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By Telefax and Courier
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Attention: Ms. Jean A. Webb
Secretary

COMMENT

COMMODITY FUTURES TRADING COMMISSION
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Frankfurt, October 6, 1998

Re: Concept Release on the Placement of a Foreign Board of Trade's Computer Terminals in the United States (63 Fed. Reg. 39779, July 24, 1998)

Dear Ms. Webb:

Eurex Deutschland ("Eurex")[1] is submitting this letter in response to the Commodity Futures Trading Commission's ("Commission") request for public comment regarding the captioned concept release (the "Concept Release"). Eurex supports the Commission's efforts to implement a uniform framework for trading on foreign board of trade terminals located in the United States and welcomes the opportunity to submit its comments on the Concept Release.

We believe the Commission's initiative is an important one that may well influence regulatory policy in other jurisdictions in Europe, Asia and Latin America. Accordingly, the Commission's Concept Release and subsequent regulatory initiatives will have potentially significant implications not only for foreign exchanges who desire to locate trading terminals in the United States, but also for U.S. exchanges who desire to locate trading terminals in non-U.S. jurisdictions.

Eurex is located in Frankfurt, Germany. Eurex is a fully computerized electronic derivatives exchange with members and trading terminals located in many different jurisdictions,[2]

[1] Eurex, formerly known as Deutsche Terminbörse (or "DTB"), officially changed its name to Eurex Deutschland on June 6, 1998.

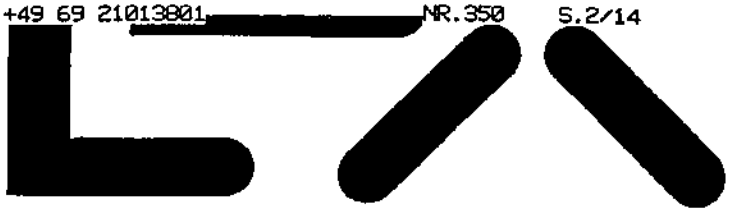
[2] Eurex currently has members located in Austria, Belgium, Finland, France, Germany, Ireland, The Netherlands, Spain, Switzerland, and the United Kingdom, in addition to the United States.

Eurex

Eurex Deutschland
Börsenplatz 7 - 11
D-60313 Frankfurt am Main
www.eurexchange.com

Mailing address:
D-60284 Frankfurt
Tel. +49 (0)69-2101 5133
Fax +49 (0)69-2101 3801

Managing Director:
Dr. Jörg Franke, Otto E. Nägeli
Andreas Preuß, Jörg Spillmann



including the United States. Eurex is currently the highest volume derivatives exchange located outside the United States and is the second highest volume derivatives exchange in the world.

As noted in the Concept Release, on February 28, 1996, Eurex was granted no-action relief by the Commission's Division of Trading Markets permitting Eurex members to trade Eurex futures and futures options contracts on terminals located in the United States.

Overview

Eurex supports the Commission's initiative and generally agrees with the objectives of the framework described in the Concept Release. At the same time, certain significant elements of the framework under consideration by the Commission are, in our view, unnecessary and inconsistent with the provisions and regulatory objectives of the Commodity Exchange Act ("CEA") relating to foreign markets. Many of these elements are similarly inconsistent with the objective of promoting efficient cross-border trading in a global marketplace. We believe these weaknesses present potential problems both for foreign exchanges desiring to locate trading terminals in the United States and for U.S. exchanges desiring to locate trading terminals abroad who may be subjected to similar regimes as a reaction to the Commission's initiative.

Discussion

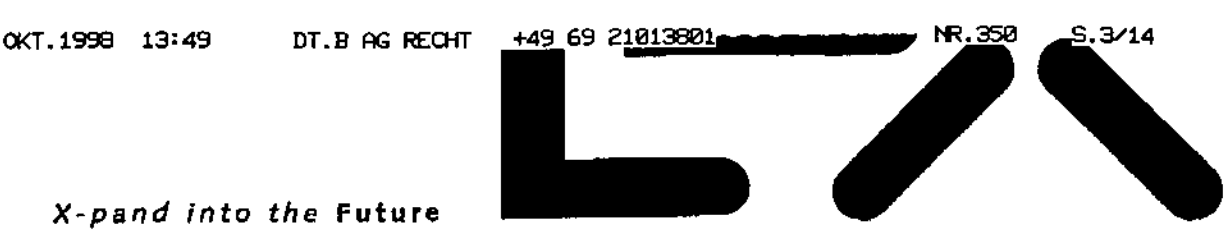
The Commission has requested comment on a number of specific issues in the Concept Release. These are addressed immediately below:

*I. **Does the placement of a foreign exchange's trading terminals in the U.S. affect the exchange's status as a foreign exchange, board of trade or market?***

If an exchange is a *bona fide* foreign exchange (see discussion below), the location of trading terminals in the United States should not affect the exchange's foreign status.

