



**The American
Stock Exchange®**
An NASD Company

Michael J. Ryan, Jr.
Executive Vice President
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COMMENT

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OFFICE OF THE SECRETARIAT

May 31, 2001

Ms. Jean A. Webb
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C., 20581

Re: Exemption for Certain Brokers or Dealers from Provisions of the Commodity Exchange Act and CFTC Regulations: 66 FR 20118 (April 19, 2001)

Dear Ms. Webb:

The American Stock Exchange LLC ("Amex" or "Exchange") submits the following comments in response to the Commodity Futures Trading Commission's ("CFTC" or "Commission") recent Federal Register notice regarding the above matter ("April 19 Notice"). Amex is registered as a national securities exchange under the Securities and Exchange Act of 1934 ("SEA").

1. Background

The Commodity Futures Trading Act of 2000 ("CMFA") permits the trading of futures contracts on individual equity securities and narrow-based indexes of equity securities ("security futures") on a national securities exchange that files a written notice with the CFTC to be designated as a contract market in security futures. The CMFA also allows Securities and Exchange Commission ("SEC") registered broker and dealers that wish to extend their business activities to include transactions in security futures to "notice" register with the CFTC. Section 4f(a)(3) of the Commodity Exchange Act ("CEA" or "Act") provides a similar exemption from the floor broker ("FB") and floor trader ("FT") registration provisions of the CEA (without the notice filing requirements applicable to other brokers and dealers) for SEC registered brokers and dealers that intend to perform the functions of an FB or FT with respect to security futures.

Persons that are exempt from FB and FT registration by Section 4f(a)(3) of the CEA are expressly exempted by Section 4f(a)(4) from certain enumerated provisions of the Act, as well as those of the Commission's rules that were promulgated under those statutory

provisions. In addition to these statutory exemptions, the Section 4f(a)(4)(B)(i) of the Act authorizes the Commission by rule, regulation or order, to exempt, conditionally or unconditionally from any provision of the Act or of the Commission's rules, any broker dealer subject to the notice filing provisions of the Act or exempt from FB or FT registration under Section 4f(a)(3) to the extent the exemption is necessary or appropriate in the public interest and is consistent with the protection of investors. Section 4f(a)(4)(B)(i) of the Act also provides that the Commission may issue an order to exempt, conditionally or unconditionally, any broker dealer subject to notice registration under new Section 4f(a)(2) of the Act, or any broker dealer exempt from FB or FT registration under Section 4f(a)(3) from any provision of the Act or any provision of the Commission's regulations to the extent that the exemption is necessary or appropriate in the public interest and is consistent with the protection of investors. The April 19 Notice proposes procedures in new Regulation 41.41 by which broker dealers may apply for an exemptive order.

2. A National Securities Exchange Should have the Right to Request Exemptive Relief on Behalf of its Members Pursuant to Section 4f(a)(4)(B) of the Act

As currently drafted, proposed Regulation 41.41(a) provides that notice registered broker dealers and persons exempt from FB and FT registration may apply to the Commission for an exemptive order pursuant to Section 4f(a)(4)(B) of the Act. The Exchange believes that it would be more efficient for the Commission and broker dealers that seek to trade security futures if national securities exchanges were permitted to request exemptive orders on behalf of similarly situated members rather than requiring each broker dealer to request relief individually. The Exchange believes that it is uniquely well qualified to provide the Commission with comprehensive comment on the potential impact of SRO rules, federal securities laws and commodity futures regulations on its members. If national securities exchanges were allowed to request exemptive orders on behalf of similarly situated members, moreover, the Commission, in many circumstances, would have to consider only one request for relief rather than a number of individual applications. Permitting the Exchange to request exemptive orders on behalf of its members also may tend to reduce dissimilar regulation of similarly situated persons that might occur if one broker dealer received an exemptive order that others did not obtain.

