The Commission may, upon call, obtain such additional materials from the applicant or person availing themselves of this exemption as the Commission deems necessary to exercise due diligence with respect to granting and monitoring this exemption.

Entities holding risk management positions pursuant to the exemption in § 150.3(a)(2) would also be required to immediately report to the Commission in the event they know, or have reason to know,[12] that any person holds a greater than 25% interest in such position. The reason for this requirement is to alert the Commission to the possibility that an individual might be attempting to use the exemption as a means of avoiding otherwise applicable speculative position limits.

C. Questions

The Commission would welcome public comments on any aspect of the proposed risk management exemption from Federal speculative position limits. However, the Commission is particularly interested in the views of commenters on the following specific questions:

(1) Are any of the proposed conditions for receiving a risk management exemption unnecessary and, if so, why? Alternatively, should any of the proposed conditions be modified and, if so, why?

(2) Should any other conditions, in addition to those set out in these proposed rules, be imposed as a prerequisite for receiving a risk management exemption? If so, what is the rationale for such additional conditions (*i.e.*, what potential harm would they address)?

(3) Is there any type of index-based trading that should be covered by the proposed rules, but is not? If so, how should the proposed rules be revised to apply to such trading?

(4) The proposed rules would allow for a risk management exemption in the case of short-only futures or futures equivalent positions used to manage risks in connection with a ‘‘bear market index.’’ Would any of the exemptive rules, as proposed, create potential problems as applied to such an index? For example, in applying the definition of ‘‘unleveraged position,’’ would problems be encountered in comparing the notional value of an unleveraged short futures position to the value of the cash, margins and accrued profits on such position?

(5) Should the proposed rules impose any restrictions or conditions regarding how broad- or narrow-based an index should be if a position based on the index is to qualify for an exemption? For example, with respect to narrow-based indices reflecting specific industry or commodity sectors, should the Commission be concerned that a narrow-based index composed entirely of agricultural commodities—for example, 25% each of corn, wheat, oats and soybeans—could operate as a mechanism for evading speculative position limits in one or more of those commodities?

(6) The proposed rules list the information that must be provided in an application for a risk management exemption. Are the requirements set out in the proposed rules appropriate? Should the requirements be revised and, if so, how?

III. Related Matters

A. Cost Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, section 15(a) requires the Commission to ‘‘consider the costs and benefits’’ of the subject rule.

Section 15(a) further specifies that the costs and benefits of the proposed rule shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery;

[12] The Commission understands that not every entity that might qualify for this exemption would necessarily know the identities of all of the participants in the position. For example, a fund based on a commodity index may qualify for the exemption but the entity operating the fund may not know the identities of the owners of outstanding shares and, therefore, may not know when any given person had acquired a 25% or more interest in the position held by the fund.

(4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The proposed rules would provide for a risk management exemption from the Federal speculative position limits applicable to certain agricultural commodities, thus giving entities such as index funds and pension funds an opportunity to more effectively manage risks for their investors through greater diversification of their portfolios. The rules would seek to protect the futures markets from potential ill effects of such risk management positions by imposing conditions on the exemption and creating an application process (including a requirement to file updates as necessary) to assure those conditions are met. The Commission, in proposing these rules, has endeavored to impose the minimum requirements necessary consistent with its mandate to protect the markets and the public from ill effects.

The Commission specifically invites public comment on its application of the cost benefits criteria of the Act. Commenters are also invited to submit any quantifiable data that they may have concerning the costs and benefits of the proposed rules with their comment letter.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.*, requires Federal agencies, in proposing rules, to consider the impact of those rules on small businesses. The Commission believes that the proposed rule amendments to implement a new exemption from Federal speculative position limits would only affect large traders. The Commission has previously determined that large traders are not small entities for the purposes of the RFA.[13] Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the action taken herein will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

When publishing proposed rules, the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the Paperwork Reduction Act. In compliance with the Act, the Commission, through this rule proposal, solicits comment to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including the validity of the methodology and assumptions used; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) enhance the quality, utility and clarity of the information to be collected; and (4) minimize the burden of the collection of the information on those who are to respond through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The Commission has submitted the proposed rule and its associated information collection requirements to the Office of Management and Budget (''OMB'') for its review.