Trading terminals represent merely the latest development in the evolution of communications devices, such as the telegraph wire and the telephone, that have been utilized for the purpose of communicating orders. Because of the relatively more complex character of computer and software technology and the absence of uniform standards that has characterized its evolution, the technology utilized tends to be somewhat less generic than other forms of technology, requiring proprietary development by exchanges to facilitate the development of internally compatible communications networks. These technological considerations have caused exchanges for the first time to be directly involved in the process of communicating orders to the market for execution. Current developments in technology suggest, however, that even this distinguishing characteristic may not exist in the future.

It has become a cliché, but it remains nonetheless true, as the U.S. Congress recognized even in 1982, that the financial and commercial markets are global markets. Congress also recognized in 1982 that regulatory policy should foster cross-border market integration and, specifically, participation by U.S. persons in foreign markets, without imposing undue obstacles or



costs. Congress realized that U.S. regulatory oversight of foreign markets, as a condition to U.S. participation, was inconsistent with the promotion of these objectives. To implement its policy objectives, the U.S. Congress took explicit steps to ensure that U.S. participation in a foreign market would not affect the market's foreign status and would not result in U.S. regulation of these markets. It did so by adopting the provisions of CEA Section 4(b).

The evolution of new technologies to effect cross-border market participation should not frustrate the realization of Congress's intended objectives. The fact that technological considerations (such as concerns regarding system compatibility, performance, security, network integrity, and the like) require active exchange sponsorship of these trading and communications systems similarly should not affect this result. This is the conclusion that has been reached, explicitly or implicitly, in each of the major European financial centers that has confronted this issue. None regulate foreign exchanges as domestic markets, although many have formal or informal procedures to be followed by exchanges seeking exemption from regulation as a local market.

As noted in the Concept Release, this policy has also been explicitly articulated by Commission staff on numerous occasions. The Commission itself explicitly embraced this position when it approved Chicago Mercantile Exchange ("CME") rules permitting cross trading on the Marche a Terme Internationale de France ("Matif") from terminals located in the United States without requiring Matif to be designated as a contract market. The Commission could not have approved these CME rule changes without having affirmatively concluded that Matif was a foreign exchange, board of trade or market exempt from the CEA's contract market designation requirement, notwithstanding the trading of its contracts on terminals located in the United States.[3]

This policy thus represents the consensus position of the international regulatory community, the Commission itself, and Commission staff. It represents a policy conclusion that is entirely consistent with the regulatory policy mandated under CEA Section 4(b). That policy may be fairly summarized as one that implements the customer protection and related public policy objectives of the CEA through regulation of the professional intermediaries who market foreign futures contracts to U.S. customers. Recognition of a foreign exchange with U.S. trading terminals as a foreign exchange thus in no way undermines the Commission's ability to implement the customer protection and related public policy objectives of the CEA, as reflected in CEA Section 4(b).

Any more intrusive policy is certain to impede the implementation of new technologies to enhance and improve the efficiency of trading on existing and future markets and

[3] The CME/Matif arrangements were not linkage arrangements in the sense of other linkage arrangements cited by the Commission in the Concept Release. Exchange "linkages" generally involve arrangements under which one exchange's products may be traded on the facilities of and subject to the rules of the other exchange, with the ability to transfer the position through the exchanges' clearinghouses. Matif contracts are not traded subject to CME rules, a crucial distinction.

will increase the cost of access to foreign markets, without providing discernible benefits to any identifiable constituency.

II. Should U.S. trading volume affect the status of an exchange as a foreign exchange?

By itself, trading volume should ***not*** affect an exchange's status as a foreign exchange. To frame this in a perspective the Commission can appreciate: the CME is and will always be a U.S. exchange no matter how successful it becomes in attracting foreign trading volume to its contracts. Even if more than 50% of its trading volume were to be derived from European trading, the CME would still be a U.S. market. Even if 75% of the CME's trading terminals were to be located in foreign jurisdictions, the CME would still be a U.S. market.

