

M A Y E R
B R O W N
R O W E
& M A W

April 26, 2005

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Re: Global Clearing Link

Dear Ms. Webb:

We are writing on behalf of our client, The Clearing Corporation (“CCorp”), in response to the comment letters, each dated April 13, 2005, from the Chicago Mercantile Exchange (“CME”) and the Chicago Board of Trade (“CBOT”) objecting to CCorp’s request that the Commission grant it permission to implement Phase II of the Global Clearing Link (the “Link”) with Eurex Clearing AG (“Eurex Clearing”) and extend the Commission’s October 21, 2004 Order to permit the combination of segregated and secured customer funds by CCorp and futures commission merchants (“FCMs”) for transactions effected through Phase II of the Global Clearing Link.¹

¹ As described more fully in CCorp’s letter of April 26, 2004 and March 14, 2005 submissions, the Link is being implemented in two stages. Phase I of the Clearing Link (the “Euro Link”) allows CCorp participants to carry on their own books Euro-denominated futures contracts and options on futures contracts that have been executed on Eurex Deutschland and Eurex Zürich AG (“Eurex”). Phase II of the Link applies these concepts to Euro-denominated futures and futures option contracts that are traded on U.S. Futures Exchange, LLC (“USFE”). Those contracts will be fungible so that, for example, a customer who establishes a position in the German Bund on Eurex can close out that position by trading on USFE. Persons trading on USFE or Eurex will be able to have their positions carried either by clearing participants at CCorp (the exclusive derivatives clearing organization for USFE) or by members of Eurex Clearing, the linked clearinghouse. (In order to implement the Clearing Link, Eurex Clearing has become a “special clearing member” of CCorp and has established an omnibus account at CCorp to hold trades and effect daily margin settlements and deliveries. CCorp similarly has become a special clearing member of, and established a mirror omnibus account with, Eurex Clearing. These steps were taken to implement the Euro Link, and would not be affected by the approval of Phase II of the Clearing Link.) When implemented, Phase II also will permit market participants to trade certain U.S. Dollar-denominated products (such as U.S. Treasury Bonds and Notes and the Russell 2000 Stock Price Index) on USFE, have those trades cleared by USFE’s registered derivatives clearing organization, CCorp, and then have the resulting position carried either by CCorp clearing participants or by members of Eurex Clearing. (Those contracts will be traded exclusively on USFE and will not be listed for trading on Eurex.) Finally, there will be contracts that are to be traded solely on Eurex (such as Euribor) but which will be capable of being carried either at Eurex Clearing or at CCorp.

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As discussed in detail in our prior submissions, the Link is expected to provide numerous benefits to market participants when it is fully implemented. These include, among others, greater access to a wide range of debt and equity index products; the ability to standardize international operations, with resulting cost reductions and savings for market users and their intermediaries; and the more efficient use of capital. Significantly, the Link offers these benefits without increasing market risk or diminishing regulatory protections. The CME and CBOT nonetheless object and urge the Commission either not to approve Phase II at all (in the case of the CBOT) or to grant CCorp's request, but only on terms that render it unworkable from a regulatory and commercial standpoint (in the case of the CME).

Taken together, the CME and CBOT's objections can fairly be summarized as follows: (i) the Commission should not allow Phase II of the Link to move forward without first requiring Eurex Clearing and its clearing members respectively to register with the Commission as a derivatives clearing organization ("DCO") and as FCMs; and (ii) the Commission should not modify and extend the relief it has already granted that permits CCorp, its clearing participants and other FCMs to hold customer funds in a single combined account, regardless of whether those funds are being used to margin trades on Eurex or USFE. In essence, and as discussed more fully below, the CME and CBOT are asking the Commission to countermand decisions it has made in the past and disregard the mandate of Section 3 of the Act to "promote responsible innovation and fair competition among boards of trade, other markets and market participants."

