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COMMODITY FUTURES TRADING COMMISSION

Hearing on What Constitutes a Board of Trade  
Located Outside of the United States  
Under the Commodity Exchange Act Section 4(a)

Tuesday, June 27, 2006  
9:00 a.m. - 4:00 p.m.

Washington, D.C.

ANDERSON COURT REPORTING  
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## 1 C O N T E N T S

## 2 Welcome and Opening Statements

3 CHAIRMAN REUBEN JEFFERY III  
4 COMMISSIONER WALTER L. LUKKEN  
5 COMMISSIONER FRED HATFIELD  
6 COMMISSIONER MICHAEL V. DUNN

7  
8 Panel I: What makes an Exchange Foreign or  
9 Domestic?

10 ANTHONY BELCHAMBERS, The Futures and Options Association  
11 RICHARD BERLIAND, JP Morgan Securities  
12 KATHLEEN CRONIN, Chicago Mercantile Exchange  
13 JOHN FOYLE, Euronext Liffe  
14 MICHAEL GORHAM, Illinois Institute of Technology Center  
15 for Financial Markets  
16 JAMES E. NEWSOME, New York Mercantile Exchange  
17 KEVIN O'HARA, Chicago Board of Trade  
18 SIR ROBERT REID, ICE Futures  
19 PETER REITZ, Eurex Frankfurt AG  
20 VERENA ROSS, Financial Services Authority  
21 BENN STEIL, Council on Foreign Relations  
22 NICK WEINREB, Euronext

Panel II: How Should the Commission Consider a DCM (DTEF)  
Application by an FBOT Whose Contacts in the  
U.S. Implicate CFTC Oversight?

ANTHONY BELCHAMBERS, The Futures and Options Association  
RICHARD BERLIAND, JP Morgan Securities  
JEFF BILLINGS, American Public Gas Association  
PATRICK BYRNE, Industrial Energy Consumers of America  
KATHLEEN CRONIN, Chicago Mercantile Exchange  
JOHN FOYLE, Euronext Liffe  
MICHAEL GORHAM, Illinois Institute of Technology Center  
for Financial Markets  
KEVIN O'HARA, Chicago Board of Trade  
BRIAN REGAN, New York Mercantile Exchange  
SIR ROBERT REID, ICE Futures  
PETER REITZ, Eurex Frankfurt AG

1 VERENA ROSS, Financial Services Authority  
2 BENN STEIL, Council on Foreign Relations  
3 NICK WEINREB, Euronext

3

4 ALSO PRESENT:

5 RICK SHILTS, Director, Market Oversight, CFTC

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## 1 P R O C E E D I N G S

2 CHAIRMAN JEFFERY: Good morning,  
3 everybody. Thank you all for braving the elements  
4 and coming here today for today's hearing on  
5 Foreign Boards of Trade. I want to particularly  
6 thank those of you who have come from a distance,  
7 our colleagues and friends from London and the  
8 regulatory and business communities. We  
9 appreciate your being here, and anyone else who  
10 may have come from other parts of the world and  
11 other parts of the country braving  
12 these really extraordinary elements that we have  
13 had to deal with over the past couple of days.

14 I will come back to the format in a  
15 second, but I am going to start with a few  
16 opening remarks, scene-setters, if you will, for  
17 the purposes and objectives of today's hearing  
18 that will be offered by each of the four  
19 Commissioners present today. Then I will revert  
20 to the particulars about logistics and use of  
21 the mike and timing and other operational  
22 matters. Then we will move into the

1 agenda which I think you have all seen. It has  
2 been circulated in advance of this meeting and  
3 is also on the Website, and there were copies  
4 at the reception table as you all walked in. If  
5 you do not have them, we will make sure we get  
6 them around to you. As you note, there are media  
7 representatives here. There is a camera here that  
8 videos. The monitors are to the CFTC's offices  
9 around the system. Then there is also a dial-in for  
10 those interested from wherever, who want to hear  
11 what transpires over the course of today's  
12 proceedings.

13 Today's hearing, in case you are in the  
14 wrong place, is about foreign boards of  
15 trade in an era of technology and globalization.  
16 I would underscore both of those words, because  
17 these are factors that, while they have been  
18 growing and burgeoning in import over the past 10  
19 to 20 years, they are really among the dominant  
20 factors shaping the global financial capital,  
21 commodities, and futures markets around the world  
22 today.

1           To frame a contrast, on the one hand,  
2 former Federal Reserve Chairman Alan Greenspan  
3 recently noted that today, the only space  
4 left is cyberspace. He noted that  
5 humorously, obviously. On the other hand,  
6 regulators, on a more serious note, including the  
7 Commodity Futures Trading Commission, are governed  
8 by laws enacted by a single country, and also have  
9 a duty to execute those laws and to carry out the  
10 mission which the Congress has entrusted  
11 to us.

12           In an era in where almost all financial  
13 market participants are seeking to engage in fully  
14 electronic trading, we need to consider what  
15 factors render an exchange foreign or domestic  
16 for statutory and regulatory purposes. The  
17 the Commodity Exchange Act was written and  
18 designed for a set of market circumstances that  
19 have evolved significantly since it was enacted. The  
20 challenge for us today is to understand how to  
21 apply these statutory labels, like "located" when  
22 exchanges are, in many cases, no longer bricks and

1 mortar and where the internet has made physical  
2 "location" an awkward and outdated statutory  
3 concept.

4           Our authority begins with Congress.  
5 Outside the authority of the law we will not  
6 stray. Congress conferred upon the Commission the  
7 statutory duty to protect the integrity of the  
8 U.S. futures markets. This duty benefits direct  
9 participants in these markets as well as the  
10 United States economy, which relies upon the futures  
11 markets' important hedging and price discovery  
12 functions.

13           The Commission, however, strongly  
14 supports both technological advances and  
15 globalization, and views these developments as good  
16 for U.S. customers and as consistent with the  
17 CFTC's statutory mission. Globalization enables  
18 U.S. market participants to access  
19 otherwise inaccessible products, encourages  
20 competition between markets, and promotes  
21 innovation in products and services. And,  
22 competition is one of the things that has helped

1 make the American economy and the financial  
2 services sector strong throughout time.

3           It follows, therefore, that the  
4 Commission hopes to help foster a competitive  
5 level playing field, all the while avoiding  
6 interference with legitimate market forces and  
7 competition. The CFMA, at root, that is,  
8 the Commodity Futures Modernization Act which  
9 amended the Commodity Exchange Act, is grounded in  
10 the view that markets more or less work. Putting  
11 our thumb on the scale of competition on one side  
12 or the other would ultimately work to the  
13 detriment not only of U.S. market users, but also  
14 of the U.S. exchanges themselves.

15           I am hopeful that these hearings will  
16 help the Commission to move forward on these  
17 important and timely issues. With that, we look  
18 forward most importantly to hearing from all of  
19 you in this room, our distinguished panelists in  
20 particular, and I turn it over to Commissioner  
21 Walter Lukken for his opening remarks.

22           COMMISSIONER LUKKEN: Thank you, Mr.

1 Chairman. I reiterate his welcome to all of those  
2 who have come today despite the weather. I have  
3 to admit, I blame Commissioner Dunn for the bad  
4 weather. One of his legal assistants last week  
5 had a baby and they named him Noah, so I figured  
6 that was a premonition of things to come today,  
7 and with that I will return to the script.

8 (Laughter.)

9 COMMISSIONER LUKKEN: Today we will  
10 discuss when an exchange is located outside the  
11 United States. However, the policy ramifications  
12 of our dialogue far exceed this focused legal  
13 determination. Today's topic goes to the heart of  
14 how regulators will carry out their mission in the  
15 modern global marketplace.

16 Twenty-four years ago when this  
17 statutory language was adopted, it was much easier  
18 to draw such bright-line distinctions between  
19 exchanges located in the U.S. and those located  
20 outside of our borders. But regulators no longer  
21 live in this bright-line world. Determining where  
22 an exchange is located is difficult, if not

1 impossible, with its server, board of directors,  
2 customers, clearing, and self-regulators scattered  
3 around the globe. As the Chairman noted, Alan  
4 Greenspan recently noted that "organizing financial  
5 exchanges in a geographic place does not seem  
6 necessary . . . The only market out there is  
7 cyberspace."

8           How does the modern regulator, defined by  
9 the quirks of its nation's laws and history, function  
10 in an interconnected global economy? The answer  
11 is, carefully. My guidance to this question will  
12 come from the policy themes set out in the  
13 Commodity Futures Modernization Act, which in my  
14 view, is tailor made for the modern electronic  
15 global marketplace.

16           First, flexibility is paramount. The  
17 CFMA equipped our agency with a principles-based  
18 regime, one of the few in the world that enables  
19 the CFTC to adapt and tailor its regulations to  
20 identified public risks without unnecessarily  
21 harming market competition. The CFMA puts the  
22 regulatory focus on the desired outcome instead of

1 the means, allowing compliance from several  
2 different paths. Bright-line regulatory rules  
3 were replaced with risk-based approaches that  
4 temper responses based on potential harm to the  
5 public. I look forward to hearing from the  
6 panelists on where these risks may lie.

7 Second, the CFMA taught us that  
8 regulatory coordination is vital. Agencies like  
9 ours do not have the resources to sufficiently  
10 monitor the entirety of the global marketplace and  
11 its participants. We must rely on the expertise  
12 of other regulators, both domestic and foreign, in  
13 fulfilling our public mission. This does not mean  
14 that the CFTC should relinquish our duties to  
15 others. Quite the opposite, the CFTC must  
16 continue to vigorously monitor the industry's  
17 adherence to statutory core principles.

18 However, the means for accomplishing  
19 this mission may involve coordination and  
20 information sharing among those foreign regulators  
21 who abide by the highest global standards. The  
22 CFTC has long been a leader in the international

1 community with its participation in IOSCO and its  
2 early appreciation of the mutual recognition  
3 concept among foreign regulators dating back to  
4 our Part 30 regime for foreign firms in 1986. I  
5 am hopeful that our agency will continue to rely  
6 on mutual recognition as we move forward on this  
7 issue.

8 Thank you, Mr. Chairman, for organizing  
9 this hearing this morning, and I look forward to  
10 hearing from all the panelists.

11 CHAIRMAN JEFFERY: With that, why don't  
12 I turn it over to Commissioner Fred Hatfield?

13 COMMISSIONER HATFIELD: Good morning,  
14 everybody. I would like to thank Chairman Jeffery  
15 for taking up this serious matter, and acknowledge  
16 the hard work of the Commission's staff in this  
17 regard. I would also like to thank our witnesses  
18 for appearing today. Many of you have come from  
19 long distances, and we sincerely appreciate you  
20 being here. This meeting of the Commission is  
21 especially timely for me, having just recently  
22 returned from a meeting of the Futures and Options

1 Association in London where I was able to review  
2 how several of these exchanges operate. The rapid  
3 pace of technological advancement and the  
4 continued globalization of financial markets make  
5 it incumbent upon us as regulators to look  
6 carefully at issues such as the ones we are  
7 addressing today.

8           Electronic trading has blurred the once  
9 obvious question of location. I believe that  
10 because of this shift to electronic trading it has  
11 become more difficult for regulators to use  
12 location as a means for determining whether or not  
13 an exchange must register with the Commission.

14           Also, the evolving marketplace  
15 landscape, recently punctuated by the announced  
16 merger plans of the New York Stock Exchange and  
17 Euronext have forced the question of  
18 cross-jurisdictional registration. These  
19 developments raise legitimate questions, and it is  
20 therefore appropriate that the Commission review  
21 this matter.

22           How we proceed, though, hopefully you

1 will help us answer that, but I suggest that we  
2 proceed with caution. We must be mindful of the  
3 global consequences of our actions, just as we are  
4 mindful of market integrity and customer  
5 protection.

6 One recent Financial Times article  
7 referred to the Commodity Futures Trading  
8 Commission as having a "history of being a  
9 relatively level-headed organization." I like  
10 that characterization, and I sincerely hope we are  
11 able to maintain that standard through this  
12 turbulent period, and I look forward to the  
13 comments of the panelists today.

14 Again I thank our Chairman for his  
15 leadership on this important matter.

16 CHAIRMAN JEFFERY: Thank you, Fred.  
17 Commissioner Mike Dunn?

18 COMMISSIONER DUNN: Thank you, Mr.  
19 Chairman, and I thank all of you for coming today  
20 to testify, and thanks to the staff for all the  
21 hard work that they put in in making this  
22 possible. I commend you, Mr. Chairman, for

1 calling this hearing today on this important and  
2 fascinating topic.

3 With a global electronic marketplace,  
4 regulatory concerns become ever more complex.  
5 The question at the heart of this issue is: how  
6 does the Commission meet its responsibility to the  
7 public trust to ensure that contract markets  
8 operating in the U.S. are fair and transparent,  
9 wherever these markets might be nominally located?  
10 With electronic markets of global reach, physical  
11 location is essentially meaningless. The real  
12 issue is the nature of a given contract market  
13 itself.

14 The history of the CEA in the U.S. has  
15 shown that in determining the level of regulation  
16 that is appropriate for a given contract market,  
17 two of the key factors considered are the susceptibility  
18 of the market to manipulation, and the nature of the  
19 investors involved. Where a contract market  
20 involves a commodity with limited physical  
21 delivery that is open to the general public, the  
22 CFTC's public duty and regulatory interests are at

1 their zenith.

2           Before we let foreign contract markets  
3 offer contracts in the United States, the  
4 Commission needs to be confident that investors  
5 are protected, and that safeguards are in place to  
6 ensure that the foreign market is fair and  
7 transparent. We typically do this by ensuring  
8 that the foreign market rate regime that the  
9 contract market is subject to is comparable  
10 to our own. When the cash market underlying  
11 the foreign contract is intertwined with the  
12 domestic, physical and economic fabric of  
13 the United States, an additional layer of  
14 complexity is presented that is not addressed in  
15 the current equivalency framework.

16           The Commodity Exchange Act provides an  
17 array of authorities and responsibilities for the  
18 Commission when it comes to our overseeing  
19 domestic commodity markets. These authorities and  
20 responsibilities are not necessarily or readily  
21 transportable to foreign governments. For  
22 instance, the duty to ensure that price and

1 commodities of interstate commerce in the United  
2 States are not manipulated, it is not readily or  
3 perhaps practically transferred to a foreign  
4 authority, no matter how competent that authority  
5 might be. The question before us, therefore,  
6 is how does the Commission ensure it is  
7 meeting its obligations to the public trust in  
8 protecting investors and ensuring fair and  
9 transparent marketplaces?

10 Finally, Mr. Chairman, I wish to also  
11 note that the situation we find ourselves in today  
12 demonstrates the danger of setting major policy  
13 through the issuance of no-action letters. The  
14 types of major policy decisions involved in  
15 granting access to the U.S. market by foreign  
16 boards of trade should be made by the Commission  
17 through an open and transparent public process  
18 such as this hearing today, not ad-hoc staff  
19 letters.

20 No-action relief should be reserved for  
21 emergencies and extraordinary circumstances and  
22 should not be used routinely as a matter of

1 regulatory or industry convenience. Globalization  
2 and technology has led to a dynamic marketplace.  
3 Our challenge at the Commission is to promulgate  
4 regulations that address that marketplace.

5 Thank you, Mr. Chairman.

6 CHAIRMAN JEFFERY: Thank you,  
7 Commissioner Dunn.

8 Before we begin, let me establish a few  
9 ground rules. First, I would like to  
10 go around our morning panelists and have everybody  
11 introduce themselves, name, rank, serial number,  
12 anything else you want to say about yourself, but  
13 hold on to your prepared comments until we get into  
14 the specifics of the agenda. In terms of the  
15 mikes, they are pretty self-explanatory,  
16 you just speak and they pick it up. You should  
17 also note that the mikes around the room are  
18 generally activated, so if you speak even  
19 privately to your neighbor, they may pick it up.  
20 So take that into account.

21 I also would ask you, our panelists  
22 and anybody from the audience who wishes to

1 speak, to identify yourself and your organization  
2 so we have a proper transcript of the proceedings  
3 for the record. One other thing I should say,  
4 because we all understand the broader topic and it  
5 is very easy, as one gets into any discussion on  
6 the broader topic of what constitutes a foreign  
7 board of trade, to mix up a lot of the specific  
8 subissues, which are admittedly overlapping in  
9 nature. It is the natural course of any  
10 discussion, and certainly the ones we have had  
11 internally at the Commission, that they tend to  
12 wander all over the place in terms of mixing and  
13 matching various issues depending on the point any  
14 given person or interlocutor wants to stress.

15 We have gone to great pains,  
16 perhaps overly so, but we want to try to stick to  
17 the format to break down as best is possible a lot  
18 of the subissues. When we get into a specific  
19 question, I will define the question and we will  
20 try to confine the dialogue to that specific  
21 question as best as possible. I will try to be  
22 reasonably rigorous in maintaining that separation

1 of the different questions and issues sets even  
2 though I recognize, and you all recognize, that  
3 these issues are in many cases interrelated and  
4 overlapping, but that is for purposes of trying to  
5 discipline the discussion and focus it as best as  
6 possible over the course of the morning and the  
7 afternoon.

8 We will now turn to the individual  
9 panelists and their introductions, and  
10 then I will make some comments about our first  
11 question and then will go into panelist  
12 discussions.

13 MR. BELCHAMBERS: Anthony Belchambers,  
14 Chief Executive of The Futures and Options  
15 Association which is a London-based European  
16 derivatives association of about 170 members,  
17 including exchanges and market participants.

18 MR. REITZ: I am Peter Reitz, member of  
19 the board of Eurex, the derivatives exchange  
20 based in Frankfurt.

21 MR. NEWSOME: I am Jim Newsome. I am  
22 President and Chief Executive of the New York

1 Mercantile Exchange.

2 MR. GORHAM: Mike Gorham, Director of the  
3 Illinois Institute of Technology's Center for  
4 Financial Markets.

5 MS. ROSS: Verena Ross, Head of Market  
6 Infrastructure Supervision at the Financial  
7 Services Authority in the U.K.

8 MS. CRONIN: Kathleen Cronin, the  
9 Managing Director and General Counsel at the  
10 Chicago Mercantile Exchange.

11 MR. REID: Bob Reid, Chairman of ICE  
12 Futures.

13 MR. BERLIAND: I'm Richard Berliand,  
14 Chairman of the Futures Industry Association, the  
15 trade association for FCMs based here in the  
16 United States, and also Chairman of the FCM for JP  
17 Morgan.

18 MR. O'HARA: Kevin O'Hara. I am Chief  
19 Strategy Officer and Chief Administrative Officer  
20 for the Chicago Board of Trade where I just  
21 started a couple of months ago. Previous to that  
22 I was at New York NYSE Group, Inc. And prior to

1 that, Archipelago, and moved over to New York via  
2 the transaction.

3 MR. WEINREB: Nick Weinreb, Head of  
4 Regulation for Euronext.

5 MR. FOYLE: John Foyle, Deputy Chief  
6 Executive, Euronext Liffe which is the derivative  
7 markets division of the Euronext Group and  
8 includes the Liffe Market in London, Euronext  
9 Paris, Euronext Brussels, Euronext Amsterdam, and [INAUDIBLE]

10 CHAIRMAN JEFFERY: Again, thank you all  
11 for taking the time to be here.

12 Just a small introduction for the  
13 first issue to be discussed under the topic,  
14 what makes an exchange foreign or domestic?  
15 We are here, as I should stress, as a  
16 commission to listen and learn from the expertise  
17 assembled in this room. As I alluded to a moment  
18 ago, we have had no shortage of internal,  
19 hallway and other discussions on these various  
20 subjects. While those discussions were  
21 interesting and provocative and somewhat  
22 informative, we realized that they were not

1       dispositive and that it was absolutely imperative that  
2       we reach out to all of you in the futures community,  
3       those who are users of the markets, those who are  
4       operators of the markets, those who in one way or  
5       another run your businesses based on the integrity  
6       of those markets.

7                 Again, I cannot stress enough the  
8       importance of all of you being here today and the  
9       contribution that you will make over the course of  
10      the proceedings. And also, in the written  
11      submission process, I should have mentioned, at the  
12      outset, that there is a formal process of written  
13      submissions. The comment period is open through,  
14      I believe, July 12th. If there is anything you  
15      do not get on the table today, you will have  
16      the opportunity to submit something to us in  
17      writing in the following 2 weeks.

18                The first question is the broadest  
19      question and the hardest to get one's mind  
20      around, and that is, what are the policy  
21      implications that the CFTC should consider  
22      if it were to establish a policy

1 regarding when a foreign board of trade is no  
2 longer considered outside the U.S. for purposes of  
3 Section 4(a) of the Commodity Exchange Act?

4 With that as background, we will turn to  
5 the specific question which is, what factors  
6 should be considered when determining whether a  
7 foreign board of trade permitting direct access has a  
8 level of contacts with the U.S. that make it subject to  
9 Section 4(a) and the requirement to register as a  
10 U.S. exchange? That is a very open-ended series  
11 of questions. Benn, since you just  
12 arrived, you get the first question.

13 (Laughter.)

14 CHAIRMAN JEFFERY: Catch your breath,  
15 and maybe we will start with Anthony. Do you mind  
16 if we start with you, and we'll give Benn a pass  
17 and we'll pick him up. Thank you very much for  
18 being here, Benn.

19 MR. BELCHAMBERS: If I could turn the  
20 question around slightly and put it a slightly  
21 different way which is, is the operational mind of  
22 the organization in the U.S.? Is its governing

1 board in the U.S.? Is the main engine of its  
2 business in the U.S.?

3 Those sorts of questions, it seems to me,  
4 if you answer no to those questions, it is  
5 very hard to actually turn around and say its  
6 location is therefore in the U.S. for the purposes  
7 of the legislation it seems to me. So if you  
8 reverse those questions, I think you come up with  
9 a slightly different sort of nuance to the  
10 argument.

11 I think the second point is that the  
12 reference to contact within the U.S. is an  
13 interesting one, and I suspect, I cannot answer  
14 this, that many around the table would share the  
15 concern that may be generated by additional  
16 contacts in the U.S., but I personally believe  
17 that that does not change the location. What it  
18 does do is it raises issues about improved  
19 information sharing, additional notification  
20 requirements, possibly, and obviously perhaps even  
21 a higher level of due diligence on the overseas  
22 market to make sure that it is properly regulated

1 by its natural home state regulator. So I would  
2 indicate those are the criteria. Obviously we  
3 will address later on those other levels of  
4 contacts.

5 MR. REITZ: I think if we look at the  
6 current situation, the Commission should be  
7 congratulated by establishing a method or a policy  
8 through the placement of foreign terminals we  
9 have, and that is accepted globally. I think the  
10 Commission has set the standard here that has been  
11 the approach for many regulators around the world  
12 after this. I think it should be proud that this  
13 model has been widely followed by other regulators,  
14 but it also raises the point that we should be  
15 aware that because of this leadership role, any  
16 major change to the approach is likely to cause  
17 changes by other regulators as well. So, anything  
18 we do here might have bigger implications beyond  
19 what we are talking about just focused on the U.S.

20 CHAIRMAN JEFFERY: Chairman Newsome?

21 MR. NEWSOME: Thank you, Mr. Chairman.  
22 The NYMEX welcomes the opportunity to participate

1 in what I think is a very important public hearing  
2 on this topic, and certainly as well as anyone  
3 here, I am under no illusion with regard to the  
4 difficulty and complexity of this topic.

5 In fact, I think it was the first  
6 primary topic that the Commission was dealing with  
7 when I came to the Commission in the late-1990s.  
8 I do believe that the foreign no-action letter  
9 process has generally worked very, very well to  
10 address the problem. But I think as time goes on,  
11 the issues are only going to get more complex and  
12 more difficult to deal with as all of our markets  
13 become more global, as the marketplace becomes  
14 more global, it certainly is a difficult issue to  
15 deal with. I think in terms of taking the  
16 approach of looking at the location, looking where  
17 the board is, looking at the level of contacts,  
18 it is pretty easy to tear holes into any of those  
19 individual approaches. We have to take probably a  
20 broader approach to look at the entire context.

21 Of course, that has its difficulties as  
22 well, because when you start looking at the

1 broader approach and trying to define all the  
2 components that go into the broader approach,  
3 again, it becomes very easy to tear holes into  
4 them. I think the exchanges and marketplace are  
5 going to continue to evolve. Many of the  
6 exchanges have evolved to a point currently that  
7 no one would have dreamed when the no-action  
8 letters were being issued in the late-1990s, and,  
9 therefore, the difficulty that we are in today.

10 I guess the bottom line is if you take  
11 that approach, it gets to trying to measure a  
12 level of intent, what is the intent of the  
13 facility? Is it to circumvent the CFTC rules with  
14 access to U.S. customers? Again, that would be  
15 extremely difficult to measure and look at the  
16 intent.

17 I think when we look at the complexity  
18 of this topic, the issue really gets boiled down  
19 to one thing, and that is the exchanges having the  
20 ability to compete on a level playing field  
21 regardless of where they are housed, the U.S.,  
22 Europe, or anywhere else, and I think that that is

1 the real issue that has brought us to this table  
2 today.

3 From my standpoint and from the NYMEX  
4 standpoint, we have not had, nor do we have, any  
5 interest in limiting the competition, whether it be  
6 from the U.S. or other global exchanges. We  
7 certainly have no interest in limiting market  
8 flexibility that was created by the Commodity  
9 Futures Modernization Act.

10 I think at least in my simple mind as I  
11 look at it today, we have two potential solutions.  
12 One of those solutions is to set standards  
13 requiring at some point U.S. registration. I do  
14 not believe that that is the correct solution, Mr.  
15 Chairman. I think a better solution would be  
16 somewhat of a two-step process, for the Commission  
17 to undertake ongoing and formal reviews of the  
18 foreign board of trade no-action letters. Then if  
19 the Commission develops comfort with the rules  
20 based upon those no-action letters, that the  
21 Commission then give the U.S. exchanges the  
22 flexibility to operate under the same or similar

1 rules.

2 I think if the Commission has comfort  
3 with one set of standards for foreign exchanges,  
4 then that comfort should then be given to the U.S.  
5 exchanges so that we can operate on a truly level  
6 playing field.

7 CHAIRMAN JEFFERY: Thank you, Jim. Mike  
8 Gorham?

9 MR. GORHAM: Three quick points. The  
10 first one is I love the fact that the CFTC and  
11 Congress behind that has really focused on  
12 creating competition. I was very proud of the fact  
13 the way the CFTC handled the Eurex application and  
14 treated that in a country-blind fashion.

