

April 13, 2005

BY E-MAIL AND CERTIFIED MAIL

Ms. Jean A. Webb
Office of the Secretariat
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Request for Approval of Phase II of a Global Clearing Link

Dear Ms. Webb:

The Board of Trade of the City of Chicago, Inc. (“CBOT®” or “Exchange”) appreciates the opportunity to comment on the March 14, 2005 request of The Clearing Corporation (“CCorp”) that the Commodity Futures Trading Commission (“Commission”) take certain regulatory actions to permit implementation of Phase II of a Global Clearing Link (“GCL” or “Clearing Link”) between Eurex Clearing AG (“Eurex Clearing”) and CCorp. U.S. Futures Exchange, LLC (“USFE”) has also submitted its own letter to the Commission, dated March 14, 2005, requesting its permission to utilize Phase II of the Clearing Link.

On October 21, 2004, the Commission approved CCorp’s application for permission to implement Phase I of the Clearing Link.¹ Phase I allows CCorp clearing participants to clear certain Euro-denominated futures and options contracts that are executed on Eurex Deutschland (“Eurex”) through CCorp, in CCorp’s capacity as a Special Clearing Member of Eurex Clearing.

I. CCorp’s Description of Phase II of the Clearing Link

Phase II of the Clearing Link is designed to permit Eurex Clearing members to clear either U.S. Dollar-denominated or Euro-denominated futures and options contracts that are executed on USFE through Eurex Clearing, in Eurex Clearing’s capacity as a Special Clearing Member of CCorp.

In its March 14, 2005 letter, CCorp has modified the focus of its description of Phase II of the Clearing Link from that in its April 26, 2004 letter. CCorp’s April 26, 2004 letter, at page 2, states that:

¹ On April 26, 2004, CCorp submitted a letter to the Commission requesting that the Commission allow CCorp and futures commission merchants (“FCMs”) to commingle segregated and secured funds in order to permit customers to clear both their USFE transactions and their Eurex transactions through CCorp. On October 21, 2004, the Commission issued an Order permitting such commingling, and at the same time, issued an accompanying interpretation of its bankruptcy rules.

Phase II would extend the principles of the Global Clearing Link to permit the *clearing* of U.S. Dollar-denominated contracts traded on USFE at either The Clearing Corporation, as is the case currently, or at Eurex Clearing . . . as well as the listing on USFE of Euro-denominated products that are traded on Eurex with the option of *clearing* those contracts at either The Clearing Corporation or Eurex Clearing (emphasis added)

CCorp's March 14, 2005 letter states, at page 2, that:

Phase II of the GCL will permit a trader executing transactions on USFE – all of which are cleared by CCorp as the DCO to USFE – to have its positions *carried* by a member of Eurex Clearing rather than by a CCorp clearing participant. (emphasis added)

The March 14, 2005 letter similarly states, at page 2, that:

Under Phase II of the GCL, market participants will be able to trade on USFE, have those trades cleared by USFE's DCO, CCorp, and then have the resulting position *carried* either by CCorp clearing participants or by members of Eurex Clearing. (emphasis added)

This shift in formulation is also apparent in footnote 3 to the March 14, 2005 letter, which states that:

Consistent with the Order issued by the Commission in connection with Phase I of the Clearing Link, contracts traded on Eurex will continue to be cleared through Eurex Clearing, but may, if approved for clearing through the GCL, be *carried* by CCorp clearing participants in their CCorp accounts. (emphasis added)

Thus, in April 2004, CCorp represented to the Commission that Phase II of the Clearing Link would permit trades executed on USFE to be *cleared* at either CCorp or Eurex, and in its March 14, 2005 letter, CCorp has instead stated that although Phase II would permit USFE trades to be *carried* by either CCorp clearing participants or Eurex Clearing members, it would require that CCorp *clear* all USFE trades. Despite CCorp's modified description of the choice that would be offered by Phase II, CCorp has not changed its explanation of the substance of the responsibilities that Phase II would assign to Eurex Clearing.