This is so for self-evident reasons. The CME is located in the United States. Its core operations, such as market governance, administration and surveillance are conducted in the United States. Its executive and administrative personnel are located in the United States. Its central systems are located in the United States. Its activities are subject to regulation in the United States by the Commission. Its history and development are in the United States. It has meaningful U.S. membership. It has a meaningful product base of contracts whose underlying assets or interests have their principal market in the United States.

By extension, whether an exchange is a *bona fide* foreign exchange is a matter of analogous considerations, all of which together constitute a facts and circumstances determination. Insubstantial non-U.S. trading volume may, together with other circumstances, be evidence that an exchange is not a *bona fide* foreign exchange. However, when an exchange is located and operated abroad, has an operating history abroad and is subject to regulation abroad, and has a local (*i.e.*, non-U.S. oriented) product base, an overwhelming presumption should exist, regardless of trading volume, that the exchange is a *bona fide* foreign exchange. The trading volume originating from terminals located in the U.S. should no more cause a foreign electronic exchange to be deemed a U.S. exchange than trading volume originating from U.S. sources should cause a foreign floor-based exchange to be deemed a U.S. exchange.[4]

As CEA Section 4(b) provides, the relevant factor is ***where*** the exchange is ***located*** not the source of its trading volume.

III. Should customer terminals connected to an automated order routing function be deemed trading terminals of the foreign exchange to which the orders are routed for execution?

Generally speaking, customer terminals connected by a member to an automated order routing function should ***not*** be deemed trading terminals of the foreign exchange to which the orders are routed by the member for execution.

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[4] Particularly in the case of contracts or underlying assets or interests whose principal market is not in the United States, trading volume should *not* be a material factor.

An exception to this general rule may be appropriate under extraordinary circumstances, such as where an exchange provides a fully automated order routing capability and dedicated communications network access to customers. An exception may also be appropriate where there is no intelligent functionality in the linkage between the order routing system and the exchange's trading system that would enable the member to screen, limit or exclude orders that violate specified parameters, unless exchange rules preclude such arrangements.

However, where the automated order routing linkage has the functionality necessary to screen orders that violate prescribed parameters – even where the parameters are preprogrammed and the screening function is fully automated – such terminals should not be regarded as terminals of the relevant exchange.

As a factual matter, it is clear that such terminals are not terminals of the listing exchange. The question then is whether such terminals should, as a matter of policy, be deemed by the Commission to be terminals of the listing exchange. We do not believe it is necessary in this context for the Commission to adopt a regulatory policy that varies from reality. Because these arrangements, by definition, require the intervention of a participant that is subject to regulation by the Commission, the Commission has all the regulatory authority it requires to impose customer protections, including protections of the kind afforded under Part 30 of the Commission's regulations ("Part 30"), which are designed to protect customers who trade through intermediaries located in the U.S. on exchanges whose activities are not directly regulated by the Commission.

Moreover, we believe that the adoption of the position suggested by the Commission (*i.e.*, attributing members' order routing arrangements to the listing exchange) would have the undesirable effect of impeding the implementation of order routing technologies. These technologies are highly desirable from a policy perspective. They contribute significantly to lower brokerage costs, level the playing field for customers, improve customers' market access and improve the efficiency of the order execution process. The Commission should not underestimate the significance of these considerations. Inefficiencies in order execution and higher costs of execution (direct and indirect) are significant factors in leading firms to consider trading alternatives, including off-exchange execution alternatives.

The Commission has also asked whether limitations should be placed on these systems, such as limitations on the scope and character of market information displayed or their functionality. We believe that these are matters that should be left to the discretion of the listing exchange and its individual members. We think it would be undesirable for the Commission to impose artificial barriers that limit the benefits to be derived by customers seeking access to enhanced order execution capabilities. It is difficult to discern any respect in which such an approach would be consistent with the customer protection objectives of the CEA or public policy in general.

We urge the Commission to refrain from adopting measures that inhibit the implementation of market driven technologies designed to enhance market efficiency and market access and lower the costs of brokerage services.[5]

IV. What other activities should a foreign exchange be permitted to undertake in the United States without affecting its status as a foreign exchange?