15 The second point is I think that it is  
16 very important that the Commission is fair in  
17 dealing with these issues of competition, and  
18 right now I believe that we do have a situation  
19 where there is a regulatory imbalance in the sense  
20 that while the Commission does not give a  
21 no-action letter to an exchange that they do not feel  
22 is properly regulated, there is absolutely a big

1 difference between the Foreign Boards of Trade and  
2 the DCMs in the sense of large trader reporting and  
3 position limits, which are two very, very important  
4 tools, and I think that is a little bit more for the  
5 discussion after the break.

6           The third that I will make is that this  
7 whole issue is incredibly messy. In the two years  
8 that I was here, in fact, on my very first day on  
9 the job, I think it was Ken Raisler, but whoever  
10 came in representing ICE, came in and they said we  
11 have to tell you about the material changes that  
12 take place as proper under the no-action letter.  
13 One change is that our owners are now in Atlanta.  
14 Secondly, we are going to become a cyber-exchange.  
15 It hit me for the first time that this is really  
16 both intellectually interesting to figure this  
17 whole thing out, but really messy, and in the 2  
18 years that I was here, we did not figure it out.  
19 So it would be nice if we figured it out today.

20   (Laughter.)

21                           CHAIRMAN JEFFERY: Thank you for those  
22 words of encouragement. Verena?

1           MS. ROSS: First of all, thank you very  
2 much, Mr. Chairman, Commissioners, and CFTC staff  
3 members for giving me the opportunity to be here  
4 today. Certainly, we at the FSA applaud the  
5 CFTC's proactively tackling the mitigation of  
6 regulatory risks in the ever-developing and  
7 growing more international derivatives markets.  
8 We accept the CFTC's concerns and appreciate the  
9 Commission's open and inclusive approach of  
10 discussing these issues and accepting input from  
11 across the industry and the regulatory  
12 community.

13           I should also say that I very much value  
14 the close working relationship and cooperation  
15 that we have with the CFTC, and I think that is a  
16 very good basis to continue to working together on  
17 making sure that overall there is sufficient  
18 regulatory strength in the global derivatives  
19 markets. In terms of the issues posed today, our  
20 view is certainly that the current regulatory  
21 process, including the current no-action letter  
22 regime and associated strong regulatory

1 cooperation, provides for effective and efficient  
2 oversight of financial markets.

3           Such an approach to our mind is  
4 essentially determined by two factors to work out  
5 where the lead regulation of an exchange and its  
6 traded contract lies. That is, firstly, the  
7 location of the exchange's head office, and,  
8 therefore, where the strategic direction is set.  
9 Secondly, the home regulator's regime being of a  
10 comparable standard to that of the host. If these  
11 criteria are satisfied, then the current accepted  
12 practice of the host regulator applying a  
13 light-touch approach to the relevant market and  
14 relying on close supervision of activities by the  
15 home supervisor, has consistently proven effective  
16 in our view. This is the current process through  
17 which U.S. and other overseas exchanges gain  
18 access to the U.K. market, and one which we at the  
19 FSA strongly support and advocate.

20           It is our belief that the current  
21 approach of trust and mutual understanding between  
22 regulators has created an effective, orderly,

1 fair, and competitive marketplace to the benefit  
2 of all concerned. At the FSA we are conscious  
3 that even the smallest change to regulatory  
4 practice can have a real impact on the regulated  
5 markets. We need to be careful that we consider  
6 that, and I understand that is also a big  
7 objective for the CFTC in looking at these issues.  
8 Where any new issues will arise, a new risk will  
9 arise. We believe that further cooperative action  
10 amongst the regulatory community and, in  
11 particular, between the FSA and the CFTC in some  
12 of the cases that have arisen, are able to deal  
13 with the valid concerns that are being raised. We  
14 believe that the most appropriate action lies with  
15 greater flexibility and cooperation within the  
16 regulatory community rather than increasing  
17 oversight of the markets by the host regulator.

18 This is the current approach being taken  
19 with developments in the WTI market, and will  
20 allow regulators to respond most appropriately as  
21 future issues arise. We do not know what those  
22 future issues exactly might be. Any new concerns

1 will most likely require equally flexible  
2 responses, therefore, and we would therefore  
3 advise against any moves which could negatively  
4 impact on the adaptability of our collective  
5 regulatory response and strategy.

6 CHAIRMAN JEFFERY: Thank you very much,  
7 Verena. I should also add, from my personal and  
8 professional perspectives, that the CFTC and the  
9 FSA have enjoyed a long-standing, close, and very  
10 constructive working relationship that works both  
11 on a formal and an informal basis, and it is one  
12 that we greatly value at the CFTC. I think it has  
13 enabled us and the FSA, if I could speak on their  
14 behalf, to actually get a lot of things done in a  
15 reasonably efficient-market and public-sensitive  
16 kind of manner.

17 And I ditto those comments for any  
18 number of other regulatory authorities around the  
19 world with whom we have the opportunity, and we  
20 have increasing opportunities as the nature of the  
21 business has evolved, to interact in the normal  
22 course of our business. Again, thank you, Verena,

1 and your colleagues for your participation in  
2 these proceedings.

3 CHAIRMAN JEFFERY: Kathleen, welcome.

4 MS. CRONIN: I want to echo the other  
5 panelists' thanks for allowing me this opportunity  
6 and the CME this opportunity to comment on  
7 obviously a very important issue to us and to the  
8 industry. I think in order to answer your  
9 question it is important for us to focus on what  
10 is permissible under the existing statutory  
11 regime, and that statutory authority hinges on the  
12 term "location." Although there is no doubt that  
13 Congress did not accurately envision the  
14 dematerialization of exchanges that has taken  
15 place since this legislation as enacted, it is  
16 clear that they did consider location versus  
17 another term such as "doing business," and  
18 determined that location was the appropriate test.

19 What constitutes located in the United  
20 States or located outside the United States? To  
21 us that determination is really based on where the  
22 exchange's infrastructure is located, and to that

1 extent, I think you need to look at where the  
2 decision-making authority resides, where its  
3 employees are located, and where its headquarters  
4 are. To expand the inquiry to look at something  
5 more broad like contacts with the jurisdiction  
6 takes you down a very dangerous path and  
7 effectively penalizes an organization for the  
8 structure of its operations, for example, locating  
9 its management in a particular place, or its  
10 clearing in a particular place, and also opens up  
11 exchanges to duplicative and inconsistent  
12 regulatory regimes.

13 I believe if you focus on the true  
14 location of an exchange, the exchange's  
15 infrastructure leads you to a single primary  
16 regulator. Recognizing the Commission's concern  
17 with protecting the integrity of United States  
18 markets, I echo some of the panelists' comments  
19 that the appropriate avenue for addressing those  
20 concerns is through extensive information sharing,  
21 regulatory cooperation, and regulatory  
22 harmonization. Thank you.

1                   CHAIRMAN JEFFERY: Thank you, Kathleen.  
2 Sir Bob?

3                   MR. REID: Thank you, and thank you for  
4 the invitation to be here with you today and to  
5 discuss this important topic. Firstly, let me be  
6 quite clear. Our view is an exchange is foreign  
7 when it has its principal offices, its management,  
8 and its board of directors in a non-U.S.  
9 jurisdiction.

10                   Secondly, that it is subject to a  
11 comprehensive regulatory regime under the laws of  
12 that jurisdiction which the Commission has found  
13 to be comparable to the regime administered by the  
14 Commission itself. Finally, is subject to  
15 appropriate information-sharing arrangements  
16 between regulators. Let me make one misconception  
17 and put that right. The use of the words "light  
18 touch" is misconceived. If I am subject to light  
19 touch, I hope never to be subject to heavy touch.

20                   (Laughter.)

21                   MR. REID: The second point I would make  
22 is that in its original no-action letter, the CFTC

1 noted that ICE Futures was required to retain  
2 specified financial resources, operate its market  
3 with due heed to the protection of investors, to  
4 ensure that trading is conducted in an orderly and  
5 fair manner, maintain suitable arrangements for  
6 trades reporting, maintain suitable arrangements  
7 for the clearing and settlement of contracts,  
8 monitor compliance with its rules, enforce its  
9 rules, investigate complaints with respect to its  
10 business, maintain rules to deal with the default  
11 of its members, cooperate with other regulatory  
12 bodies through the sharing of information, or  
13 otherwise maintain high standards of integrity and  
14 fair dealing and prevent abuse.

15           This is a very comprehensive list, Mr.  
16 Chairman. It is a comprehensive list which we  
17 observe. It is the basis of our arrangement for  
18 operation within the United States. And it is the  
19 basis on which the FSA looks at our operation and  
20 agrees that we are in fact complying. It is a  
21 stable position which has been strengthened by  
22 experience and practice. The links are there, and

1 the important thing is to make sure that those  
2 links work between our two countries. Thank you.

3 CHAIRMAN JEFFERY: Thank you very much.

4 MR. BERLIAND: I guess I am the sole  
5 intermediary representative here and will attempt  
6 to represent the end user as well. I have three  
7 points to make.

8 The first one I think is with respect to  
9 the definition of the foreign board of trade, and  
10 I really have very little to add to the points  
11 that have been made, most importantly, by Anthony.  
12 I would like to add one thing, though, and that is  
13 I think there are two tests that absolutely should  
14 not be used in determining whether an entity is a  
15 foreign board of trade. Number one of those is  
16 where the server/matching engine is located. I  
17 think that that is an extremely dangerous test and  
18 it goes very contrary to the biggest commercial  
19 opportunity that lies available to exchanges today  
20 in potentially going through mergers and  
21 acquisitions. The second test I would concur  
22 with as a user is that the use of contacts or U.S.

1 customers being a measure of a foreign board of  
2 trade's activity would be something that we would  
3 choose to resist quite aggressively. Indeed, I  
4 think trying to test what is a U.S. customer is e  
5 in itself quit a challenge, and, again, I think  
6 we will come back to that later today.

7 The second point I would make is with  
8 respect to that of the user community, and that  
9 is, from the perspective of the intermediary and  
10 the end user, certainty is the most important  
11 thing we want, and certainly is generally  
12 something that is sacrificed whenever you end up  
13 in a field of regulatory duplication. If we are  
14 trying to solve for more than one regulator, it makes  
15 life very complicated indeed for us as intermediaries  
16 and customers. In my experience, we had in the  
17 U.K. with a multitude of different regulators back  
18 in the 1980s exactly that environment. The FSA  
19 has now produced in our view an environment that  
20 allows us to have clarity across the areas in  
21 which overlaps occur.

22 The final point I would make is around

1 the commercial approach to this. I would like to  
2 echo the point that was made in the FT which is that  
3 I do believe that the CFTC has demonstrated a very  
4 level-headed approach to the way they regulate the  
5 markets. In fact, I would go one stage further  
6 and say as I deal with something in excess of 30  
7 regulators around the world in my daily business,  
8 I would choose the CFTC over any other regulator  
9 bar none, and it is for two reasons. Number one  
10 is it has broadly approached its problems  
11 commercially. And number two, it is more  
12 technically qualified in its area of expertise  
13 than any other. And I very much hope that we will  
14 be able to use this particular forum and the CFTC  
15 itself to demonstrate the leadership that you have  
16 done in the past. Thank you.

17 CHAIRMAN JEFFERY: Richard, thank you  
18 very much for those comments. Kevin?

19 MR. O'HARA: Again, I am honored to be  
20 here on behalf of the Board of Trade. I, too,  
21 would like to say that both the Commission and the  
22 industry, quite frankly, should take a bow given

1 what has gone on over the last 5 or 10 years, more  
2 products for customers, better services, more  
3 electronic, and more efficient. I think that with  
4 the on-flux of globalization of this industry and  
5 competition, in the end it has just brought better,  
6 high-quality products to investors.

7           Philosophically, we at the Board of  
8 Trade embrace this, and we look forward to being a  
9 very large participant as things go on. I have a  
10 procedural comment and a substantive one; and as we go  
11 on today, we can drill down on this. From a procedural  
12 standpoint, I completely agree, or we completely agree,  
13 with Commissioner Dunn, and I have spent some time down  
14 in this town, and I think that a regime of  
15 no-action letters over a long period of time can  
16 get messy, uncertain, and go down roads that there  
17 may not be political accountability.

18           It is best that in the end, especially  
19 in a complex, dynamic, and growing industry in  
20 substantive area of important regulation, that it  
21 be codified even at its broadest levels, I am not  
22 talking about specifics, and codified so that

1 everyone can operate from essentially a single  
2 piece of paper, if you will. The idea is that you  
3 are operating off of multiple no-action letters,  
4 telephone calls with staff, and speeches can get a  
5 little difficult from the consistency standpoint  
6 as to those who are regulated.

7           Secondly, I think one of the most  
8 important things that the Commission would want to  
9 look at is its ability to view into these foreign  
10 markets. That would be through information flow,  
11 and we have talked about coordination with the MOUs.  
12 I think the ability to access books and records is  
13 highly important whether that is done by rule or  
14 contractual consent, the ability to have  
15 jurisdiction over persons offshore, again,  
16 extremely important for maintenance of the  
17 integrity of markets and investor protection.  
18 Again, these are more procedural issues, but I  
19 think that would be important to the Commission  
20 and to the industry.

21           Thirdly, on the substantive side, and  
22 this is really the toughest question, where do you

1 draw lines? Do you draw lines? I can tell you  
2 everything I do not want, but I cannot tell you  
3 what should be in it. I think Jim Newsome makes  
4 actually a pretty good point that if the  
5 Commission is willing to accept rules from a  
6 foreign board of trade and approves them,  
7 generally speaking, those same rules should be  
8 applicable or should be approved potentially by a  
9 board of trade in the United States as well so  
10 that this leveling of the playing field or the  
11 lack of regulatory arbitrage is mitigated.

12 CHAIRMAN JEFFERY: Kevin, thank you.  
13 Nick?

14 MR. WEINREB: Thank you, Mr. Chairman.  
15 I will be brief so that John Foyle and I will not step  
16 on each other's toes in describing positions. I will  
17 have a couple of introductory remarks and I will  
18 leave for these questions' substance to my  
19 colleague Mr. Foyle. We are honored to be invited  
20 and to participate in this hearing. It is an  
21 important hearing, and it is an important subject.  
22 We share the views of the other participants that

1 the no-action regime has been an extraordinarily  
2 successful one.

3 It has offered leadership in how international  
4 cooperation should work, how international business should  
5 be facilitated, and competition should be facilitated on an  
6 international basis, and the core of cooperation amongst  
7 regulators has to go forward, delivering as it does the  
8 flexibility to respond to changing circumstances. As we  
9 all recognize, the financial markets are changing at an  
10 ever-increasing rate. The structure, the substance, of how  
11 business is done changes from day to day, year to year, so  
12 we are talking about changes in cyberspace, dematerialized  
13 exchanges. The no-action regime does, through the process  
14 of recognition of standards together with cooperation, allow  
15 you to be able to deal very effectively with issues as they  
16 arise. We would hope that the no-action regime continues  
17 effectively in its existing form going forward. I'll refer  
18 to my colleague, Mr. Foyle, to add more substance to that.  
19 Thank you.

20 MR. FOYLE: The context which we are looking at is  
21 a period of extraordinary change in development in global  
22 financial markets generally, and I have to say particularly

1 in the derivatives field. And echoing the comments of  
2 others on this panel, what has occurred over the  
3 last seven or eight years is in significant  
4 measure a consequence of the approach that the  
5 Commission has taken through its no-action regime  
6 to facilitate the business of the derivatives  
7 market both in foreign parts and in the U.S. to  
8 develop in response to the technology that has  
9 become available, and to do so in a context of  
10 fair competition for the benefit of the users of  
11 all of those markets. That is due in no small  
12 measure to the regime that you have put in place  
13 in conjunction with the relevant overseas  
14 regulators.

15 The context of our view about the  
16 important policy questions that you are addressing  
17 is that we think against this background of  
18 extraordinarily rapid change, which is likely to  
19 continue, the crucial thing, the challenge for  
20 regulators, is to remain flexible in the approach  
21 that you adopt in conjunction with other  
22 regulators.

1           And secondly, to develop that  
2           cooperation with other regulators. It is not  
3           practicable or realistic to expect that the  
4           business conducted by a particular exchange on a  
5           global basis can be subjected to effective  
6           regulation without cooperation between a number of  
7           regulators that are touched by the actions of the  
8           sources of business of that exchange.

9           Cooperation between regulators has been  
10          developed over the last 7 or 8 years, particularly  
11          under the no-action regime, and we encourage you  
12          to further that aim because it is a vital part of  
13          the response to the challenges which regulators  
14          face.

15          Finally, the focus on principles  
16          emanating from the CFMA in the case of the CFTC,  
17          and, indeed, echoed by the approach taken by the  
18          FSA in the United Kingdom, by other regulators in  
19          the European community, and elsewhere around the  
20          world. The way to look at the circumstance of a  
21          particular exchange, we do not believe we should  
22          look at a single factor and that there are many

1 that you take into account before granting a  
2 no-action letter.

3           We know that the review is thorough. The  
4 staff in conjunction with the Commission looks at  
5 the totality circumstances and not one single  
6 element or one single measure. Also, monitor the  
7 way in which the affairs of a particular exchange  
8 change over time, and my goodness, they have  
9 changed over time since the no-action letters, for  
10 example, that was granted in 1999 to three of the  
11 markets in the Euronext Group. The Commission  
12 through its staff has maintained a close watch  
13 over those changes, and no doubt, amongst the  
14 other things you have done, are to coordinate with  
15 the regulators in question and looked to see  
16 whether the circumstances all in all, that the  
17 totality of the circumstances, indicate any  
18 difficulties or problems with the regimes which  
19 you are operating for oversight of the business of  
20 the relevant Euronext markets.

21           So we believe you have the right  
22 emphasis and we would encourage the Commission to

1 continue to put the emphasis on flexibility, on a  
2 principles-based approach to regulation, and on  
3 maintaining and developing cooperation with the  
4 home state regulators.

5 CHAIRMAN JEFFERY: Thank you very much.  
6 Why don't we turn to Benn Steil who is from the  
7 Council on Foreign Relations and who is a  
8 distinguished academic and commentator on matters  
9 of international economics and finance? Thank you  
10 very much for being here.

11 MR. STEIL: Thank you, Mr. Chairman. I  
12 apologize for my late arrival. My pilot blamed  
13 your weather here in Washington which is not so far  
14 nearly as bad as advertised. I have two very  
15 brief comments in opening.

16 First of all, I think it is  
17 exceptionally important to acknowledge just how  
18 successful the Commission's no-action regime has  
19 been since DTB, now Eurex, started trading  
20 10-year Bund futures out of Chicago in 1997. This  
21 particular development stimulated enormously  
22 positive reforms in both market structure and

1 exchange governance around the world. Liffe, for  
2 example, instituted its crash program to move from  
3 floor to screen only after these volumes started  
4 coming in from Chicago. I would also emphasize  
5 that the SEC has never had such a regime for cash  
6 exchanges, and I would also argue that that is  
7 probably the main reason why these positive  
8 developments have been a bit slower in coming to  
9 our cash markets in the United States,  
10 particularly to the New York Stock Exchange.

11 Having said that, I do believe that the  
12 activities of U.S. market participants on foreign  
13 markets can in some instances give rise to  
14 legitimate concerns at the Commission and might  
15 merit more active Commission involvement in  
16 regulation. One can envision a situation in which  
17 U.S. participation in trading a contract on a  
18 foreign exchange were sufficiently large in terms,  
19 for example, of the number of institutions  
20 participating, the size of such institutions, and  
21 the volumes traded, such that a problem in the  
22 foreign clearinghouse could trigger a wave of

1 defaults which could spread throughout the U.S.  
2 financial markets even among institutions which  
3 were not participants in that foreign market. In  
4 other words, as U.S. participation in foreign  
5 trading rises, there is the greater potential for  
6 systemic risk in the U.S. financial markets.

7 I should emphasize that that would not  
8 necessarily mean that the Commission should repeal  
9 a no-action letter, but it would perhaps suggest  
10 that the Commission would want to initiate a  
11 higher level of cooperation with the foreign  
12 regulator directed specifically at the activities  
13 of the foreign clearinghouse which would  
14 potentially be the source of the systemic risk in  
15 the U.S. markets. Thank you, Mr. Chairman.

16 CHAIRMAN JEFFERY: Thank you, Benn.  
17 With that, I think we have heard from each of our  
18 panelists on the initial question. I would like  
19 to turn to my fellow Commissioners for questions.

20 COMMISSIONER LUKKEN: My first thoughts  
21 on this are we have jumped into the weeds on  
22 drawing the line somewhere on this question, and I

1 wanted to step back a little bit and ask the  
2 question, should we draw a line at all?

3 The answer may be yes, but I wanted to  
4 talk a little bit about, as I mentioned in my  
5 discussion, what are the risks involved here in  
6 our discussions? We are not talking about risks  
7 to the customers as far as I can tell. These  
8 transactions still have to go through FCMs or our  
9 Part 30 foreign regimes with its capital  
10 requirements and customer asset protections and  
11 disclosure requirements and so forth. We are not  
12 recognizing a clearing firm through this no-action  
13 process.

14 So in my view, we are talking about the  
15 risk here of market integrity which goes to the  
16 heart of our manipulation authority. The  
17 situation that we have talked about with ICE and  
18 NYMEX, we are sharing information with FSA that  
19 allows us to see the entirety of the marketplace,  
20 so we feel pretty comfortable that we are able to  
21 surveil those markets to prevent manipulation. If  
22 that risk has been care of, what risks are still

1 around for us to resolve by coming up with a test  
2 that we are trying to come up with today?

3 This is something I would like to ask  
4 the panelists, to focus in on where the public  
5 risks are, beyond the surveillance to the  
6 manipulation risks that I mentioned. I would note  
7 that I agree with Mike -- as far as this no-action  
8 process has gained a life of its own. It really  
9 is a staff document, but people rely on it as if  
10 it were a Commission policy.

11 Whatever we do, I think there has to be  
12 some recognition that this has outgrown its  
13 original intent and that people rely on it as if  
14 the Commission has acted in this area. I do think  
15 that that is important, so I would ask the group:  
16 A. What are the risks involved that we are trying  
17 to alleviate here? And, B. Is there a way to  
18 codify the no-action process to give it more  
19 substance or substantial weight that the  
20 Commission can stand behind it?

21 CHAIRMAN JEFFERY: Are there any  
22 comments, questions, or responses to Commissioner

1 Lukken? Kevin, please.

2 MR. O'HARA: I would say that I do not  
3 see it as much a customer risk as a competitive  
4 risk. Again, the day that comes where one would  
5 elect to be a foreign board of trade versus a  
6 U.S. designated contract market because somehow  
7 you can get some competitive advantage over your  
8 competitor, from that standpoint it would be a  
9 competitive issue.

10 Benn certainly knows about in the cash  
11 equities world the ECNs versus ATSS versus  
12 exchanges, and everyone was trying to one-up each  
13 other from a regulatory standpoint as to what  
14 bucket you were in so somehow you would have a  
15 regulatory advantage. This goes back to my  
16 earlier comment that as there are a set of  
17 substantive rules such as limits that would apply  
18 to a foreign board of trade, it would be hard to  
19 say in the United States that a designated  
20 contract market generally could not be allowed to  
21 have the same set of rules apply to it as well.

22 On the codification issue, again, my

1 friends down at the SEC which, unfortunately, do a  
2 lot of regulating, as I say, by telephone call, by  
3 speech and by no-action letters, and, again, I  
4 think everyone here has said that the no-action  
5 regime has created wonderful benefits, there is no  
6 question about it, and in large part, what is in  
7 those no-action letters should find themselves in  
8 some codification.

9 I think from an administrative law  
10 standpoint, Congress looked to you folks as their  
11 designees as being politically accountable and so  
12 that you should bless a document. The staff is  
13 wonderful as they are. They are not elected and  
14 they are unaccountable to Congress at least  
15 directly, and that ending up with one piece of  
16 paper, if you will, or multiple pages of paper  
17 that everyone can work off of is highly important  
18 based on my past experience, and that is where my  
19 thoughts on that one come from.

20 CHAIRMAN JEFFERY: Anyone else? Jim?

21 MR. NEWSOME: I would like to respond,  
22 and I want to pick up on Kevin's comments. This

1 debate is not about limiting competition, nor  
2 should it be about limiting competition, but make  
3 no mistake about it, it is about competition, and  
4 it is about very real competition. I think Sir  
5 Bob's comments were completely accurate when he  
6 was talking about the no-action letter as far as  
7 being relative now versus relative then. But I  
8 think the one thing that has changed and draws us  
9 to this debate is that when those no-action  
10 letters were permitted, there was no direct  
11 competition, and the fact that we now have direct  
12 competition on products brings to light some of  
13 the more subtle differences between the regulatory  
14 schemes.

15 At the end of the day, obviously in the  
16 NYMEX-ICE Futures debate, when we are talking about our  
17 friends at the FSA which everyone recognizes that we have  
18 a great relationship with and that they are  
19 comparable regulators to the CFTC, that does not  
20 mean that there are not competitive differences.  
21 If you take that approach, then where do you draw  
22 the line? What regulatory body do you draw the

1 line with?

2           It further creates the situation where  
3 at some point you are going to have to draw the  
4 line, and that is why I think the more balanced  
5 approach is the best approach in terms of review  
6 of the foreign board of trade no-action letters,  
7 and simply if the Commission has a comfort with  
8 the way that that entity is going to be allowed in  
9 the U.S., whether it be position limits, large  
10 trader reports, whatever the case might be, the  
11 Commission has the ability to make that  
12 determination. And if the Commission makes that  
13 determination, then it seems reasonable to me that  
14 the U.S. designated contract market should have  
15 the flexibility to operate the same way, and,  
16 therefore, longer-term. We stay away from having  
17 to have this same debate every 5 or 6 years if we  
18 take the bright-line approach which, in my  
19 opinion, is not a good approach.