In its March 14, 2005 letter, CCorp has described the relationship between CCorp and Eurex Clearing as one of "outsourcing" certain processes and operations to a service provider, and has described Eurex Clearing as CCorp's agent in this regard. In particular, CCorp has represented that Eurex Clearing would perform the following functions, among others, with respect to Euro-denominated contracts traded on USFE²:

² On page 4 of its letter, CCorp has stated that "[t]hese services are the same or highly similar to those services provided by Eurex Clearing to CCorp that support CCorp's operation as a special clearing member

- Notifications and allocations of deliveries, and administration of the delivery process through settlement accounts
- Option exercises and assignments
- Post-trade management, including give-ups and take-ups
- Collection and maintenance of original margin from Eurex Clearing members³
- Variation margin calculations, collection and payment
- Exchange of data with CCorp and performance of daily reconciliations of transactions and positions, cash balances, variation margin, credit support coverage, and delivery obligations and fulfillment
- Calculation of settlement prices

Eurex Clearing will not only collect original margin from Eurex Clearing members with respect to cross-listed Euro-denominated contracts traded on USFE. Eurex Clearing will also collect original margin from its Clearing members to support USFE transactions in U.S. Dollar-denominated products. Moreover, the Link Clearing Agreement authorizes Eurex Clearing to calculate and collect such original margin from its Clearing members in accordance with its own Rules. Link Clearing Agreement, Section 6(a). As discussed below, Eurex Clearing will maintain these funds in its own accounts and will not forward such original margin to CCorp. Furthermore, as stated in proposed USFE Rule 510(b), the functions described above will generally be governed by German law.⁴

Thus, Eurex Clearing will be performing virtually all of the essential clearinghouse functions for which CCorp is responsible, and it will be doing so totally outside the regulatory reach of the Commission. The only recourse the Commission will have is the withdrawal of approval of the arrangement. This type of draconian action has never been a useful or appropriate regulatory tool.

II. A DCO may not outsource essential clearing functions to an unregistered entity

of Eurex Clearing as approved under the Commission's Phase I Order." Any such similarity is not dispositive with respect to Phase II, since the relief granted by the Commission with respect to Phase I only permitted CCorp to clear transactions executed on Eurex, and did not address the clearance of transactions executed on a U.S. designated contract market by an unregistered foreign clearing organization.

³ Eurex Clearing will also collect and hold original margin from Eurex Clearing members with respect to U.S. dollar-denominated contracts traded on USFE.

⁴ Proposed USFE Rule 510(b) states that:

As provided in Rule 9-103B of The Clearing Corporation, with respect to Cross-listed Contracts, the law of the Federal Republic of Germany is applicable to the payment and collection of variation settlement amounts, the exercise and assignment process of Options, the notification and allocation process for deliveries, physical delivery, give-up and take-up processing, cash payments, trade and position management, reporting and timeliness and holiday calendars, and any disputes relating thereto.

In its May 14, 2004 comment letter with respect to Phase I, the CBOT had argued that in order to perform the functions contemplated by the Clearing Link, it appeared that Eurex Clearing must be registered as a Derivatives Clearing Organization (“DCO”). CCorp and USFE have not resolved this issue by shifting the focus of the description of the operation of the Clearing Link from the clearing of trades by the linked clearinghouse to the carrying of trades by clearing members or participants of the linked clearinghouse. No matter how it is described, under Phase II, Eurex Clearing will be performing significant clearing and settlement functions as described above.

Core Principle 11, Financial Integrity of Contracts, applicable to designated contract markets such as USFE, requires that transactions be cleared and settled with a DCO. Section 5(d)(11) of the Commodity Exchange Act (“Act”). The Guidance issued by the Commission regarding compliance with the Core Principles, in discussing Core Principle 11, also states that clearing of transactions executed on a designated contract market should be provided through a registered DCO. Appendix B to Part 38 of the Commission’s Regulations.

Section 5c(b) of the Act permits a designated contract market or a derivatives transaction execution facility to comply with applicable core principles through delegation of functions to a *registered* futures association or another *registered* entity. That Section also makes it clear that the delegating registered entity remains responsible for the carrying out of a delegated function, and it must promptly take any necessary steps to ensure that the function is being performed.