A foreign exchange should be permitted to establish a local presence to conduct a range of promotional activities and to provide a local assistance function for members and prospective members located in the United States.

This principle is widely followed in the United States and Europe in the context of computerized and non-computerized exchanges. Many exchanges have representative offices in jurisdictions in which they are not subject to local regulation. The same considerations should apply in the case of computerized and non-computerized exchanges, although, of course, the use of computer terminals will affect the scope and character of the assistance likely to be required of a local office.

A local representative office should be permitted to engage in the customary range of educational, promotional and market research activities, and to provide information and assistance to prospective and existing members in relation to admission to membership, contract terms, rules and electronic trading requirements. To the extent that U.S. members of the foreign exchange are required to comply with specified terms and conditions, personnel located in the local office should be permitted (but not required) to audit or otherwise review compliance with such terms and conditions.

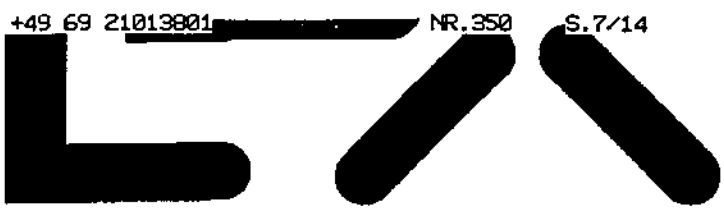
As noted earlier, the locus of key exchange functions is relevant in determining where an exchange should be deemed located. As this implies, there are limits to the range of activities an exchange should be permitted to conduct in the United States if it is to maintain its status as a foreign exchange. An appropriate limitation on the scope of activities permitted by a representative office would be one which precludes the conduct of core exchange functions, such as exchange governance, operation of the central processing systems comprising the exchange market or effecting the execution of transactions, performance of market surveillance and compliance functions and the like.

V. What conditions should be imposed on a foreign exchange as a condition to relief?

A. Overview

In the Concept Release, the Commission has requested comment on a number of issues relating to the conditions that the Commission should impose and the procedures the

[5] We note that, to date, the Commission has not imposed limitations on the use of automated order routing capabilities for contracts traded on U.S. exchanges. We see no basis for the Commission to discriminate between U.S. and foreign exchanges in this area.



Commission should adopt as a predicate to any relief. In particular, the Commission has asked: (i) whether it should prescribe specific standards for relief or apply a "totality of the circumstances" test; and (ii) whether the Commission should require petitioning foreign exchanges to provide an extensive range of information regarding the exchange's structure, financial condition, operation, contracts, rules, local regulatory environment and other matters, with such information to be updated continuously.[6]

These are fundamental issues and it is entirely appropriate that they be raised by the Commission. We believe, however, that the proposals presented for comment by the Commission amount to a form of merit review and *de facto* U.S. regulation of foreign exchanges, structured as an exemptive procedure. If every jurisdiction in which an exchange locates trading terminals were to impose a similarly extensive range of informational and reporting requirements, and a similar review process, an intolerable commercial burden would be created, significantly impeding cross-border market integration.

Moreover, we do not believe that such an approach is necessary to accomplish the Commission's relevant regulatory objectives.

In considering these important questions, it is useful to proceed from basic premises. These involve answering two fundamental questions:

> ***First***, what are the legitimate regulatory objectives of the Commission's review?
>
> ***Second***, given the CEA's mandate that an exchange located outside the United States should not be subject to U.S. regulation, what ***incremental*** regulatory concerns are presented by the use of electronic trading terminals in the United States, this being the single feature that distinguishes foreign computerized exchanges with terminals located in the United States from foreign non-computerized exchanges?

It is clear from CEA Section 4(b) that in the context of trading on foreign exchanges, the principal regulatory concern to be addressed is the protection of U.S. customers vis-à-vis the professional intermediaries with whom they deal. That section effectively precludes regulation of, or conditioning access to, foreign exchanges, boards of trade or markets, but expressly authorizes the Commission to regulate the futures commission merchants and other professionals through whom U.S. customers trade on these markets.

As a result, a significant component of the CEA's regulatory objectives is addressed by the Commission's existing requirement that any exchange member effecting

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[6] The Commission has also requested comment on the extent to which the Commission should avoid duplication of Part 30 of its regulations in connection with any application process. We strongly support efforts by the Commission to identify and eliminate sources of regulatory duplication.

transactions for U.S. customers must be registered as a futures commission merchant (or, in the case of non-U.S. members, eligible for exemption under Part 30).

