



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5260
Facsimile: (202) 418-5527
www.cftc.gov

Division of
Market Oversight

Richard A. Shilts
Director

CFTC letter No. 06-09
May 5, 2006
No-Action
Division of Market Oversight

Mr. Michael Sackheim, Esq.
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019

Re: Request for No-Action Relief with Regard to Commodity Exchange Act Section 4a
and Commission Regulation 150.2, Speculative Position Limits for Certain Corn and
Wheat Futures Positions

Dear Mr. Sackheim:

As you know, pursuant to Section 4a(a) of the Commodity Exchange Act (the “Act”), the Commission establishes and enforces speculative position limits for futures and option contracts on a limited group of agricultural commodities, including corn and wheat traded on the Chicago Board of Trade (“CBOT”). Those limits are set out at § 150.2 of the Commission’s regulations. Section 150.3(a) of those regulations provides that certain positions may exceed the limits, including *bona fide* hedging transactions, as defined in regulation 1.3(z). Section 1.3(z)(3) provides that, in addition to certain enumerated hedging transactions listed in § 1.3(z)(2), the Commission may recognize other transactions and positions as *bona fide* hedging in accordance with requirements set out in § 1.47 of the regulations.

By letter dated March 1, 2006, you have requested, on behalf of your client, DB Commodity Services LLC (“DBCS”), no-action relief with respect to certain positions in CBOT corn and wheat futures, to be held by the DB Commodity Index Tracking Master Fund (“Master Fund”), a commodity pool owned and managed by DBCS. Specifically, you have asked that the Division of Market Oversight (“Division”) to confirm that it will not recommend to the Commission that enforcement action be taken with respect to such corn and wheat futures positions if the positions (in any month other than the spot month) are in excess of the applicable speculative position limits.¹ For the reasons, and subject to the conditions, described in the remainder of this letter, the Division hereby grants the no-action relief you have requested.

Factual Background

¹ While contending that the futures positions to be held by the Master Fund are “akin” to *bona fide* hedging positions, your no-action request specifically does not constitute a request pursuant to regulation 1.47 to classify those positions as *bona fide* hedging under regulation 1.3(z)(3).

The Funds

As stated in your letter, DBCS is the registered commodity pool operator (“CPO”) with respect to both the Master Fund and the DB Commodity Index Tracking Fund (“Investor Fund”). The assets of the Master Fund consist of a portfolio of futures contracts on the commodities comprising the Deutsche Bank Liquid Commodity Index™ – Excess Return (“the index”) and cash or cash equivalents. The Master Fund’s only investor is the Investor Fund and the only assets of the Investor Fund are common units of beneficial interest (“shares”) in the Master Fund. These shares are listed on the American Stock Exchange (“Amex”) and are available for purchase by the public. The Investor Fund currently has \$2 billion worth of shares registered with the Securities and Exchange Commission (“SEC”) to be offered and sold to the public.²

The Index

You have stated that the index is composed of notional amounts of the following commodities in the following percentages: crude oil (35%), heating oil (20%), aluminum (12.5%), gold (10%), corn (11.25%) and wheat (11.25%). You have described the index as “a widely used commodity index and ... an internationally referenced economic benchmark.” The Master Fund will track the index over time by holding long futures positions that correspond to the commodities comprising the index.³

Both the index and the Investor Fund are highly transparent. The index sponsor calculates the intra-day index level every 15 seconds during the trading day, based on Reuters quotes for the underlying futures contracts. The intra-day and daily closing levels of the index are available on Reuters, Bloomberg, Deutsche Bank’s website and Amex’s website. Information on the daily closing and settlement prices of the futures contracts that make up the index is available on the websites of the respective futures exchanges and other sources and real time data on the contracts is available by subscription from Reuters and Bloomberg. Any adjustments to the index are published on Deutsche Bank’s website.

Information regarding the shares in the Investor Fund is freely available on websites maintained by Amex, DB London and the Investor Fund itself. The Amex website makes available: the daily net asset value for the Investor Fund; number of shares outstanding; daily trading volume; intra-day and closing prices; the prior day’s net asset value; current index value; indicative intra-day net asset value per share; and a link to the Fund’s prospectus. The Investor Fund website includes the following information regarding the Fund: the prior business day’s net asset value and index value, and the reported closing price; the mid-point of the bid-ask price in relation to the net asset value as of the time the net asset value is calculated; calculation of the premium or discount of such price against such net asset value; the prospectus; and other applicable quantitative information. DBCS, the CPO of the Investor Fund, also publishes or causes to be published the net asset value of the Fund and the net asset value per share daily, as well as the

² The Master Fund and the Investor Fund filed a joint registration statement with the SEC and are sometimes referred to in your letter as “the Funds.”

³ The futures contracts and the respective exchanges where they are traded include: crude oil and heating oil on the New York Mercantile Exchange (“NYMEX”), gold on the COMEX division of the NYMEX, aluminum on the London Metals Exchange (“LME”), and corn and wheat on the CBOT.

indicative intra-day net asset value every 15 seconds throughout the trading day. All of the foregoing is published on Reuters, Bloomberg and the Deutsche Bank's website.

