

MEMORANDUM

Date: May 31, 2012

To: Shagufta Ahmed and Nicholas Fraser, Office of Management and Budget (OMB), Office of Information and Regulatory Affairs

From: Ken Danger, James Outen, and Neal Kumar Commodity Futures Trading Commission (CFTC), Division of Market Oversight (“DMO”) and Office of General Counsel

Re: Justification Statement for Non-Substantive Revisions to CFTC Forms

Pursuant to Commission regulation 151, the Commission will impose speculative position limits on futures and swaps. These limits on speculative positions do not apply to positions that qualify as a “bona fide hedge under regulation 151.5(a)(2). In order to determine whether a person has complied with position limits, regulation 151.5 requires market participants to submit reports that establish whether or not a futures or swaps transaction is in fact a bona fide hedge as described under regulation 151.5(a)(2). In addition to position limits, regulation 151.6 imposes enhanced reporting requirements for persons that hold positions in swaps or futures in excess of “position visibility” levels. Thresholds for position visibility levels are based on a percentage of an applicable position limit and are designed to give the Commission enhanced surveillance data on the largest traders in certain energy and metals markets.

The position visibility and bona fide hedging reporting requirements each have associated forms. The bona fide hedging forms for persons with a position in excess of a particular position limit include forms 404, 404S and 404A, while the position visibility reports are filed using forms 401 and 404. The Commission is currently developing systems to allow market participants to submit these forms electronically, and as part of that effort the Commission has discovered necessary clarifications to the existing data fields for the forms as well as additional instructions to provide needed guidance to market participants.

Each of the forms relate to specific provisions of Commission regulation 151. In addition, under Commission regulation 151.5(e), the Commission may request additional information for the forms related to bona fide hedging transactions. Further, the Commission has

delegated to the Director of the Division of Market Oversight (“DMO Director”) the authority to request additional information in the bona fide hedging form filings and to accept alternative position visibility filings. Commission staff has summarized the scope of the forms and the proposed changes for the benefit of the Office of Management and Budget (“OMB”), and we have also attached redlined copies demonstrating changes to these forms.

Form 404

Market participants are required to submit form 404 if they exceed an applicable position limit and are relying upon the bona fide hedge exemption for physical (cash) positions (e.g., owning 100,000 bushels of wheat). Thus, form 404 requires market participants to submit information related to physical positions that allows the Commission to determine whether the positions in futures or swaps are a bona fide hedge under regulation 151.

The attached redlined document includes certain clarifications in the instructions to the form to reduce confusion. For example, the instructions clarify that persons should “enter positive values for all position data.” The Form also aligns the reporting requirements with the Rule by clarifying that that person should report positions in “referenced contracts in each Core Referenced Futures contract” and not positions “in each Core Referenced Futures Contract”. Similarly, in order to align the form with the rule, staff deleted the sentence “if it is your practice to exclude certain source commodities, products, or byproducts in determining your cash positions for bona fide hedging, they should be excluded from the CFTC Form 404 report.” In addition, certain instructions, such as those related to “position visibility” reporting were moved higher up in the form to ease comprehension.

In order to reduce burden, staff also eliminated numerous check-off boxes in the original form that would have required market participants to file two separate forms for position visibility and bona fide hedging. These changes are not visible in the attached redlined document due to the way Microsoft Word handles changes that relate to “tables.” However, these changes can be seen by comparing the original form with the redlined version. The check-off boxes have been replaced by data column in the form (1st column) that requires market participants to indicate whether the information is related to a filing associated with position limits or position visibility. As a result of this reformatting, the instructions to Section A and B

have been updated. For example, market participants should “use ”PL” if the filing is for position limits; use “PVMP” if the filing is for position visibility covering the largest net position; and use “PVFT” if the filing is for position visibility covering positions as of the first business Tuesday, respectively. Finally, in order to further reduce burden, several check-off boxes related to the type of exemption (e.g., ownership or fixed price purchases) have been dropped from the form, and now market participants need only indicate whether the cash positions are related to the “principal or agent”.

The Commission is also clarifying the name portion of the form. These changes create separate boxes for data related to names (e.g., first, last, company etc.), so that market participants can uniformly code this data as opposed to writing the data in a paragraph or as prose. To this end, staff have added fields for NFA ID, Legal Entity Identifier, and CFTC ID as well as the address, phone number and email address of the filer. This additional identifying information will help ensure that market participant data is processed correctly.

Form 404A

Market participants are required to submit form 404A if they want to exceed an applicable position limit in order to hedge anticipated cash market purchases. For example, if a large processor anticipated purchasing 100,000 bushels of corn in order to process that raw material into animal feed, form 404A allows market participants to report such anticipated cash market activity. Generally, form 404A allows market participants to report a variety of anticipated activities and the data helps the Commission establish whether these activities are consistent with the bona fide hedging as defined under regulation 151.