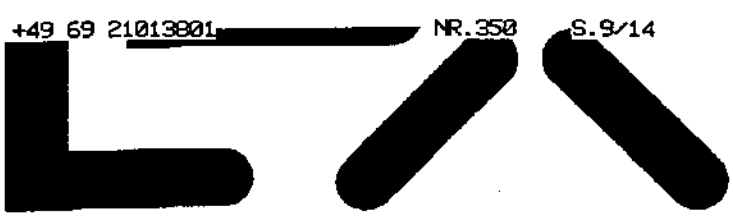
As the foregoing considerations suggest, the principal objective of the application process should be to verify the applicant's status as a "*bona fide*" foreign exchange, board of trade or market. We agree that this is a facts and circumstances analysis. However, as we have noted above, we believe that there should be a strong presumption in favor of the conclusion that an applicant satisfies this requirement where the applicant has a *bona fide* center of governance and operations outside the U.S. The application process should therefore focus on supplying the information necessary to support this conclusion.

We disagree, however, with the Commission's implicit suggestion that this necessitates a comprehensive substantive evaluation by the Commission of the extent to which the structure of the applicant or the character or content of its regulatory environment is comparable to its U.S. analogue. In this regard, we believe the analogy drawn by the Commission to the information required and review undertaken by the Commission under Part 30 misplaced.

It is clear from CEA Section 4(b) that Congress did not intend the Commission to undertake such a review. Section 4(b) establishes a clear contrast between the manner in which professional intermediaries are to be treated, on the one hand, and the manner in which foreign exchanges are to be treated, on the other hand. The former are subject to potentially substantial regulation as to matters that are enumerated in the statute and that have clear analogues under the CEA's regulatory regime for U.S. registrants. The latter are entirely excluded from regulation. The provisions of Part 30 were designed specifically to implement the authority granted to the Commission under CEA Section 4(b) with respect to professional intermediaries. The Part 30 framework is thus not an appropriate framework on which to base the treatment of foreign exchanges.

Moreover, the exemption for foreign exchanges contained in CEA Section 4(b) is not predicated on any requirement that the relevant exchange have any particular operating or rulemaking structure, or be subject to any qualifying character of regulation. The exemption applies whether or not the foreign exchange has rules similar to those in effect in the United States regarding upstairs trading, order allocation, negotiated execution prices, average pricing, cross trading, dual trading, prearrangement, or the like.

Because these considerations are not relevant to the exempt status of a foreign exchange that has no trading terminals in the U.S., and U.S. customers may trade on such exchanges without condition, we do not see any basis on which they should become relevant to the exempt status of a foreign exchange with U.S. trading terminals. The fact that a U.S. customer's order is communicated through a computer terminal located in the United States, rather than through a phone in the United States to a broker located on the floor of an exchange or sitting at a terminal located outside the United States, does not warrant such a fundamental distinction in treatment.



On the other hand, the use of such trading terminals does give rise to other *bona fide* regulatory concerns that the Commission should appropriately address. These include verifying that the electronic trading capability that is being offered provides fair market access to U.S. customers and assuring system integrity and the like. Accordingly, information regarding these considerations should also be included in the application process.

Going beyond considerations of this kind to address issues that are not unique to the use of electronic trading terminals in the U.S., but that instead are equally applicable to trading by U.S. customers on foreign floor-based exchanges is inconsistent with CEA Section 4(b). We are not aware of any other jurisdiction that imposes conditions comparable in scope and detail to those presented for comment by the Commission. We believe the U.S. Congress recognized that such an approach would establish a highly undesirable and counterproductive precedent.

We agree entirely with that judgment and are seriously concerned that the adoption of a process similar to that described in the Concept Release and, subsequently, other jurisdictions would present an untenable international regulatory climate in which to promote cross-border trading.

The Commission also raises for comment the possibility of requiring "immediate" notice of any material change in any of the information supplied by a foreign exchange in its application. As noted above, the required information would include information regarding the exchange's structure, rules, contract terms, regulation, financial condition and other data. The scope of this requirement would effectively constitute ongoing regulatory oversight by the Commission of the foreign applicant. For reasons similar to those outlined above, we believe such an approach would be burdensome, inappropriate and unnecessary.