Although Section 5c(b) of the Act does not address delegation by a DCO, the Commission has previously permitted a registered DCO to outsource clearing and settlement functions to another *registered* DCO, *i.e.*, in connection with the Common Clearing Link between the CBOT and Chicago Mercantile Exchange, Inc. The Commission’s October 7, 2003 Order granting the CBOT’s application for registration as a DCO specifically noted that “[i]n order to fulfill its responsibilities as a DCO, CBOT has entered into a Clearing Services Agreement (“CSA”) with the Chicago Mercantile Exchange (“CME”) *that is currently registered as a DCO.*” (emphasis added).

CCorp has cited its former or current “technology-sharing” or “processing” arrangements with various entities, including the Commodity Clearing Corporation, predecessor of the New York Clearing Corporation, the New York Mercantile Exchange, the London Clearing House (“LCH”), BrokerTec Clearing Company LLC, Nasdaq LIFFE LLC and The Options Clearing Corporation (“OCC”). In some of these instances, CCorp was performing services for the other entity, and, in any event, each of these entities was or is registered with the Commission (with the exception of OCC, which is registered with the Securities and Exchange Commission)⁵.

⁵ The New York Clearing Corporation took over the clearing functions of the Commodity Clearing Corporation in 1999, prior to the adoption of the Commodity Futures Modernization Act of 2000 (“CFMA”), which established the DCO registration category.

With LCH, the Commission has established a precedent for registering a foreign clearing organization as a DCO. Specifically, on May 11, 2004, the Commission amended its earlier registration Order to permit LCH to clear financial futures and options traded on or subject to the rules of U.S. designated contract markets. Significantly, as part of that Order, LCH was not only required to comply with the Core Principles set forth in Section 5b of the Act, it was also subjected to other conditions, including requirements that it segregate U.S. customer funds and hold cash or U.S. Treasury securities deposited as margin in U.S. accounts.

Neither the Act, Commission regulations nor precedent permit a registered entity to fulfill any applicable Core Principles through delegation or outsourcing of its responsibilities to an *unregistered* entity, such as Eurex Clearing. Therefore, Phase II of the Clearing Link cannot be approved unless, at a minimum, Eurex Clearing becomes registered as a DCO.⁶

III. CCorp will not retain sufficient operational control over the functions of Eurex Clearing to enable CCorp to comply with certain applicable Core Principles

As a registered DCO, CCorp must comply with the Core Principles set forth in Section 5b(c)(2) of the Act and Part 39 of the Commission's Regulations. Here, the central issue is whether CCorp will be able to meet all of the DCO Core Principles in light of the particular responsibilities that it proposes to assign to Eurex Clearing in Phase II of the Clearing Link. No DCO has previously outsourced any of its regulatory responsibilities to an entity that is not subject to U.S. law. In conducting its analysis, the Commission must determine whether, in this context, it is possible to overcome the obvious jurisdictional obstacles that would be presented by the foreign operations contemplated by Phase II of the Clearing Link.

CCorp makes much of the fact that the Clearing Link will apply to cross-listed Euro-denominated products that meet the definition of "excluded commodities" under the Act, implying that this would justify a lighter regulatory touch. However, Section 2(d) of the Act, cited by CCorp, exempts derivative transactions in excluded commodities from certain regulatory requirements only if such transactions are executed by eligible contract participants, and are either not executed on a trading facility or are executed on an electronic trading facility on a principal-to-principal basis between parties trading for their own accounts. Similarly, Section 2(g) of the Act exempts non-agricultural swap transactions from certain requirements if they are individually negotiated by eligible contract participants and are not executed on a trading facility. Although differing

⁶ In CCorp's June 2, 2004 letter to the Commission, responding to the CBOT's May 14, 2004 letter regarding CCorp's request for relief with respect to Phase I of the Clearing Link, CCorp stated that Section 4(b) of the Act prohibits the Commission from establishing approval requirements for foreign clearinghouses. This provision addresses Commission regulation of persons in the U.S. who offer products traded on foreign markets and is inapplicable to circumstances where foreign clearinghouses perform significant clearing functions for trades executed on U.S. designated contract markets.

regulatory requirements apply to different types of markets based on the nature of the market participants and the types of products traded, the Act's Core Principles for DCOs do not draw any distinctions among futures transactions executed on designated contract markets, based upon the nature of the commodities, with respect to applicable clearing requirements.