The attached redline document includes certain clarifications in the instructions to the form to reduce confusion. For example, the instructions clarify that persons should “enter positive values for all position data.” The Form also aligns the reporting requirements with the Rule by clarifying that that person should report positions in “referenced contracts in each Core Referenced Futures contract” and not positions “in each Core Referenced Futures Contract”. In addition, in several places in the form, citations to relevant parts of regulation 151 were added in order to guide market participants to relevant provisions within the Rule. Also, in a few instances staff added or replaced words related to “sales” or “purchases” of Referenced contracts due to omissions or mistakes in the earlier version. The instructions clarify that positions in

Referenced Contracts should be reported for “all-months-combined” and that units for physical commodities should be reported in the same manner throughout the form.

In order to further reduce burden on market participants, staff include several check-off boxes that require market participants to indicate the type of anticipatory hedge they are claiming. Adding check-off boxes reduces burden as otherwise market participants would be required to put in “zero” in all sections of the form that were not relevant to their particular situation. Staff also eliminated four data fields in section E related to fixed and unfixed service receipts or payments in order to reduce burden.

The instructions for Section C for anticipatory hedging were clarified in several respects. First, staff clarified that market participants should report the anticipated merchandising (purchases and sales) of that cash market commodity “through the storage facility” for the period specified “for which you have not already entered into a contract.” Staff also clarified that capacity should be measured on a one-time basis rather than on the throughput basis. Staff also included data fields for sales and purchases during the hedging period as these fields were inadvertently excluded from the form. A data field on anticipated inventories during the hedging period was included in order to allow staff to determine whether the information submitted is consistent with bona fide hedging as defined in the rule. All of these changes align with the intent of the Rule.

The Commission is also clarifying the name portion of the form. These changes create separate boxes for data related to names (e.g., first, last, company etc.), so that market participants can uniformly code this data as opposed to writing the data in a paragraph or as prose. To this end, staff have added fields for NFA ID, Legal Entity Identifier, and CFTC ID as well as the address, phone number and email address of the filer. This additional identifying information will help ensure that market participant data is processed correctly.

Form 404S

Market participants are required to submit form 404S if they exceed an applicable position limit and are relying upon the bona fide hedge exemption for positions known as “pass-through swaps” or “pass-through swap offsets.” This exemption applies when two parties enter into a swap, and the swap qualifies as a bona fide hedge for one of the counterparties under

151.5(a)(2). In the event the non-hedging party to the swap wishes to claim a bona fide hedge exemption for either the offset or the swap itself, they must file form 404S.

Generally, form 404S requires market participants to submit certain information that helps the Commission establish whether the pass-through swap or the pass through swap offset qualifies as a bona fide hedge. The attached redline document includes certain clarifications in the instructions to the form to reduce confusion. For example, the instructions clarify that persons should “enter positive values for all position data.” The Form also aligns the reporting requirements with the Rule by clarifying that that persons should report positions in “referenced contracts in each Core Referenced Futures contract” and not positions “in each Core Referenced Futures Contract”.

The Commission is also clarifying the name portion of the form. These changes create separate boxes for data related to names (e.g., first, last, company etc.), so that market participants can uniformly code this data as opposed to writing the data in a paragraph or as prose. To this end, staff have added fields for NFA ID, Legal Entity Identifier, and CFTC ID as well as the address, phone number and email address of the filer. This additional identifying information will help ensure that market participant data is processed correctly.

Finally staff added the associated Position Type Indicator for the Commodity Referenced Price as it was inadvertently excluded on initial form. Fields for Clearing Organization identifier and Clearing Organization Cleared Product Identifier which further specify the type of swap that is being reported on the 404S will also allow staff to determine the exact nature of the swap that is being reported. In general this data will help ensure that the swaps that are being reported on 404S should be reported on that form as required by the Rule. A reference to these data fields was added as footnote 3.

Form 401

Market participants are required to file form 401 if they exceed certain position levels in energy and metals Referenced Contracts. Form 401 seeks to collect additional data about a person’s swap and futures positions and detailed data about uncleared swaps on certain reporting days.

The attached redline document includes certain clarifications in the instructions to the form to reduce confusion. For example, the instructions clarify that persons should “enter positive values for all position data.” The Form also aligns the reporting requirements with the Rule by clarifying that that person should report positions in “referenced contracts in each Core Referenced Futures contract” and not positions “in each Core Referenced Futures Contract”.

The Commission is also clarifying the name portion of the form. These changes create separate boxes for data related to names (e.g., first, last, company etc.), so that market participants can uniformly code this data as opposed to writing the data in a paragraph or as prose. To this end, staff have added fields for NFA ID, Legal Entity Identifier, and CFTC ID as well as the address, phone number and email address of the filer. This additional identifying information will help ensure that market participant data is processed correctly.

Finally, in section C of the Form, staff added the associated Position Type Indicator for the Commodity Referenced Price as it was inadvertently excluded on the initial form. The field for Position Type Identifier indicates whether the uncleared swap is subject to position limits or not and thus clarifies the nature of the type of swap being reported. In general this data will help ensure that the swaps that are being reported on 404S should be reported on that form as required by the Rule. A reference to this data field was added as footnote 3.