20           CHAIRMAN JEFFERY: Sir Bob?

21           MR. REID: As far as the regulatory  
22 relationship is concerned very much depends on how

1 you as a corporation conduct your business. It  
2 is that relationship of how the parties get on  
3 together is I think the key thing, and that it is  
4 not so much in the small print. But coming to  
5 Walter's point and what one should be concerned  
6 about, my concern really all the way through, and  
7 I have been involved with this market from its  
8 inception, is you need to know who the players  
9 are, you need to know how they are playing, and to  
10 begin with, it was a fairly simple,  
11 straightforward gas-oil trading business, and now  
12 it is a much more technical business and becoming  
13 more technical by the day now that all the  
14 algorithmic players are in place. Now one needs  
15 to be able to work out what does that mean in the  
16 monitoring of your market, and this is really  
17 something where the two regulators or all  
18 regulators should be involved in assessing what is  
19 happening as to how these markets are being  
20 played.

21 That is where I think the point that  
22 Benn makes is an extremely good point, that where

1 this thing will become unstuck is throughout the  
2 clearinghouse. If all of a sudden there is a mass  
3 of contracts unable to be delivered and there is a  
4 default situation, then you will have to be able  
5 to handle that. There I think that stronger links  
6 in the area of assessing this trend of the  
7 clearinghouse operation against a much more  
8 technical market today, and it will be much more  
9 technical tomorrow, I think is really a very  
10 important point indeed that Benn made.

11 CHAIRMAN JEFFERY: Richard?

12 MR. BERLIAND: I think Jim's point is  
13 absolutely correct, that the biggest public  
14 interest here is around competition. I would say,  
15 however, that in my experience, the press and many  
16 less well-informed commentators in the marketplace  
17 fail, I think, to really drill into enough of the  
18 detail, and, therefore, will claim that there are  
19 elements of regulatory arbitrage that are at work  
20 here that are driving activity in the marketplace,  
21 when I think in many cases, they are not the  
22 primary driver.

1           For example, it is my belief as a user  
2           and as an intermediary that the flow of activity  
3           between ICE Futures and NYMEX today, while there is some  
4           element of position limit concern, that is not the  
5           primary driver of market activity. That having  
6           been said, there are plenty of examples, and I am  
7           on the record as having commented on this before,  
8           of where regulatory arbitrage has a huge impact on  
9           flows.

10           One I would highlight, for example, is  
11           the difference in the environment in the U.S.  
12           between the SEC and the CFTC on listed options as  
13           contrasted with the FSA combined environment. I  
14           can speak with a great deal of confidence and  
15           certainty about the amount of business that gets  
16           booked in the U.K. because you cannot book those  
17           products all in the same account in the United  
18           States. So while I do not believe position limits  
19           are the major factor in the NYMEX-ICE Futures debate on  
20           competition, they are a factor, but don't let any  
21           of us forget that the biggest public interest I  
22           think here is around elements of competition. To

1 answer your second point, which is with respect to  
2 the no-action letter, I think, while I am not a  
3 lawyer, and, therefore, not qualified to comment  
4 on this relative to many people around this panel,  
5 the benefit of the no-action environment is that  
6 it is clearly flexible.

7 I think the pace at which markets are  
8 changing today is so rapid that we need to ensure  
9 that we keep within our operating environment that  
10 level of flexibility. It is only 6 years since  
11 CFMA, and we are already at the point where the  
12 marketplace has moved very rapidly ahead.  
13 Therefore, my only comment would be that if we are  
14 going to go down a codification route that it be  
15 done so in a way that does not constrain or very  
16 rapidly become irrelevant to the way that the  
17 marketplace is developing.

18 CHAIRMAN JEFFERY: Thank you. Kathleen?

19 MS. CRONIN: I have just a couple of  
20 observations on Walt's question with respect to  
21 the no-action process. I think we would agree  
22 generally with the comments of others around the

1 table that the no-action process has worked  
2 effectively to date, although it is not clear to  
3 us the statutory authority that the no-action  
4 process derives from. But I think we would be in  
5 favor of a statutory amendment or modification  
6 that codified essentially the no-action process  
7 and created a category of registration with  
8 respect to foreign boards of trade that are  
9 offering direct access of the products into the  
10 U.S. comparable to the Registered Overseas  
11 Investment Exchange, I believe, under the regime  
12 of the FSA. And that is something that the CME has  
13 tremendous experience with overseas in a number of  
14 jurisdictions where we offer direct access to our  
15 products.

16 We think that the appropriate scope of  
17 the inquiry is the effectiveness of the regulatory  
18 regime in the foreign board of trade's home  
19 jurisdiction, and, again, the attributes that we  
20 have talked about with respect to information  
21 sharing and regulatory cooperation. And to the  
22 extent that the CFTC is satisfied that there is

1 sufficient oversight in the home jurisdiction,  
2 then we would be in favor of that type of  
3 registration category which is supplemented then  
4 by informational filings on a periodic basis with  
5 respect to regulatory status in the home  
6 jurisdiction and trading activity in the United  
7 States.

8 CHAIRMAN JEFFERY: Anything else?

9 MR. BELCHAMBERS: May I make an  
10 observation?

11 CHAIRMAN JEFFERY: Yes.

12 MR. BELCHAMBERS: Everyone is reading  
13 the question slightly differently, I think, but if  
14 I read it correctly, it was what are the risks  
15 we face in this arrangement, and it seems to me  
16 that the full question is, what are the risks that  
17 are uncovered exist that in this arrangement, and you  
18 cannot answer that question until you have done  
19 the analysis of what kind of criteria are taken  
20 into account.

21 Having looked briefly, if I may put it  
22 this way, and I am open to correction from Verena,

1 I would argue that the kinds of things that are  
2 taken into account in issuing a no-action letter  
3 are not a million miles away from the kinds of  
4 things that are taken into account by the FSA in  
5 its Recognized Overseas Investment Exchange  
6 regime. Nor, indeed, would I have the same in France.  
7 The French regime is extremely similar to the  
8 FSA's regime, and, therefore, until you have  
9 actually sat down and done that analysis, that gap  
10 analysis, it is very difficult I think to answer  
11 that question.

12 In terms of the success of the no-action  
13 regime, my own view is that it is very much based  
14 on the CFTC's Part 30 order. It is a similar type  
15 of principle, overseas recognition, a few  
16 additional requirements, careful monitoring,  
17 information flows, cooperation actions, all of  
18 those sorts of things, and it is worthwhile  
19 bearing in mind that that regime has been in place  
20 and has already been observed since about 1986.  
21 It is a long-tested regime, and as far as I am  
22 aware, there has been no identifiable market

1 failure from that regime, which is very similar to  
2 the no-action letter.

3 CHAIRMAN JEFFERY: Benn?

4 MR. STEIL: I have a very brief comment  
5 regarding competitive dynamics. I think it is  
6 exceptionally important that any new regulations  
7 we consider today not just address the competitive  
8 dynamics we are seeing in the market here today,  
9 for example, the nature of the competition between  
10 ICE Futures and NYMEX, but the competitive dynamics that  
11 we are going to see in the future. I think it is  
12 absolutely inevitable that in an inherently  
13 globalizing industry like the electronic  
14 derivatives trading industry you are going to see  
15 two things.

16 One, very large exchanges in one  
17 jurisdiction inevitably trading contracts that  
18 have an intimate relation with the economy in  
19 another jurisdiction. That to me is absolutely  
20 inevitable given the benefits of scale in the  
21 exchange business. Second, to the extent that  
22 such exchanges are successful, they are certainly

1 going to get increasing participation from foreign  
2 jurisdictions, but I think it is exceptionally  
3 important not to use some sort of mechanistic  
4 trigger to establish where the Commission should  
5 heighten its regulatory involvement.

6 The E.U. has addressed these concerns in  
7 the European Single Financial Market by  
8 accompanying a mutual recognition regime  
9 with basic minimum standards that would apply  
10 across every jurisdiction. The CFTC has tried to  
11 do the same thing in principle through its  
12 interagency cooperation, for example, with the  
13 FSA, and I think that becomes more important going  
14 forward as this industry becomes more global.

15 CHAIRMAN JEFFERY: I think that is very  
16 helpful.

17 MR. WEINREB: Mr. Chairman, may I pick  
18 up on what Benn has said and what others have  
19 said?

20 CHAIRMAN JEFFERY: Yes, sir.

21 MR. WEINREB: I think one reason why the  
22 no-action regime works so effectively is there is

1 a shared consensus about what regulators are  
2 trying to achieve. All regulators have  
3 obligations to protect market integrity, to  
4 protect the interests of investors, and in most  
5 cases, to foster competition, and this is a  
6 mechanism where people with shared interests can  
7 cooperate very effectively with one another with  
8 the result, of course, that it is much easier to  
9 get cooperation and information sharing because  
10 ultimately people recognize why you want the  
11 information, you recognize why they are willing to  
12 give it and why they may want reciprocal  
13 information, and it works extremely well.

14 If I can just pick up one point made by  
15 some of the U.S. exchanges about wanting level  
16 playing fields, to pick up the traditional cliché.  
17 I think that what we are seeing here is that the  
18 test on the no-action regime is one of equivalence  
19 of standards, and by equivalence, of course, one  
20 looks at the totality of circumstances, and some  
21 things may be slightly tougher in one regime, others  
22 slightly laxer, but taking the regime as a whole,

1       there is equivalence.

2                       Certainly when we were discussing with  
3       the then Chairman Newsome the no-action letters  
4       for Liffe and Euronext Paris, it was this is what  
5       we do in the States. Show us how you do the same  
6       in Europe. How do you achieve the same end  
7       results? The CFTC got comfortable with what we  
8       are doing, they talked to us, they talked to the  
9       FSA, and they eventually concluded, yes, there is  
10      equivalence. I think what you are now seeing, of  
11      course, is the U.S. exchanges saying, actually, we  
12      would like effectively the same approach, set the  
13      high-level principles and then let us demonstrate  
14      how we can indeed achieve that, and from our  
15      point of view, we have no difficulty with that.

16                      Indeed, within the U.K. it is very much  
17      the structure one has in that the legislation and  
18      the FSA requirements set a very high level of  
19      principles, and then each exchange sits down with  
20      the FSA and you go through principle by principle  
21      how you are going to do this, demonstrate to us  
22      how you will do it.

1 Will that deliver the right results?  
2 The result is one where the arrangements of the  
3 U.K. exchanges are not identical by any means, but  
4 they all are equivalent within the U.K. context  
5 because they all have satisfied the FSA that they  
6 do meet the requirements of regulated markets.

7 I think really what we are seeing is  
8 the U.S. exchanges are saying, we could accept  
9 the equivalence of standards of foreign  
10 boards of trade passporting in here, then we  
11 should have the same, and I think that is a fair  
12 point for them to be making.

13 CHAIRMAN JEFFERY: Thank you very much.  
14 Ms. Verena Ross from the FSA, thank you, Verena.  
15 You have the floor.

16 MS. ROSS: Thank you, Chairman.

17 Just to come back to Commissioner  
18 Lukken's question about what are the risks we are  
19 really looking at here, and I think I fully agree  
20 that the key thing is about market integrity and  
21 ensuring that there is a fair, open, and effective  
22 market operating. To my mind, as you said, that

1 that is very much something which we, between us, have  
2 focused on very strongly over the past years and I  
3 think have successfully, through enhanced  
4 cooperation and enhanced information exchange. been  
5 able to deal with.

6 In terms of regulatory regimes, there  
7 are clearly differences as to how regimes have  
8 grown up across the world, and they are not  
9 completely identical. On the other hand, as Nick  
10 Weinreb has said, what actually happens is that in  
11 some areas one regime is just slightly tougher, or  
12 you could call it tougher, but it certainly is  
13 slightly different, but what we are all aiming at  
14 is the same regulatory aims and objectives.

15 After all, some of the analyses that the  
16 CFTC has done over the years has clearly looked at  
17 Part 30 and other equivalence regimes and has  
18 looked at whether these regulatory regimes in  
19 foreign countries are after all deemed to be  
20 equivalent, and obviously have reached that  
21 conclusion with regard to the FSA. I think it is  
22 important that we as the regulatory community

1 continue to work towards looking at our different  
2 standards and that we after all achieve the same  
3 aim.

4 We might do it through slightly  
5 different means, but we all want, for example,  
6 very rigorous market monitoring arrangements which  
7 ensure that market integrity is maintained.  
8 Obviously, the CFTC has been a leading light in  
9 doing that, for example, in their work with CESR  
10 and so on, and I think that it is very important  
11 to continue working on international regulatory  
12 harmonization and understanding, where there are  
13 differences, and if there are differences, why  
14 they are there and what that means.

15 I personally cannot comment on the  
16 process of the no-action regime and what it does  
17 in terms of the administrative process here in the  
18 U.S., but it appears to me that in substance, as  
19 Anthony has said, it achieves pretty much the same  
20 end as we do through our Recognized Overseas  
21 Investment Exchange regime in the U.K. by looking  
22 up front at whether there is an equivalent regime

1 and there is proper home state regulation, and  
2 then also continuing to have, probably more  
3 actually than we get in the U.K., ongoing  
4 information flow abroad about trades coming  
5 through from the U.S. and other information about  
6 new contracts and so on.

7 CHAIRMAN JEFFERY: Thank you very much.  
8 Chairman James Newsome, the former Chairman of the  
9 CFTC, and now Chief Executive Officer of the New  
10 York Mercantile Exchange.

11 MR. NEWSOME: Thank you, sir. Always  
12 the Chairman.

13 (Laughter.)

14 MR. NEWSOME: I think as the markets  
15 have evolved and in the face of direct competition  
16 on the same products to the same customers, I no  
17 longer believe that similar or comparable is good  
18 enough. I think it has to be the same. If you  
19 are going to have true competition, then the  
20 playing field has to be completely level.

21 I think with regard to Richard's  
22 comment, and certainly would not disagree with him

1 on JP Morgan's view with position limits, but to  
2 some customers, particularly what have become new  
3 customer bases that drive lots of volume at all of  
4 the exchanges, it is a much bigger issue with them  
5 that puts us at a competitive disadvantage.

6 Again, I would not make that statement  
7 across all customer bases, as Richard has pointed  
8 out. But simply with regard to whatever issue,  
9 whether it is large trader reporting or position  
10 limits or new issues that come about, I do not  
11 think it is necessarily important that the  
12 Commission has to draw the line with those issues.  
13 My comment is simply that if you develop comfort  
14 with one market participant on the same product,  
15 addressing the same customers, that it should be  
16 good for all market participants for all  
17 exchanges.

18 CHAIRMAN JEFFERY: Jim, I can't resist  
19 jumping into this a little bit and making a  
20 statement and also asking two questions. Do you  
21 expect identical regulation across jurisdictions  
22 around the globe? Do you really mean that given

1 the reality of the different histories, cultures,  
2 traditions of market development?

3 All the regulators that we deal with,  
4 everybody is structured in a different way. We  
5 have an SEC, we have the CFTC. The FSA in London,  
6 England, has one sort of overriding regulatory  
7 agency. That is a pretty high place to set the  
8 bar if that is what you really mean and that is  
9 what your recommendation is to us as a Commission  
10 as our aspirational goal. I find that may be  
11 really difficult to leap over.

12 MR. NEWSOME: I would agree completely,  
13 and that was not my intent. I agree I used that  
14 verbiage, but in a different context. The context  
15 that I was using it, to the extent that  
16 competitive issues or competitive regulations are  
17 identified, that the Commission has comfort with  
18 one exchange versus another, that there should be  
19 a level playing field between the two.

20 CHAIRMAN JEFFERY: The other is, and I  
21 don't know whether it is a comment or question and  
22 it may or may not be appropriate to make it at

1 this time, but I will now and I reserve the right  
2 to repeat it later in the context of our  
3 discussion this afternoon, and that is, I think  
4 U.S. exchanges, our brief as a U.S. regulator as  
5 the Commodity Futures Trading Commission, have to  
6 be ever mindful of discussions if the shoe is on  
7 the other foot, so to speak.

8           There are a lot of things that happen,  
9 that are happening in our markets, where we hear  
10 from if not NYMEX, one of your U.S. competitors,  
11 wanting to do things in overseas markets coming to  
12 us and asking us for help with the regulators in  
13 those markets to get those regulators comfortable  
14 with the bona fides of the exchange and other  
15 issues. I think one thing is, it is very  
16 important to keep in mind that this discussion  
17 that we are having today goes both ways.

18           One of the things that I think as the  
19 Commission, and certainly I as a Commissioner want  
20 to strive to do, is make sure that whatever  
21 emerges from these deliberations emerges in a way  
22 that we as a Commission do not adversely affect the

1 ability of the markets too broadly to globalize  
2 internationally, which I think we would all agree  
3 is beneficial to consumers in the U.S. and around  
4 the world, but also jeopardize the competitive  
5 position of the U.S. exchanges which are a core  
6 constituency of the CFTC and the markets we serve.  
7 So I just put that point out there for  
8 consideration as all of us continue over the  
9 course of the day. Again, it is one person's view  
10 as a Commissioner.

11 MR. REITZ: Peter Reitz from Eurex.

12 CHAIRMAN JEFFERY: Thank you very much.

13 MR. REITZ: I completely agree with what  
14 you just said, that you have to always keep in  
15 mind that it works both ways, and I think what Jim  
16 stated earlier is probably the ultimate goal, that  
17 at the end of the day we are operating in a global  
18 environment and we want to have as an idea, an  
19 identical regulatory regime we are operating  
20 under.

21 I think the way to get there is  
22 following the approach that the CFTC has already

1 taken in trying to harmonize regulatory  
2 environments, so the initiative you have taken  
3 with the European regulators, the CESR-CFTC  
4 project, I think is the road to go. We will  
5 probably never reach the ultimate goal of  
6 completely identical regimes, but if the  
7 regulators get together and agree on common goals,  
8 I think they will also be able to agree on the  
9 best way to achieve those.

10 CHAIRMAN JEFFERY: Thank you very much.  
11 I will turn to Commissioner Hatfield for questions  
12 or comments.

13 COMMISSIONER HATFIELD: First of all, I  
14 want to say that I think this is a great  
15 discussion. I thought Richard made a good point  
16 about we do not really know the extent to which  
17 there may or may not be some sort of competitive  
18 advantage gained through the different regulatory  
19 regimes, and that is very hard to measure.

20 But let's just assume that Jim is right,  
21 that for some of the groups there is an advantage  
22 in some regulatory regimes. That being the case,

1 I wanted to ask Mike if I could, because you  
2 touched on this in your opening remarks, if we  
3 admitted that there was a problem and we were  
4 going to try to address it, we have talked about a  
5 single regulatory regime with cooperation, we have  
6 talked about dual regulation, and we have also  
7 been talking about some sort of regulatory relief  
8 on one side to level the playing field, could you  
9 give us your thoughts on that as to whether or not  
10 you think we could address it, and if so, how?

11 MR. GORHAM: I have two thoughts here.  
12 The first one is that I do not know if I am the  
13 only one who thinks this is a really, really,  
14 really pressing issue, and I know NYMEX makes  
15 public statements that they are not worried  
16 because they are actually growing despite the fact  
17 that somebody else had a 30-percent share, but  
18 normally when exchanges compete with each other,  
19 floor to floor, electronic to electronic, nobody  
20 is ever able to steal a contract from another  
21 exchange.

22 Right now we are in an incredibly

1 interesting historical period in the U.S. where  
2 you have floors moving to screens, and when you  
3 have screens competing with floors just like DTB  
4 did 10 or 15 years ago, whenever that was when  
5 they took the Bund back from Liffe, you have this  
6 serious risk of the electronic exchange actually  
7 taking the whole contract.

8 I think NYMEX is at risk of actually  
9 losing WTI and everything else that they have.  
10 NYMEX could have been a little faster moving into  
11 the electronic arena, but in any event, I think  
12 that is the situation. So if anything is done, if  
13 it is done a year from now, it could be too late.  
14 The CME may save NYMEX. We will see what happens  
15 with that, so the first thing has to do with  
16 urgency.

17 The second one is that I do believe that  
18 there is a regulatory imbalance between the two.  
19 Walt made the point that with the no-action regime  
20 we basically believe that the foreign regulator is  
21 doing a reasonably similar job as CFTC is doing  
22 here, but when it comes to manipulation, which I

1 know is the second half of our discussion this  
2 morning, the CFTC does something nobody else in  
3 the world does. It has large trader reporting,  
4 and I do not know if other jurisdictions have  
5 position limits, but you require position limits.  
6 Traders do not like either one of those, and if a  
7 trader has a choice of should we go to NYMEX where  
8 we have position limits and we have to report  
9 large trades, or should we go to ICE Futures and we do not  
10 have to do that and everything else is equal, you  
11 know where they are going to go.

12           So I think that either the CFTC and  
13 Congress have to decide what John Fenton does  
14 really does not matter, that we do not really need  
15 large trader reporting and position  
16 limits, and require neither here just the  
17 same way it is not required there, or as Jim is  
18 suggesting, try and create a balance, a level  
19 playing field. The final point on this that I  
20 think that what this brings back to, again, it is  
21 the second part of the morning, but it is this  
22 issue of the product itself.

1                   What Jim is suggesting is that somehow  
2                   in this competition for WTI, et cetera, there  
3                   ought to be a level playing field because both  
4                   exchanges, both the foreign board of trade and the  
5                   DCM, have the same product. I think it matters  
6                   where that product is based. I know there are a  
7                   lot of problems with that, but if you look at the  
8                   competition a couple of years ago when  
9                   Euronext/Liffe went head to head with the CME on  
10                  eurodollars, should the Commission have told  
11                  Euronext/Liffe you guys have to start doing large  
12                  trader reporting because now you are competing  
13                  with one of our exchanges? Well, this a product  
14                  that you can argue is actually an offshore  
15                  product. So it gets pretty messy, and one of the  
16                  decisions you might have to make is does it matter  
17                  whether this is a domestic product or an offshore  
18                  product in this competitive situation.

19                  CHAIRMAN JEFFERY: We are going to come  
20                  to that after the break when we talk about various  
21                  factors, volumes, contacts, et cetera. Jim  
22                  Newsome?

1                   MR. NEWSOME: Just a brief comment.  
2           Certainly, in a very competitive environment we do  
3           not mean to insinuate that the Commission can or  
4           should alleviate all competitive issues because  
5           there are some that are way outside of the  
6           Commission's jurisdiction, for example, whether to  
7           trade on the floor or whether to trade  
8           electronically.

9                   And those are issues that the  
10          marketplace, particularly NYMEX, is dealing with  
11          now. But I think if the Commission decides and,  
12          as Mike referred to, that large trader reports and  
13          position limits which have long been a cornerstone  
14          of the CFTC's surveillance program, that if those  
15          remain important and if that U.S. contract market  
16          should be bound by those, then anyone offering  
17          those same products to the same customers should  
18          be bound by the same guidelines if it is important.

19                   CHAIRMAN JEFFERY: Commissioner Walter Lukken?

20                   COMMISSIONER LUKKEN: May I just chime  
21          in here? The point I think was that we have to  
22          look at the totality of the regulatory regime, and

1 so they may not have position limits, but they do  
2 make it up in other ways by requiring other things  
3 in their regulatory regime.

4 My question is, how do we avoid picking  
5 and choosing in cafeteria style a race to the  
6 bottom? We will pick from the U.S. exchange  
7 or U.S. regulatory world, and we will pick  
8 this from the British world, and we end up  
9 with sort of a least common denominator world of  
10 regulation which I am not sure is the best thing.  
11 When you say "let's not have position limits," does  
12 that also include picking up some of the other  
13 things that FSA does in order to oversee those  
14 markets because they do not have position limits?

15 MR. NEWSOME: I think that is the  
16 difficulty, Commissioner Lukken, in dealing with  
17 this topic, and that is why I think you have to  
18 take a balanced approach versus a bright-line test  
19 approach. And I think in looking at this topic,  
20 the Commission has to look at what they think is  
21 important and what the Congress of the United  
22 States has given the Commission authority over, market

1 integrity, financial integrity, customer  
2 protection.

3 All we are saying is simply if it is  
4 good for one in this jurisdiction, it has to be  
5 good for everyone, that you cannot pick and  
6 choose. Ultimately, I think it puts markets in a  
7 situation of even looking at picking and choosing  
8 who their regulator might be. For example, we are  
9 a full registerer in the FSA. We prefer to have  
10 our core contracts regulated by the CFTC as a  
11 U.S. contract market, but if from a competitive  
12 standpoint we get to a point that we think we have  
13 to move our electronic contracts to the FSA, then  
14 we will make that decision, but do so at the risk  
15 of further carving the CFTC and the U.S. Congress  
16 out of the day-to-day information that you  
17 currently get. We hope not to get to that point,  
18 but I fear that that is where it could be headed.

19 CHAIRMAN JEFFERY: May I ask for a little  
20 interjection here from the Division of Market  
21 Oversight? I want to get some information on the  
22 table related to the information exchange that has

1       been ongoing between us and the FSA.in the context  
2       of the WTI contract over the past several months.  
3       And I want to make sure people understand,  
4       and the record is clear on this that we are not  
5       flying blind here.

6                   The FSA can speak for themselves, but  
7       they have their own standards and procedures and  
8       they may not be identical to ours. We have  
9       reasonably full access to the information they  
10      receive, and I thought it would be interesting for  
11      Rick Shilts, our Director of Market Oversight,  
12      just to describe in brief the nature of the  
13      information and reporting that is currently in place  
14      on an informal basis. I do not want people in  
15      this room, or participants on this panel, to  
16      think that things are happening and nobody on  
17      either side of the pond, if you will, knows what  
18      those things are. Rick?

19                   MR. SHILTS: ICE Futures launched the  
20      new WTI contract in early February, which  
21      as you may know, the contract was cash-settled  
22      based on the NYMEX daily settlement prices. So at

1 that time in looking at the ICE Futures and NYMEX  
2 markets and that they are so integrally related, we  
3 started a dialogue with the FSA to arrange for  
4 information-sharing arrangements with the FSA where  
5 we could compare information on the two markets.

6 As you know, the Commission relies  
7 on its large trader reporting system which  
8 generates position data on traders that meet a  
9 certain reporting level in that contract.  
10 We found that the ICE Futures also has similar  
11 position information that is reported to the FSA.  
12 So, beginning in April, we have been sharing that  
13 information between the two regulators. Our  
14 large trader data is supplemented with the  
15 information we get from the FSA that is generated  
16 from ICE Futures.

17 In doing surveillance of the NYMEX  
18 markets, we are able to accumulate and look at the  
19 positions that are on NYMEX, and look also at the  
20 positions that are on ICE Futures.  
21 That has been working very well.  
22 To date we have not identified any particular

1 problems. In addition to that, we have  
2 initiated a regular dialogue between our  
3 surveillance staff and the FSA surveillance staff  
4 where we compare notes on a routine basis and  
5 discuss any surveillance issues as well as any  
6 other matters that might come up of concern  
7 between the two regulators.