CCorp asserts that the German regulatory authorities have a national interest in ensuring the integrity of prices in cross-listed Euro-denominated products. However, Phase II of the Clearing Link would not only permit Eurex Clearing to clear Euro-denominated products that would be traded on USFE, but would also permit Eurex Clearing to clear U.S. Dollar-based futures contracts traded on USFE, including those based on U.S. government debt instruments, which are of similar national interest to the United States. Indeed, CCorp touts the purported benefits to customers of combining these products in a single account in order to take advantage of the benefits of portfolio margining.

As a DCO, CCorp is obligated to comply with Core Principles addressing Financial Resources (Core Principle B), Risk Management (Core Principle D), Treatment of Funds (Core Principle F), and Default Rules and Procedures (Core Principle G), among others. Sections 5b(c)(2)(B), (D), (F), and (G) of the Act. Under Phase II of the Clearing Link, Eurex Clearing would collect and hold original margin collateral with respect to all trades executed on USFE that were carried by Eurex Clearing members. Eurex Clearing would not deposit any original margin collateral with CCorp on behalf of its Clearing members, nor would it make any deposit to CCorp's General Guaranty Fund.⁷ Instead, Eurex Clearing would only meet its financial obligations to CCorp, as a special clearing member, through the credit support set forth in the Link Clearing Agreement, the amount of which has not been made public. It is questionable whether CCorp would be able to meet each of these Core Principles, only relying upon such credit, when the original margin supporting transactions executed on USFE, and cleared through Eurex Clearing, would be maintained outside of the U.S. and would not be accessible to CCorp.⁸

In addressing Core Principle M (Information Sharing), Section 5b(c)(2)(M) of the Act, CCorp has attempted to compare the information-sharing arrangements among CCorp, USFE, Eurex and Eurex Clearing to those in other links previously approved by the Commission. CCorp specifically cites the information-sharing agreements in connection with the CME/Singapore International Monetary Exchange, Ltd. ("SIMEX") mutual offset system and the CME/MEFF Sociedad Rectora de Productos Financieros de Renta

⁷ Nevertheless, it appears that CCorp Rule 801(d), as amended, would allow CCorp to draw upon its General Guaranty Fund in the event that Eurex Clearing were in default under the terms of, or failed to make a payment under, the Link Agreement.

⁸ CCorp has represented that Phase II does not introduce any new issue with respect to the collection of margin that was not previously addressed in the Phase I submission. To the contrary, Phase I did not address the clearing of transactions executed on a U.S. designated contract market through a foreign clearing organization, nor did it address a situation where original margin for such transactions would be collected and retained by members of the foreign clearing organization.

Variable, S.A. ("MEFF") link. Neither of these links involved the clearing of transactions executed on a U.S. exchange by a foreign clearing organization. The CBOT addressed the significant differences between the proposed Clearing Link and other links approved by the Commission, in detail, in its May 14, 2004 comment letter with respect to Phase I of the Clearing Link.

CCorp argues that Eurex is subject to oversight by German Federal and state agencies that is comparable to that provided by the Commission. The Commission has applied the comparability analysis in the context of determining whether, absent Commission registration, foreign brokers may solicit accounts from U.S. persons to trade foreign products on foreign exchanges, under Part 30 of the Commission's regulations. In the August 10, 1999 no-action letter cited by CCorp, the Commission analyzed the German regulatory framework in the context of a request to permit Eurex members to install additional Eurex electronic trading terminals in their offices located in the U.S., to permit Eurex to make additional contracts available for trading by U.S. persons on those terminals, and to permit Eurex to make automated order routing systems available to Eurex members to accept orders from U.S. persons for execution on Eurex, without requiring Eurex to obtain contract market designation.

http://www.cftc.gov/tm/letters/99letters/tmeurex_no-action.htm

The comparability analysis has never been applied to determine whether a foreign clearing organization may perform significant clearing and settlement functions for trades executed on U.S. exchanges on behalf of U.S. persons. Even if the comparability argument were an appropriate basis for analysis, the relevant comparison would be to the nature of German oversight over clearing organizations, and CCorp has not addressed any laws or regulations specifically governing the responsibilities of Eurex Clearing.

