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April 9, 2001

Ms. Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission
1155 21st Street NW
Washington DC 20581

Re: Proposed Rules Implementing the Commodity Futures Modernization Act of 2000, 66 Fed.Reg. 14262 (March 9, 2001)

Dear Ms. Webb:

The @Markets Association (“@Markets”) is a trade association formed in November, 2000 to represent the interests of the business-to-business (“B2B”) exchange community in the development of open and competitive international online markets.¹ @Markets welcomes this opportunity to comment on the Commodity Futures Trading Commission’s (“Commission’s”) proposed rules implementing those provisions of the Commodity Exchange Act (“Act”), as amended by the Commodity Futures Modernization Act of 2000 establishing and governing different trading facilities subject to the Commission’s exclusive jurisdiction and oversight.

These amendments codify and expand the Commission’s proposed new regulatory framework for multilateral transaction execution facilities, which sought to establish a regulatory system “tailored to match the degree and manner of regulation to the varying nature of the products traded thereon, and to the sophistication of the customer.”² In particular, the provisions of the Act governing exempt commercial markets (section 2(h)(3)-(5)) and derivatives transaction execution facilities (section 5a) remove many of the statutory and regulatory impediments that previously inhibited the B2B markets from offering derivatives and other risk management products to their participants. As such, we are confident these amendments will facilitate the development of B2B markets.

¹ At an organizational meeting held on March 15, @Markets appointed its first Board of Directors. The members of the board include a cross section of representatives from the traditional and emerging markets: (1) E. Russell Braziel (Chairman), President and Chief Executive Officer, Netrana, Inc.; (2) John M. Damgard, President, @Markets Association; (3) Scott Deeter, Chief Executive Officer, CyberCrop.com; (4) George D. Flynn, President, EMETRA; (5) Ram Ganeshan (Public Director), Assistant Professor, The College of William and Mary; (6) Peter Kollock, Executive Vice President, OnExchange, Inc.; (7) Satish Nandapurkar, Managing Director, Chicago Mercantile Exchange; (8) Laurence E. Mollner, President, Mariah Trading Co., LLC; (9) Didier Varlet, Chairman and Chief Executive Officer, Carr Futures, Inc.

² 65 Fed.Reg. 38986 (June 22, 2000).

Ms. Jean A. Webb

April 9, 2001

Page 2

The Commission has wisely elected not to propose any requirements that are not specifically set forth in the legislation. In particular, the provisions of the proposed rules that affect most directly the business-to-business community—Part 36-Exempt Markets, and Part 37-Derivatives Transaction Execution Facilities—generally do little more than recite the relevant provisions of the Act. We support the Commission's decision in this regard.³

Nonetheless, we also recognize that the Act and the proposed rules afford the Commission the opportunity to impose additional requirements at a later time. For example, consistent with the provisions of section 2(h)(4)(D) of the Act, proposed rule 36.3(c)(2) authorizes the Commission to require an exempt commercial market to "disseminate publicly trading volume and other trading data to the extent appropriate" if, following an opportunity for a hearing, the Commission finds that the market "performs a significant price discovery function." Neither the Act nor the proposed rules define the standards that the Commission is to employ in determining that a market performs a significant price discovery function. We would expect to have the opportunity to comment on appropriate standards prior to or in connection with any such determination by the Commission under this section of the Act.

We further note that, under proposed Part 37, the Commission has considerable latitude in determining whether a derivatives transaction execution facility is complying with the core principles set forth in section 5a(d) of the Act. We encourage the Commission to continue to demonstrate the restraint generally reflected in the proposed rules.

Specific Comments

Eligible Commercial Entities. In the *Federal Register* release accompanying the proposed rules, the Commission asks whether the definition of an "eligible commercial entity" set forth the section 1a(11) of the Act should be amended to include individuals who serve functions similar to those that floor traders perform on a physical trading facility.⁴ Consistent with our view that the Commission should maintain flexibility in its implementation of these provisions of the Act, we would support the adoption of an amendment to the rules to include within the definition of an "eligible commercial entity" individuals that perform market-making functions.

³ Our comments in this letter are limited to Part 36 and Part 37 of the proposed rules. With respect to the other provisions of the proposed rules, we defer to other industry representatives with more direct experience in the regulation of exchange-traded products. However, we expect to comment on the proposed rules governing designated clearing organizations when they are published for comment.

⁴ 66 *Fed.Reg.* at 14265. An "eligible commercial entity" is generally defined to include any corporation, partnership, or proprietorship that has a demonstrable ability to make or take delivery of the underlying product, incur risk, in addition to price risk, related to the product and that (a) has a net worth in excess of \$1 million and enters into the transactions in connection with the entity's business or to manage the risks associated with an asset or liability owned or likely to be owned or incurred by the entity; (b) has assets in excess of \$10 million; or (c) is guaranteed by a financial institution, an insurance company or a governmental entity. The term also includes any dealer that regularly provides risk management or hedging services to such entities involving transactions to purchase or sell the product or derivative instruments in the product. As defined in the Act, an "eligible commercial entity" does not include any individuals.