A. Eurex Clearing Should Not Be Required to Register as a DCO

1. CCorp is the Exclusive Clearing Organization for USFE

CCorp acts as the legal obligor and central counterparty to each and every trade made on USFE. Stated differently, it is CCorp, and CCorp alone, that is the buyer from every clearing participant and the seller from every clearing participant for every trade made on USFE. That is true regardless of whether CCorp is dealing solely with its traditional clearing participants or, in the case where a position is being carried by a member of Eurex Clearing, with Eurex Clearing as a "special clearing member" of CCorp.² The CME nevertheless would have the Commission overlook the practical, financial and legal realities of the situation and focus on selected portions of the statutory definition of the term "derivatives clearing organization." The statutory text, when read in full, does not support the CME's contentions.

² In a transaction on USFE involving a member of Eurex Clearing, CCorp steps in as central counterparty to its participant(s) and to Eurex Clearing in its capacity as the special clearing member of CCorp; Eurex Clearing, in turn, becomes the counterparty to its clearing member(s) simultaneously and in parallel to CCorp. As special clearing member, Eurex Clearing is responsible to CCorp for the obligations of the members of Eurex Clearing, irrespective of whether those clearing members perform. CCorp, in turn, is responsible for all obligations owed to its participants, regardless of whether Eurex Clearing performs.

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Specifically, the term “derivatives clearing organization” is defined by Section 1a(9) of the Act to mean a clearinghouse or similar entity, facility, system, or organization “that, with respect to an agreement, contract, or transaction –

“(i) enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties;

“(ii) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the derivatives clearing organization; or

“(iii) otherwise provides clearing services or arrangements that mutualize or transfer among participants in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the participants.”

Taking each of these elements in turn:

(i) *“Enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties”* – In no circumstances will the credit of Eurex Clearing ever be substituted for that of the parties to trades made on USFE. It is The Clearing Corporation – and only The Clearing Corporation – that is the central counterparty. It is true that Eurex Clearing will be responsible for the trades and positions of its clearing members who carry the trades they make on USFE through Eurex Clearing’s special clearing member account at CCorp. It is for that reason that Eurex Clearing maintains its special clearing member omnibus account at CCorp. If carrying an omnibus account constitutes acting as a DCO, every clearing member of every U.S. clearinghouse should similarly be required to register as a DCO.³

³ The CBOT makes much of the fact that CCorp’s April 2004 letter referred to trades and positions being “cleared” by members of Eurex Clearing. However, this attempts to assign legal meaning to that term where none was intended. CCorp’s earlier submission made explicit that the use of the term “clear” was not intended to have any special significance:

It bears emphasis that while we have, in the interest of simplicity, characterized Euro-denominated contracts traded on Eurex and Dollar-denominated contracts traded on USFE as capable of being “cleared” at either Clearing House, those contracts will in fact be cleared only [by] ... The Clearing Corporation for all trades made on USFE, and Eurex Clearing for all trades made on Eurex. It is the Primary Clearing House [a term used in the Link Clearing Agreement to describe CCorp’s relationship to USFE and Eurex Clearing’s relationship to Eurex] — and only the Primary Clearing House — that will act as the central counterparty and be responsible to its clearing members and participants for the performance of all contracts made on the Exchange for which it is the Primary Clearing House.

See April 26, 2004 letter from Kenneth M. Rosenzweig to Jean A. Webb, <http://www.cftc.gov/files/submissions/filings/tccletterofrequest.pdf>, at 2 n. 2.

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(ii) *“Arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the derivatives clearing organization”* – The second element of the DCO definition (settlement or netting on a multilateral basis) describes an activity that is undertaken not only by DCOs, but by many other types of financial institutions. Thus, while descriptive of one of the functions of a clearinghouse, this portion of the DCO definition has to be read in conjunction with the other components of Section 1a(9) and the purposes to be served by DCO regulation. By way of illustration, if the mere fact of “settlement or netting” was sufficient to trigger DCO registration requirements, the settlement banks that make variation and original margin payments to and from clearinghouses and FCMs (such as Bank of New York and JP Morgan Chase) would all be DCOs. In like manner, FCMs that are members of net margin clearinghouses (in other words, all of the futures clearinghouses other than the New York and Chicago Mercantile Exchanges) would be DCOs because they would in such circumstances be “arrang[ing] or provid[ing]” for net payments of their customers’ margin obligations. (In this regard, Eurex Clearing as a special clearing member of CCorp nets the positions of its clearing members in the same manner as all of CCorp’s other clearing participants.) In any event, it is CCorp – and not Eurex Clearing – that remains obligated to its clearing participants for performance. The safety and soundness concerns that give rise to DCO registration are, therefore, no more than tangentially implicated by such an arrangement.