The Congress deemed it necessary in 2000 to include in the Commodity Futures Modernization Act extensive and detailed registration requirements and Core Principles governing clearing organizations. CCorp has not identified similar legal requirements in either German law or regulation. The CFTC and the Committee of European Securities Regulators ("CESR") have established a Task Force to consider, among other things, "the level of customer and market protections accorded by the regulatory regimes of national jurisdictions within the EU and the US and on such a basis simplifying and rendering more reciprocal existing application and recognition procedures." CESR-CFTC Communiqué requesting comment on a common work programme to facilitate trans-Atlantic derivatives business, March 31, 2005. This Task Force is the appropriate forum to examine the levels of customer protection covering the clearing of transactions in EU countries as compared with those established by Congress. In any event, approval of the performance of virtually all significant clearing and settlement functions outside the U.S. for trades executed on U.S. exchanges for U.S. persons requires careful consideration of these issues in light of the importance given to clearing by the Congress.

IV. The Commission should not extend the application of its October 21, 2004 Order to permit CCorp, its clearing participants and FCMs to commingle

**segregated and secured funds in connection with USFE trades carried by
Eurex Clearing members**

**A. The extension of this relief would create significant risks that such
funds would be subject to foreign bankruptcy law in the event of the
bankruptcy of a Eurex Clearing member or its depositories**

On October 21, 2004, in order to facilitate the implementation of Phase I of the Clearing Link, the Commission issued an Order pursuant to Section 4d(a)(2) of the Act. The Order's exemptive relief permits CCorp and FCMs to commingle U.S. customers' funds used to margin Eurex contracts cleared through CCorp, which would otherwise be subject to Regulation 30.7 secured funds requirements, with customer-segregated funds used to margin trades on U.S. exchanges.

Under the October 21, 2004 Order, all combined funds held by CCorp, its clearing participants, or other FCMs are subject to the requirements applicable to segregated accounts, and the relief is subject to a number of specific terms and conditions. Specifically, in order for CCorp and FCMs to qualify for the exemptive relief, CCorp must remain in compliance with the Core Principles applicable to registered DCOs, which are set forth in Section 5b of the Act, and engage in risk management activities including, but not limited to:

- maintaining credit support between CCorp and Eurex Clearing;
- maintaining minimum amounts in CCorp's Guaranty Fund;
- identifying, monitoring and addressing risks stemming from the cross-border nature of the arrangement, differences in time zones, and the fact that responsibilities are assigned to two separate clearing organizations;
- obtaining daily open interest and trade data from Eurex Clearing, and identification of participants' sub-accounts, in connection with trades cleared through CCorp;
- having its risk management personnel on duty during all times when Eurex products are traded;
- maintaining the right to establish different settlement prices for Link transactions for internal risk management purposes, the right to collect additional original margin, and the right to limit or otherwise control variation pays and collects made by Eurex Clearing;
- monitoring its clearing participants' financial integrity;
- maintaining adequate liquidity; and
- promptly notifying the Commission if there are any material changes to CCorp's risk management abilities and policies.

In addition, the exemptive relief was conditioned upon requirements that:

- CCorp must report trading volume, open interest, and settlement price information (as described in Parts 15 and 16 of the Commission's Regulations) to the Commission for Eurex transactions cleared through CCorp; and
- FCMs must comply with large trader reporting obligations (as described in Parts 15 and 17 of the Commission's Regulations) to the Commission with respect to Eurex transactions cleared through CCorp.

In order to facilitate the implementation of Phase II of the Clearing Link, CCorp has now requested, by separate letter dated March 14, 2005, that the Commission expand the application of its October 21, 2004 exemptive relief in order to permit CCorp and FCMs to deposit and/or maintain commingled U.S. customer funds used to margin both Eurex and USFE contracts, with Eurex Clearing members.⁹ In support of its position, CCorp contends that many Eurex Clearing members would qualify as permissible non-U.S. depositories of customer segregated funds under Commission Rule 1.49.¹⁰

The Commission's October 21, 2004 Order, permitting the commingling of segregated and secured funds under the conditions described therein, addressed circumstances where it was anticipated that the commingled pool of funds would be held in the United States depositories of CCorp and U.S. FCMs. CCorp is now requesting that the Commission extend its relief so that the commingled pool of funds may be deposited and maintained in a foreign jurisdiction by Eurex Clearing members.