8 As I said, it has not been in place that  
9 long, and it has worked over the last couple of  
10 expirations. We are looking forward to continue  
11 that process and to continue our dialogue with the  
12 FSA, and we think that it will provide a good  
13 mechanism for us to have a fuller picture of what  
14 is going on on NYMEX and the related ICE Futures market  
15 that is settled based on NYMEX. The last thing to note  
16 is that the agreement would also cover the additional  
17 contracts that ICE Futures has started trading,  
18 the heating oil and the gasoline futures contracts,  
19 and any others that would be similarly  
20 constructed.

21 CHAIRMAN JEFFERY: Sorry to put you on  
22 the spot. Thank you very much for that

1 information.

2 MR. SHILTS: No problem.

3 CHAIRMAN JEFFERY: I thought I would  
4 turn to Commissioner Dunn, for your questions or  
5 comments, Mike.

6 COMMISSIONER DUNN: Thank you very much.  
7 I really find this as intriguing as I thought it  
8 would be thanks to the panel and to the excellent  
9 questions from my fellow Commissioners. Now let  
10 me muddy it up a bit.

11 In listening to the panel, it really  
12 seems the bottom line is to ensure a level  
13 playing field of competition, and I think here  
14 at the CFTC we see that as a public good because  
15 the consumer will ultimately benefit by that.  
16 What is at play here is that there may be  
17 some type of disadvantage due to the regulatory  
18 regimes that we may have in the U.S. For  
19 those who say that the no-action letters work  
20 well, I think that there are some inherent  
21 problems with that for the beneficiaries of those  
22 letters.

1                   Number one, they are only staff  
2 representation. They can be withdrawn at any time  
3 with or without a change in circumstances. But,  
4 what is of greatest concern to me is that it only  
5 goes to that single beneficiary that applied for  
6 it, and given the globalization and the technology  
7 we have today, anyone that gets a 30-day or  
8 better leg up on somebody else in competition  
9 is going to be better situated competitively.

10                   By the time the rest of the world is  
11 aware of a request for a no-action letter, the die  
12 is cast. I see that as a real competition  
13 concern. Michael, I think you have brought up  
14 some very, very good points on the regulatory  
15 imbalances that we have and the data we see  
16 through surveillance. I think given the E.U.  
17 looking at trying to come together and tear  
18 down trade barriers, they often times  
19 see what we have here in the United States  
20 as a disguised way of protecting our  
21 markets.

22                   I am wondering is that a general

1 perception in the European community that the rule  
2 of the regulatory regime is to knock down those  
3 barriers, whereas there might be a thought that  
4 here in the United States that we are trying to protect  
5 them, and the only way you can get around that is  
6 through the no-action letter. To muddy that up a  
7 little further, when we have other countries such  
8 as Singapore and Australia who have also said that  
9 they have some definitions of what is a foreign  
10 board of trade, it seems like we are a long way  
11 from getting to that level playing field that you  
12 talk about and ensuring that we have open and fair  
13 competition globally.

14 CHAIRMAN JEFFERY: You have muddied it  
15 up too much, Mike.

16 (Laughter.)

17 CHAIRMAN JEFFERY: Sir Bob?

18 MR. REID: Yes, I'm Bob Reid of ICE  
19 Futures. In Europe at the moment, Jim, we are  
20 besotted by football.

21 (Laughter.)

22 MR. REID: And if you lose, the first

1 thing you do is blame the referee. So if your  
2 competitive position has been eroded, it is never  
3 your own fault, it is always the referee's fault.

4 I hope that we are not going to fall  
5 into that trap here. As far as I am concerned,  
6 with competitive positions there is never a level  
7 playing field. Your quality of service, your  
8 technology, the way in which you handle your  
9 customers, determines what share you get of the  
10 market. The fact that ICE Futures may have made a  
11 rapid gain in the WTI, I hold no great optimism  
12 that that position is static, because our  
13 competitors, and one is here in the room, are  
14 extremely strong and extremely capable, and they  
15 are capable of making alliances that will fight  
16 hard in this market. So this competitive position  
17 is for the benefit of the consumer.

18 I think in fairness about the no-action  
19 letter, and I have detailed in my initial address  
20 what it contained, in fact is a misnomer. It is  
21 not no-action -- it is a fantastic amount of  
22 action, and I think it has worked. The question

1 is whether it needs to be better codified, whether  
2 it needs to be better laid out as Michael has  
3 suggested, that people know what is there and that  
4 they can get the same treatment as anybody else,  
5 and this is something obviously that the CFTC will  
6 take away from these discussions. But I would  
7 stress it has worked, and it has worked through a  
8 very, very turbulent time, and CFTC deserves to be  
9 congratulated for this.

10 I have been in Ireland for 50 years and  
11 I have never seen a market so turbulent  
12 politically and from the point of view of the  
13 tightness of supply and demand. These exchanges  
14 have handled this without major disruption and I  
15 think that is a great credit to the system, and I  
16 congratulate you for that. Thank you.

17 CHAIRMAN JEFFERY: Thank you, Sir Bob.  
18 Are there any other comments? Benn Steil, Council  
19 on Foreign Relations?

20 MR. STEIL: I have two or three points  
21 with regard to a level playing field. I think we  
22 can all agree that that is a very worthy ambition,

1 but I am going to muddy things up a little bit.

2 First, I have some concerns about either  
3 the CFTC or the SEC essentially playing trade  
4 negotiator on behalf of U.S. exchanges. Mutual  
5 recognition regimes are wonderful, but I think  
6 they should be carried out at a political level.

7 I would not want to see the CFTC acting  
8 as an advocate for U.S. exchanges overseas because that  
9 would conflict with the CFTC's role as a neutral  
10 market regulator. One might argue that if we want  
11 to go down the formal mutual recognition route  
12 that perhaps the Treasury should be the one  
13 primarily responsible for signing on the dotted  
14 line, even if the CFTC were the agency responsible  
15 for essentially mapping out what the details of  
16 such a regime would look like.

17 Secondly with regard to level playing  
18 fields, I think we have to understand that the  
19 devil is often in the details. I go back to the  
20 creation of the Capital Adequacy Directive in the  
21 European Union in the mid-1990s, there was a  
22 political ambition that banks and securities

1 houses should be able to trade securities  
2 according to the same capital regime. That is a  
3 level playing field, but banks and securities  
4 houses are very different institutions. For good  
5 public policy reasons, we do not want banks  
6 failing because when they do fail it is very  
7 difficult to unwind their positions, they have a  
8 lot of illiquid assets, so it may make sense to  
9 treat banks and securities firms differently when  
10 they engage in the same activity because they are  
11 different institutions.

12 Likewise, without in any way wishing to  
13 come out on one side of the debate or the other  
14 with regard to the competition between ICE and  
15 NYMEX, one might argue that cash settlement of a  
16 contract is different from physical settlement of  
17 a contract and that the two types of settlement may  
18 merit different regulation even though the  
19 institutions trading these contracts are looking  
20 to do similar things economically.

21 CHAIRMAN JEFFERY: You make two  
22 excellent points. Chairman Newsome?

1                   MR. NEWSOME: I have a couple of  
2                   comments. One is I would reiterate Sir Bob's  
3                   comment that some of the competitive issues are  
4                   certainly not regulatory in nature and are being  
5                   dealt with by market participants. I am in full  
6                   agreement on that. One, I was going to bring up  
7                   the comment Benn just made about the difference  
8                   between cash and physical.

9                   Certainly, we do believe that there are  
10                  differences and have no illusion that physically  
11                  delivered products should be held to a higher  
12                  standard because of the nature of the product and  
13                  the difficulties that can arise from it. But I  
14                  think as part of this discussion we have to assume  
15                  that as the markets evolve that foreign boards of  
16                  trade could list physically delivered products in  
17                  the U.S., and certainly, that needs to be part of  
18                  the consideration.

19                  I had a question to Rick, and I am just  
20                  naïve in this. How often do you collect the large  
21                  trader reports? I know we do it daily. Is it the  
22                  same with regard to the ICE Futures or is it different?

1           MR. SHILTS: Yes, we get the same daily  
2 type reports near the expiration period. We get  
3 the weekly reports at all other times with the  
4 ability to get the information on call during any  
5 other time prior to the expiration period.

6           MR. NEWSOME: I was just naïve. I did  
7 not know how often you got the reports. Thank  
8 you, Rick.

9           CHAIRMAN JEFFERY: Is there anything  
10 else? I think your comments about physical  
11 delivery is a good segue and to a break. We  
12 will give you all a 10-minute time out. Hopefully  
13 there is coffee in the hallway. If there isn't,  
14 there is the Port of Piraeus -- around the corner --  
15 not that that is a commercial message. Then  
16 we will come back before the lunch break to talk  
17 about some of the specific, possible, differentiating  
18 factors, assuming that some form of a factor test  
19 were considered to provide greater specificity to  
20 the no-action letter request process.

21                           (Recess.)

22           CHAIRMAN JEFFERY: Ladies and gentlemen,

1 you can blame the referee for ending the break  
2 here. In the interests of advanced planning, we  
3 will make every effort to call a lunch break by no  
4 later than 12:30, and we will call a lunch break  
5 before 12:30.

6 The next module, as it were, if you look  
7 at your schedule or your list of questions, calls  
8 for us to get down to a next level of detail  
9 on a number of the points that were touched in the  
10 broader, more open, freewheeling discussion  
11 preceding the coffee break. That is, for lack of  
12 a better phraseology, if one were to try to be  
13 more specific about defining what is a foreign  
14 board of trade, what are the relevant factors, and  
15 can we agree on those factors? And to the extent  
16 we know what those factors are, can we agree on  
17 how to measure those factors, and do we all  
18 understand those factors in the same way?  
19 Specifically, and there may be a lot of them, but  
20 for simplification purposes, we have on the  
21 question list three discrete categories of  
22 factors, if you will.

1           One is volume: To what extent is volume  
2           in the context of an aggregate number of contracts  
3           traded or whatever on an exchange,  
4           dispositive of whether or not an exchange  
5           qualified as a foreign board of trade?

6           Second is the question, which I think  
7           Benn touched upon and others danced around earlier  
8           this morning, of the nature of the contract or  
9           contract design -- a significant aspect of which, as  
10          a threshold matter, involves a question of whether  
11          the contract is physically settled or cash  
12          settled. A third category is a broad  
13          catchall.

14          I think, Richard, you commented on some  
15          of these things earlier on. Are there other U.S.  
16          contacts for lack of a better terminology, or  
17          lack thereof, whether it is matching engine or a  
18          clearing entity or corporate headquarters or  
19          presence of senior management or whatever it may  
20          be?

21          Why don't we start with the volume  
22          question? I think that in some ways is the easy

1 one. It is the one that is most frequently focused  
2 on, at least by all of us when we have been looking  
3 at some of these questions, and certainly it is an  
4 easy one to measure in certain respects. We read  
5 about it in the media, we hear about it from the  
6 different exchanges using it to make one or the  
7 other points on these matters. Maybe we should go  
8 around the room, starting with you, Benn, if  
9 you wouldn't mind, to just talk about volume as a  
10 measuring stick or as a factor: A, its relevance;  
11 and B, to the extent it is relevant, how you  
12 would use it.

13 MR. STEIL: I will go back to  
14 Commissioner Lukken's comments earlier. With  
15 regard to the no-action regime, we are dealing  
16 with professional investors here. We are dealing  
17 with sophisticated institutions, so I do not think  
18 our focus should be on ensuring that these  
19 institutions do not bear losses, again, to the  
20 extent that we are not talking about systemic  
21 risk. So I do not believe that volume per se  
22 should be a mechanistic determinant of when we

1 declare an exchange to be no longer foreign, and  
2 now subject completely to our jurisdiction.

3           As I commented earlier, I think it is  
4 inevitable in a globalizing industry like this  
5 that you are going to have a few very large  
6 derivative exchanges operating around the world  
7 that are going to trade contracts that are of  
8 great economic interest in other jurisdictions.  
9 That is inevitable, and, therefore, they are going  
10 to attract enormous participation from other  
11 jurisdictions.

12           I think if we were to hold these  
13 hearings 5 years hence we would find the story a  
14 heck of a lot more complicated, because however  
15 interesting the competition between NYMEX and ICE  
16 Futures may be right now, you can multiply that by  
17 5 or 10. We are going to have competition, for  
18 example, from Asian exchanges. The Hong Kong exchange  
19 is an interesting case where it has very little in  
20 terms of derivatives business now because of  
21 regulations that were imposed in Hong Kong after  
22 the Asian financial crisis. Those regulations are

1 going to be relaxed and you are going to see a  
2 huge derivatives business springing up over there.

3 It is inevitable that the CFTC is going  
4 to have a deepening interaction with regulators in  
5 Hong Kong and elsewhere in Asia, just like it has  
6 now with European regulators. So I think if we go  
7 down the road of using volume as a mechanistic  
8 trigger, I think we are going to be back here  
9 revisiting the issue because I do not think it  
10 will work. You will have too many regulators  
11 trying to apply the same tool, you are going to  
12 have a lot of conflict between them, and I think a  
13 cooperative approach is better than multiple  
14 regulators each claiming jurisdiction over the  
15 same institution and the same set of contracts.

16 CHAIRMAN JEFFERY: Thank you very much.  
17 Anthony Belchambers?

18 MR. BELCHAMBERS: If I may just make a  
19 couple of general observations because this is the  
20 first time we are actually getting into what I  
21 could call secondary tier factors, and I think  
22 that is an important distinction to the primary

1 ones that were mentioned earlier. In that sense,  
2 I suppose I am slightly worried that there is  
3 potential for a real crossover between, on the one  
4 hand, how do you define location, and on the other  
5 hand, what do you mean by economic impact, and it  
6 seems to me that the regulatory duties and burdens  
7 are very different when you apply it to those two  
8 different criteria.

9 The second thing is, mention has been  
10 made of potential for an own goal, if I can put it  
11 that way. Interestingly, if I can just refer to  
12 your request at page eight where you do say, "The  
13 Commission recognizes that cross-border trading is  
14 a growing segment of the trading volume for all  
15 futures exchanges, both foreign and domestic,  
16 accordingly, in formulating its regulatory  
17 approach, the Commission will strive to ensure  
18 that it neither inhibits cross-border trading nor  
19 imposes unnecessary regulatory burdens," and it  
20 seems to me the potential for an own goal arises  
21 in two contexts.

22 The first context is if you start using

1 these kinds of tests, the difficulty then is you  
2 might be impairing the capacity of U.S. markets to  
3 grow their own business, firstly either by  
4 acquiring overseas platforms or by establishing  
5 overseas exchanges, so that is one issue. The  
6 other second issue which is rather different is,  
7 as everyone has said, the CFTC is a thought leader  
8 in this area.

9           There will be other markets and other  
10 regulators who will be looking very closely at  
11 what you are doing here and what decisions flow  
12 out of this public hearing, and as a result, if  
13 other regulators decide to follow what might be an  
14 unfortunate burdensome regulatory outcome of dual  
15 licensing and dual regulation, then that has a  
16 very serious impact on the capacity of the  
17 exchanges to develop their own markets and  
18 internationalize their contracts. So I would just  
19 make those two general observations.

20           In terms of the volume, what I do think  
21 is interesting is over many years now regulatory  
22 authorities have been trying to say to exchanges,

1       cease being clubs, open up your rights of access,  
2       afford rights of remote access to an international  
3       client base. The risk here is by using volume as  
4       a test, you could actually be setting up a bit of  
5       a pushback that will reduce the added value of  
6       having an international client base. And I think  
7       what is even more interesting is because of the  
8       size of the U.S. economy, it is almost inevitable  
9       that a large percentage of volume on most of the  
10      large markets is going to come out of the U.S. in one  
11      form or another just because of the sheer size of  
12      the economy.

13                 I think the only other point I would  
14      make in general is that we are seeing an  
15      environment now where exchanges are in a highly  
16      competitive place. They are trying to  
17      internationalize their contracts. They are  
18      extending their trading hours. They are doing all  
19      sorts of things to accommodate the needs of an  
20      international client base. The risk is that if  
21      you use volume as a measure, and there are  
22      arguments to suggest that it is an extremely

1       difficult measure, and I will not go into that  
2       because others I am sure will, then I think that  
3       there could be real problems for the whole process  
4       of internationalizing the marketplace.

5                   CHAIRMAN JEFFERY: That is a sobering  
6       reminder. Thank you, Anthony. Peter?

7                   MR. REITZ: Thank you. I would like to  
8       reiterate one thing that Anthony just said, and  
9       just to be very clear that if we are going down  
10      that road of multiple regulation, it will not be  
11      dual regulation. In the case of Eurex, I think  
12      we will have to deal with 18 regulators, and I  
13      think each one of them will have a slightly  
14      different approach to these things, and it would  
15      lead to I think a breakdown of the current system  
16      of cooperation of regulators.

17                   To the specific point of volume, I do  
18      not know who is going to make the point on how  
19      difficult it is to determine volume, but I will take a  
20      first crack at it. Determining what is the right  
21      measurement, the right point of measurement, on  
22      determining whether volume is U.S. volume or not

1 U.S. volume, I think will be very difficult. What  
2 we are seeing now is that most of our clients are  
3 set up globally, they have set up their  
4 infrastructure, that they can use different time  
5 zones to cover their trading hours around the  
6 clock, and the point of entry at the exchange may  
7 have nothing to do with where this order  
8 originally comes from. I think it will be very  
9 difficult for organizations that pass around their  
10 trading book depending on where the sun is shining  
11 on these global exchanges to determine the right  
12 level of where we should measure volume.

13 The second thing I would say, taking one  
14 step back, is why should volume be the measurement  
15 of regulatory interest? I think if you look at  
16 protecting customers and checking markets, it  
17 should be as relevant for the first customer as it  
18 is for the 10 percent or whatever percentage you  
19 want to take customer, so the regulatory interests  
20 should not be driven by the success that an  
21 exchange has in a particular market. Right now I  
22 think that is addressed by the upfront mechanism

1 to apply for the no-action letter, and it should  
2 be addressed at that point, at the very beginning  
3 of activity in a market.

4 Also, volume, and this again is a more  
5 practical point, would be very difficult as a  
6 measurement because it fluctuates. If volume  
7 reaches a certain level or a certain percentage in  
8 one year, it may lessen in the next year, and then  
9 you would create, I think, a legal uncertainty with  
10 changing regulation in markets that have contracts  
11 that go out a long time. We have contracts that  
12 go out 10 years, and if we change the regulation  
13 in the duration of that contract several times  
14 just because we are more successful in one market  
15 and less successful in another and volume changes  
16 over time, I think that would be very difficult.

17 CHAIRMAN JEFFERY: Your point is well  
18 taken. Thank you, Peter. Jim Newsome?

19 MR. NEWSOME: Thank you, Mr. Chairman.  
20 Mr. Chairman, I would admit responsibility at this  
21 point for at least partially getting us to the  
22 table to discuss this issue, but I think it is

1 very clear to everyone in the room that the issue  
2 is much, much broader than the specific context  
3 that at least started the ball rolling to get us  
4 to this point.

5 With regard specifically to volume, I  
6 think as the Commission looked at the no-action  
7 process back in the late-1990s, it is clear that  
8 the Commission did not view this as a simple  
9 mechanical or geographic test just by the fact  
10 that there was specific language put in the  
11 no-action letters requiring reporting of volume to  
12 the CFTC staff with U.S. customers as compared to  
13 overall worldwide volume. So I know that that has  
14 been a topic for a number of years.

15 I would also say that as the markets  
16 have evolved, even the viewpoint of NYMEX has  
17 evolved with regard to this discussion, certainly  
18 at the very beginning it was NYMEX's viewpoint  
19 that the Intercontinental Exchange should come in  
20 and register as a designated contract market.  
21 That is not the approach that we have taken today.  
22 Again, going back to my initial comments, I think

1 if you take the bright-line approach with regard  
2 to any specific topic, whether that is volume,  
3 board location, technology location, it becomes  
4 too easy to drill holes in all of those.

5 And I think from a global standpoint,  
6 whether your exchanges or firms, I think we would  
7 quickly outline that kind of approach and be back  
8 at the table in the next 3, 4, or 5 years having  
9 the same or similar discussion. That is why we  
10 are suggesting today more the balanced approach  
11 and giving the Commission the ability to look back  
12 and review formally the no-action request and  
13 determine what is and what is not important, and  
14 then to make determinations of how every market  
15 participant within your jurisdiction should  
16 operate.

17 CHAIRMAN JEFFERY: Thank you, Jim. Mike  
18 Gorham?

19 MR. GORHAM: Mike Gorham, IIT. The  
20 reason the volume test will not go away is because  
21 it has an intuitive appeal. On the surface it  
22 seems like a great idea.

1           Number one, there is this kind of a  
2 feeling, sort of fuzzy feeling, that the more  
3 Americans are involved in the market, the more  
4 American this market must be. Secondly, volume is  
5 nice because it is measurable, it is quantifiable,  
6 and you can actually draw a bright line if you  
7 want to. But I think the volume test is a  
8 terrible test, and aside from the points Peter  
9 made having to do with just measuring what is U.S.  
10 volume and the whole idea of the instability of  
11 volume and share over time, there is also a basic  
12 issue that has to do with why would you even think  
13 volume is important.

14           What I am getting to there is that you  
15 guys do a lot of things, but two of the most  
16 important things you do is protect markets from  
17 manipulation, and protect customers from fraud and  
18 other customer abuses. The volume thing kind of  
19 speaks to number two, and what it suggests is that  
20 the more Americans are involved in these markets  
21 and the greater the share that Americans are in  
22 any particular market, then the more protection

1 that we should be giving them somehow by bringing  
2 them in as a DCM.

3 The point is that you have already said  
4 by issuing the no-action letter that the FSA or  
5 the German regulator, or whatever regulator that  
6 is, already does a good job of protecting  
7 customers from fraud and other kinds of customer  
8 abuses, so why would it make any difference if it  
9 were 100-percent Americans or 0 percent Americans?  
10 From my point of view, it just does not make any  
11 sense to use that as a test.

12 CHAIRMAN JEFFERY: Thank you. Verena  
13 Ross?

14 MS. ROSS: Very similar to I think what  
15 has been said so far, and we at the FSA do not  
16 recommend any definition of contract or market  
17 regulation being based on volume, and this  
18 approach in our minds would be difficult to  
19 implement, as in some of the practical issues  
20 which have been raised, awkward to justify, and  
21 pose a real risk of causing confusion amongst  
22 market participants. Furthermore, U.S.

1 participation in any contract will be difficult to  
2 gauge depending on the relevant order-routing  
3 mechanisms and would also be susceptible to  
4 changing trading patterns of consumers both within  
5 the U.S. and externally. In order to maintain  
6 market confidence, it is extremely important that  
7 the regulatory framework is well defined. To rely  
8 on a variable participation figure to determine  
9 the level of regulatory oversight would not  
10 achieve this to our minds. Correspondingly, we  
11 believe that all products traded on an exchange  
12 should be subject to one set of regulation to  
13 achieve the most effective and efficient oversight  
14 possible with regards to cost burden, consumer  
15 protection, and compliance, and, thus, to our mind  
16 it can best be achieved through reliance on the  
17 principle of home regulation, mutual recognition,  
18 and effective regulatory cooperation and  
19 information sharing where risks and issues arise.  
20 Thank you.

21 CHAIRMAN JEFFERY: Thank you. Kathleen  
22 Cronin?

1           MS. CRONIN: I think while it is easy to  
2 recognize that the volume attributable to U.S.  
3 customers triggers a unique regulatory interest on  
4 the part of the CFTC, again, I go back to the fact  
5 that I do not believe that there is a basis under  
6 the existing statutory authority to regulate  
7 markets based on volume.

8           Putting that aside, we would not favor a  
9 regime that linked the degree of regulatory  
10 oversight to U.S. volume. I think others have  
11 more eloquently expressed the administrative  
12 difficulty of calculating what constitutes exactly  
13 U.S. volume, and also pointed out that essentially  
14 using volume as a test in a global marketplace in  
15 which volume flows to exchanges from a multitude  
16 of jurisdictions creates an unwarranted and  
17 unnecessary degree of regulatory uncertainty. And  
18 also being mindful of the fact that to the extent  
19 that the CFTC decides that a volume threshold is  
20 appropriate, it is likely that foreign regulators  
21 will also look to a volume threshold to assert  
22 their individual interests. I think it is a

1 recipe for disaster, and I think using volume as  
2 the gauge does not provide an avenue that can  
3 effectively be addressed through other means.

4 CHAIRMAN JEFFERY: Sir Robert Reid?

5 MR. REID: Volume has changed in terms  
6 of source, and they also change in terms of  
7 quantum, and so they really are not a factor which  
8 is stable. As Peter described, if volume is to be  
9 a decisive factor as to where and when you have to  
10 register, the prospect of multi-registration  
11 really would be unworkable, and he quoted a number  
12 which I certainly would not doubt in terms of  
13 places where you might have to register.

14 So, really that would bring an enormous  
15 amount of confusion. I think also what is a very  
16 important point is that if volume is a criterion  
17 and it is used as a criterion and volumes change,  
18 you lose the certainty of the legal regime under  
19 which the oil is being contracted. These  
20 contracts in some cases could be out as far as 7  
21 or 10 years, and imposing any sort of legal  
22 uncertainty as to where registration lies I think

1 would be unacceptable to the market participants,  
2 and I think it would constrain the market.

3 CHAIRMAN JEFFERY: Thank you. Richard  
4 Berliand?

5 MR. BERLIAND: I do get the distinct  
6 impression that we are all furiously agreeing with  
7 each other from whichever perspective.

8 (Laughter.)

9 MR. BERLIAND: I am going to move away  
10 from the theoretical and talk just practically.

11 CHAIRMAN JEFFERY: That would be very  
12 helpful because I have to say, maybe I am just  
13 less informed than everybody else in this room,  
14 but volume as Mike said is the one thing we can  
15 quantify.

16 MR. BERLIAND: Absolutely.

17 CHAIRMAN JEFFERY: We know it when we  
18 see it. We can measure it. It is a metric one  
19 can reach to. So the question is, if one accepts  
20 that it has maybe some merit, notwithstanding  
21 everything I have just heard,  
22 what are the issues associated with

1 that?