To the extent that the information required of an applicant were, on the other hand, focused on its foreign status and computerized trading system, prompt notification of material changes in this information would be appropriate.

B. Specific informational requirements and conditions

As noted above, independent of the merits of any specific informational requirement or condition proposed by the Commission, the approach proposed by the Commission, as reflected in the scope and character of these items taken as a whole, is inconsistent with the principal of deference to a foreign exchange's primary regulator. In this sense, the Commission's proposed scheme more closely resembles a merit review of all aspects of a foreign exchange's circumstances. We believe the resulting processes and informational requirements are unwarranted and, if duplicated, would be so burdensome as to have a chilling effect on cross-border trading using electronic terminals.

Notwithstanding the foregoing, we have also identified immediately below certain concerns raised by the specific informational and other requirements identified for comment by the Commission.

1. *General information*

As noted above, this item should focus on factual information that is relevant to establish the *bona fide* foreign character of an applicant exchange.[7] (See Section II above.)

2. *Information concerning rules and regulations*

Under this category, the Commission has proposed an extensive submission of detailed information regarding an applicant's rules and the regulatory regime applicable to it in its home jurisdiction. The Commission specifically notes several specific subjects as to which it proposes to require additional disclosure.

An overview of the regulatory regime applicable to a foreign exchange and the exchange's supervisory authorities may be appropriate information bearing, at the margin, on an applicant's foreign status. To the extent that the Commission is not independently aware of the information, it may also be helpful in identifying the appropriate authority to which it should direct requests for information sharing.

However, the scope and character of the analysis suggested by the Commission's informational requirements go beyond this objective.[8] An applicant should not be obligated to provide a history of defaults or market failures, or to provide a critical assessment of the efficacy of information sharing arrangements. These considerations are not appropriate under CEA Section 4(b) and the Commission is in a better position to review and evaluate for itself the material provisions of information sharing arrangements. We similarly do not believe that the Commission should conduct an analysis of the disciplinary history of a foreign applicant. Information regarding the current regulatory status of an applicant should suffice for this purpose.

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[7] Although a *list* of proposed contracts (as proposed by the Commission) could be relevant information, more specific information regarding the contracts that an applicant intends to list is not relevant and should not be required. Contracts that raise issues under CEA section 2(a)(1)(B) are currently addressed by the Office of General Counsel's separate no-action procedures for foreign stock index contracts. CEA section 4(b)(1) otherwise explicitly precludes Commission approval of the terms and conditions of a foreign exchange's contracts, even if they are marketed to by U.S. persons. Accordingly, information regarding proposed contract terms, for example, should not be required by the Commission, and, similarly, the Commission should not require notification of new contracts or changes in contract terms.

[8] The nature of the specific regulatory issues identified by the Commission is instructive because it is emblematic of the Commission's approach to regulation of the U.S. markets and of issues that have been the subject of topical debate in the U.S. Some, however, are independently troubling. For example, the Commission requests information regarding rules governing the entry of customer account information. Eurex, like other exchanges, captures only information regarding its members (including whether trades entered into the trading system represent proprietary or customer positions). Requiring exchanges to capture information regarding the identity of customers would be inappropriate and unnecessary. Such information is appropriately captured at the member level. Members dealing with customers are subject to Commission regulatory requirements.

These requirements suggests that the Commission intends to undertake a separate substantive analysis of this regulatory information and to form its own views as to the quality of the foreign regulatory regime and local regulators. We believe this is inappropriate and burdensome.

We do not believe that the Commission should conduct a merit review of foreign regulatory regimes or foreign regulatory authorities. We similarly do not believe that the Commission should evaluate whether a foreign regime is comparable to, or as "good" as, that in the United States (except, as noted above, in the context of professional intermediaries dealing with U.S. customers). We believe such an approach is inconsistent with Congress's intent. Moreover, we do not believe that the character or scope of the foreign regulation to which a foreign applicant is subject is relevant to the applicant's status as a foreign exchange, board of trade or market (although, as noted above, the applicability of a foreign regulatory regime might be a relevant factor in evaluating an applicant's *bona fide* foreign status).