When the Commission adopted Rule 1.49, it also promulgated an amended Framework 2 in Appendix B to its Part 190 bankruptcy rules, which established an allocation convention to protect other customers' claims from dilution if the "sovereign action" of a particular foreign government or foreign court resulted in a shortfall in segregated funds held in that jurisdiction or in that currency. 68 Fed. Reg. 5545. These protections only apply in the context of a bankruptcy of a U.S. FCM administered under U.S. bankruptcy law. Moreover, Framework 2 defines "sovereign action" to include only the actions of a governmental or judicial body.¹¹ Thus a shortfall in funds caused by the actions of a

⁹ CCorp has not requested that the Commission permit such funds to be deposited with Eurex Clearing. According to CCorp's March 14, 2005 letter, Eurex Clearing's rules require its clearing members to deposit their own funds as margin, rather than depositing their customers' funds.

¹⁰ Commission Rule 1.49 permits FCMs to deposit customer-segregated funds with non-U.S. depositories located in either money center countries or the countries of origin of the relevant currencies, where such depositories are: banks or trust companies (with more than \$1 billion in regulatory capital or whose commercial paper or long-term debt, or that of their holding companies, meets specified rating requirements); registered FCMs; or registered DCOs.

¹¹ Framework 2 defines "sovereign action" to include, but not be limited to "the application or enforcement of statutes, rules, regulations, interpretations, advisories, decisions, or orders, formal or informal, by a federal, state, or provincial executive, legislative, judiciary or government agency."

foreign clearinghouse or foreign clearing member could affect all customers of a bankrupt U.S. FCM.

If the Commission were to expand its October 21, 2004 Order, as requested by CCorp, and Phase II of the Clearing Link were implemented, commingled segregated and secured funds could routinely reside in the foreign depositories of Eurex Clearing members. Such customer funds held in German accounts would be subject to the risks of a bankruptcy of the U.S. FCM and of the Eurex Clearing member. If the Eurex Clearing member becomes the subject of an insolvency proceeding in Germany, the ability of the U.S. customer to retrieve its funds in the account with the member will be subject to German insolvency law. In addition, the Clearing Conditions for Eurex Clearing provide that if a general clearing member fails to make any payments or deliveries to Eurex Clearing, then the member as well as all non-clearing members represented by it, may be precluded from the clearing process for the duration of such failure (1.8.2(5)), a potentially widespread difficulty.

In the event of a bankruptcy of a U.S. FCM, the bankruptcy court's ability to control the disposition of funds held in German accounts is limited. The U.S. bankruptcy court would have exclusive jurisdiction over property of the estate, "wherever located." 28 U.S.C. § 1334(e). This grant of jurisdiction would include the FCM's accounts in Germany. Nevertheless, a court in another country is not precluded from exercising jurisdiction over property that is part of a U.S. bankruptcy estate located in that country, e.g., in actions brought by non-U.S. creditors of the FCM against the accounts in Germany. As discussed above, the CFTC's bankruptcy regulations already appear to recognize this issue by providing for the Framework 2 allocation convention in the event of a shortfall with respect to customer claims as a result of "sovereign action" when customer funds are held in a depository outside of the United States. Appendix B to Part 190 of the Commission's Regulations.

The commencement of a bankruptcy case in the United States creates an automatic stay of legal proceedings against the debtor, including collection activity, and of actions to obtain property of the debtor.¹² If a creditor causes property of a bankrupt's estate to be seized in a foreign country, that creditor has violated the automatic stay. Whether that creditor can be punished, however, is a function of whether a U.S. court is able to obtain personal jurisdiction over that creditor. By the same token, as discussed in the previous paragraph, a U.S. court cannot control the actions of a foreign court irrespective of 28 U.S.C. §1334(e). As one court put it, "the bankruptcy court is precluded from exercising control over property of the estate located in a foreign country without the assistance of the foreign courts." *In re International Administrative Servs., Inc.*, 211 B.R. 88 (Bankr. M.D. Fla. 1997).¹³

¹² A U.S. bankruptcy trustee may theoretically file an application with a German court to enforce a stay based on the U.S. bankruptcy proceedings, but this would be a lengthy and complicated process, with uncertain results.