Collection of Information: Rules Establishing Risk Management Exemption From Federal Speculative Position Limits, OMB Control Number.

The estimated burden was calculated as follows:

Estimated number of respondents: 6.

Annual responses by each respondent: 1.

Total annual responses: 6.

Estimated average hours per response: 10.

Annual reporting burden: 60 hours.

List of Subjects in 17 CFR Part 150

Agricultural commodities, Bona fide hedge positions, Position limits, Spread exemptions.

In consideration of the foregoing, pursuant to the authority contained in the Commodity Exchange Act, the Commission hereby proposes to amend part 150 of chapter I of title 17 of the Code of Federal Regulations as follows:

PART 150—LIMITS ON POSITIONS

1. The authority citation for part 150 is revised to read as follows:

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

2. Section 150.1 is amended by adding new paragraphs (j) through (m) to read as follows:

§ 150.1 Definitions.

* * * * *

(j) *Risk management position*, for the purposes of an exemption under § 150.3(a)(2), means a futures or futures equivalent position, held as part of a broadly diversified portfolio of long-only or short-only futures or futures equivalent positions, that is based upon either:

(1) A fiduciary obligation to match or track the results of a broadly diversified index that includes the same commodity markets in fundamentally the same proportions as the futures or futures equivalent position; or

(2) A portfolio diversification plan that has, among other substantial asset classes, an exposure to a broadly diversified index that includes the same commodity markets in fundamentally the same proportions as the futures or futures equivalent position.

(k) *Broadly diversified index* means an index based on physical commodities in which:

(1) Not more than 15% of the index is composed of any single agricultural commodity named in § 150.2 (for which purposes, wheat shall be regarded as a single commodity, so that positions in all varieties of wheat, on all exchanges combined, may not exceed 15% of the index, and the soybean complex shall be regarded as a single commodity, so that positions in soybeans, soybean oil and soybean meal, on all exchanges combined, may not exceed 15% of the index); and

(2) Not more than 50% of the index as a whole is composed of agricultural commodities named in § 150.2.

(l) *Passively managed position* means a futures or futures equivalent position that is part of a portfolio that tracks a broadly diversified index, which index is calculated, adjusted, and re-weighted pursuant to an objective, predetermined mathematical formula the application of which allows only limited discretion with respect to trading decisions.

(m) *Unleveraged position* means:

(1) A futures or futures equivalent position that is part of a portfolio of futures or futures equivalent positions directly relating to an underlying broadly diversified index, the notional value of which positions does not exceed the sum of the value of:

(i) Cash set aside in an identifiable manner, or unencumbered short-term U.S. Treasury obligations so set aside, plus any funds deposited as margin on such position; and

[13] 47 FR 18618 (April 30, 1982).

(ii) Accrued profits on such position held at the futures commission merchant.

(2) [Reserved]

3. Section 150.3 is amended by revising paragraph (a) introductory text, adding a new paragraph (a)(2), and adding a new paragraph (c) to read as follows:

§ 150.3 Exemptions.

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

* * * * *

(2) Risk management positions, as defined in § 150.1(j), that fulfill the following requirements:

(i) Such risk management positions must comply with the following conditions:

(A) The positions must be passively managed;

(B) The positions must be unleveraged; and

(C) The positions must not be carried into the spot month.