3. The CFTC Should Exempt by Rule or Regulation Persons that Perform the Functions of FBs and FTs on the Floor of a National Securities Exchange with Respect to Security Futures from the Provisions of the CEA and Regulations Thereunder that are Covered by Comparable Provisions of the SEA, SEC Regulations and Exchange Rules

The American Stock Exchange LLC intends to list security futures as a national securities exchange that notice registers with the CFTC as a designated contract market. Thus, Amex members who are registered as brokers and dealers will trade security futures exempt from FB and FT registration. These persons already are subject to a variety of

federal and Amex regulations that address many of the same regulatory concerns underlying requirements applicable to FBs and FTs on contract markets. Due to market structure and statutory differences, however, the specific requirements applicable to members of national securities exchanges generally differ from those applicable to persons trading on contract markets. Amex specialists,¹ for example, perform the functions of a broker and dealer on the Exchange floor, yet they are subject to a complex pattern of regulation under the SEA, SEC regulations, and Amex rules that is unlike the regulatory structure applicable to FBs and FTs on a contract market.

The Exchange, accordingly, is requesting the CFTC to exempt by rule or regulation persons that perform the functions of FBs and FTs on the floor of a notice registered contract market (i.e., specialists, brokers² and registered traders³) with respect to the activities of these persons in security futures from the provisions of the CEA and regulations thereunder that are covered by comparable provisions of the SEA, regulations promulgated under the SEA, or exchange rules that have been approved by the SEC. To demonstrate the need for the requested relief, we have provided an illustrative list of CFTC rules that regulate conduct of FBs and FTs that are subject to analogous provisions of the SEA, regulations thereunder, or Exchange rules. This list is attached as Appendix A.

4. Request for Rule Making Regarding the Obligations of National Securities Exchanges that List Security Futures to Comply with CEA and CFTC Regulations Regarding Contract Market Responsibilities

The April 19 Notice requested comment on whether certain brokers and dealers should be exempted from provisions of the Commodity Exchange Act and CFTC regulations. It also requested comment on procedures by which broker dealers may request exemptive orders. The April 19 Notice did not request comment on what provisions of the CEA and regulations thereunder would apply to SEC registered national securities exchanges that trade security futures as a CFTC notice registrant. This is a crucial issue for national securities exchanges, particularly where the contract market requirements that might apply to them are already covered by the SEA or rules promulgated under the SEA.

¹ A specialist acts as a “broker’s broker” and as a dealer on the floor of an exchange. Amex specialists are subject to Exchange rules 108(d), 115, 126(e), 126(g), Commentary .03, 154, 155, 170 through 193, 200 through 207, 220, Commentary .02, and, with respect to options 950(a), 950(f), 950(h)-(l), 950(n), and 958A. Specialists also are subject to SEA Section 11(b) and SEA Rule 11b-1.

² Floor brokers represent orders as agent. On the Amex, the activities of floor brokers are subject to Exchange rules 103(c), 156 and, with respect to options, rules 950(a), 950(g) and 950(p).

³ Registered traders trade for their own account on the floor of an exchange. On the Amex, they may not act as agent during a trading session for an off-floor order in any security in which they act as principal during the session (Amex Rule 111(c)). In addition to Exchange rules regulating the conduct of trading generally, the activities of Amex registered traders are subject to Amex rules 110 through 114 and, with respect to Registered Options Traders, rules 950(a), 950(c), 957 and 958. Amex registered traders also are subject to SEA Section 11(a)(1)(I) and SEA Rule 11a1-5.

We, therefore, urge the Commission to address through rule making prior to the commencement of trading in security futures the extent to which a notice registered contract market would be responsible for complying with provisions of the CEA and regulations thereunder.