Unique Regulatory Oversight

You have pointed out that, in addition to DBCS being regulated as a CPO by the Commission and the National Futures Association, both the Investor Fund and the Master Fund are subject to "unique federal and self-regulatory oversight" by virtue of the shares being listed on Amex, a national securities exchange regulated by the Securities and Exchange Commission ("SEC"). Thus, both the Investor Fund and the Master Fund are regulated by both the SEC and the National Association of Securities Dealers ("NASD"). In particular, the offer and sale of shares in the Investor Fund, and the secondary market therein, are subject to the comprehensive federal securities regulatory scheme administered by the SEC and the NASD (in its capacity as a self-regulatory organization) and all shareholders invest as securities customers through an SEC-registered broker-dealer (or other entity exempt from broker-dealer registration, such as a bank).

Trading Activities

You have stated that the Master Fund is "not an actively managed commodity pool (or other 'speculator' within the intent of Commission regulation 1.3(z))" because the Fund does not seek to generate positive returns under any and all market conditions, or based on the CPO's investment skill. Rather, the Master Fund's investment objective is simply to track the index over time "whether the index is rising, falling or flat." To that end, the Master Fund will acquire long futures position in the six commodities making up the index, in the proportions described in the Investor Fund's prospectus. You point out that, because the Master Fund is not an actively managed pool, it "does not use any third party commodity trading advisor, does not charge any performance or incentive fee based on the profitability of its portfolio, does not utilize a discretionary trading program or any other investment or trading methodology, and does not use leverage in connection with its futures portfolio."

You further note that regulation 1.3(z) provides in relevant part that hedging transactions "are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise."⁴ You point out that the Master Fund's only objective is to track the index over time (through acquiring long futures positions), using a nondiscretionary methodology, with no investment objective to "achieve capital appreciation." Therefore, you suggest that the Fund should be viewed as "akin to a commercial enterprise that is in the business of investing and reinvesting in long futures positions in the index commodities," with "no intent to speculate ... in the futures market" and which presents no "danger of excessive speculation."

Maximum Size of Corn and Wheat Futures Positions

⁴ In that context, you point to the Commission's 1987 interpretation clarifying the hedging definition "to include certain investment strategies of institutional investors, such as through acquiring a long position in Treasury bond futures to hedge against interest rate exposure." 52 FR 27195 (July 20, 1987). You suggest that the Master Fund's activities are analogous to the financial hedging activities described in the 1987 interpretation.

You state that the Funds currently have registered \$2 billion worth of shares in the Investor Fund, to be offered and sold to the public. Based on the percentages of the index represented by corn and wheat, and current price levels, that amount of shares translates to maximum long CBOT corn and wheat futures positions of approximately 17,500 corn contracts and 11,000 wheat contracts. However, there is no maximum amount of capital the Funds may accept (and accordingly, no maximum size of long positions the Master Fund may acquire) because the CPO intends to register additional shares in the event the supply of currently registered shares is exhausted. You have proposed that, in the event such additional shares are created, requiring additional long futures positions, DBCS be permitted to notify the Division, in reliance on the no-action relief granted in this letter. Upon receipt of such request, the Division could either confirm that the increased position size is subject to the relief granted in this letter and is, therefore, permitted, or inform DBCS that such increased position size is not subject to the relief and, therefore, is not permitted. In either event, DBCS would be able to learn the Division's decision through a simple notice filing and would not be required to reapply for no-action relief *de novo*.

You have also represented that DBSC "will not carry into the spot months any positions in wheat and corn futures contracts in excess of the [spot month] positions [limits] set forth in Commission Rule 150.2."

Conclusion

For the reasons, and subject to the conditions, described in this letter, the Division has determined that it will not recommend to the Commission that enforcement action be taken for violation of Commission regulation 150.2 with respect to the corn and wheat futures trading activity conducted by DBCS, and the futures positions held by the Master Fund, if those positions (in any month other than the spot month) are in excess of the applicable speculative position limits. In particular, the conditions governing this no-action relief include:

- The futures trading activity passively tracks a widely recognized commodity index;
- The futures trading activity is unleveraged;
- The futures trading does not result in price exposure for the Master Fund (*i.e.*, the price exposure is passed on to the shareholders in the Investor Fund);
- As noted, positions in excess of the speculative limits are not carried into the spot month;
- Both the index and the Investor Fund are highly transparent;
- Both the Investor Fund and the Master Fund are subject to unique federal and self-regulatory oversight by virtue of the shares being listed on Amex, and thereby subject to regulation by the SEC and the NASD; and
- The Master Fund will hold maximum long CBOT corn and wheat futures positions not exceeding 17,500 corn contracts and 11,000 wheat contracts.

The position taken herein is based upon the representations you have made to the Division. Any different, changed or omitted facts or conditions, including revisions to the legal requirements applicable to speculative position limits and exemptions thereto, might require the Division to reach a different conclusion. You must notify the Division immediately in the event that there is any significant change from the facts presented to us concerning the activities of DBCS, the Master Fund or the Investor Fund, as described in your letter. Further, this letter represents the position of the Division of Market Oversight only and does not necessarily represent the views of the Commission or any other division or office of the Commission.

If you have any questions concerning this correspondence, please contact Donald H. Heitman, an attorney on my staff, by email at dheitman@cftc.gov, or by phone at (202) 418-5041.

Very truly yours,

Richard A. Shilts
Director
Division of Market Oversight