As a result of the foregoing, one cannot reach the facile conclusion that U.S. customers utilizing the Clearing Link will receive the same treatment in an FCM bankruptcy as if their trades were cleared on a registered DCO. The outcome depends on the provisions of applicable foreign law, the identity of foreign creditors who might seek to use foreign law to attach assets outside of the United States and the actions of the foreign court in response to such a proceeding. Moreover, delays in the repatriation of such funds conceivably could impair the ability of a bankruptcy trustee to meet margin calls as provided by Section 766(a) of the Bankruptcy Code.

Although the CBOT does not believe that the Commission should grant any of CCorp's requested relief for all of the reasons stated herein, if the Commission were nevertheless to permit commingled funds to be deposited with Eurex Clearing members, CCorp and FCMs should, at a minimum, be subject to the same conditions and requirements that the Commission imposed upon them in connection with Phase I. Indeed, CCorp has requested that the Commission make the same relief granted in the October 21, 2004 Order available for Phase II of the Clearing Link on the same terms that applied to Phase I. Such obligations should apply with respect to all USFE and Eurex transactions executed through FCMs, and cleared through the Clearing Link.

In particular, FCMs should be required to file large trader reports with the Commission and NFA with respect to all USFE transactions, including those in cross-listed products that are executed through such FCMs, even if those positions are carried by Eurex Clearing members and cleared through Eurex Clearing. For Euro-denominated products traded on USFE that are carried by Eurex Clearing members through the Clearing Link, CCorp has represented that position reports will be filed with Eurex and the German regulators. However, CCorp has identified an important difference between U.S. and German requirements with regard to the position information that is routinely made available to the regulators. In particular, CCorp notes that the Trading Surveillance Office of Eurex ("TSO") only requires Eurex Clearing members to provide information regarding the beneficial owners of customer positions when the aggregate of all customer positions exceeds position limits. Although CCorp represents that the TSO and the National Futures Association ("NFA") have "expressed their intent" to share market surveillance information with each other, the value of such an agreement will necessarily be limited by the amount of information that is gathered by the respective parties.

It is particularly important that CCorp and USFE have continuous access to large trader information, including the identification of the beneficial owners of such positions, for all USFE transactions, in order to meet their respective obligations to conduct financial surveillance and engage in prudent risk management activities. Therefore, if the

¹³ The bankruptcy proceedings involving Griffin Trading Company were, indeed, facilitated by the Order of the High Court of Justice, Chancery Division, Companies Court, in the United Kingdom, where Griffin Trading Company held customer funds, that directed the UK Provisional Liquidators to be mindful of the fact that the proceedings in the UK were ancillary to the U.S. bankruptcy proceedings. Such an outcome for all future bankruptcies cannot, however, be presumed.

Commission were to approve Phase II of the Clearing Link, it should make it clear that large trader reports, which identify individual traders, must be filed with the Commission and NFA with respect to all USFE positions, whether carried by U.S. FCMs or by Eurex Clearing members.

B. The Commission should not expand the relief granted in its October 21, 2004 Order until the significant ongoing analysis of the advisability and potential impact of the commingling of segregated and secured funds has been completed by the Commission's Global Markets Advisory Committee

At its June 2, 2004 meeting, the Commission's Global Markets Advisory Committee ("GMAC")¹⁴ determined that a Subcommittee on International Bankruptcy should be formed which would specifically address issues related to the use of segregated funds versus secured funds.¹⁵ The Subcommittee was appointed in August 2004, and its members include senior management of the CBOT, CME, USFE, NFA, and major FCMs.