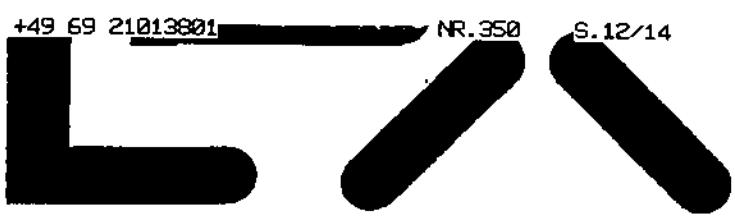
3. Technological information

It is appropriate that the Commission obtain technological information necessary to assure the integrity of the applicant's trading system and to assure, from the perspective of access to market data and trade execution, that U.S. persons are not disadvantaged. However, further data, such as processing time and system performance data, would be burdensome and, except to the extent bearing on the issue of fair market access, unnecessary.

The Commission has also suggested that foreign applicants provide information regarding liability to traders for system failures. We are not aware of any exchange, or other similarly situated entity, that accepts responsibility for systems or communications delays or failures, except in remote circumstances within the exchange's control and involving an egregious level of culpable misconduct. In any event, U.S. traders are already subject to such risks (and the related contractual allocation of responsibility) when placing orders on computerized and non-computerized foreign exchanges. The issue is not new or unique to computerized trading from U.S. terminals. Such problems can arise from exchange or clearinghouse processing failures, failures in telephone lines and the like. There is, therefore, no reason for the Commission to involve itself in this issue in the context of this initiative.

4. Financial and accounting information

For many of the reasons cited above, we do not believe that an applicant's financial data should be required to be included in an application for relief. The financial integrity of a foreign applicant is a judgment appropriately left to the applicant's home regulator and should not be separately evaluated by the Commission. In addition, the preparation of accounting data by a foreign applicant, in accordance with U.S. generally accepted accounting, would be extremely problematic and, in some cases, possibly preclusive.



The transaction volume reporting regime proposed by the Commission would also be overly burdensome. As noted above, having determined that an applicant is a *bona fide* foreign exchange, board of trade or market, we do not believe that the Commission should require ongoing transaction volume data reporting. If the Commission nonetheless retains a reporting requirement, it should limit this requirement to contracts whose underlying assets or interests have their principal market in the United States, and should require data to be reported no more frequently than quarterly.[9]

In any event, the Commission should not require a breakdown, by jurisdiction , of transaction volume. We do not believe that this data is relevant to the Commission and it would result in a significant additional burden for an exchange to reprogram its systems to capture such information. Any such requirement would be further complicated by the fact that many foreign exchange members, particularly in Europe, trade through branches in multiple jurisdictions.

5. *Reciprocity*

Although there is no explicit statutory provision regarding reciprocity, given the objectives of the CEA in relation to the promotion of fair competition, we believe it would be entirely appropriate for the Commission to take reciprocity into account in exercising its administrative discretion to respond to petitions for relief. In that connection, however, the Commission should not evaluate the existence of reciprocity on the basis of a detailed evaluation of the comparability to the U.S. model of another regulator's approach to the issue of foreign trading terminals. Instead, the Commission should focus on whether the foreign regulator's approach ultimately affords relief to U.S. applicants that is substantially similar to that afforded foreign applicants by the Commission.

6. *Intended U.S. activities*

We agree that information regarding the scope of an applicant's proposed U.S. activities are relevant to consideration of the applicant's *bona fide* foreign status. Accordingly, we believe it would be appropriate for the Commission to require information regarding any permanent U.S. offices and the scope of the activities to be undertaken by local personnel. (See Section IV above.)

It is not clear to us, however, why information regarding U.S. delivery points is relevant to the issue of U.S. trading terminals.

7. *Immediate notification of violations*

If an exchange member located in the U.S. violates a term or condition of Commission approval, notice to the Commission (or the National Futures Association) would be appropriate. However, an "immediate" notification requirement is unnecessary and problematic,

[9] Any analysis of trading volume should be based on trading volume over an extended period, such as one year.

not least because the determination that there has been a violation is often a process more than an event. Accordingly, we recommend that the Commission either adopt an approach that requires notice within an objective time frame following any formal determination that a term or condition has been breached or that requires prompt notification following notice that a breach may have occurred.