5. Conclusions

The Exchange believes that the relief it has requested on behalf of persons that act as floor brokers, floor traders and specialists in security futures on national securities exchanges that notice register with the CFTC is in the public interest, is consistent with the protection of investors, and is necessary and appropriate to avoid duplicative and possibly inconsistent regulation of persons trading security futures. The Exchange also believes that proposed Rule 41.41 should be revised to allow a national securities exchange to request exemptive orders from the Commission on behalf of its members. The Exchange, moreover, urges the CFTC to review in a rule making proceeding prior to the commencement of trading in security futures the extent to which national securities exchanges that seek to trade security futures as CFTC notice registrants should be required to comply with the provisions of the CEA and regulations thereunder, particularly when such markets may be subject to similar requirements in the SEA and regulations thereunder.

We would be pleased to further discuss our views on these matters with the Commission and its staff.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. By J.", written in a cursive style.

cc: Robert Colby
Christopher Cummings
Elizabeth King
Annette Nazareth
Lawrence Patent
Alan Seifert

APPENDIX A

CFTC Regulations Relating to FBs and FTs that are Similar to Regulatory Requirements Applicable to Amex Members

17 C.F.R. §1.38 “Execution of transactions.” The subject matter of this regulation is addressed by a number of Amex rules, including rules 115, 123, Commentaries .01 through .03 to Rule 126, 151, 152, 950(a), and Commentaries .02 and .03 to Rule 950(d).

17 C.F.R. §1.39 “Simultaneous buying and selling orders of different principals; execution of, for and between principals.” The subject matter of this regulation is addressed by a number of Amex rules, including Commentaries .01 and .02 to Rule 126, rules 151, 155, 950(a), and Commentaries .02 and .03 to Rule 950(d).

17 C.F.R. § 1.62 “Contract market requirement for floor broker and floor trader registration.” This regulation requires contract markets to adopt rules for the registration of floor brokers and traders, and to report to the Commission actions against a member that constitute a statutory disqualification or a revocation of trading privileges. Article IV of the Exchange Constitution and the Exchange’s Membership Requirements and Admissions Procedures (CCH Paragraph 9176) describe the process for becoming a member. Amex rules 110(a) and 950(a) require the registration of registered traders. Rule 170(a) requires the registration of specialists. SEA rules 17a-3(a)(12) and (13) describe records that need to be maintained in connection with the hiring of associated persons of members. SEA Rule 19d-1 (“Notices by Self-Regulatory Organizations of Final Disciplinary Actions, Denials, Bars, or Limitations Respecting Membership, Association, Participation, or Access to Services, and Summary Suspensions”) requires the Amex to report the specified actions to the SEC.

17 C.F.R. § 1.63 & 1.64 “Service on self-regulatory organization governing boards or committees by persons with disciplinary histories,” and “Composition of various self-regulatory organization governing boards and major disciplinary committees.” The requirements for service on the Exchange’s Board of Governors are set forth in Article II, Section 1(b) of the Exchange Constitution. SEA Section 6(b)(3) also establishes standards for the selection of persons to serve on exchange committees and the governing bodies. Article V, Section 1 of the Exchange Constitution describes the composition of Disciplinary Panels and requires the appointment of a professional hearing officer to chair the Panel. Article II, Section 6 of the Exchange Constitution describes the composition of the Amex Adjudicatory Council, the Exchange’s appellate body. Article VIII of the Exchange Constitution provides that arbitration proceedings shall be conducted according to the NASD Code of Arbitration Procedure.

17 C.F.R. §1.69 “Voting by interested members of self-regulatory organization governing boards and various committees.” The subject matter of this regulation is addressed by the following provisions of the Exchange’s Constitution: Article II, Section 3 (“Personal

Interest”), Article II, Section 5(d), and Article V, Section I(f). This issue is also covered by rules 2(b) and 11(a) of the Rules of Procedure Applicable to Exchange Disciplinary Proceedings.

17 C.F.R. §18 “Reports by traders” This rule imposes reporting and record keeping requirements on traders. Similar reporting and record keeping requirements are imposed upon Amex floor traders by a variety of Exchange rules and SEC regulations. See Article XI, Section 3 of the Exchange Constitution, and Amex rules 114, Commentary .06, 175, Guidelines (h) through (k), Rule 191, 590 Part 3, 904, 906, 950(l), 957, 904C, 906C, and 904G. SEA Regulations 17a-3 and 17a-4 also impose record keeping requirements on brokers and dealers.