(ii) Entities intending to hold risk management positions pursuant to the exemption in § 150.3(a)(2) must apply to the Commission and receive Commission approval. Such applications must include the following information:

(A) In the case of an exemption based on a fiduciary obligation, as described in § 150.1(j)(1), an application must include:

(*1*) A description of the underlying index or group of commodities, including the commodities, the weightings, the method and timing of re-weightings, the selection of futures months, and the timing and criteria for rolling from one futures month to another;

(*2*) A description of the ''fiduciary obligation;''

(*3*) The actual or anticipated value of the underlying funds to be invested in commodities within the next fiscal or calendar year and the method for calculating that value, as well as the equivalent numbers of futures contracts in each of the § 150.2 markets for which the exemption is sought;

(*4*) A description of the manner in which the funds to be invested in commodities will be set aside;

(*5*) A statement certifying that the requirements of this exemption are met and will be observed at all times going forward and that the Commission will be notified promptly of any material changes in this information; and

(*6*) Such other information as the Commission may request.

(B) In the case of an exemption based on a portfolio diversification plan, as described in § 150.1(j)(2), an application must include:

(*1*) A description of the investment index or group of commodities, including the commodities, the weightings, the method and timing of re-weightings, the selection of futures months, and the timing and criteria for rolling from one futures month to another;

(*2*) A description of the entire portfolio, including the total size of the assets, the asset classes making up the portfolio, and a description of the allocation among the asset classes;

(*3*) The actual or anticipated value of the underlying funds to be invested in commodities and the method for calculating that value, as well as the equivalent numbers of futures contracts in each of the § 150.2 markets for which the exemption is sought;

(*4*) A description of the manner in which the funds to be invested in commodities will be set aside;

(*5*) A statement certifying that the requirements of this exemption are met and will be observed at all times going forward and that the Commission will be notified promptly of any material changes in this information; and

(*6*) Such other information as the Commission may request.

(iii) Whenever the purchases or sales that a person wishes to qualify under this risk management exemption shall exceed the amount provided in the person's most recent filing pursuant to this section, or the amount previously specified by the Commission pursuant to this section, such person shall file with the Commission a statement that updates the information provided in the person's most recent filing and provides the reasons for this change. Such statement shall be filed at least ten business days in advance of the date that such person wishes to exceed those amounts and if the notice filer is not notified otherwise by the Commission within the 10-day period, the exemption will continue to be effective. The Commission may, upon call, obtain such additional materials from the applicant or person availing themselves of this exemption as the Commission deems necessary to exercise due diligence with respect to granting and monitoring this exemption.

(iv) Entities holding risk management positions pursuant to the exemption in § 150.3(a)(2) shall immediately report to the Commission in the event that they know, or have reason to know, that any person holds a greater than 25% interest in such position.

* * * * *

(c) The Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight, or the Director's designee, the functions reserved to the Commission in § 150.3(a)(2) of this chapter.

Issued by the Commission this 20th day of November, 2007, in Washington, DC.

David Stawick,

Secretary of the Commission.

[FR Doc. E7–22992 Filed 11–26–07; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket Nos. 2004N–0217, 2005P–0189, and 2006P–0137]

RIN No. 0910–ZA28

Food Labeling: Nutrient Content Claims; Alpha-Linolenic Acid, Eicosapentaenoic Acid, and Docosahexaenoic Acid Omega-3 Fatty Acids

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) proposes to issue this rule finding that certain nutrient content claims for foods, including conventional foods and dietary supplements, that contain omega-3 fatty acids, do not meet the requirements of the Federal Food, Drug, and Cosmetic Act (the act) and may not appear in food labeling. This rule is being proposed in response to three notifications submitted to FDA under the act. One notification concerning nutrient content claims for alpha-linolenic acid (ALA), docosahexaenoic acid (DHA), and eicosapentaenoic acid (EPA) was submitted collectively by Alaska General Seafoods, Ocean Beauty Seafoods, Inc., and Trans-Ocean Products, Inc. (the seafood processors notification); a second notification concerning nutrient content claims for ALA, DHA, and EPA was submitted by Martek Biosciences Corp. (the Martek notification); and a third notification concerning nutrient content claims for DHA and EPA was submitted by Ocean Nutrition Canada, Ltd. (the Ocean Nutrition notification).

FDA has reviewed the information included in the three notifications and is proposing to prohibit the nutrient content claims for DHA and EPA set