B2B markets are in their infancy; how they will evolve is by no means clear. Certain markets may find that individual market makers are a critical element in assuring necessary liquidity. An underlying principle of the Commodity Futures Modernization Act and the Commission's own regulatory reform effort is the belief that, to the extent practicable, the markets, not regulatory policy, should determine the success or failure of a particular product or means of trading. This principle supports extending the definition of an "eligible commercial entity" to include individuals performing a market-making function.

We understand that the Commission previously has not required such individuals effecting trades through an electronic trading facility to be registered with the Commission as floor traders. We support the Commission's decision in this regard and submit that the Commission similarly should not require such individuals to be registered in order to be considered "eligible commercial entities" under Part 36 and Part 37 of the proposed rules.⁵ In lieu of a registration requirement, we recommend that the rules provide only that such individuals must meet the requirements for membership established by the facility.⁶

Recordkeeping Requirements; Confidentiality. Although exempt commercial markets generally are exempt from regulation by the Commission, we understand that the Commission nonetheless has the obligation under section 2(h)(4) of the Act to enforce the provisions of the Act prohibiting fraud and manipulation in connection with transactions effected on such markets. To this end, section 2(h)(5) of the Act requires an exempt market to maintain and make available to the Commission upon request records of activities related to its business as an exempt market.⁷ More specifically, the Act provides that a market must be able to furnish the Commission, upon special call, with such information as the Commission determines appropriate to enable the Commission to reconstruct trading activity on the facility. In addition, an exempt commercial market is required to provide the Commission with access to the facility's trading protocols and with electronic access to transactions conducted on the facility. In lieu of granting electronic access, the Commission has proposed that the facility may elect to provide the Commission with large trader information in a form approved by the Commission.

The scope of the Commission's alternative proposal, which would require exempt markets to furnish large trader reports in lieu of providing the Commission electronic access, is unclear.

⁵ Although the Commission requests comment on this issue in connection with its discussion of Part 37 of the proposed rules, we assume that the expansion of the definition of an "eligible commercial entity" to individuals that perform a market-making function would apply as well to transactions effected on exempt commercial markets under Part 36 of the proposed rules.

⁶ If such individual would not meet the asset test for individuals under the definition of an "eligible contract participant" in section 1a(12) of the Act, the facility may wish to consider whether the individual's transactions on the facility should be guaranteed by another eligible commercial entity.

⁷ The market also must maintain records of the name and address of each participant authorized to enter into transactions on the facility in reliance on the exemption. Pursuant to section 2(h)(5)(B) of the Act, an exempt market must retain all records for a period of five years.

Proposed rule 36.3(b) states only that such reports would be required "as determined by the Commission in response to a petition by the exempt market." If the Commission intends that such reports would be regular and periodic, we submit that such a requirement is beyond the scope of the Commission's authority under section 2(h)(5)(B) of the Act, which provides that the market must "provide such reports to the Commission regarding transactions executed on the facility . . . as the Commission may *from time to time* request to enable the Commission to satisfy its obligations under this Act." [Emphasis supplied.] We do not believe that the Act contemplates the continued Commission oversight of these markets implied in the proposed rule.

Separately, we note that participants in B2B markets generally would consider the types of information required to be maintained and made available to the Commission under the Act and the proposed rules to be highly sensitive and confidential. In order to allay any concerns that such information may be disclosed unnecessarily or improperly to the detriment of a market and its participants, we respectfully request the Commission to confirm that an exempt commercial market will be deemed to be a "board of trade" for purposes of the confidentiality provisions of section 8(a) of the Act and the relevant provisions of the Freedom of Information Act.

Representations; Disclosure. Consistent with the provisions of section 2(h)(5)(F) of the Act, proposed rule 36.3(c)(1) prohibits an exempt commercial market from representing to any person that it is "registered with, or designated, recognized, licensed or approved by the Commission." In the *Federal Register* release accompanying the proposed rules, the Commission asks whether an exempt market further should be required to disclose affirmatively that the market and trading on the market "are not so regulated or approved by the Commission."⁸ Such affirmative disclosure is unnecessary. As a general matter, we do not believe that participants in these markets would expect that the markets would be subject to Commission regulation. Moreover, all of the participants in these markets would be sophisticated investors and can be expected to make appropriate inquiries regarding a market before applying for trading privileges on the facility.

Conclusion

@Markets appreciates the opportunity to submit these comments on the Commission's proposed rules implementing those provisions of the Act governing different trading facilities subject to the Commission's jurisdiction. If you have any questions regarding this letter, please contact me at (202) 772-3000.

Sincerely,



E. Russell Braziel
Chairman

⁸ 66 *Fed.Reg.* at 14266.

Ms. Jean A. Webb

April 9, 2001

Page 5

cc: Honorable James E. Newsome
Honorable Barbara Pedersen Holum
Honorable David D. Spears
Honorable Thomas J. Erickson