(iii) *“Otherwise provides clearing services or arrangements that mutualize or transfer among participants in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the participants.”* – The third element is clearly inapplicable, since in no circumstances is Eurex Clearing responsible for mutualizing or transferring risk among the participants in The Clearing Corporation. It is The Clearing Corporation – and not Eurex Clearing – that will mutualize or transfer risk arising out of the transactions effected on USFE.

We think that the foregoing clearly demonstrates that CCorp is the sole DCO with respect to all transactions made on USFE and that Eurex Clearing is not a DCO as a matter of law. Furthermore, and as a policy matter, requiring linked clearinghouses to register as DCOs would effectively negate the benefits of inter-exchange and inter-clearinghouse linkages. Foreign clearinghouses could, of course, register as DCOs, but doing so would be expensive and time-consuming and would effectively require them to duplicate the infrastructure and systems that already are in place at domestic DCOs such as CCorp.⁴ Of at least equal significance, requiring a foreign linked clearinghouse to register as a DCO puts it in a position where it can be subject to conflicting and inconsistent requirements imposed upon it by the Commission and its home country regulator. Nothing in the Act or in the Commodity Futures Modernization Act of

⁴ The CBOT nonetheless urges the Commission to defer any decision until the Task Force established by the Commission and the Committee of European Securities Regulators has conducted its study and issued its findings, which is not expected to occur until sometime in 2008. See <http://www.cftc.gov/opa/press05/opa5049-05.htm> (“regulators will establish a common work program of practical measures to be implemented over three years”).

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2000 (“CFMA”) suggests, even remotely, that it was the intention of Congress to subject foreign clearinghouses to regulation in the United States where their only nexus to the U.S. markets was through a clearinghouse-to-clearinghouse link.⁵

Finally, we would note that there does not appear to be any principled basis for treating Eurex Clearing any differently than the Singapore Exchange (formerly known as SIMEX), whose clearinghouse is a participant in a longstanding and continuing inter-exchange and inter-clearinghouse linkage with the CME, or MEFF, which is party to a dormant link arrangement with the CME that was approved in 2001 – after enactment of the CFMA. As noted above, the Commission has never suggested that MEFF or SIMEX has to register as a DCO. One can, of course, attempt to make highly nuanced distinctions between the mechanics and operation of these different links. For example, the CME argues that its link with MEFF is “fundamentally different” because the clearing members of MEFF agreed to carry only positions originating from trades made on MEFF. The CME fails, however, to offer any explanation whatsoever as to why the Link between CCorp and Eurex Clearing is not more closely analogous to its arrangements with SIMEX, where trades made on the CME are transferred onto the books of SIMEX in its capacity as a special clearing member of the CME.⁶

2. *CCorp Is and Will Remain in Compliance with the DCO Core Principles*

The CBOT makes much of the fact that CCorp and Eurex Clearing have entered into legal agreements that obligate them to provide certain services to each other to facilitate the discharge of their respective responsibilities. Thus, for example, Eurex Clearing will act as CCorp’s agent and collect and pay variation margin from and to CCorp clearing participants for Euro-denominated contracts. As we explained in our April 26, 2004 and March 14, 2005 submissions, these arrangements are designed to make it unnecessary for CCorp to replicate the systems that Eurex Clearing already has in place.⁷ The nature of these arrangements and their

⁵ The Commission obviously did not understand the CFMA to so provide. Were it otherwise, it would have either recognized the existing linked non-U.S. clearinghouses as DCOs under the grandfather provisions of Section 5b(d) of the Act or notified those clearinghouses operating that registration was now required by the Act. Indeed, the Commission approved the clearing link between the CME and MEFF Sociedad Rectora de Productos Financieros de Renta Variable, S.A. (“MEFF”) in 2001 – after enactment of the CFMA – without any particular discussion of the 2000 amendments. Moreover, as a practical matter, the Commission cannot take such a position and expect foreign governments to refrain from imposing their own requirements on U.S.-based exchanges and clearinghouses.