The Subcommittee began its work in September 2004, to analyze the issues raised by a potential merger of segregated funds and secured amount funds, in whole or in part, particularly in light of international bankruptcy concerns. Specifically, the Subcommittee has been examining, among other things, whether such a merger could increase the risks to customers trading on U.S. futures markets, and whether there are any steps that could be taken to address those risks. The Subcommittee provided status reports to the GMAC on January 12, 2005, identifying several possible customer protection concerns, including whether the failure of a clearing organization in a foreign jurisdiction, or of a foreign carrying broker, might increase the risk of an FCM insolvency. The Subcommittee identified possible ways of dealing with such risks, including, among others, limiting participation in merged segregated and secured accounts to markets whose clearing organizations are registered DCOs, or amending the Commission's regulations to create subclasses of customers for purposes of bankruptcy distributions.

At the January 12, 2005 GMAC meeting, it was proposed that the Subcommittee continue to explore how subclasses of customers might be created that would permit the subordination of certain claims to others in a bankruptcy, building on the model of CFTC Rule 1.49, if segregated and secured accounts were combined. Questions that would

¹⁴ According to the Global Markets Advisory Committee Charter, its objectives are: "to conduct public meetings and to submit reports and recommendations on matters of concern to the exchanges, firms, market users and the Commission regarding the regulatory challenges of a global marketplace which reflect the increasing interconnectedness of markets and the multinational nature of business, . . ."
" (www.cftc.gov/ac/acgmcharter.)

¹⁵ In an August 9, 2004 letter addressed to each member of the GMAC, Commissioner Walter L. Lukken, Chairman of the GMAC, stated that ". . . the subcommittee should undertake a review of the history of the current regime as well as provide an analysis identifying the benefits, risks and other issues, both legal and operational, involved with maintaining, modifying or eliminating the current structure."

need to be answered include how the subclasses would be constituted; the nature of FCM recordkeeping requirements, i.e., whether calculations for separate subclasses would need to be done daily or only in the event of a bankruptcy; whether a haircut regime should apply; and whether it would be feasible to require that excess funds must be maintained in the U.S. The Subcommittee hopes to make recommendations to the GMAC in the summer of 2005. The GMAC will, in turn, decide whether to make such recommendations to the Commission. The CBOT understands that Commission staff is also continuing to perform its own independent analysis regarding these issues in a broader context than CCorp's request with respect to Phase II of the Clearing Link.

In light of the fact that a number of distinguished industry participants on the Subcommittee on International Bankruptcy and GMAC, as well as the Commission's own staff, are in the process of examining how it might be possible to reduce the risks of the application of foreign bankruptcy law to segregated and secured funds, it is premature for the Commission to approve Phase II of the Clearing Link. The Commission should postpone making a ground-breaking decision that would permit a combined pool of segregated and secured funds to be deposited with foreign clearing firms for the purpose of clearing domestic futures transactions through an unregistered foreign clearinghouse, until the detailed review that the Commission has undertaken, and has requested the GMAC to undertake, has been completed.

V. Conclusion

As noted above, the Commission has already determined that transactions on a designated contract market such as USFE should be cleared on a registered DCO. It follows that a DCO such as CCorp cannot delegate virtually all of its essential functions to a *non-registered* clearing organization, especially one outside the regulatory reach of the Commission. Moreover, CCorp has not demonstrated how the laws of Germany govern the actions of Eurex Clearing and has not shown how those laws, if any, are in any way comparable to the Core Principles Congress has deemed necessary for the appropriate protection of U.S. customers.

For all of the reasons stated above, the CBOT recommends that the Commission not grant permission to CCorp or USFE to implement Phase II of the Global Clearing Link at this time. The Exchange further believes that the Commission should not make any decision regarding a possible expansion of its October 21, 2004 Order, to permit commingled segregated and secured funds to be deposited with Eurex Clearing members, for the purpose of clearing USFE transactions through Eurex Clearing, until the GMAC has completed its analysis and made recommendations to the Commission.

Ms. Jean A. Webb

April 13, 2005

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The CBOT appreciates the opportunity to provide comments on CCorp's and USFE's requests. If you have any questions regarding these comments, or wish to discuss this matter, please feel free to contact Anne Polaski, Assistant General Counsel, at (312) 435-3757, or at apolaski@cbot.com.

Sincerely,

Bernard W. Dan