Additionally, we do not believe that this requirement should in any case extend to violations of the CEA or Commission regulations. The regulatory activities of a foreign exchange should focus on enforcement of its rules, not the local regulatory regimes to which its members are subject. These regimes vary from jurisdiction to jurisdiction. Listing exchanges are generally not familiar with local regulatory requirements applicable to their members and should not be tasked with responsibility for identifying violations of these requirements. In no case should a listing exchange be obligated to report or identify customer violations of local regulatory requirements.

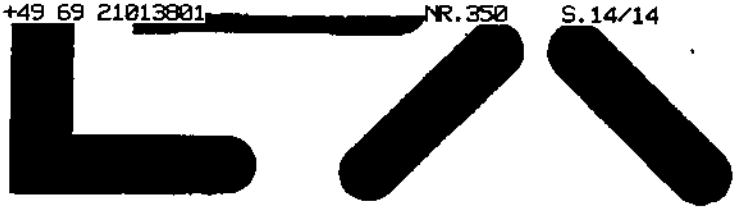
8. Modification or termination of orders

If a foreign exchange itself violates in a material respect the requirements imposed by the Commission as a condition to the placement of trading terminals in the U.S., the Commission should of course consider appropriate action, as it would in the case of a U.S. exchange, consistent with the scope of its jurisdiction. A foreign exchange should not be subject to sanction, however, as a result of the actions of any other person acting pursuant to the Commission's grant of an order.

The Concept Release describes the Commission's ability to modify or terminate an order as a free floating arbitrary authority that does not instill confidence that an order granted by the Commission will have the permanence and certainty that applicants legitimately seek and, we believe, the Commission intends. The Commission should clarify that any such action would be taken in accordance with an appropriate administrative procedure that assures that any such action is based on objective evidence of a material breach of a condition to Commission approval, and that affords the affected applicant with notice and a reasonable opportunity to respond to allegations.

C. Linkages

The Commission has also stated that, where there is a linkage arrangement between an applicant and another foreign exchange, ***each*** of these exchanges must complete the application process. We do not agree that such a requirement is necessarily appropriate. Where all contracts tradeable by members of the applicant exchange from U.S. terminals are listed and cleared by, and subject to the rules of (and regulatory regime applicable to), the applicant exchange, the application process should ***not*** include any other exchange with whom the applicant happens to have a linkage arrangement. This is the case regardless of whether the two exchanges share a common trading platform. Many linkage arrangements do not in any way affect U.S. participants and are therefore immaterial to the application process.



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We agree that there may be linkage arrangements for which such an approach would be appropriate. An example of such a linkage arrangement would be one in which members of the applicant exchange may trade (from terminals located in the United States) contracts listed and cleared, and subject to the rules of, the linked exchange. However, the mere existence of a linkage arrangement between an applicant exchange and another foreign exchange should not automatically give rise to a separate application requirement for the linked exchange.

VI. How should the Commission define "affiliates" of members eligible to have access to trading terminals?

We believe that any entity controlled by, controlling, or under common control with, a member should qualify for "affiliate" status. Subject to more restrictive exchange requirements, we believe that for these purposes, control of an entity should be established on the basis of ownership or control of a 50% or greater equity or equivalent interest in the controlled entity.

VII. What limitations should the Commission impose to preclude membership rules which permit "customers" from having access to terminals or becoming members of a foreign exchange, board of trade or market?

Under current Eurex rules, members must be engaged in the business of trading derivatives.

At the same time, we are not aware of any need for the Commission to impose formal limitations on exchange membership qualifications. Certainly, there is no basis for the Commission to impose membership limitations on foreign exchanges that are not also imposed on domestic U.S. exchanges.

In any event, no limitations should be imposed by the Commission in any case where an exchange has no "special" membership categories and all members have the same rights and obligations.

* * *

We appreciate the opportunity to submit our comments to the Commission on this important initiative and would be pleased to discuss further with the Commission or its staff any of the issues addressed in this letter. Please do not hesitate to contact Jörg Franke (tel. 011-49-69-2101-2100) or Volker Potthoff (tel. 011-49-69-2101-4867) or Ekkehard Jaskulla (tel. 011-49-69-2101-5133) of Eurex Deutschland or Edward J. Rosen of our U.S. counsel, Cleary, Gottlieb, Steen & Hamilton, if we can provide further information or assistance to the Commission or its staff in connection with this initiative.

Very truly yours,

Jörg Franke
Chief Executive Officer

Ekkehard Jaskulla
Legal Counsel