17 C.F.R. §155.2 “Trading Standards for Floor Brokers.” This regulation requires contract markets to adopt rules to prohibit various floor broker activities.

- Paragraphs (a) and (b) of this regulation concern a floor broker trading for an account in which he or she has an interest while holding an executable agency order. The subject matter of this regulation is addressed by Amex rules 150, 155 and 950(a).
- Paragraph (c) of this regulation prohibits discretionary trading by floor brokers. The subject matter of this regulation is addressed by Amex Rule 103 and 950(p). In addition, Section 11(a) of the Securities Exchange Act of 1934 prohibits trading by members of an exchange in the absence of a specific exemption. No exemption is available for discretionary trading by floor brokers.
- Paragraph (d) of this regulation generally prohibits members from disclosing orders that they are holding. The subject matter of this regulation is addressed by Article V, Section 4(h) of the Exchange Constitution (“just and equitable principles of trade”), rules 16, 154, Commentary .10, 174, 950(a), and 950(f).
- Paragraph (e) of this regulation generally prohibits members from taking the other side of customer orders except with the consent of the customer and in compliance with rules approved by the CFTC. The subject matter of this regulation is addressed by Amex rules 129, 152, 155, and 950(a).
- Paragraph (f) of this regulation prohibits prearranged trading. The Amex defines prearranged trading as, “any purchase or sale transaction or series of transactions, which is coupled with or effected in contemplation of any agreement, arrangement or understanding, directly or indirectly, with any other party, to reverse such transaction and limit the risk of either party to the transaction.”¹ The Exchange has disciplined persons and member firms for prearranged trading in the absence of a manipulative intent under Article V, Section 4(h) of the Exchange Constitution (“just and equitable principles of trade”). Prearranged trading for manipulative purposes also violates SEA Section 9.
- Paragraph (h) prohibits a member from withdrawing or withholding an order of another person for the convenience of another member. The subject matter of this

¹ Floor Transactions Handbook. Page 7.

regulation is addressed by Article V, Section 4(h) of the Exchange Constitution (“just and equitable principles of trade”), 109, 156, and 950(g).

- Paragraph (i) requires floor members to promptly confirm their transactions with the contra-party to the trade. The subject matter of this regulation is addressed by Amex rules 719, 720, and 962 through 966. The Exchange currently requires members to submit trade information to comparison within two hours of the time of trade.

17 C.F.R.2 §155.5 “Prohibition on dual trading by floor brokers.” SEA Section 11(a) prohibits the members of an exchange from trading for their account unless a specific exemption is available. Amex Rule 111(c) (made applicable to options by Rule 950(c)) prohibits a Registered Traders from effecting a transaction for an account in which he or she has an interest and executing an off-floor order as broker in the same option during the same trading session. Amex specialists are explicitly allowed to act as broker and principal in the same security and trading session pursuant to SEA Rule 11b-1 and rules adopted by the Exchange. (See, for example, Amex Rules 150, 154, 155, 950(a) and 950(f).) Brokers only may trade for their account to offset a transaction made in error (SEA Section 11(a)(1)(f)).

17 C.F.R. §156 “Broker Associations” This regulation requires persons that meet the definition of a broker “association” to register with the contract market. The regulation further requires the contract market to use broker association registration information in its surveillance activities. The subject matter of Section 156 is addressed by Amex rules that require members to register their associations with the Exchange. (See Article IV, Section 2(b) of the Amex Constitution.) The Exchange’s Constitution and rules, moreover, provide that a member may be associated with no more than one member organization unless the association is approved by the Exchange. (Article IV, Section 2(c) and Rule 342.) Members, accordingly, are obligated to report their associations to the Exchange. The Exchange’s regulatory program, including its surveillance functions, is subject to routine examination by the SEC’s Office of Compliance Inspections and Examinations.