

exchange trading, the U.S. The EBS systems are made available only to a limited participant base, comprised exclusively of institutional market makers, who may trade on the system only as principals and not as agents for third parties.

Overview

EBS supports the Commission's efforts to adopt a uniform framework governing terminal access from the U.S. to foreign boards of trade. However, we believe that the approach reflected in the Proposed Rules presents several serious problems. First, the Commission's position that a foreign board of trade is no longer "located outside the U.S." solely by virtue of having terminals in the U.S. is, in our view, flawed from both a legal and a public policy perspective. Second, the requirement that the foreign board of trade be subject to a regulatory structure that is "generally comparable to that in the U.S." is inappropriate, counterproductive and inconsistent with important policies underlying the Commodity Exchange Act (the "CEA"). Third, the similar treatment of Automated Order Routing Systems ("AORSs") and Direct Execution Systems ("DESs") does not take into account the significant distinctions between the two and would impose unnecessary burdens on foreign boards of trade.

A. Foreign Boards of Trade Located within the U.S.

The Commission's position that a foreign board of trade that is accessible from within the U.S. via an AORS or a DES is not "located outside the U.S." for purposes of Section 4(a) of the CEA is untenable. As an empirical matter, the ability to access a foreign board of trade's electronic execution system from within the United States is simply not the same as locating the board of trade itself within the United States.² As a matter of law, we believe the position is inconsistent with the meaning of Section 4(b) as well as Section 4(b)'s twin policy objectives of deference to home country regulation of boards of trade and the promotion of cross-border trading. As the U.S. Congress appreciated in 1982 when it adopted Section 4(b), these two objectives are inextricably linked.

Section 4(b) of the CEA expressly prohibits the Commission from adopting rules or regulations that require Commission approval of, or govern in any way, any contract, rule, regulation or action of any foreign board of trade, exchange, market or clearinghouse therefor. By regarding foreign boards of trade having U.S. DESs and AORSs as being located within the U.S., however, the Commission creates a jurisdictional predicate to regulate, directly or indirectly, most aspects of the operation of these boards of trade. Following the Commission's logic, the international trend toward electronic boards of trade, combined with technological advances in electronic communications, could result in every board of trade in the world being deemed to be located in the U.S., subject to the Commission's supervision. It is difficult to

² In this sense, the definition of "DES" used by the Commission to describe remote terminal access to a foreign board of trade is itself inherently misleading. The terminals used by a board of trade's members generally are not themselves "direct execution systems." They instead provide remote electronic access to a board of trade's execution system. The two are significantly different.

square such a result with either the plain language or the Commission's previous interpretation of Section 4(b).³

From a public policy perspective, the Commission's approach may prove to be counterproductive. The home country regulator of a board of trade is in the best position to provide comprehensive regulation with the least burden on the board of trade, because of its proximity to and familiarity with the board of trade's management and operations. Moreover, where a foreign board of trade has terminals located in multiple jurisdictions, deference to the home country regulator is the only practical regime. Indeed, taken to its logical conclusion by all international regulators, the Commission's proposal would result in electronic boards of trade being deemed to be located, and subject to regulation by local authorities, in each jurisdiction in which their members had installed DES terminals. Each board of trade would be required to satisfy the local regulatory idiosyncrasies of all such jurisdictions, a forbidding prospect. If regulators in each country where terminals were located were to adopt the approach proposed in the Release, the resulting regulatory costs, burdens and delays would likely undermine the very efficiencies that electronic trading affords to market participants.

We acknowledge that the Commission has a legitimate regulatory interest in protecting customers and the integrity of U.S. markets. However, we believe that the best way to achieve this goal is through regulation of intermediaries operating in the U.S. and dealing with U.S. customers under the Commission's existing authority to regulate futures commission merchants and Rule 30.10 firms. Such an approach would be in accord with Section 4(b), which contemplates that the focus of the Commission's oversight would be limited to activities of professional intermediaries involving U.S. customers located in the U.S.

B. Commission Approval of Home Country Regulation

We believe that the requirement of the Proposed Rules that the Commission undertake merit review of a foreign board of trade's home country regulatory scheme is similarly inappropriate. Proposed Rule 30.11(b)(ii) would require that the petitioner's home country have an "established a regulatory scheme that is generally comparable to that in the U.S." and Proposed Rule 30.11(b)(v) requires that the home country regulator's technical review of the petitioner's automated trading system comply with the relevant IOSCO standards. Any such merit review would be inconsistent with the policies underlying Sections 4(a) and 4(b) of the CEA. Congress prohibited the Commission from regulating *foreign* boards of trade, markets and exchanges; it did not authorize the Commission to determine which jurisdictions qualify as comparable to the U.S. for these purposes. A merit review of a foreign regulatory regime for the purpose of determining whether it is sufficiently comparable to the U.S. model must be recognized as fundamentally inconsistent with the principle of deference to home country regulation.

³ Specifically, the Commission could not have approved trading on the *Marché à Terme International de France* ("MATIF") from Globex terminals located in the U.S. without requiring MATIF either to be designated as a contract market or to obtain an exemption under Section 4(c), unless the Commission had concluded that MATIF was a foreign board of trade.

The Commission clearly has an interest in preventing attempts to evade U.S. jurisdiction and the CEA by organizing boards of trade in jurisdictions lacking *bona fide* regulatory regimes. However, we believe this to be a much lower threshold than the comparability standard set forth in the Proposed Rules. Moreover, we believe that the Commission has ample resources to make such a basic determination without requiring the petitioner to submit the significant amounts of information described in the Proposed Rules.

C. Automated Order Routing

The Proposed Rules discount important distinctions between DESs, which provide direct, non-intermediated access to a foreign board of trade's matching and execution system, and AORSs, which allow electronic entry of orders through an intermediary to a foreign board of trade's matching and execution system. AORSs are installed by board of trade members, rather than the board of trade itself, and therefore should not subject the board of trade to the full panoply of regulation under the CEA by invalidating its foreign status. Although we do not believe that the presence of a DES terminal in the U.S. provides a reasonable basis to conclude that an exchange is not foreign, the conclusion is even more untenable in the case of an AORS terminal. AORSs facilitate communication between a board of trade member and its customer. To the extent that such members are intermediating transactions on foreign boards of trade for U.S. customers, the Commission already has adequate authority to regulate the intermediary. Moreover, we do not believe that the technological efficiencies derived from AORSs (or DESs) justify the regulatory response proposed by the Commission. As a result, we see no basis in law (or policy) for the Commission to impose limitations on the use of an AORS to solicit or accept orders for contracts traded on a foreign board of trade.

Conclusion

For the reasons described above, we believe that the approach to electronic trading systems reflected in the Proposed Rules presents several serious problems that are inconsistent with the CEA and would impede technological innovation and global market access. We support the Commission's efforts to implement a uniform framework for permitting terminal access from the U.S. to foreign boards of trade. However, we believe that such a framework should be based upon deference to home country regulators in jurisdictions having *bona fide* regulatory schemes and focus on intermediaries dealing with U.S. customers.

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If you have any questions or would like further information regarding this letter, please feel free to contact me at 212-225-2820.

Very truly yours,

A handwritten signature in black ink, appearing to be 'ER', written in a cursive style.

Edward J. Rosen

cc: The Honorable Brooksley E. Born
The Honorable Barbara P. Holum
The Honorable David D. Spears
The Honorable James E. Newsome
I. Michael Greenberger
Peter Bartko
Jane Forster