2 MR. BERLIAND: And that was really what  
3 I wanted to address, is just the practicality of  
4 using this, and, Peter, I think you have alluded  
5 to a lot of this already. There are a number of  
6 things that the rules and regulations constrain  
7 daily activity for traders today, and I will use as an  
8 example a contract being approved by the CFTC for  
9 U.S. investor use, so access to Korea or access to  
10 Taiwan or whatever the current marketplace that is  
11 in application. The reality is today that U.S.  
12 based investors already have the ability to  
13 circumvent those rules. They do so by going to  
14 the over-the-counter markets, and the contracts  
15 they trade are look-alike in many respects, but  
16 from a regulatory point of view, they clearly lack  
17 the same transparency. They are also much more  
18 expensive, which as an intermediary clearly I am  
19 benefiting from because I am facilitating that  
20 trading, but at the end of the day I do not believe  
21 they are in the best interests of the supervision  
22 of the market.

1           I guess, Mr. Chairman, that I would take  
2           exception to the fact that one can measure this,  
3           really to Peter's point. I just jotted down eight  
4           different ways that I could think one could  
5           construe the definition of U.S. involvement in  
6           terrestrial participation. You define the  
7           original investor, the nationality of the fund  
8           vehicle in which they invest, the adviser legally  
9           speaking that is actually advising that fund, the  
10          physical domicile or nationality of the adviser,  
11          the domicile or legal entity with which it is  
12          documenting for access to the market, call it the  
13          FCM, the physical presence of the entity that is  
14          receiving at the FCM, the technology that is being  
15          used for routing, the exchange gateway to which it  
16          is being routed.

17                 That is eight just straight off. And I  
18          appreciate that today under the no-action letters  
19          it is already required that the U.S. volume be  
20          reported, and I think it is certainly a measure,  
21          it is certainly measurable, but I would argue that  
22          the value is relatively limited. I guess really

1 from my perspective if you look practically at  
2 this, what really is the issue here, as I say,  
3 number one, is that any measure of volume is subject to  
4 circumvention. That would be my argument, and we  
5 see it with many other rules.

6           Number two is I would hate for us to be in  
7 the position where U.S. customers are negatively  
8 impacted from essentially benefiting from  
9 innovation on the part of foreign boards of trade.  
10 Selfishly, I do not wish to be involved in the  
11 excessively expensive cost of monitoring this and  
12 reporting, whether it would be the intermediaries,  
13 or I think I would speak for the exchanges. And  
14 briefly, I think we should be promoting  
15 competition. So I think that would be the  
16 practical view on how this would be dealt with.

17           CHAIRMAN JEFFERY: That is very helpful.  
18 Thank you, Richard. Kevin O'Hara?

19           MR. O'HARA: Not surprisingly, I am going  
20 to echo much of what was said. Real quickly on counting  
21 volume, obviously volume changes as everyone has noted.  
22 I have also seen in other areas of the government

1 where you draw the line. I do not know where you  
2 draw the line, at 25 percent or 35 percent, and  
3 then you look at it a year later and say that is  
4 completely irrelevant, we flipped a coin to get  
5 there. Therefore, if you were going to do it,  
6 where do you draw the line? It seems awfully  
7 arbitrary. There is no data to sort of back you  
8 into that.

9           Again, it would be our position at the  
10 Board of Trade that volume is not a good criteria  
11 for making these determinations. What was  
12 suggested earlier, that three of the core values  
13 of the Commission, protecting against  
14 manipulation, the integrity of the markets, and  
15 protecting investors, whether there is a little, a  
16 lot, or somewhere in between of a foreign board of  
17 trade having impact in the United States is that I  
18 would think that the Commission would care whether  
19 it was six U.S. investors, or 106, or 1,006.  
20 Again, that gets back to the volume criteria.

21           I think it will be interesting when we  
22 go another circle around here after we have all

1 said that volume is not the criteria, what is the  
2 criteria, and that will be I guess the more  
3 interesting question.

4 CHAIRMAN JEFFERY: Thanks, Kevin. Mr.  
5 Foyle?

6 MR. FOYLE: I agree with so much of what  
7 has been said by my fellow panelists here about  
8 volume not being an appropriate criterion. Not to  
9 duplicate their observations, it isn't relevant in  
10 my view to the key objectives of good regulation  
11 as to the Commission's protection of customers in  
12 a factual sense, and protection of customers who  
13 use the markets from manipulation. The volume  
14 coming from U.S. parties, however that is defined,  
15 is simply not crucial, not key to those factors.  
16 But it does appear to be quantifiable. That is  
17 one of the attractions about it.

18 Let me just give you one or two  
19 examples, adding I think in particular to what  
20 Richard Berliand said which will illustrate just  
21 how extraordinarily difficult it would be to  
22 define in an entirely appropriate way how to

1 measure this volume. There are quite a few of the  
2 eight factors that Richard mentioned which we  
3 would not routinely, as the exchange on which the  
4 business is being done, be aware of in respect to  
5 every order that is transacted. It would be a  
6 massively complicated task to ask for any of those  
7 pieces of information, let alone all of them. Let  
8 me illustrate the kinds of factors that can cause  
9 volumes to swing. It is bound to be affected over  
10 time by the level of economic activity,  
11 particularly if you look at a contract over seven,  
12 eight, nine or ten years as Peter observed, and it  
13 is going to change by the patterns of business in  
14 particular contracts.

15 But let's look at two in which the  
16 numbers we report to you every quarter and have  
17 done since the no-action letter was issued, how  
18 those numbers are affected by a couple of factors.  
19 Growing up as a practice with a number of  
20 important large FCMs based in the States, and they  
21 look to service their business from many parts of  
22 the world outside of the U.S. onto a market like

1 those run by Euronext by routing orders from  
2 those customers around the world through their  
3 U.S. offices where they are put into the trading  
4 system by direct access in many cases to trade on  
5 the market. We see that volume coming through the  
6 direct access terminals in question, and we  
7 include it in the numbers we report to you. Is  
8 that really U.S. volume given that it is coming  
9 from, in many cases, customers outside of the U.S.?  
10 On the other hand, other FCMs would route that  
11 business to their London office, or not talking  
12 about business from elsewhere around the world,  
13 but talking about their U.S. business, they might  
14 well route it to London to go through their U.K.  
15 office in order to put it into the trading system.

16 So, there the point at which it is  
17 injected into the network for trading is not a  
18 U.S. based entry direct point of access.  
19 Should we exclude and ignore that business as not  
20 being related to U.S. customers, where much of it  
21 is indeed the business of U.S. customers? Do we  
22 make an attempt in the numbers we report to you to

1 include that volume and to include that in the  
2 figures that we report? But if you have a firm  
3 definition so that everyone knows exactly what  
4 they are required to do, how would you treat those  
5 two different sorts of routes that orders can take  
6 into our markets? And if you fixed upon a  
7 particular definition, if a consequence of the way  
8 the numbers were turning out is that some  
9 threshold might be triggered, then for any market  
10 in that position it is entirely possible that  
11 either the FCMs handling that business or the way  
12 the exchange manages the order flow could be  
13 redesigned in order to avoid triggering the  
14 threshold.

15           It is not an easily measurable  
16 criterion. It is not a suitable criterion for such  
17 an important question as to whether or not there  
18 is a problem with a no-action letter continuing to  
19 apply to a particular exchange. You also, if I  
20 may, in terms of the second part of the question  
21 you posed on the agenda, asking whether if there  
22 were a criterion should it relate to matters on a

1 contract-by-contract basis as opposed to the  
2 exchange overall, I have tried to address the  
3 exchange overall situation.

4 Let me turn to the question of contract  
5 by contract, and I will give you a specific  
6 example. In 2002, the Liffe market introduced a  
7 dollar swap note contract. We had a U.S. based  
8 marketmaker. That meant in the initial phases of  
9 the contract a high proportion of the business was  
10 likely to come from the marketmaker, he would not  
11 necessarily be the opposite side of every trade,  
12 but he might well be there with something like 40  
13 to 50 percent of the business. In the event in  
14 the first year of trading that contract over 80  
15 percent of the business came from what we would  
16 call under the existing arrangements and reported  
17 to you as U.S. based users of the market.

18 A few years later as the proportion fell  
19 with more users coming into that contract, the  
20 proportion was down to around 50 percent, and  
21 ultimately the contract did not succeed. There  
22 should have been a question because of that

1 particular contract generating this high  
2 proportion of U.S. based business is 80, should  
3 there have been a question of the whole exchange  
4 and you finding it not appropriate to apply the  
5 no-action letter to the whole exchange? Well, I  
6 think the answer to that is no. That would be,  
7 given that it was a new contract and the volumes  
8 overall were fairly small, a wrong  
9 outcome.

10           Should you have looked at that  
11 particular contract and said that particular  
12 contract should be subject to direct regulation by  
13 the CFTC, we no doubt [INAUDIBLE]  
14 about the impossibility of splitting the  
15 regulatory responsibility from one single  
16 exchange, let alone dual regulation, but given  
17 that this contract was based on as a settlement  
18 process, a cash settlement contract based on  
19 quotations published by the British Bankers'  
20 Association in London, then it was arguable that  
21 whatever proportion came out of one jurisdiction  
22 it should not be viewed as anything else other

1 than a British contract. If you do not take that  
2 view, and I can turn to Sir Bob's correct  
3 observation about the obsession in Europe if not  
4 around the world of football at the moment, if you  
5 took the view that because even as high as 80  
6 percent of the participants in the contract are in  
7 some way U.S. based, without looking at what the  
8 contract is, it would be akin to saying that when  
9 the United States played their last World Cup  
10 football match in Germany recently, before they  
11 were eliminated. At least half --

12

13 CHAIRMAN JEFFERY: That's this World  
14 Cup.

15

16 MR. FOYLE: I'd prefer not to go back to  
17 1950, so at least half the players were U.S. and  
18 it may well be that well over half the crowd were  
19 from the U.S. as well. Does that mean that the  
20 Chicago Police Department should have been  
21 responsible for policing the event?

22 CHAIRMAN JEFFERY: That's pretty good --

1 yes, sure.

2 MR. WEINREB: I just want pick up on the  
3 points that Benn Steil and Anthony Belchambers  
4 made in that the world is interlinked. The U.S.  
5 is an important part of all financial markets, all  
6 markets we trade. And so, the U.S. has an  
7 interest in energy products generally, fiscal  
8 commodity products generally, interest rate and  
9 exchange rate products generally.

10 The difficulty is that these product  
11 groups are ones to which lots of other  
12 jurisdictions also feel they have a legitimate  
13 claim. As Peter alluded to, all the major  
14 exchanges seek international distribution of their  
15 trading systems. They want to put direct access  
16 facility into the major jurisdictions. Everyone  
17 wants to put [INAUDIBLE] into the U.S., not for equity  
18 options of securities because the SEC, of course,  
19 does not refuse it but because the CFTC [INAUDIBLE] will  
20 want to put in the U.S., but not only in the U.S.

21 I suspect if you compare the various  
22 exchanges on the table, we have slightly different

1 portfolios, but everyone is interested in Japan,  
2 Singapore, and Switzerland. Increasingly, they  
3 will be interested in China and India. The  
4 difficulty is if one goes down the route of saying  
5 this is a U.S. product and as a result, we should  
6 impose U.S. regulation, the difficulty for the  
7 international exchanges is that the U.S. says it,  
8 the Swiss say it, the Japanese say it, and that is  
9 the way to chaos. If you are looking for  
10 simplicity, certainty, and fostering competition,  
11 that is not the way to achieve the result.

12 CHAIRMAN JEFFERY: I appreciate that.  
13 Before I turn the microphone over, I am going to  
14 make a comment and a plea to those of you who are  
15 not on the panel.

16 The comment is, at least to my ears,  
17 there is a surprising degree of unanimity, or a  
18 consensus if not unanimity, on some of the  
19 shortcomings, for lack of a better term, of a  
20 volume-driven test. The question is: Are there  
21 different views elsewhere in the room? I must say  
22 it comes as somewhat of a surprise, not just the

1 consistency of your comments, not the voracity,  
2 but the passion with which you articulate them,  
3 given that it is a demonstrable, measurable,  
4 tangible measure that reasonable people, and I  
5 would like to think we are reasonable people here  
6 and certainly those who follow the futures markets  
7 in our world who may be less steeped in all the  
8 details tend to look at with a reasonable degree  
9 of regularity.

10 So if there are any other comments that  
11 somebody in the audience might have, particularly  
12 on the other side of this question, I welcome  
13 them. Just because you are not on the panel  
14 doesn't mean you are not free to raise your hand,  
15 identify yourself, and be recognized. With that,  
16 why don't I turn it back to Commissioner Lukken.

17 COMMISSIONER LUKKEN: I guess I am  
18 struck by the same observations that you are, that  
19 the volume would be a difficult criteria. I go  
20 through my own mind -- what are we trying to  
21 measure? If I picked up a phone and called  
22 Richard in London, that would not be picked up

1 even though a U.S. customer is at the end of that  
2 transaction.

3           If I sent him a BlackBerry, I don't  
4 think that would be picked up. If Richard entered  
5 the system through New York versus London, that  
6 would be picked up maybe but with a London  
7 customer being the end user. So it is not a  
8 perfect world, but as people have noted, it is  
9 quantifiable. We are looking for some indicative  
10 factor that gives us ability to try to enter  
11 the fray as a regulator. I guess that is my  
12 question.

13           Even though it is not necessarily a  
14 bright-line litmus test, volume, I think there are  
15 some indicators that this brings to the table.  
16 Mainly, one of the things that we look at in the  
17 no-action process is whether people are  
18 intentionally trying to circumvent U.S. law by  
19 doing what they are doing. At some point, volume,  
20 I think, gives some indication that people may be  
21 trying to get around U.S. law. If 100 percent of  
22 volume is coming from U.S. customers, that may

1 give us some indication. It may not be the only  
2 indication that people are trying to circumvent  
3 our laws, but it is some indicator. I am wondering,  
4 could volume be used as not the criteria but one  
5 of the criteria we look at, if anybody has any  
6 thoughts on that?

7 MR. WEINREB: Commissioner Lukken, to  
8 respond to that, I think within the context of the  
9 existing no-action regime where the initial  
10 process is a due diligence exercise, where you  
11 look at a variety of factors, the first thing you  
12 are trying to establish is: Is this a bona fide  
13 exchange established in a legitimate financial  
14 center? Clearly, if 100 percent of the volume was  
15 expected to be or was from Americans, if the  
16 management was in the U.S., if everything was in  
17 the U.S., you might reasonably conclude that this  
18 is a U.S. exchange. Obviously, you have the  
19 process in place that material changes are  
20 notified to the Commission. And so, it gives you  
21 the chance on a periodic basis to say: Let's do a  
22 sanity check on the assumptions. Do we still

1 believe this is correct? I think the difficulty  
2 is if you move from the existing no-action regime  
3 to one where this is all written in law, where you  
4 have a definition of U.S. volume and the purpose  
5 of how you would use it set out. It becomes much  
6 more difficult there. So I think, within the  
7 current context, it works extremely well. All the  
8 difficulties you have heard, I think come to the  
9 front, the more you try to formalize this into a  
10 set of rules or procedures.

11 CHAIRMAN JEFFREY: Thank you, Nick.

12 COMMISSIONER HATFIELD: Yes, I am sort  
13 of mindful that we have been focusing a lot today  
14 on WTI and crude, and the point has been well made  
15 that what we possibly do as a result of what we  
16 are discussing here today could have global  
17 implications that others could take off on. I am  
18 wondering to the point about what happens in the  
19 years to come. Are there contracts here -- for  
20 instance, Kevin in Chicago, what if electronic  
21 trading had started on corn or wheat, and it had  
22 gotten over 50 percent of that market -- or are

1       there contracts in Europe that could cause the  
2       same sort of sensitivity that, say, the crude  
3       contract might in the United States, if that makes  
4       any sense?

5                   MS. ROSS: Peter will correct me if I  
6       get the figures wrong. My understanding is that  
7       in 2005, about 46 percent of trading on EUREX came  
8       from the U.K. That is certainly not something  
9       where we even get very regular reports on terms of  
10      how is that changing. We pick that up through our  
11      discussions or talking to the regulator, but we  
12      don't get actually the same kind of quarterly  
13      reports like you do in terms of what volume is  
14      coming from where. Therefore, we very much see it  
15      as being part of this mutual recognition regime,  
16      where the responsibility for that exchange, even  
17      though there is an awful lot of volume coming out  
18      of the U.K., it is very firmly in the German  
19      jurisdiction and that is where it stays. That is  
20      kind of really the basis on which we look at it.  
21      It isn't volume-driven. It is highly driven by  
22      the ultimate head office where the decisions are

1 taken and so on.

2 CHAIRMAN JEFFREY: That is very helpful.  
3 Anyone else?

4 COMMISSIONER DUNN: I certainly have  
5 brought this group together on this particular  
6 question. Hearing them say, "well, volume is not  
7 the right answer," if one customer is U.S., shouldn't  
8 we be protecting that person? Maybe we ought to  
9 broaden our scope? I am being facetious, there  
10 was quite a pause there.

11 It strikes me that should a market  
12 be 99.9 percent U.S. in volume, and there is  
13 some chicanery in that marketplace, if integrity  
14 of the market is in question or if there is  
15 manipulation or investors are defrauded, at  
16 the end of the day, Congress will come to us and  
17 say: Where were you on this? Although the  
18 opinion here is that volume doesn't count  
19 because of the practicality of determining  
20 where a trade initiated or began, it does have  
21 an impact on what we do at the end of the day  
22 simply because we are going to be held

1       accountable.

2                   MR. O'HARA:  To that point again -- and  
3       I don't pretend to have the answers -- maybe in  
4       some totality of the circumstances, but that is  
5       where the Commission would want to have the  
6       ability to have audit trails, access to the books  
7       and records and persons in the event that would  
8       occur, which is something I stressed earlier.  That  
9       is a very important safeguard, I think, from your  
10      governmental responsibilities if there were  
11      something to go wrong, the ability to forensically  
12      put together what happened and have the documents  
13      to do that and persons.  I throw this out here.  I  
14      am the new guy at the table, but my sense is that  
15      no one wants to commit on this one.  It seems  
16      that, I don't know, it is some kind of totality of  
17      the circumstances.  You know it when you see it,  
18      but how you define that, whether it is a no-action  
19      regime or in a codified CFTC rule is difficult.

20                   CHAIRMAN JEFFREY:  Thank you.

21                   MR. BERLIAND:  To answer this question  
22      to a small extent anyway and really to give

1 perhaps some guidance from an empirical  
2 perspective as to how other markets around the  
3 world have dealt with us, I guess the first way I  
4 would answer is I am not convinced that within  
5 Europe you do have many examples of contracts that  
6 would achieve this level of political sensitivity.

7           However, if you go to Asia, there are  
8 some superb examples, and I would use the SGX  
9 probably as an example of an exchange that has  
10 been more intimate than any other in terms of  
11 looking for regulatory inefficiencies and market  
12 inefficiencies elsewhere in its region to attract  
13 volume. The two most notable contracts, of  
14 course, would be the Japanese contract, trading on  
15 the Nikkei 225, and secondly would be for the  
16 Taiwanese market. In both cases, there have been  
17 elements of market inefficiency, regulatory  
18 inefficiency, and fiscal inefficiency that they  
19 have attempted to address.

20           So, to use Taiwan as an example, it is a  
21 marketplace with position limits, a marketplace  
22 that restricts foreign investors, a marketplace

1 that has had a tax that has constrained foreign  
2 investment, i.e., a per contract fee that is  
3 payable. The Singapore market has essentially,  
4 therefore, exploited that inefficiency.  
5 Politically, the Taiwanese therefore have  
6 attempted to address this conflict between having  
7 control over their domestic market with having  
8 activity in its own stock index occurring outside  
9 its borders on a fully unregulated basis. It has  
10 very recently addressed this by lowering the  
11 barriers to entry with respect to reducing tax,  
12 increasing the position limits, and allowing  
13 further participation of foreign investors.

14 It will be very interesting to see what  
15 percentage of volume is brought back into the  
16 domestic market. So I would encourage, in looking  
17 at the research on these markets, to look at that  
18 example to see how the use of regulatory  
19 differentials has driven market activity. I think  
20 you will find it very interesting.

21 MR. BELCHAMBERS: Could I just make one  
22 brief observation? That is in the U.K., there was

1       some consideration about the role of the  
2       regulation in terms of either promoting  
3       competition or making sure that it didn't obstruct  
4       it, and I think there is a very, very big  
5       difference between the two.  Therefore, I think it  
6       is very important that when you have a situation  
7       like this where there are competition  
8       implications, it has got to be a matter for the  
9       regulatory authority in its own sovereign right to  
10      decide how it strikes a balance between investor  
11      protection and facilitating competition.  That  
12      decision will vary from jurisdiction to  
13      jurisdiction.

14                 In circumstances where you find that  
15      certain overseas attractions, whatever they might  
16      be -- they might be labor costs, they might be  
17      regulatory costs, they might be location costs --  
18      there are all sorts of factors that go into  
19      deciding where you choose to locate your business  
20      for whatever reason.  When you come to look at  
21      that, it is then a matter for internal debate as  
22      to whether you think your regulatory burden is too

1 heavy or too light and where the cost benefit  
2 lies. That seems to me to be almost an internal  
3 matter measured against what you see around you.

4 MR. NEWSOME: I think Commissioner Dunn  
5 raises a very practical point, and those of us  
6 sitting around the table like to think of these  
7 issues as just specific to our markets, but the  
8 U.S. Congress looks at it differently sometimes.  
9 I have been in that seat, and I have been in that  
10 seat, arguing for the global competition and  
11 supporting that. I think when you look at it in  
12 some of the broader contexts that Commissioner  
13 Dunn has brought up, it goes beyond some of the  
14 specific issues we have looked at, considering  
15 volume or where the technology is located. I  
16 certainly think the Commission has to consider  
17 some of these broader contexts in which the U.S.  
18 Congress has given them authority to look at and  
19 protect U.S. consumers. Certainly, it is not to  
20 take away from the great work that is done at the  
21 FSA or in any other foreign jurisdictions, but  
22 there are some specific responsibilities that the

1 U.S. Congress expects from the CFTC.

2 I think looking at whether or not the  
3 contract is physically delivered in the U.S. or  
4 directly related to a contract that is physically  
5 delivered in the U.S., whether the contract  
6 provides a significant price discovery function  
7 for U.S. delivered commodities, whether the  
8 contract serves as a core U.S. economic indicator,  
9 and then the ability to work with other U.S.  
10 agencies, whether it be the SEC, the FERC, the  
11 EPA, issues that are outside of many of the other  
12 jurisdictions. I think those are all  
13 considerations that the CFTC has to take into  
14 context when you look at whether or not it is  
15 allowing a foreign board of trade in through the  
16 no-action process or requiring somebody to become  
17 a designated contract market.

18 CHAIRMAN JEFFREY: Anyone else on that?

19 MR. WEINREB: If I could just respond a  
20 bit to what Chairman Newsome said. I agree with  
21 him that the more a contract seems to impact upon  
22 the U.S. market, the stronger the interest of the

1 CFTC and Congress will be. I think the underlying  
2 question is: When you recognize that, how do you  
3 achieve it? I think what most of the panelists  
4 are saying is we think the best way to achieve it  
5 is by heightened cooperation with regulators.

6 You have a basic level of cooperation  
7 and information sharing under the no-action  
8 regime. The more you identify specific issues,  
9 you address them by scaling up the cooperation as  
10 you have indeed done with the NYMEX discussion.  
11 It seems that is the most effective way. The only  
12 part of what Jim said that I disagreed with was  
13 when he said working with U.S. agencies. If Jim  
14 had said working with other regulators everywhere,  
15 whether it is the SEC and Treasury here and  
16 foreign regulators, I would agree wholeheartedly  
17 with what you are saying.

18 CHAIRMAN JEFFREY: In the interest of  
19 being faithful to our promise to break at 12:30  
20 for lunch, and given that we just segued through  
21 Jim's and Nick's comments from volume into other  
22 factors and given the importance of some of these

1 others factors -- U.S. interest, physical versus  
2 cash settled, uniqueness of the contracts, et  
3 cetera -- and the recognition, at least on the  
4 part of some of us, that those are best considered  
5 on a full stomach or at least with some  
6 sustenance, maybe we will defer those to the  
7 opening of the afternoon session.

8 We will come back here at 1:30  
9 and then move into the other topics  
10 otherwise scheduled for the afternoon. If  
11 that is agreeable to everybody, we will  
12 break for lunch and then reconvene  
13 at 1:30.

14 (Break)

15 CHAIRMAN JEFFREY: Thank you, ladies and  
16 gentlemen. Why don't we now continue with  
17 rounding out the discussion that we began this  
18 morning. We were talking about identifying  
19 factors that might be relevant to the  
20 definition of a foreign board of  
21 trade. I think we covered volume -- let's  
22 stipulate that for the time being -- and we

1 are on to other factors, specifically contract  
2 design, nature of the contract, i.e., what is the  
3 underlying product, the relevance of physical  
4 versus cash settlement on a particular product,  
5 and any other factors that might come to mind.

6 Certainly, product design, cash versus  
7 physical settlement, strategic or other  
8 significance of the product are really kind of the  
9 key ones, at least the ones that we hear about or  
10 hear spoken of most frequently when people are  
11 coming to us, suggesting that we should do more or  
12 less in terms of exercising our regulatory  
13 oversight responsibilities. Why don't I turn to  
14 you Benn? I know you started on this. Bring us  
15 back up to speed, and then we will go around the  
16 table again and solicit everybody's input.

17 MR. STEIL: I thought I would pick up on  
18 Commissioner Dunn's comments before we left before  
19 lunch, specifically with regard to the role of the  
20 great elephant in the parade which is Congress.  
21 Congress, no doubt, is going to expect you to  
22 assert your authority in the markets and to

1 protect U.S. investors. However, I think the  
2 Commission bears some burden of responsibility in  
3 terms of educating Congress as to the limits in  
4 terms of the Commission's ability to assert its  
5 authority on an international marketplace where  
6 participants have a choice of jurisdiction.