⁶ The CME-SIMEX Mutual Offset System envisions an arrangement where trades made on the CME for the account of a SIMEX member firm or its customer will be cleared in the first instance into the account of a CME clearing member before being transferred immediately and automatically into SIMEX’s special clearing member account at the CME. The momentary interpositioning of a CME clearing member has no practical significance (other than for operation of CME’s clearing systems) and certainly is not a basis for making distinctions between the CCorp-Eurex Clearing and CME-SIMEX links.

⁷ The CBOT further notes, without elaboration, that the performance of many of these functions will be “governed by German law.” We do not know how it could be otherwise. For example, the Clearing Link Services Agreement between Eurex Clearing and CCorp obligates Eurex Clearing to administer deliveries on German Bund,

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legal underpinnings were carefully and thoroughly analyzed by the Commission when it approved the Euro Link. The CBOT has not, and cannot, offer any reason why the Commission should revisit these subjects.

The CBOT next makes the wholly erroneous argument that a DCO may not outsource certain of its operational responsibilities to an unregistered entity. In particular, the CBOT asserts that the arrangements between CCorp and Eurex Clearing (which, as noted, have already been reviewed and found satisfactory by the Commission in connection with the Euro Link) are contrary to the provisions of Section 5c(b) of the Act. This argument fails for two reasons. First, and as the CBOT itself acknowledges, Section 5c(b) operates as a restraint only on the delegation of responsibilities by a contract market or derivatives transaction execution facility. In other words, Section 5c(b) has no bearing at all on the discharge of a DCO's regulatory and self-regulatory responsibilities. Second, and more importantly, even if Section 5c(b) did apply to DCOs, CCorp is not "delegating" any of its responsibilities to Eurex Clearing.

The Commission has been careful to distinguish between "delegation" of a registered entity's responsibilities under the Act and Core Principles and "outsourcing" of certain aspects of the registered entity's day-to-day operations:

[A] delegation confers upon another the authority to act in the delegating entity's name. The distinction between delegation of authority and contracting for services is particularly well-illustrated in matters related to member discipline and market surveillance. A market that delegates these functions empowers the delegatee to take appropriate remedial actions, including the sanctioning of members or market participants for rule violations. In contrast, a market may contract with an entity to conduct trading surveillance and to investigate the facts surrounding alleged rule infractions. Unlike a delegatee, a contractor would not have the authority to decide on behalf of the delegating entity whether an infraction had occurred or to impose remedial sanctions....

[R]egardless of whether a registered entity has delegated functions or contracted for services, the entity must assure itself that the delegated functions or contracted services will enable it to remain in compliance with the Act's requirements.

(... cont'd)

Bohl and Schatz futures contracts. These contracts are settled by the delivery, in Germany, of debt securities issued by the German government. We fail to see how this type of arrangement could possibly be governed by the law of any country other than Germany (any more than the physical settlement of CME foreign currency contracts delivered through foreign banking systems could be governed by the laws of a country other than one in which the currency is being delivered). Indeed, Commission guidance recognizes that the terms and conditions of physical-delivery futures contracts should closely correspond to the customary practices of the applicable cash market. *See generally* 17 C.F.R. Part 40, Appendix A (Guideline No. 1).

