

Integrated List of CFTC Staff Questions Concerning the Application of U.S. Futures Exchange, L.L.C. (USFE or Exchange) for Designation as a Contract Market

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Bylaws

1. Section 5.1 of the Bylaws states that the Directors, managers and officers of the Exchange shall have authority and power set forth in USFE Rule 804, Emergency Powers. Rule 804 permits the Chief Executive Officer or his or her designee to take actions that may be appropriate under emergency conditions. Please discuss the authority and power provided to the Directors, managers and employees under Section 5.1 and describe how and when such authority and power might be exercised.

- Rule 804 and Section 5.1 of the Bylaws are intended to work in a coordinated manner. As an initial matter, Rule 804 permits the Chief Executive Officer or his or her designee to take actions under emergency conditions. Section 5.1 of the Bylaws in turn provides that “Directors, managers and officers of the Exchange shall have authority and power set forth in Rule 804” Section 5.1 is intended to confirm that Directors, managers and officers may have such authority and power. However, they may only have such power and authority if they are designated by the Chief Executive Officer in this respect under Rule 804.

2. Section 6.5 of the Bylaws addresses quorum and voting at meetings of the Board. Please describe the impact on quorum and voting, if any, because of the existence of Class A, Class B. and Public Directors. Are all Board members able to address and vote on all issues, or are votes on certain issues restricted to one class of Directors? Would it be possible to have a quorum but not to decide an issue because too few members of one class of Directors were present?

- The existence of three classes of Directors does not impact the quorum requirements. As set forth in Section 6.5 of the Bylaws, a majority of the entire Board constitutes a quorum at any meeting of the Board, regardless of which directors constitute such majority. Furthermore, a majority vote of the Directors present at any duly constituted Board meeting, if a quorum is present, will constitute the act of the Board in accordance with Sections 5.1(d) and 6.5 of the Bylaws, regardless of which Directors are part of such majority vote.
- There are no issues set forth in the Bylaws that are reserved for one particular class of Directors. All Directors are permitted to address and vote on all issues. The only special voting right included in the Bylaws is that if a vote of the Board is evenly divided, then the Class A Directors will have a one vote majority (*i.e.*, a Casting Vote as defined in the Bylaws) on the matter at issue except for specified trading rules set forth in Section 5.1(d)(i)-

(xii) of the Bylaws.

- Because it is impossible to have a quorum without at least one Class A Director present, it would not be possible that an issue remain undecided because too few members of one class of Directors were present. Even if only one Class A Director were present, such Class A Director could exercise the Casting Vote if the Directors present at such meeting were evenly divided on the issue.

3. Please explain the apparent inconsistency between Sections 9.8(a)(ii) and 9.8(b) of the Bylaws.

- There does appear to be an inconsistency and USFE's proposed solution would be to remove Section 9.8(b).

4. Section 10.1 of the Bylaws limits the liability of the Exchange, its shareholders, members, and others, except in instances where there has been a finding of willful or wanton misconduct. The previous version of the Bylaws also included a finding of fraud among the reasons for not limiting liability. Please discuss why a finding of fraud was deleted as a reason for not limiting liability.

- As a drafting matter, fraud was deleted from Section 10.1 because it is subsumed by and constitutes only one form of "willful or wanton misconduct". Fraud, together with other forms of willful or wanton misconduct, therefore remains a reason for not limiting liability under the Bylaws.

5. Section 10.2(d) of the Bylaws appears to permit Directors who are parties to an action brought against the Exchange other than by or in the right of the Exchange, as well as actions brought by or in the right of the Exchange, to vote on whether they should be indemnified. Please discuss the rationale for this position.

- Although Section 10.2(d) of the Bylaws does not specifically prohibit a Director who is a party to such an action from voting on whether he or she should be indemnified, we note that any Director in such a situation would nevertheless be subject to the restrictions of Rule 207(d) of USFE. Rule 207(d)(i) provides that:

“No person shall vote, participate in deliberations or take any action involving the regulatory functions of the exchange as a member of the Board of Directors of the Exchange or any committee of the Exchange on any matter involving a Named Party in Interest if such member:

- (A) is a Named Party in Interest;
- (B) is an employer, employee, or fellow employee of a Named Party in Interest;
- (C) has any other significant, ongoing business relationship with a Named Party in Interest; or

(D) has a family relationship with a Named Party in Interest.”

- Moreover, any decision by the Board of Directors of USFE to indemnify a Director would have to comply with the requirements of Section 10.2(a) and 10.2(b), as applicable, of the Bylaws and the limitations on indemnification included therein.
- Finally, we note that Section 5.1(f) of the Bylaws imposes on each Director the fiduciary duties owed by directors of a Delaware business corporation. Thus, in addition to the specific provisions of the USFE Rules and Bylaws, a Director would also be compelled by his or her fiduciary duties to act appropriately when acting with respect to indemnification matters.

6. Please describe the process by which the non-public Directors of USFE's Board will be selected. Will the non-public Directors be selected by any official, employee or board of a parent company of USFE? Will any Class A Directors be drawn from the officials, employees or boards of USFE's parent companies?

- The Class A Directors will be selected by the Class A Shareholder, U.S. Exchange Holdings, Inc., a Delaware corporation wholly owned by Eurex Frankfurt A.G. The Board of Directors of U.S. Exchange Holdings, Inc. will decide whom it will elect as Class A Directors of USFE. The six Class A Directors of USFE may include officials, employees or members of the boards of U.S. Exchange Holdings, Inc., its parent or affiliated companies.
- The Class B Directors will be selected by the Class B Shareholder, which is Boston Holdco. As described above, the General Partner will have management control over Boston Holdco and will therefore control the selection of Class B Directors by Boston Holdco. As described above, the General Partner’s Board of Directors consists of five individuals, one each appointed by one of five specified RCA Participants or their affiliates (*i.e.*, Citigroup, Deutsche Bank, Goldman Sachs, Lehman Brothers and Morgan Stanley). It is expected, although not required, that each Class B Director will be an employee or official or otherwise associated with one of such five RCA Participants or their affiliates.

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