7           If we look at the evolution of the U.S.  
8 cash market since the late 1990s and the way  
9 markets have reacted to Congressional  
10 intervention, I think there is cause for worry.  
11 In the late 1990s, we saw repeated capital market  
12 sanction campaigns launched by members of Congress  
13 against Chinese and Russian companies to try to  
14 stop them from listing in the U.S. equity markets.  
15 They learned the lesson "don't list in the U.S.  
16 equity market." List in Europe. List in Hong  
17 Kong. Guess what, U.S. investor capital flowed  
18 into those exchanges just as efficiently as it  
19 used to flow into the New York Stock Exchange in  
20 the 1990s. More recently, of course,  
21 Sarbanes-Oxley. I would argue that the primary  
22 reason why the two big U.S. exchanges, the New

1 York Stock Exchange and NASDAQ, are now so  
2 interested in acquiring European exchanges is not  
3 so much to get new exchanges but to buy out of  
4 Congress' jurisdiction. I think it is very  
5 important that Congress understand that although  
6 the Commission can impose rules within this  
7 jurisdiction, it cannot impose the jurisdiction  
8 itself.

9 CHAIRMAN JEFFREY: Thank you very much.  
10 That is an important distinction.

11 MR. BELCHAMBERS: Can I just make one  
12 observation by way of a general rebuttal. There  
13 have been some who, dare I say it, around the  
14 table who have been saying in some way that, yes,  
15 we don't want to say anything disparaging about  
16 the FSA or certain other regulators, but we still  
17 believe nevertheless the CFTC should take greater  
18 ownership in a number of respects. My only  
19 observation is that I think we need to be very  
20 careful about placing too much reliance on assumed  
21 but unidentified deficiencies. I think there has  
22 been a flavor of that around the table.

1                   That goes right back to my original  
2 point about it is imperative that a full  
3 regulatory gap analysis is done to ensure that  
4 there are no elements of risk that are uncovered  
5 by the nature of the relationship between two or  
6 more regulators. In terms of the contract test, I  
7 guess I can see that there will be justifiable  
8 issues where you have a contract that is of  
9 significance in economic terms in the U.S. Now,  
10 having said that, I also believe that this, like  
11 order flows, is a secondary factor. It is not a  
12 primary factor for determining the location of an  
13 exchange.

14                   I also believe that it can be dealt  
15 with through memorandum of understanding, perhaps  
16 tighter conditions, more information flows, more  
17 frequent information flows to deal with that  
18 economic significance test. I suppose at the end  
19 of the day, I mean if you are going to issue a  
20 no-action letter, there is nothing to stop, I  
21 would assume, the CFTC from imposing a few extra  
22 conditions. If the exchange doesn't like it,

1 well, they don't get the no-action letter.

2 CHAIRMAN JEFFREY: I should point out  
3 that each no-action letter -- and correct me,  
4 colleagues, if I misspeak -- is individually  
5 tailored to the specific facts and circumstances  
6 of the applicant. To date, i.e., over the past 10  
7 years that we have undertaken a no-action letter  
8 process with respect to foreign boards of trade,  
9 we have issued a total of 16 such letters. It is  
10 important that people understand that each one of  
11 these gets pretty carefully considered.

12 Also, whether staff-drafted and driven or  
13 not, every single Commissioner sees them and has the  
14 opportunity to comment or object. It is also  
15 important to note that the volumes we are dealing  
16 with here in terms of nature and frequency of  
17 request -- I think we all recognize that we are in  
18 a period of accelerating market development, and  
19 the pace is apt to substantially increase in the  
20 months and years to come -- have been  
21 imminently manageable in the context of what we  
22 have been asked to deal with to date.

1           That is just factual background on the  
2 no-action process because I think there is some  
3 thought or suggestion out there that we have a  
4 tsunami of no-action letter requests that are  
5 coming in and they kind of go through the mail and  
6 nobody takes a look at them. If that impression  
7 is anywhere out there, I just want to disabuse  
8 people of any such notions. Peter?

9           MR. REITZ: Just adding to that, what  
10 Anthony said, it is also true that not only are  
11 they individualized to the exchanges but they  
12 could also have individual requirements if needed  
13 in addition on a per contract basis. I think that  
14 gives the Commission the means to address any  
15 particular heightened interest in a specific  
16 contract. We as exchanges are all licensed as  
17 exchanges, not on a per contract, with our home  
18 regulators. I think in the U.S. that is also true  
19 since the CFMA in 2000. Regulating an exchange on  
20 a per contract basis, in EUREX's case, again we  
21 would probably be subject to, I don't know, 17  
22 regulators regulating us because we do have so

1 many contracts that would spur specific interest  
2 and specific regulations. It is not a  
3 EUREX-specific problem, obviously. A lot of U.S.  
4 exchanges have even contracts that are physically  
5 delivered in South America or somewhere else in  
6 the world. If you shift over to a regime where  
7 you do it on a per contract basis, then these  
8 contracts would probably be regulated elsewhere  
9 other than the U.S. as well. I think, again, it  
10 would create a complete mess of regulation and  
11 would insert a level of uncertainty because then  
12 the problem we discussed this morning about  
13 fluctuating interests or fluctuating volume from  
14 certain parts of the world would be elevated to  
15 the next level because it will create uncertainty  
16 on a per product level. So I don't think that is  
17 a good idea.

18 CHAIRMAN JEFFREY: Turning to the New  
19 York Mercantile Exchange, for those of you who  
20 thought you were hallucinating, yes, we have a new  
21 spokesperson for the MERC and it is Brian Regan  
22 for NYMEX. Thank you, Brian, for being here.

1                   MR. REGAN: Thank you, Mr. Chairman.  
2                   Yes, I am pinch hitting for Jim this afternoon,  
3                   and so perhaps it would make sense for me to step  
4                   back very briefly and synthesize some of the  
5                   comments that Jim was making this morning. We  
6                   realize that the Commission has a basic obligation  
7                   to interpret the provisions of the Commodity  
8                   Exchange Act including the carve-out from  
9                   registration as a contract marketer or DTEF as in  
10                  Section 4(a), the provisions for boards of trade  
11                  located outside the United States. I think part  
12                  of why we are all here today is that there is at  
13                  least a tacit understanding that it doesn't really  
14                  make sense to apply a literal or mechanical or  
15                  geographical test to that or definition to that,  
16                  but really that term or that phrase needs to be  
17                  interpreted in light of the CFTC's core missions.

18                  I know when the CFTC put out its concept  
19                  release back in 1998, there was a statement in  
20                  there that there was some level of activities that  
21                  would rise to the extent that a Foreign Board of  
22                  Trade would need to register with the CFTC as a

1 contract market. I think there has been pretty  
2 much total turnover in the Commissioners since  
3 that time, and obviously it is healthy to take a  
4 fresh look at these questions from time to time.  
5 We do think it is fair to pose the question and  
6 consider the issue as to whether there is some  
7 combination of circumstances. I think Kevin used  
8 the phrasing this morning of totality of  
9 circumstances, and people may have different  
10 checklists or different factors that they think  
11 are important, for example, the nature of the  
12 contract, the impact on a U.S. based fiscal  
13 cash commodity market, possible use of a  
14 settlement price for a market that is regulated by  
15 the CFTC, the settlement mechanism, also perhaps  
16 the specialized expertise of the CFTC staff with  
17 regard to certain products that may not be readily  
18 replicated by regulators in other jurisdictions.  
19 We think it is at least possible that there may be  
20 some combination of circumstances that will rise  
21 to the level that there is a critical mass where  
22 the Commission decides it needs to take a hard

1 look at whether such a market does or does not  
2 need to be registered with the CFTC as a contract  
3 market. Now, we happen to think that shouldn't be  
4 the preferred choice or course of action. The  
5 Commission needs to take a hard look at whether  
6 there are steps that can be done short of that,  
7 and that if that happens, that would be relatively  
8 infrequent. I think that is really the basic  
9 question before the Commission this afternoon,  
10 today really, whether there is any outer limit or  
11 outer boundary that will trigger that basic  
12 registration requirement. As I said, if the  
13 Commission decides to go down that path, it would  
14 be our expectation that it would be quite infrequent,  
15 perhaps even rare, and that it would be so  
16 self-evident that, as another panelist mentioned  
17 this morning, the Commissioners would know it when  
18 you see it. But if it is decided that there isn't  
19 an outer limit or boundary where the CFTC decides  
20 it does need to exert control, then obviously  
21 going the other path in terms of a more  
22 comprehensive no-action process does put a lot

1 more pressure on the Commission in that process in  
2 terms of making sure that the concerns expressed  
3 this morning about regulatory parity and a level  
4 playing field are fully addressed. There is at  
5 least some risk that relying purely on a no-action  
6 process could end up magnifying what are often  
7 somewhat subtle differences in regulatory  
8 approaches or regulatory distinctions.

9 CHAIRMAN JEFFREY: Brian, not to put you  
10 on the spot, and I ask these questions of Mike  
11 first, but I want you to respond as well. Related  
12 just to this question of what the multiplicity of  
13 the factors are, one factor might be the nature of  
14 the contract. Is it not just the product but also  
15 is it physically settled or cash settled? Can you  
16 maybe comment a little bit on whether or not that  
17 is a distinction that matters or that is a distinction  
18 without a difference and also can I get your  
19 take on to what extent that distinction is at all  
20 relevant? Obviously, Bob, you are not going to be  
21 off the hook on this one either. Why don't we  
22 start with Professor Gorham?

1                   MR. GORHAM: Let me make three points,  
2                   and my third point exactly addresses your  
3                   question. The first point is that competition is  
4                   a wonderful thing. It is wonderful when we have  
5                   domestic competition. The MERC and the Board of  
6                   Trade trying to steal each other's contracts or at  
7                   least knowing that the other one would steal the  
8                   contracts if they slip. It is even better, as we  
9                   mentioned, in this new era of global competition.  
10                  EUREX coming in has done wonderful things for  
11                  customers all around the world with respect to the  
12                  Board of Trade, and Euronext coming in and trying  
13                  to do the euro dollar has helped discipline the  
14                  CME. So, all that stuff is really good stuff, and  
15                  it works both ways. The New York Board of Trade,  
16                  many of their contracts, like the cross rates and  
17                  the currencies, those are not domestic products;  
18                  those are foreign products. All of the coffee,  
19                  sugar, cocoa, all of those things, the world  
20                  sugar, those are all foreign products, the CME  
21                  euro dollars, et cetera. It is both ways, and  
22                  that stuff is really good for the world. The

1 second point is as long as the CFTC, when you get  
2 the products, as long as the CFTC fulfills its  
3 major obligation which is to ensure that these  
4 markets are not manipulated, then it is doing what  
5 it needs to do. I have to say that I have  
6 actually changed a little bit since I walked into  
7 this room, based upon the things that Rick said,  
8 based upon my side conversations with Verena Ross,  
9 based upon my conversation at the break with John  
10 Fenton who is Head of Market Surveillance here. I  
11 am convinced that in fact what the CFTC is doing  
12 right now is sufficient to make sure that there is  
13 not manipulation in the specific markets, the WTI  
14 markets. While that might create a burden, the  
15 large trader reporting might create a bit of a  
16 burden, you are still doing the job that you need  
17 to do with respect to these markets. My bottom  
18 line there is I don't think it matters whether the  
19 product is foreign-based or whether it is domestic  
20 in terms of drawing a line between foreign and  
21 domestic boards of trades. The third has to do  
22 with the design of the product. People have made

1 a distinction between cash settled and physically  
2 delivered products. The thing is that either one  
3 of those markets can be manipulated. It is just a  
4 different place that you do the manipulation. If  
5 you have a cash settled contract, what you do is  
6 you go in, you get big position in the futures  
7 market, and then you go in and you try and somehow  
8 move the underlying cash price, so that you can  
9 advantage your position. There is obviously a  
10 difference in design, but I don't see that it  
11 makes a difference from the point of view of how  
12 this is regulated. Case in point, it is sort of  
13 the strangest thing in the world that the product  
14 that is an issue, one of the products that is  
15 sitting on the sidelines at issue here, the ICE Futures  
16 WTI contract, is cash or financially settled based  
17 upon the price that is created in the market that  
18 could disappear because of that competition. In  
19 other words, as this actually happens, as the  
20 NYMEX share shrinks down to very little or  
21 nothing, and you have this big market based on  
22 that, you have huge potential for manipulation.

1                   CHAIRMAN JEFFREY: Thank you, Professor  
2 Gorham. Brian, any further elaboration on those  
3 comments now that you have seen your market share  
4 evaporate before you very eyes? We will report  
5 that to Chairman Newsome. That is well done.

6                   MR. REITZ: I think Mike is right that  
7 contract design is important. When any exchange,  
8 be it organized here or outside the United States,  
9 when the research staff tries to design a  
10 contract, you want to make sure it is a contract  
11 that is balanced in terms of hopefully the  
12 participation by buyers and sellers, and you have  
13 the convergence at the end. You want to make sure  
14 all that works. I think there is obviously more  
15 apparatus that is attached to a physically  
16 delivered contract in terms of pipelines and  
17 oversight procedures that are required by the  
18 exchange itself. I guess it is an open question  
19 or fair question as to whether that then means  
20 that there needs to be further level of oversight  
21 by the particular regulatory body, be it here or  
22 elsewhere.

1                   CHAIRMAN JEFFREY: Thank you. Verena,  
2 any further comments?

3                   MS. ROSS: Just briefly to say really  
4 that obviously, the derivative markets have  
5 historically developed a lot of contracts and  
6 products based on overseas products, overseas cash  
7 markets, overseas product settlement prices and  
8 delivery. Therefore, any definition of oversight  
9 responsibility based on nationality of contract  
10 has the potential, in my mind at least, to kind of  
11 restrict that innovation in the future which is  
12 obviously important for the world market.  
13 Examples of that have been raised here before:  
14 The euro dollar contract, the LME's North American  
15 special aluminum contract -- it has a North  
16 American bit in its name -- and other such things.  
17 So, by no means, is the WTI contract unique in  
18 that, and I am sure we will see over the next many  
19 years, many more such products emerging. I think,  
20 therefore, that innovation is a positive thing,  
21 and we need to make sure we support it as  
22 regulators. I think the rapid development and

1 growth of the derivatives markets have proved  
2 extremely effective in allowing participants at  
3 all stages of the value chain to manage risks  
4 efficiently, not least within the U.S. commodities  
5 and financial markets. The regulatory community  
6 would do well to remain mindful of the future  
7 implications on that innovation, and we certainly  
8 should not do anything to the detriment of that  
9 process. The only other very quick remark to what  
10 we talked about on the settlement process and the  
11 fact that the WTI contract relies on the price on  
12 NYMEX for settlement, we certainly looked very  
13 carefully when we considered the contract in the  
14 process of looking at ICE Futures launching a new  
15 contract. We always look very carefully at the  
16 settlement process and what the arrangements  
17 around that settlement process are, and that is a  
18 key requirement which exchanges have to satisfy,  
19 that they have proper arrangements for the  
20 settlement process to go through.

21 CHAIRMAN JEFFREY: Thank you very much,  
22 Verena.

1 MS. CRONIN: Thank you. I think I am  
2 struggling to come up with a new and innovative  
3 way to rephrase the same concerns that I have  
4 raised several times this morning, and I am having  
5 some trouble. So, forgive the duplication. I  
6 think obviously, again, it is understandable that  
7 the CFTC would have a greater interest in  
8 particular contracts that have a greater perceived  
9 national interest, but notwithstanding that, I  
10 don't believe the scrutiny of particular products  
11 is currently within the CFTC's statutory  
12 authority. I also think, more importantly,  
13 putting aside the concerns about retaliatory  
14 regulation, there are a number of CME products  
15 which we would be concerned about for our  
16 jurisdictions exerting authority over to the  
17 extent that if the CFTC were to go down this path,  
18 including all of our FX contracts, obviously,  
19 which all have a substantial nexus to a number of  
20 foreign jurisdictions. Fundamentally, an attempt  
21 to impose compensatory regulations is ultimately  
22 going to be ineffective. To the extent that an

1 exchange is going to be challenged or subject to  
2 additional regulatory scrutiny because it is going  
3 to offer a particular product, it is either going  
4 to lead them to decide not to offer that product  
5 -- which I think undermines the competitive market  
6 and would drive customers to the OTC market which  
7 we don't believe is the appropriate avenue -- or  
8 also potentially lead exchanges to structure their  
9 operations in such a way as they would avoid U.S.  
10 oversight, and in so doing, make it more difficult  
11 for U.S. customers to access those markets and put  
12 us at a competitive disadvantage.

13 CHAIRMAN JEFFREY: Thank you very much.

14 SIR REID: Thank you. I took some time  
15 to think about the issue of why certain places  
16 attract trading and why people come and trade in  
17 certain areas. Over the years, I think London,  
18 for example, has been a natural place that people  
19 want to come and trade. Two or three hundred  
20 years ago, it was about ports; it was about the  
21 ability to handle distribution; it was about money  
22 and the ability to finance it. As the centuries

1 passed, it became a matter of legislation making  
2 sure it was hospitable towards people actually  
3 trying to make investment and to build their  
4 businesses. In a way, after a series of prime  
5 ministers and governments, we have hit a period in  
6 the last 20 years in which the commercial sector  
7 has benefited from what I would call positive  
8 government decision-making. Some of us might  
9 argue about that, but every citizen does. When  
10 you look around the world, New York is another  
11 place, obviously, where it is natural to come and  
12 trade. When you take these examples of London and  
13 New York and you could take Singapore, Tokyo, and  
14 Hong Kong, really these are places where people  
15 get together, they are satisfied with the  
16 legislative situation they find themselves, and  
17 they make trades. As far as London is concerned,  
18 the Scots have not been very happy about that, but  
19 they have never been able to move it to Edinburgh  
20 because the attractions have not been there. When  
21 you look at the way these things have developed  
22 and evolved through history, really taking the

1 volume has been a defining factor. It certainly  
2 isn't the delivery points of the product you are  
3 trying to selling. It certainly isn't a defining  
4 factor. So, you are really faced with history and  
5 what has evolved and your legislative environment.  
6 That is my first observation. I think we should  
7 stop trying to look for reasons why registration  
8 should take place in certain places because of  
9 these auxiliary factors. It happens because these  
10 are places where trading is done. Now, when we come  
11 to the issue which seems of enormous interest to  
12 people, the ICE Futures WTI issue combined with NYMEX  
13 relationship, I have never had the opportunity to  
14 talk to my competition. In 50 years in the oil  
15 business, I have never actually seen so much of  
16 the competitors as I have this morning. This is  
17 frightening. I was brought up in the era of  
18 antitrust, and I am not sure I should be here,  
19 Commissioner, sorry.

20 CHAIRMAN JEFFREY: We have a lot of  
21 lawyers in the room to keep everybody honest.  
22 [Multiple persons talking simultaneously.]

1                   SIR REID: But really seeing my market  
2 share in the last 10 minutes go from 25 to 100  
3 percent, I am beginning to think I am glad I came  
4 here. I should get some reward when I go home. I  
5 really do feel that these are active markets. The  
6 way prices are fixed and the time that is taken to  
7 look at our settlement process by the FSA, and I  
8 am sure in conjunction with CFTC, I believe as  
9 long as we are transparent, as long as we are  
10 continuously mindful of market abuse and  
11 manipulation, then in fact I think the market is  
12 secure.

13                   CHAIRMAN JEFFREY: Thank you, Sir Bob.

14                   MR. BERLIAND: I am conscious, I guess,  
15 of a couple things. Most of today's session has  
16 been talking about why the ideas on the table  
17 don't work. In other words, really we have been  
18 trying to knock down ideas to solve your problem,  
19 but we have not been very good at actually coming  
20 up with better solutions. I do happen to believe  
21 that it is as soon as you start to dig into the  
22 current levels of detail that we have been talking

1 about today -- volumes, contract specs, and so on  
2 -- that you end up finding it very difficult to  
3 put a model in place that will solve not only for  
4 what exists but, far more challenging, for what  
5 will exist in five or ten years time. I think,  
6 therefore, it really does come back to trying to  
7 find a solution that gets to two main objectives.  
8 Number one is clearly trying to ensure sufficient  
9 flexibility that as the markets develop, you are  
10 not having to come back and reinvent, recodify,  
11 and redefine the rules that should apply to the  
12 marketplace. The second piece of the equation is  
13 clearly ensuring that you gain the confidence and  
14 the political interest that exists as much in this  
15 country as they do in all the other countries  
16 around the world. It seems to me that the biggest  
17 challenge we have at the moment is the gap between  
18 what I think there is broad consensus on around  
19 this table, that there is a high level of control,  
20 supervision, and understanding of the marketplace  
21 that exists across the pond at this stage, and the  
22 belief that exists within the political interests

1 here and offshore. Certainly, you will read the  
2 press and you will hear comments come from  
3 Congress and elsewhere around the world, that  
4 there is broad belief that we are not controlling  
5 these markets adequately, or at least there are  
6 certainly a number of interests that would like to  
7 say that. I think part of that is down to  
8 straight education. The one Commissioner who is  
9 not present here today, Sharon, you will talk to  
10 her and listen to her comments with respect to the  
11 studies about what is truly influencing the price  
12 of oil today. I certainly do not believe that the  
13 clients that I represent and bring to the  
14 marketplace and other members of the FIA bring to  
15 the marketplace are driving oil to these levels.

16 I think, therefore, our challenge is  
17 going to be to educate the political interests  
18 rather more than it is to try and solve the level  
19 of minutia that will, in my view, almost  
20 inevitably fail. I guess I come back to the  
21 opening comment today, which is I do think this is  
22 a process of ensuring maximum levels of

1 cooperation with flexibility and then building on top  
2 of that, a level of education to our politically  
3 interested parties. I am, by no means,  
4 underestimating the size of the challenge in doing  
5 just that. I think it is extremely difficult, but  
6 I do believe that is where our focus should be. I  
7 guess I am, therefore, pointedly not answering the  
8 question about what the contract spec should be.  
9 I think it is a shame that there is nobody here  
10 from the New York Board of Trade because I think  
11 their contracts are probably the most complicated  
12 ones out there. I certainly would consider sugar  
13 as being a staple diet of this country. The  
14 thought that a deliverable contract is essentially  
15 deliverable in many parts of the world, I dread to  
16 imagine what type of structure one could put  
17 around that to ensure designation as being a  
18 national contract, despite the clear interest as a  
19 staple. I feel a little bit sad not to be more  
20 constructive, but I do feel that is the angle we  
21 should be taking here.

22 CHAIRMAN JEFFREY: Thank you. Just on

1 the New York Board of Trade comment, I will tell  
2 you it is unfortunate that they were unable to  
3 attend. By way of a homework assignment for all  
4 participants and interested parties, I really  
5 would encourage you to read these comment letters  
6 as they come in. Different people have different  
7 angles as you can well appreciate, but the New  
8 York Board of Trade comment letter which I read last  
9 night with a high degree of care and attention,  
10 goes into some of these variations. As one  
11 person's view, it is extremely well done. Whether  
12 one agrees with it or not, it does speak very  
13 clearly to the complexity, which we all  
14 understand, of the issues presented.

15  
16 MR. O'HARA: I actually think we are  
17 hearing an answer here, although what we have  
18 heard is a lot of folks saying, well, we shouldn't  
19 do this, we shouldn't do that through providing  
20 broad philosophy. I think the answer is this has  
21 been a great success. As I am sitting here  
22 listening to you folks, I would say the first line

1 of defense for a regulator is a vigorously  
2 competitive marketplace. Benn Steil can speak to  
3 this as much as anyone. My old world was the  
4 equities, cash/equities and options world, and  
5 those worlds were as anti-competitive as they  
6 could be. Until the mid-nineties, there was the  
7 huge scandal of NASDAQ. The SEC developed rules  
8 and lowered barriers that allowed my old employer,  
9 Archipelago, to show up. In a matter of five  
10 years, the equities markets became highly  
11 efficient, highly technologically-driven, very  
12 cost-efficient, transparent markets to the point  
13 where the grand New York Stock Exchange ended up  
14 purchasing Archipelago last March. In the options  
15 markets, the same thing occurred as mostly an  
16 outgrowth of a scandal again in the 1999-2000  
17 period where they changed the rules and broadened  
18 competition. Now, this has played out more on a  
19 national level here in the United States. What I  
20 see here, obviously, in the futures business is  
21 playing out on a much more international level.  
22 So when we talk about the Euronexts or the EUREXs

1 coming in and spurring competition, I mean it is  
2 interesting to see what has gone on in the last  
3 several months with NYMEX and ICE Futures. ICE Futures  
4 reminds me a lot of the old Archipelago guys. ICE  
5 Futures has entered the marketplace, they put a  
6 product out, and NYMEX responded to that competitively  
7 with a deal with the MERC. As long as you create, and  
8 I think in large part, you have, you have created a  
9 very competitive marketplace where entrants can  
10 come in, where there is lots of flexibility in  
11 your business model, as a Commission, you should  
12 feel pretty secure when you look at your core  
13 principles of no manipulation and investor  
14 protection. Let me tell you, if you have a  
15 competitive market, and if ICE Futures turns around and  
16 hurts one of their customers, guess what, they are  
17 going to run to a competitor or vice versa. I  
18 very much saw that in the equities world where  
19 there were seven ECNS and six regional exchanges  
20 all beating the living hell out of each other for  
21 business. Benn smiles over there. He saw the  
22 evolution. Again, going back to what I first

1       said, I think why folks are having a hard time  
2       defining where the rules and lines should be is  
3       because I think there is a success here. Maybe it  
4       needs to be tweaked as we go along, but as long as  
5       you create a competitive environment, that, in  
6       large part, will keep the situation, so the  
7       regulators will not have to come down with their  
8       thumb on one side of the scale or not. To  
9       Richard's comment that part of this process is  
10      education, in capitalism, sometimes there are  
11      hiccups along the way, but in large part, this is  
12      working.

13                   CHAIRMAN JEFFREY: Thank you very much,  
14      Kevin. Nick Weinreb?

15                   MR. WEINREB: Thank you, Mr. Chairman.  
16      I would like to go back to Richard's comments. I  
17      agree with a lot of Kevin, perhaps all of what  
18      Kevin is saying about competition. The thing that  
19      struck me about Richard's comments was he was  
20      saying, well, we really ought to be offering a  
21      solution and it is all negative trying to tear  
22      down what you are suggesting without offering

1 anything else. Actually, what I have heard  
2 consistently through the day is a very positive  
3 statement, an answer to the issue, which is  
4 regulatory cooperation gets you to where you want  
5 to go to. It is tried and trusted. It is built  
6 very much into the existing regime. It is an  
7 effective mechanism. It has worked not only in  
8 this example, but also it has worked more  
9 generally in the financial markets over the years.  
10 We even mentioned the fact that derivatives markets  
11 have tended to be based on products where the cash  
12 market may be elsewhere. I think all derivatives  
13 markets have done this over the years. For  
14 example, to take our own experience, Liffe, when it  
15 started, was with trading futures on T-Bonds.  
16 Subsequently, it traded on German Government and  
17 Italian Government bonds. In each case, of  
18 course, although there was a large chunk of the  
19 cash market in London, which is why we have  
20 particular interest in it, there was also a cash  
21 market in the home country. More recently, if I  
22 can mention a product which is probably less

1 acceptable to the CFTC, stock futures, fund stock  
2 futures, on Liffe, there are stock futures on not  
3 only cash equities in London but in Paris,  
4 Amsterdam, Frankfurt, New York. In each case,  
5 both with the bond contracts and the stock  
6 futures, what we have done with the full support  
7 of the FSA is to ensure there are proper  
8 information sharing arrangements between the two  
9 markets and the two regulators because we  
10 recognize if you take the example of stock  
11 futures, clearly people can lean on the cash in  
12 order to influence the price advice on the stock future or  
13 vice versa. It is in everyone's interest, both  
14 the exchange's and the regulator's, that that  
15 doesn't happen, that markets aren't manipulated.  
16 The way to address that is by ensuring adequate,  
17 effective cooperation both at exchange level and  
18 regulator level. I think all of the issues we are  
19 coming back to are ones where the scale and scope  
20 of the cooperation may change, may evolve, may be  
21 raised or lowered, depending on the circumstances,  
22 but it does get you to where you want to go to,

1 and it is one of the virtues of the no-action  
2 regime. Because things aren't set in stone, you  
3 can be flexible. You can have, as you do in the  
4 no-action letters, the standard clause, not a  
5 standard clause. I mean all the letters may be  
6 tailored, but they end up with standards that the  
7 regulator will agree to cooperation and the  
8 exchange will agree to cooperation. They all  
9 enter into it with openness and willingness. It  
10 gives you then the flexibility to say, well, in  
11 these circumstances, we would like a bit more or a  
12 bit less. I think very much the positive answer  
13 to address Richard's concern is there is an answer  
14 which is regulatory cooperation does indeed  
15 deliver the goods.

16 CHAIRMAN JEFFREY: I appreciate that.  
17 Thank you, Nick.

18 MR. FOYLE: Nothing to add, thank you,  
19 Chair.

20 CHAIRMAN JEFFREY: Okay, you are going  
21 to be first next time. We will switch the order  
22 of the Commissioners. Mike, do you have any

1 questions or additional comments?

2 COMMISSIONER DUNN: No, I really don't.

3 COMMISSIONER HATFIELD: I am tempted to  
4 talk about Nick's mentioning of stock futures, but  
5 since that is a whole other hearing in negotiation  
6 with the SEC now, I will just keep my mouth shut.  
7 Richard and the Chairman both referenced the New  
8 York Board of Trade, and I do think the Chairman  
9 is right, that their letter for the official  
10 record is of some significance and I might, rather  
11 than just ask a question, read a couple sentences  
12 from that letter because I think there is a really  
13 good example here. They say in their letter, "The  
14 New York Board of Trade plans to make electronic  
15 trading available for all of its products and to  
16 place terminals for trading sugar, coffee, cocoa  
17 in foreign countries including some where the  
18 products are produced, stored, and developed.  
19 Considering the importance of the underlying  
20 commodities to their economies, these countries  
21 will likely take a strong interest in how our  
22 markets are regulated by the CFTC and specifically

1       how the CFTC treats foreign Boards of Trade  
2       wishing to place terminals in the United States.”  
3       I think that is really the essence and the crux of  
4       the letter. I am not really saying anything about  
5       that other than I do think it argues for  
6       flexibility and looking at these issues case by  
7       case.

8                   COMMISSIONER LUKKEN: I go back to  
9       something Anthony had talked about earlier which  
10      is the flexibility of being able to do a gap  
11      analysis and finding where potential differences  
12      between regulatory regimes might be. There are  
13      two ways you can approach this. One is from a  
14      top-down model where you say you must register  
15      with the CFTC and we will strip away those parts  
16      that you don't think are necessary. I think the  
17      approach that the no-action letter process goes  
18      through is the bottom-up. Let's build it up. It  
19      provides us some flexibility to say, okay, at a  
20      minimum, we are going to require these standards,  
21      but as risks are imposed upon these markets, we  
22      may add bells and whistles here and there, sort of

1 a sliding scale of regulation. The CFMA brought  
2 us that tiered sliding scale thought pattern as  
3 far as regulation, and I think it has worked very  
4 well. I guess I would like some views as we start  
5 to think about this. Which do you like better,  
6 the top-down approach or the build it up from the  
7 bottom approach? Which provides us the most  
8 flexibility? You heard the theme of flexibility  
9 as we went around the table. Where should we  
10 start? Should we try to improve what we have  
11 already, or should we go with this full-blown  
12 registration and strip away those parts that we  
13 don't like?

14 MR. BELCHAMBERS: I have a distinct  
15 hatred of top-down anyway. So I would have to say  
16 I would automatically prefer more of a bottom-up  
17 approach. Can I just come at it from a slightly  
18 different angle? If you look at the terms and  
19 conditions and requirements that stand behind the  
20 no-action letter, it would be extremely hard for  
21 anyone to turn around and say that the CFTC  
22 doesn't have ownership over this. The exchange is

1 required to submit to CFTC jurisdiction in  
2 relation to any actions that it may take pursuant  
3 to the no-action letter. People have raised  
4 inspections of books and records. Well, that is  
5 facilitated under the no-action letter. It seems  
6 to me that taken together with all the other  
7 requirements, including the qualities of analysis  
8 that precedes that no-action letter of the  
9 overseas licensing authority of the exchange, it  
10 is very hard to say there is a problem here. I  
11 have great difficulty with understanding where the  
12 problem really lies, other than in that  
13 competition space. We have already covered that  
14 one, I think, to some extent. Yes, I prefer the  
15 bottom-up approach, and I feel that the no-action  
16 letter approach reflects that.

17 MR. STEIL: I would like to echo  
18 Anthony's support in favor of the bottom-up  
19 approach by giving an example of where I think the  
20 top-down approach has failed. EUREX, when it came  
21 into the U.S. a few years ago as a U.S. exchange,  
22 not only negotiated with your Commission but with

1 the SEC about potentially trading SEC-regulated  
2 products. At the end of the day, they decided to  
3 come into this market only trading the  
4 CFTC-regulated suite of products, and I will get  
5 to that in a moment. I think we can all say that  
6 this has been a tremendous success for the U.S.  
7 derivatives market, even if it hasn't been a  
8 tremendous financial success for EUREX. It  
9 motivated huge reforms at the CBOT and the CME. We  
10 are talking about more innovation. We are talking  
11 about more disinter-mediated trading. We are  
12 talking about lower tariffs. This has benefited  
13 derivatives users in the United States, absolutely  
14 no doubt. Now, the SEC insisted that if EUREX  
15 were to trade SEC-regulated products, that the SEC  
16 would regulate EUREX's global franchise. It is  
17 not surprising that sort of top-down approach  
18 didn't work, and EUREX decided not to provide  
19 competition within the United States for these  
20 SEC-regulated derivatives products. Kathleen  
21 talked about the cost of activities moving out of  
22 our jurisdiction into foreign jurisdiction, and

1 that is one problem. We have seen a lot of that  
2 particularly in the migration of foreign listings  
3 from New York to London over the years in response  
4 to U.S. regulation. But what about the fact that  
5 EUREX is not here competing in this market for the  
6 trading of SEC-regulated products? That is a real  
7 loss to traders in the United States. Less  
8 competition means less innovation. It means  
9 higher costs. I know we are talking about a  
10 counter-factual here. We don't know what EUREX  
11 would have done in that particular market, but we  
12 do know from the experience with allowing  
13 competition in these markets from foreign  
14 exchanges on the CFTC side, that it has had a very  
15 positive impact. That is why I would echo  
16 Anthony's support in favor of the bottom-up  
17 approach and against the top-down approach.

18 CHAIRMAN JEFFREY: Thank you, Benn.  
19 Anyone else on Walt's question?

20 COMMISSIONER LUKKEN: Can I just answer  
21 my own question. I was thinking back to my old  
22 battle when I worked in the Senate and worked on

1 the CFMA. We were faced with this problem in  
2 regard to the securities futures products, whether  
3 we build up from the bottom and only add those  
4 things that the SEC needed, insider trading rules  
5 and other things, or that we require them to be  
6 full-blown securities registrations and register  
7 with the SEC. We lost that battle, and they had  
8 to register both as securities and as futures. I  
9 think it has impacted how the market has  
10 developed. My own view is that top-down approach.  
11 So that is another example I think we should think  
12 about. I answered my question.

13 CHAIRMAN JEFFREY: Thank you. Anyone  
14 else on that? I am not going to summarize, but I  
15 have just one observation I would make from  
16 listening to this discussion, the post-lunch  
17 discussion related to contracts, natures of  
18 products, et cetera. There seems to be some  
19 degree of consensus on things about whether it is  
20 a U.S. exchange or a foreign board of trade. On  
21 the one hand, bright-lines are hard to draw.  
22 There are a lot of factors of various

1 sorts that might be weighed in non-precise or  
2 non-specified ways in thinking about these  
3 questions or the question of whether or not an  
4 entity is a foreign board of trade in a particular  
5 factual context but that don't necessarily lend  
6 themselves to specific definition and algebraic  
7 formulation. That is why, in approaching this  
8 issue of what is a foreign board of trade, the  
9 action/no-action letter process has been the  
10 process that the Commission has used heretofore.  
11 How we proceed on that in terms of refining it,  
12 modifying it, or otherwise going forward, I think  
13 remains to be seen. This discussion has been very  
14 helpful in identifying the factors, pointing out  
15 some of the strengths and weaknesses of various  
16 factors, and most importantly, at least for me,  
17 underscoring -- I probably had a pretty good  
18 appreciation of this at the outset, but if I  
19 didn't before, I certainly have a better  
20 appreciation now -- just the complexity of coming  
21 up with a formulaic approach and also the overall,  
22 the more important strategic need which hopefully

1 will guide our thinking going forward as we read  
2 written comments from all of you and as we  
3 deliberate internally for any action that we take  
4 being designed in a way that it can stand the test  
5 of time, not necessarily for all time but for a  
6 reasonably foreseeable period of time as markets  
7 and technologies evolve.

8 MS. HAMMER: Will you accept a point  
9 from the floor?

10 CHAIRMAN JEFFREY: Yes, name, rank, and  
11 serial number, please.

12 MS. HAMMER: I am Viva Hammer. I am  
13 from the Office of Tax Policy at the Treasury Department,  
14 and I am speaking for myself. I have not prepared comments,  
15 but on the question of what you call totality of  
16 circumstances, we call it facts and circumstances  
17 in the tax environment. Although it sounds  
18 attractive because of its flexibility, it also  
19 involves a certain amount of uncertainty,  
20 especially as an authority like yourself changes  
21 over time. If an organization wants to come  
22 before you, it can be very unclear about how a

1       totality of circumstances situation will be judged  
2       in the future. I am just offering my experience  
3       with facts and circumstances, although looking  
4       good from the outset, it can lead to uncertainty and  
5       also a long period of contemplation before rulings  
6       come out.

7                   CHAIRMAN JEFFREY: That is an excellent  
8       point. That is exactly the sort of thing that we  
9       and all of us in the community will have to weigh  
10      the trade-offs of various approaches. What I  
11      would like to do now, unless people strongly  
12      object to this, is cut off the discussion on the  
13      morning's topics. I don't think we need a break  
14      just yet. In fact, maybe we won't at all because  
15      we can let people go on about their business after  
16      we finish up. We will proceed to the second panel  
17      which is really the same as the first panel, plus  
18      we have two additions. The second panel really is  
19      going to step back a little bit from the  
20      technicalities of what is a foreign board of trade  
21      per se and hear a little bit more particularly  
22      from our new panelists to get to this really

1 critical theme of the responsibility of the CFTC  
2 under the Commodity Exchange Act to make sure we  
3 are properly exercising our responsibility to  
4 maintain the integrity of the markets and identify  
5 circumstances and eliminate those that would be  
6 constructive to market manipulation, trading  
7 abuses, or otherwise. To that end, we talk a lot  
8 about consumer protection. Really, consumer  
9 protection in our world, the futures world, it is  
10 not me buying a futures product on an exchange.  
11 Well, it is that, too, but it is the consumer, the  
12 American public, having the confidence that the  
13 product he buys in the supermarket or the gas  
14 station, the price setting, the price discovery  
15 mechanism for that particular product is done with  
16 a high degree of market integrity. To that  
17 extent, again, I want to introduce our new  
18 panelists. It will be instructive for all of us  
19 to hear the perspective of, if not the consumer,  
20 the community more broadly defined than what I  
21 think a lot of us in this room would tend to see  
22 or more frequently think of as the more narrow

1 futures industry community. With that, I would  
2 like to introduce our new panelists. We have Jeff  
3 Billings -- Jeff, raise your hand -- from the  
4 American Public Gas Association, and Pat Byrne --  
5 Pat, where are you, great -- Pat from the  
6 Industrial Energy Consumers of America. By way of  
7 name and identification, maybe you can give a  
8 little bit more background, Pat and Jeff, on your  
9 personal backgrounds, your organizations, and then  
10 we can just move into your prepared remarks.

11 MR. BILLINGS: Sure. Thank you, Mr.  
12 Chairman. I am Jeff Billings, and I work with the  
13 Municipal Gas Authority of Georgia. We are a  
14 joint action agency that basically brings together  
15 municipally-owned gas systems around the State of  
16 Georgia and other states. On a larger scale, we  
17 are part of the American Public Gas Association  
18 which is sort of a larger joint action group of  
19 the same thing. Publicly-owned utilities around  
20 the country are members of the American Public Gas  
21 Association, and I represent that organization  
22 today. As far as my background goes, I am the

1       Manager of Risk Management at the Gas Authority of  
2       Georgia, and so I am responsible for the hedging  
3       of natural gas, the hedging of our storage gas. As  
4       far as other things I have done, I have also run  
5       the trading desk of a small hedge fund, so I have  
6       that background as well, and I have worked at the  
7       Chicago Mercantile Exchange, so I have a little  
8       bit of that background as well. Maybe not the  
9       purist end user that you are going to find here  
10      today, but I hopefully will offer some different  
11      perspectives that I can add to the group, and I  
12      want to thank you very much for having us today.

13                   CHAIRMAN JEFFREY: Pat?

14                   MR. BYRNE: Thank you, Mr. Chairman.  
15      Thank you, members of the Committee. My name is  
16      Pat Byrne. I work for General Shale Brick  
17      Company. We are one of the largest brick  
18      companies in the United States and part of a  
19      larger brick company that is the largest in the  
20      world. I am the Manager of Materials and  
21      Procurement, so I am responsible for the hedging  
22      and purchasing of the fuels that we use to fire

1 the brick. Natural gas is the primary fuel for  
2 that. It is a large cost driver in our product by  
3 the time it goes to market. We are also members  
4 of the Industrial Energy Consumers of America, and  
5 I am also here on IECA's behalf. I think maybe I  
6 have no background in financial markets  
7 whatsoever. I work for a company, and I buy what  
8 it takes to make our plants run. I kind of look at  
9 what my company does and what our partner  
10 companies in IECA do as we are the true end  
11 consumers of a commodity, specifically natural gas  
12 in this case, and I also see that a lot of what  
13 the discussion that we are having today and what  
14 the CFTC questions and this hearing is about does  
15 dramatically affect how we hedge, how we procure  
16 the fuels, specifically natural gas, and it does  
17 have a big effect on our business. So that is why  
18 I am happy to be here today. Thank you for the  
19 invitation, and I look forward to participating.

20 CHAIRMAN JEFFREY: Great. I would be  
21 curious, and I think my fellow  
22 commissioners would share this curiosity as to

1 your views on what we have been discussing so far.  
2 You have sat and not participated, but you have  
3 had an opportunity to listen to market  
4 participants address this question of what  
5 constitutes a foreign board of trade and identify  
6 various factors that might or might not be  
7 relevant to the definition of a foreign board of  
8 trade. I recognize some of this is  
9 speaking a completely different language and  
10 also recognize that your comment, at the end of  
11 the day, are not your own but of your  
12 organizations that represent users. Give your  
13 spontaneous or pre-scripted remarks or reactions  
14 to the kind of discussion that has taken place to  
15 date this morning. The relevance of that is not  
16 to put you on the spot but your reactions are, I  
17 would expect, not at all dissimilar to the kinds of  
18 questions we get from consumers out there, from  
19 legislators, from Congressional staff, et cetera.  
20 This is the dilemma in which we all operate day to  
21 day out in the futures world, and we are all, to  
22 varying degrees, technical experts in some aspects

1 of these markets. You are users. You are the  
2 guys who we have a statutory mandate to look out  
3 for, for lack of a better term. So, your take  
4 here is extremely important and informative to our  
5 thinking as we go forward from today on these  
6 questions.

7 MR. BILLINGS: I missed part of the  
8 morning session, but as far as where lines are, we  
9 won't pretend to be any smarter than the folks  
10 sitting around the table that are having trouble  
11 drawing the lines. No idea there. We have no  
12 idea. What we do know is that, as end users, we  
13 are very concerned that we could have situations  
14 where regulatory inequalities exist such that  
15 trading in the physical markets, trading in the  
16 derivatives moves to exchanges without CFTC  
17 oversight or with less regulatory oversight such  
18 that it takes away from the designated contract  
19 market and ultimately affects the price discovery  
20 process. The price discovery process is really  
21 where our biggest concern lies. Is volume the  
22 right place? I heard loud and clear this morning

1       that no, it wasn't. We are not sure about that.  
2       Possibly markets that are directly linked to  
3       designated contract markets, those, in my opinion,  
4       are obviously affecting the price discovery  
5       process, whether we would like to admit that or  
6       not. There are plenty of arbitrages that exist.  
7       We have guys who sit at desks all day long and  
8       trade the difference between ICE and NYMEX as an  
9       example. Activity that happens on those exchanges  
10      affects the price discovery of natural gas. On the  
11      physical side of our business, what has started to  
12      happen over the last few years is that the pricing  
13      of our physical natural gas is actually being tied  
14      to NYMEX in this particular example. So we have  
15      physical markets that are directly tied, not just  
16      associated but directly tied. I would really call  
17      it a derivative of the futures market. In that  
18      sense, we just feel like it is more important than  
19      ever that the designated contract market have  
20      proper oversight because it is directly affecting  
21      the American consumer.

22                   CHAIRMAN JEFFREY: Thank you very much.

1 That is very helpful. Pat Byrne?

2 MR. BYRNE: I listened to the  
3 discussions this morning and the discussion about  
4 volume. I think it was in relation to should volume  
5 be the consideration to where a Foreign Board of  
6 Trade needs to come under CFTC jurisdiction.  
7 Volume is not important in that respect. However,  
8 volume is very important when we talk about the  
9 day to day reporting. Whether it is a  
10 consideration for whether a board comes under CFTC  
11 jurisdiction or not may or may not be something.  
12 I think probably more, as I read in the Federal  
13 Register, one of the comments that was said and  
14 one of the questions here was "would it be  
15 appropriate for the Commission to exercise  
16 jurisdiction over FBOTs that permit direct access  
17 when they list contracts with underlying products  
18 that are integral to the U.S. economy." Maybe I  
19 read that wrong, but when I see a product that is  
20 integral to the U.S. economy, I think of natural  
21 gas, vitally integral to the U.S. economy. Losing  
22 manufacturing jobs, we struggle with it all the

1 time. Those prices are dictated by what Jeff  
2 talked about and what some of the other folks  
3 talked about and may be some of the inefficiencies  
4 or manipulations that could occur in the over the  
5 counter markets and such. I think some of the  
6 things that were mentioned as far as the  
7 commitments of trade or some of the other stuff  
8 like that is very important, no matter what. Any  
9 market or exchange that contributes to price  
10 discovery for natural gas must have oversight from  
11 the CFTC, and that especially includes over the  
12 counter markets and ICE. Otherwise, I think we  
13 have seen in some of the examples we talked about  
14 here, traders will go the path of least  
15 resistance. If there is not as much oversight  
16 somewhere else, we feel strongly that they  
17 probably will go where there is less oversight and  
18 honestly maybe room for manipulation. I am not  
19 saying that anybody here would do that, but it is  
20 really hard to track. That oversight gap is what  
21 we are hearing and what I am really concerned  
22 about.

1                   CHAIRMAN JEFFREY: Thank you very much  
2 for that, Pat. Any other comments from other  
3 panelists?

4                   MR. WEINREB: Two reactions: First of  
5 all, the statement that traders go to the path of  
6 least resistance, well, there will be some who  
7 will, but most traders go to the more efficient,  
8 the cheaper marketplace in order to do business  
9 legitimately. Secondly and related to that, I am  
10 a great believer in competition. Often in the  
11 global world, you have one exchange having a  
12 single product that no one can compete with  
13 because they have all the liquidity. Actually,  
14 having two markets competing for the same product  
15 tends to enhance liquidity and enhance price  
16 discovery. I feel more comfortable about having  
17 exchanges go head to head in competition than  
18 [INAUDIBLE] wing-fencing an exchange and saying,  
19 no one else can touch this product because they  
20 have got it because that leads to wider spreads  
21 and poor liquidity, and ultimately it does a  
22 disservice to the general public, the end users.

1           MR. BYRNE: We are certainly for more  
2 competition, but it has to be at that level  
3 playing field. I think what we are saying is that  
4 any oversight for specifically the natural gas  
5 market, over the counter ICE, et cetera, needs to  
6 be at least where the oversight in NYMEX is  
7 greater than it is now. So more than one player,  
8 that is fine. Competition is good. However, the  
9 current regulations that are there over the NYMEX  
10 need to apply across the board to whomever those  
11 players are. Competition is great, but oversight  
12 is part of that, too.

13           CHAIRMAN JEFFREY: John Foyle, any  
14 further comments or elaborations on Pat's or  
15 Jeff's comments?

16           MR. FOYLE: On Patrick's point, this is  
17 not a simple matter because we have one contract,  
18 and we are saying, well, one can't have this  
19 regulation the same way that another market's  
20 contract is arranged. The arrangement of the  
21 exchange has to put in place -- and I think,  
22 Chairman, you may come to this question in due

1 course -- in order to ensure that it has  
2 established a properly regulated framework, one  
3 that can respond to its regulator. It covers a  
4 large number of matters from membership criteria  
5 which, in global markets, involves deciding  
6 whether to admit members from different countries,  
7 different jurisdictions around the world.  
8 Twenty-seven different countries, I think at last  
9 count, [INAUDIBLE] services. There is a  
10 range of contracts, not just one contract. It is  
11 true for the United States markets and true for  
12 the IPE. If you split up the way regulations  
13 apply to those different products and apply a  
14 different approach to each one, the cost and the  
15 additional cost that is incurred by users in  
16 complying with a range of different requirements  
17 and the confusion that arises does the quality of  
18 the market a lot of damage which ultimately means  
19 it is less able to compete, perhaps not able to  
20 compete at all effectively with other markets  
21 supplying a similar contract. It is an attractive  
22 concept to seek to achieve. These are not the

1 same rules applying to a particular type of  
2 contract in the sense of the underlying, but these  
3 are not contracts that exist in isolation. They  
4 are part of an elaborate -- in the case of the  
5 markets in question around this table -- global  
6 markets with players from all around the world.  
7 You can't apply two different regulatory  
8 approaches, each designed to achieve to the same  
9 end result of protecting customers who use those  
10 markets, guarding against manipulation,  
11 identifying the dangers when they arise, and  
12 having the powers to take action in conjunction  
13 with the record. All those things would be in  
14 common for the regulators of the markets for the  
15 CFTC and other regulators of markets represented  
16 here, but there is a difference in the approach  
17 between them, and you can't pick and choose which  
18 boots you want to have apply to a particular  
19 contract. To have a different menu for each  
20 contract would be utterly chaotic. It just would  
21 not be effective. It would not be cost-effective,  
22 and it would not enable the competition between

1 marketplaces and exchanges, which is currently  
2 serving consumers in the U.S. and around the world  
3 so effectively in terms of the correlative  
4 offerings they have from competing exchanges.

5 CHAIRMAN JEFFREY: Thank you.

6 MR. BYRNE: I agree. If you are  
7 talking across the range of commodities that are  
8 traded, you are right. However, natural gas is a  
9 regional commodity. It is produced and delivered  
10 and consumed in the United States. So the fact  
11 that what is traded internationally is pretty much  
12 just the paper contracts that go back and forth,  
13 but the physical production and delivery all  
14 occur within certain regions of the United  
15 States. Therefore, and because there are  
16 different markets that all play into this and,  
17 yes, it is very complicated in several markets  
18 that things may go around, it makes it even more  
19 critical in our view that one entity control all  
20 that and have oversight of it, and we feel it is  
21 the CFTC. If I may read a comment from a CFTC  
22 enforcement person, "Because trades on exchanges

1 and over the counter are interdependent, each  
2 energy enforcement case brought by the agency  
3 included violations that occurred on the OTC  
4 market." So, if the OTC markets aren't being  
5 looked at that closely, in the case of natural  
6 gas, then it stands to reason that we think there  
7 should be more. I know it is difficult when you  
8 look across the range of commodities to say, yes,  
9 and one size fits all doesn't work, but I would  
10 say let's start with the most volatile traded  
11 commodity which is natural gas United States  
12 futures and see if that does that. Honestly, from  
13 the view of the consumer, fundamentally right now,  
14 there is no reason why natural gas has been so  
15 volatile. When you look at what is the missing  
16 piece, we don't have enough oversight of the over  
17 the counter markets, ICE included, that we feel is  
18 policing that to say for sure it is not happening.  
19 Maybe it is not. Maybe everything is just there  
20 in its normal market, but some of the things that  
21 the CFTC puts in place with NYMEX, we feel would  
22 be much better served if that would apply to all

1 of the over the counter markets, specifically with  
2 natural gas. The other commodities, I will be  
3 honest, I can't really speak to. I don't trade  
4 sugar or anything else like that.

5 CHAIRMAN JEFFREY: Any other panelists?

6 MR. BELCHAMBERS: Just an observation, I  
7 wouldn't quarrel with any of the indications that  
8 you say are important to you, which is high  
9 quality and supervision and oversight. You said  
10 that the price discovery process was critical,  
11 particularly where you have a related underlying  
12 physical business. I wouldn't quarrel with that.  
13 You want to see trade reporting as regards  
14 borrowing. I wouldn't quarrel with that. Where I  
15 have a problem is it is not actually being alleged  
16 that there are real tangible, identifiable  
17 deficiencies in that process. It seems to me,  
18 from what I have heard from the CFTC and from the  
19 FSA, that they have an exceptionally good working  
20 relationship. They pool a lot of information  
21 under MOUs. You could argue, having also said the no-action  
22 letter does not mean that there is a lot of jurisdiction

1 of the CFTC. You could argue but  
2 actually do oversight to some extent. I have a  
3 real problem about couching the argument in those  
4 terms. So far as the OTC markets are concerned, I  
5 would say, wouldn't I, that this is probably  
6 largely a domestic issue, and I am not entirely  
7 sure that this falls within the boundaries of this  
8 particular public hearing. I said that there are  
9 issues that you may well want to see addressed,  
10 and I wouldn't quarrel with that, but I am just  
11 not sure they sit easily here, which is about  
12 where the location of an exchange is and the  
13 criteria that you take into account in determining  
14 location. Those are my only observations.

15 CHAIRMAN JEFFREY: I think the argument  
16 of the OTC, the U.S. OTC versus the U.S. exchange  
17 question is important for natural  
18 gas markets and energy markets broadly, but it is  
19 a separate and distinct question from the  
20 definition of a foreign board of trade and the  
21 degree of coordination and cooperation and  
22 information exchange that is maybe necessary and

1 appropriate as between the CFTC and Federal  
2 regulators in other jurisdictions. As it relates  
3 to that latter question, I think this leads  
4 nicely into our final topic for the afternoon.  
5 As we think about working relationships  
6 with other regulatory authorities, the focus,  
7 of course, in this discussion of timing,  
8 circumstance, et cetera, has been the CFTC and the  
9 FSA over the WTI contract, the ICE Futures-NYMEX  
10 issue. Who is to say the Brazilians might not be  
11 coming to the CFTC in a few years, wondering about  
12 the Brazilian soybean contract that is traded in  
13 Chicago and have similar questions to us that we  
14 are posing to day in the context of a WTI  
15 contract? The question is: When it comes to  
16 understandings between regulators and methods of  
17 cooperation and information exchange, are there  
18 certain or are there any kind of minimum baseline  
19 requirements that any of the panelists or others  
20 think we ought to be certain to include in our  
21 discussions with other regulators to make sure  
22 that we are adequately discharging our

1 statutory responsibilities under the  
2 Commodity Exchange Act and to make sure  
3 we are actually doing what we need to do to  
4 maintain the integrity of the futures  
5 markets in the U.S.?

6 MR. STEIL: I am sure you are already doing  
7 this, but I will go back to the comment I made  
8 this morning. I think there is no more important  
9 task for the Commission when it gives a no-action  
10 letter than to ensure itself of the integrity of  
11 the foreign clearinghouse because if there is a  
12 significant amount of U.S. participation in a  
13 foreign market and that foreign clearinghouse does  
14 collapse, the reverberations could spread in the  
15 U.S. well beyond those market participants. So I  
16 would put first and foremost in evaluating the  
17 no-action process going forward, how much do we  
18 know about the risk management at the foreign  
19 clearinghouse? I think as exchanges become global  
20 enterprises, clearinghouses therefore become even  
21 more important than they are now, and they are  
22 pretty darn vital now. These are AAA-rated banks

1 or the equivalent. They produce enormous  
2 efficiencies in the trading market. The cash  
3 markets have only recently adopted them, and we  
4 have seen on-exchange trading rocket. But as they  
5 become more efficient, they become more  
6 systemically significant because if they collapse,  
7 the reverberations could be enormous. I put the  
8 issue of the clearinghouses front and center.

9 CHAIRMAN JEFFREY: Excellent point,  
10 thank you. I promised I would reverse the order.

11 MR. WEINREB: I think it is a difficult  
12 questions to answer because in one sense, the  
13 information sharing agreements you are putting in  
14 place, any regulation you are putting in place are, in  
15 a sense, blank checks. You don't really know what  
16 is going to come next week, next month, what the  
17 issues are. Realistically, what you are looking  
18 for is a feeling of comfort that when you pick up  
19 the phone or send an email, they are going to  
20 respond. They are going to respond positively. I  
21 accept, as Benn said, there may be specific areas  
22 you want to look at more strongly, but you are

1 really looking to get hearts and minds, I think,  
2 ultimately. I am not sure there is more detail.  
3 It is hearts and minds. Actually having a  
4 regulator say, yes, we fully share what you want  
5 to do. We are fully willing to cooperate, his  
6 examples of ways of cooperation with other people.  
7 That is ultimately, I think, what you are looking  
8 for.

9 CHAIRMAN JEFFREY: Thank you very much.  
10 Mr. Foyle, any further elaboration?

11 MR. FOYLE: No.

12 CHAIRMAN JEFFREY: Kevin, are you there?  
13 Any further comments on the question?

14 MR. O'HARA: I will reserve my time on  
15 that.

16 MR. BYRNE: I think you are talking  
17 about using foreign regulators to oversee some  
18 things, in this particular case, the ICE. I think  
19 that CFTC and Congress shouldn't necessarily rely  
20 on foreign regulators, especially when it comes to  
21 natural gas. Again, I keep coming back to that  
22 because, as I said, it is a regional commodity.

1 It is produced and traded and consumed here in the  
2 United States. Allowing foreign exchange to  
3 oversee natural gas price discovery is, in our  
4 view, flawed because foreign regulators are  
5 disconnected from the American public and not  
6 really held accountable to our interests. If we  
7 have a question about the regulation or oversight,  
8 we have avenues here in the United States, as  
9 consumers of the commodity, to go back through and  
10 do that. We can't force you to do anything. That  
11 is the view there from our perspective.

12 CHAIRMAN JEFFREY: We appreciate that.  
13 Thank you.

14 SIR REID: I don't trade OTC natural gas  
15 futures.

16 CHAIRMAN JEFFREY: Any comments more  
17 generically on things? If you were in our  
18 position and you were confronted daily with issues  
19 that were of market significance but outside of  
20 one's regulatory brief and therefore reliant upon  
21 the nature and substance of your relationships  
22 with other regulators, are there certain things

1 you would want to make sure were always touched  
2 upon in any regulator discussion about a specific  
3 product or contract, be it natural gas or anything  
4 else?

5 SIR REID: I think of the points that he  
6 made, I think it is important that CFTC would have  
7 a complete reporting mechanism that told them what  
8 volumes were being traded and by whom and that  
9 they have a picture of how these trades were being  
10 financed, whether they were cleared from one party  
11 to another. I would also, if I was in your  
12 position, want to know whether the participants  
13 were trade participants who were going to use this  
14 natural gas in their own business or whether they  
15 were financial participants using this for  
16 hedging. You would build an information package  
17 around that. I think if you had that, then you  
18 would be able to get a very clear picture. Now, I  
19 am sure you have that at the moment, but if you  
20 don't, I think that is complete. At the same  
21 time, looking forward, I think you would need to  
22 give thought to the arrival of natural gas coming

1 in the shape of LNG on how big a part is that  
2 going to play in your market and how that is  
3 priced and if that comes in under contract or does  
4 it come in on a spot basis and how that whole  
5 thing is going to be handled. The deficits will  
6 be made up by LNG, and that is something that  
7 needs to be thought about. So you put a structure  
8 in place to do that. It is an issue that really,  
9 as Anthony says, falls outside of what we would be  
10 doing today, but it is a real point. That is a  
11 market point that must be addressed.

12 CHAIRMAN JEFFREY: Those are good  
13 thoughts. Thank you very much.

14 MS. CRONIN: Just a couple of  
15 observations: I think, obviously, in dealing with  
16 foreign regulators, the relationships that you  
17 establish are key, as is regulatory cooperation.  
18 You need to know that if there is a problem with a  
19 product, that your partner in the foreign  
20 jurisdiction is going to take the necessary action  
21 to ensure that remedial action is taken. So,  
22 regulatory cooperation, I think is what is

1 essential. If the consumers don't have direct  
2 access to the foreign regulator, they need to rely  
3 on the CFTC to correlate regulatory enforcement  
4 actions with the foreign regulator. Then just the  
5 obvious, I think you need to make sure that the  
6 foreign regulator has processes in place to ensure  
7 that there is adequate oversight of the regulatory  
8 system in the markets that it oversees and  
9 adequate market surveillance.

10 CHAIRMAN JEFFREY: Thank you very much  
11 for those remarks.

12 MS. ROSS: Really, to my mind, I think  
13 this goes back to making sure that there is  
14 regulatory and legal certainty here, and I think  
15 the risk that I see is that in extreme  
16 circumstances, additional host regulatory  
17 requirements could result in an exchange only  
18 being able to comply with one regulator's  
19 requirements if it directly contravenes another  
20 regulator's requirements. That is clearly not  
21 something which I think is tenable or desirable.  
22 To our minds, therefore, it is very important that

1       there is clarity about which regulatory,  
2       statutory, and legal requirements apply and that  
3       it is used in a way to ensure overall market  
4       confidence and market integrity in the global  
5       market. I think, as others have said, we would  
6       therefore recommend that the regulatory treatment  
7       of foreign board of trade remains broadly  
8       unchanged with the regulators working closely  
9       together, sharing information as necessary to  
10      provide appropriate risk mitigation where we see  
11      regulatory issues or gaps arising. I think, very  
12      rightly, Kathleen was pointing to that is what our  
13      dialogue is there for, that we actually do  
14      exchange those views. Where we see our domestic  
15      players maybe having concerns on something like  
16      that, those are the issues we should bring to our  
17      regulatory corporation to make sure that between  
18      us, we can deal with those issues. I should also  
19      clarify that certainly we don't have direct  
20      oversight over the ICE OTC platform other than what I  
21      [INAUDIBLE] ICE futures in the U.K.  
22      market, and we have no natural gas contract.

1                   CHAIRMAN JEFFREY: Great, thank you very  
2 much, Verena. Jeff Billings, any additional  
3 comments?

4                   MR. BILLINGS: Yes, just one point of  
5 clarity is we trust that FSA, and I don't know  
6 that much about FSA, and I am not suggesting that  
7 FSA doesn't have the ability to regulate markets.  
8 We are absolutely sure you do. Really, what we  
9 are looking for is continuity, such that any  
10 information sharing that could go on between a  
11 foreign regulator and a U.S. regulator is  
12 certainly welcome. We don't want to duplicate  
13 efforts. But we do feel like the information that  
14 is gathered from the designated contract markets  
15 for the CFTC, that same data should be obtained  
16 for FBOT as well. We feel like, although there  
17 could be some overlap and that would be welcome,  
18 that we should still have the same level playing  
19 field for a designated contract market and a Foreign  
20 Board of Trade. I guess another little bit of a  
21 can of worms was opened there that I will just  
22 step into a little bit, and that is ICE OTC that

1 is not regulated by FSA. I would again say that  
2 it is our belief that those types of markets are  
3 directly affecting the price discovery of  
4 designated contract markets, and that is a place  
5 where there is potentially some room for  
6 additional oversight.

7 CHAIRMAN JEFFREY: Thank you very much,  
8 Jeff.

9 MR. REGAN: I just have three quick  
10 comments. Earlier today, at different times,  
11 there have been suggestions or indications of  
12 different nuances in terms of regulatory  
13 approaches with different regulatory regimes. I  
14 think it is important to note, to be fair, that  
15 there are other areas where the regulatory policy  
16 is pretty much the same. As a specific example is  
17 the IOSCO principles for screen-based trading  
18 which the CFTC adopted as part of its regulatory  
19 policy structure, I think back in 1990. There, in  
20 terms of regulatory coordination with other  
21 regulators, it may just simply be a matter of  
22 comparing notes in terms of how that is actually

1 applied, but there, the standards should be the  
2 same. In terms of other areas where there may be  
3 some apparent difference in terms of regulatory  
4 approach, in the no-action process, I think  
5 overall historically the CFTC staff has done an  
6 excellent job in terms of the technical analysis of  
7 regulatory regimes and other areas. I would just  
8 simply point out two areas with respect to  
9 regulatory coordination where the CFTC may want to  
10 drill down and obtain specific information and  
11 specific details. One would be in terms of the  
12 basic market oversight with regard to the quality  
13 of the data that is collected, the recency of the  
14 data, and what the historical experience of the  
15 regulator has been, whether collecting at a  
16 certain time works and obtaining data at other  
17 times or on a call basis, what their experience  
18 has been and how that has worked for them. The  
19 other area is with regard to a topic that came up  
20 a number of times this morning with regard to  
21 position limits, and not all regulators require  
22 them. I think, again to be fair, the CFTC, in

1 discussing that topic with other regulators, would  
2 benefit from finding out what their historical  
3 experience has been with the market oversight they  
4 do provide to get a good understanding of the  
5 business culture there and how they have been able  
6 to provide the market oversight that they do,  
7 notwithstanding having a hard number and a rule  
8 somewhere.

9 CHAIRMAN JEFFREY: Great, thank you very  
10 much, Brian.

11 MR. REITZ: Thank you. I just want to  
12 reiterate some of the points that were already  
13 made. I think the current process works well. I  
14 think the due diligence review that is part of the  
15 no-action letter process is the route going  
16 forward. I think the establishment of the  
17 principles, be it the IOSCO or also the project  
18 that you started with CFTC and CESR, will go to further  
19 harmonize things. WE can only encourage you to  
20 continue to do that. I want to pick up on a point  
21 that Verena raised earlier in terms of conflicts  
22 in regulatory schemes that might occur in multiple

1 regulatory environments. I think that is one  
2 where, especially if we go down that route of  
3 regulating markets on a per contract basis, we  
4 will end up in a real mess. If I look at our  
5 rulebook, 95 percent or probably 99 percent of our  
6 rules are across all products, across market  
7 segments that we have in terms of products on our  
8 exchange. I am sure that the 1 percent that is  
9 left, which is the product design, does not  
10 justify having 99 percent of your rulebook apply  
11 to several regulatory regimes that may be in  
12 conflict with each other.

13 CHAIRMAN JEFFREY: Thank you very much,  
14 Peter. For the last word, Anthony Belchambers,  
15 but this wasn't intended to give you the last word.  
16 [Multiple persons speaking simultaneously.]

17 MR. BELCHAMBERS: What I was going to  
18 say was, in looking at the question, to what  
19 extent, if any, should the Commission rely on a  
20 foreign regulator for assistance, that will be a  
21 variable answer because it will come out of the  
22 findings of your due diligence that you exercise

1 on that overseas regulator. So I don't think  
2 there is a consistent answer to that question. In  
3 terms of what has been mentioned, mention has been  
4 made about the importance of being able to inspect  
5 books and papers, I think you already have that  
6 under the no-action process. I would say also  
7 information on trading volumes, I think you have  
8 that under that process. In response to some of  
9 the observations that have been made by Patrick  
10 and Jeff, I would just make three quick  
11 observations. The first one is acquiescence to  
12 the CFTC jurisdiction, I think that is offered as  
13 well under that process. There is some direct  
14 acquiescence to that jurisdiction under the  
15 procedure. Finally, I think one of the things we  
16 haven't really touched on to any great extent is  
17 market surveillance, investigation, and  
18 enforcement, and that may get closer to what you  
19 both have been saying. So that is a key part of  
20 due diligence, and part of that process is what  
21 powers of market intervention does the offshore  
22 licensing authority have over the exchange. In

1 particular, I will mention what Kathleen said, she  
2 used the word, partner. I think that is a  
3 critically important word in making sure that  
4 those information flows are not just received but  
5 where it is necessary, action is taken on them,  
6 and that is the one thing I would say. In relying  
7 on an overseas regulator, you want to be  
8 absolutely sure that where you have particular  
9 concerns, that overseas regulator will take  
10 action. I think that is critical. I think that  
11 probably addresses the two points that you both  
12 made.

13 CHAIRMAN JEFFREY: That is well stated.  
14 We are pretty much through the formal agenda. I  
15 would like to turn to my fellow commissioners for  
16 any closing questions or comments.

17 COMMISSIONER DUNN: I would like just a  
18 quick question on this panel on this particular  
19 subject since I passed on the time before.

20 CHAIRMAN JEFFREY: You have double time.

21 COMMISSIONER DUNN: I was taken by Sir  
22 Bob's answer in the past round when he talked

1 about why people would trade at a particular  
2 location. Then listening to Patrick and Brian, it  
3 brought to mind the great American bank  
4 robber/philosopher who, when asked why he robbed  
5 banks, said, "That is where the money is." People  
6 are going to go follow a path of least resistance.  
7 If we are going to rely on the equivalency of other  
8 regulators, at what level do we need to  
9 understand what that regulator is about and how  
10 they do their regulation vis-à-vis what we are  
11 asking for? I bring this up because I spent about  
12 a decade at USDA as an Under Secretary,  
13 negotiating phylo-sanitary standards.  
14 The hoops that we went through to bring in  
15 Hass avocados to the United States extended  
16 over multiyear periods, public hearings,  
17 Federal Register comments on numerous occasions,  
18 extension of the regulations period, and  
19 extension of the comment period -- just to bring in  
20 avocados. What we would look at is we had a  
21 risk assessment of the efficacy of that regulatory  
22 regime to determine whether or not there

1 was a risk of disease. The same concept applies  
2 here. To what extent is it incumbent upon us to  
3 develop criteria for what is equivalent and to  
4 what extent do we have a requirement to audit  
5 those others or find out what those other  
6 regulators are doing? Verena, I am looking  
7 at you.

8 MS. ROSS: I think it is very important  
9 that we each understand how we go about the job of  
10 doing regulation, what our objectives and aims  
11 are, and how we are getting to achieving those  
12 objectives and aims. To my mind, the process you  
13 go through with the third party consideration and  
14 the consideration you go through in a no-action  
15 letter regime, to my experience, I haven't gone  
16 through it personally, but that sounds to me like  
17 it is pretty comprehensive. You actually go  
18 through trying to understand exactly that. I  
19 think I go back to what I said earlier this  
20 morning, which is it is ultimately about achieving  
21 equivalent aims. That doesn't mean that every  
22 single way of getting to those aims will be

1 exactly identical for how we look at the things,  
2 and that is partly driven by historical reasons  
3 and partly driven by market structures and so on.  
4 For example, we talked about position limits. We  
5 don't have position limits. That is right.  
6 However, we have very clear processes under  
7 which the exchanges need to monitor their markets.  
8 We spend an awful lot of time, working with the  
9 exchanges, making sure the standards for market  
10 monitoring and achieving market integrity and  
11 price formation integrity are there and are  
12 sufficient. That means that we require them to  
13 look specifically at large trades as they come up  
14 toward expiring. Who is playing in these markets?  
15 What are their intentions? We work very closely  
16 with the exchanges, looking at those types of  
17 issues and making sure that ultimately there are  
18 no concerns about anyone manipulating the markets  
19 or doing things which basically provide for no  
20 proper price formation mechanisms. I think there  
21 are an awful lot of things which, even though we  
22 might not exactly go about in the same way, we

1 ultimately are working exactly to the same aims  
2 and objectives. Rightly, I think you point out  
3 that we need to understand that and we need to  
4 work with each other to be absolutely sure that we  
5 understand how it is working. I think as long as  
6 we do that, we can make sure that there is  
7 equivalent consumer protection, equivalent  
8 investor protection, which by the way, is also  
9 something which we have to evaluate when we get a  
10 foreign exchange wanting to come into the U.K.  
11 That is exactly the same kind of assessment that  
12 we go through. Obviously, the CFTC has passed  
13 with flying colors.

14 MR. WEINREB: I agree with what the FSA says.  
15 I am not sure I would be in a position to disagree.  
16 As a more general answer to the question,  
17 essentially, there are two levels of which you  
18 should be doing the due diligence. First of all  
19 is the basic fact finding. Are they a member of  
20 IOSCO? Do they endorse IOSCO principles? What is  
21 the reputation of the regulator in international  
22 circles? That answers some of the questions.

1 Then the next level down is, okay, we, the  
2 Commission, have a set of core principles that we  
3 have to operate under. Let's do a one to one  
4 comparison. This principle, how do you do it in  
5 your jurisdiction? Then it allows you to end up  
6 having your own shopping list, and you have  
7 checked every item on the shopping list. If you  
8 got satisfactory answers in relation to each of  
9 the questions, then I think you have equivalence.

10 CHAIRMAN JEFFREY: Great, thank you.

11 MR. REID: I think if you look back in  
12 your history, you will find the answer to the  
13 question. Benjamin Franklin spent 16 years in  
14 London, and he spent a similar amount of time, not  
15 as many as 16 years, in France. He made the  
16 journey. He understood the people. Like John  
17 Adams who went to Holland, he got recognition from  
18 Holland. To get anything from the Dutch is  
19 extremely difficult in any time, but he got  
20 recognition. The important thing was these two  
21 men actually made the journey and they spent the  
22 time. I think if regulators are going to know

1 each other, they actually have to spend the time  
2 in getting together and understanding and meeting  
3 each other and discussing their common problems.  
4 I don't think, Chairman, there is any escape from  
5 that. That is the way your predecessors did it,  
6 and that is the way I think it has to be done.

7 CHAIRMAN JEFFREY: Thank you for that,  
8 Sir Bob.

9 COMMISSIONER HATFIELD: Thank you, Mr.  
10 Chairman, I just want to thank you again for  
11 organizing this hearing today and the staff for  
12 helping put it together. I mostly thank all of  
13 you for coming a long way and for spending the  
14 whole day. I think it has been very informative.  
15 What I take away from it is a reconfirmation that  
16 there are benefits and detriments to working in  
17 each regulatory environment, in every regulatory  
18 environment. It is very difficult, if not  
19 impossible, for us to create a completely level  
20 competitive playing field in that process. I do  
21 think that we have come away from here today with  
22 some good ideas in which we can continue to look

1 at how we protect the integrity of the price  
2 discovery process and also consumer and investor  
3 protection. I think the ideas here today help us  
4 as we move forward in addressing those issues.  
5 So, thank you all again very much for coming  
6 today.

7 CHAIRMAN JEFFREY: Thank you, Fred.

8 COMMISSIONER LUKKEN: I just want to  
9 reiterate my commissioners. Thanks, everybody,  
10 for coming today. I know it is a long way for  
11 some of you. I tend to agree with some of the  
12 comments made at the end. As I have stated in the  
13 past, I think regulating nowadays in the modern  
14 economy is as much relationships as it is  
15 following rules. So we need to really get into  
16 the weeds with our fellow regulators and learn  
17 about their systems, understand them, see how they  
18 are comparable to our own systems. There is a  
19 tendency for us to want to be clipboard  
20 regulators, to be able to check off certain boxes,  
21 and if we feel comfortable with those boxes, then  
22 we sort of go on with our business. I think

1       nowadays the world is a little squishier than that.  
2       We have to be able to do really qualitative  
3       analysis of the risks that might be involved with  
4       regulating, and it requires us to do some really  
5       analytical work in this area, but I think we can  
6       do it. We have an excellent staff here at the  
7       CFTC, and it is something I look forward to  
8       working with them and the industry on into the  
9       future.

10                   CHAIRMAN JEFFREY: Thank you all. I  
11       would just like to offer a comment on the process  
12       and then my own thanks to all of you for  
13       participating. First, in terms of the process  
14       going forward, as we mentioned at the outset, the  
15       comment period is open through July 12th. We  
16       encourage and, of course, welcome your written  
17       comments. We also, as a general matter, pride  
18       ourselves, individually and collectively, as  
19       having a reasonably open door policy here. So, to  
20       the extent you want to talk to us about specifics  
21       or follow-on of various issues that were raised  
22       here or others that weren't raised that should

1 have been, we are open to those discussions.  
2 Harking back to some of the themes sounded at the  
3 outset, we have a difficult and challenging  
4 balance to strike here between, on the one hand,  
5 maintaining what I believe has always been a  
6 hallmark of our approach to regulation at the  
7 CFTC -- a very pro-competitive, pro-globalization  
8 regulatory philosophy and the theory that, at the  
9 end of the day, that brings lower cost to the  
10 consumers, the ultimate beneficiaries of sound  
11 regulation, while at the same time, making sure  
12 that the playing field is leveled, to use  
13 the terminology bantered about here. Most  
14 importantly, the real obligation that we have is  
15 to make sure we are adequately discharging our  
16 responsibilities to maintain the integrity of the  
17 futures markets as environments for transparent,  
18 competitive, fair price discovery that ultimately  
19 benefits all consumers. That is the tension that  
20 we are struggling with here. I think every one of  
21 you, just by your being here and investing the  
22 time, an entire working day and for some of you

1 who have come from distance, even more,  
2 speaks volumes to your and our shared commitment  
3 to achieving the multiplicity of objectives we are  
4 all trying to achieve including, most importantly,  
5 maintaining the integrity of these markets in a  
6 world that continues to grow, and to serve the  
7 critical market price discovery and hedging  
8 functions while letting all of you go about your  
9 various lines of work at exchanges or as market  
10 participants in various capacities or as  
11 consumers, knowing that the price you pay, whether  
12 you like it or not, the absolute level is set in a  
13 fair and competitive manner. Again, I thank you  
14 all for being here. I also want to thank  
15 specifically the CFTC professionals and all the  
16 employees of the CFTC who worked very hard and  
17 long hours in the preparation for this hearing on  
18 everything from the work papers and discussion  
19 agendas that you have all received to the  
20 logistics of these nice name tags and lunch.  
21 Those of you who have been involved in  
22 organizing events know that in many cases, the

1 devil really is in the details, and those details  
2 just don't happen. I thank all of you and your  
3 colleagues upstairs who have really helped make  
4 this, what I think, a successful afternoon's  
5 discussion. With that, I think I will call the  
6 proceedings to a close. Again, we welcome your  
7 comments and follow-up as we proceed to -- to use  
8 a football and soccer analogy -- move the ball  
9 down the field, as it were, on these important  
10 issues. Thank you all very much.

11 (Whereupon, at approximately 3:17  
12 p.m., the meeting was adjourned.)

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