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Moreover, the registered entity must have a sufficient degree of control over the persons under contract because it remains the registered entity's "responsibility to ensure that its obligations under the Act are met."⁸

The point here is simply that CCorp has not delegated any of its responsibilities under the Core Principles, either to Eurex Clearing or to any other third party.⁹

Finally, the CBOT would have the Commission revisit many of the subjects that the Commission considered in its approval of the Euro Link. These issues were comprehensively discussed in CCorp's submissions prior to the Commission's approval of the Euro Link. Thus, for example, CCorp's discussion of its compliance with Core Principle B ("Financial Resources") notes that the steps taken to ensure the financial integrity of trades effected through the Clearing Link were addressed at length in the Phase I submission and reiterates that Eurex Clearing, as a special clearing member of CCorp, stands in the stead of any defaulting Eurex Clearing Member that may be carrying a USFE contract.¹⁰

The CBOT would nevertheless have the Commission re-examine the soundness of CCorp's and Eurex Clearing's financial arrangements, all because the Commission's approval of the Euro Link (Phase I) did not, in the view of the CBOT, address the "situation where original margin for such transactions would be collected and retained by members of the foreign clearing

⁸ 66 Fed. Reg. 42256, 42266 (August 10, 2001) (trading facilities, intermediaries and clearing organizations; final rules).

⁹ The CBOT, perhaps recognizing that this line of argumentation is flawed, claims that CCorp will not be in a position to retain "operational control" over Eurex Clearing and, therefore, will not be able to comply with the Core Principles. To accept the CBOT's argument, however, the Commission would have to disregard CCorp's detailed demonstration of its ability to remain in compliance with each and every one of the fourteen Core Principles that govern its operations as a DCO. See March 14, 2005 letter from Kenneth M. Rosenzweig to James L. Carley and Richard A. Shilts ("Carley-Shilts Letter"), <http://www.cftc.gov/files/tm/tmcarley-shilts-ltr.pdf>, at 13-20. The CME takes a slightly different tack, arguing that because these are "clearing-related services," a person who provides those services "should" be required to register as a DCO and that without such registration, Eurex Clearing will not be required to demonstrate compliance with the Core Principles. See April 13, 2005 letter from Craig S. Donohue to Jean A. Webb, at 2. The CME's argument is a *non sequitur*. Only registered DCOs are required to comply with the Core Principles. As discussed above, it is CCorp – and not Eurex Clearing – that is acting as a DCO. There is, therefore, no reason why Eurex Clearing should be required to demonstrate compliance with the Core Principles.

¹⁰ See Carley-Shilts Letter, <http://www.cftc.gov/files/tm/tmcarley-shilts-ltr.pdf>, at 14-15. The CBOT similarly would have the Commission reconsider whether Eurex Clearing should be permitted to administer the delivery process for the Bund, Bobl and Schatz contracts that settle through Clearstream Banking Frankfurt AG. See April 13, 2005 letter from Bernard W. Dan to Jean A. Webb ("Dan Letter"), at 3. Practically every clearinghouse outsources the delivery process for some or all of its contracts. For example, Treasury Notes and Bonds traded on the CBOT and cleared by the CME are delivered by and to banks; crude oil is delivered through pipelines; and foreign currencies frequently are delivered (on a net basis) through the facilities of CLS Bank. There is, therefore, nothing that is novel or unique about CCorp's arrangement with Eurex Clearing.

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organization.”¹¹ It is difficult to know what to make of the CBOT’s argument. The only margin that is “collected and retained by members of a foreign clearing organization” is the margin collected by members of Eurex Clearing. That obviously has no bearing on CCorp’s compliance with the Core Principles, particularly inasmuch as it is Eurex Clearing – and not its clearing members – that is obligated to CCorp for performance, both under the Euro Link (Phase I) and under the terms of proposed Phase II.¹²

B. FCM Registration

The CME would have the Commission disregard longstanding precedent and require members of Eurex Clearing to register with the Commission as FCMs. In support of its argument, the CME notes that foreign-based intermediaries have never been permitted to carry positions executed on a contract market “without involving a registered FCM intermediary.” The CME’s comment, however, sidesteps the fact that the Commission has never deemed it appropriate to require members of a linked foreign clearinghouse to register with the Commission.

To the contrary, the Commission has long taken the position that its resources were best devoted to the protection of U.S. markets and U.S. customers, and that “the protection of foreign customers of firms confining their activities to areas outside this country ... may best be left for local authorities in such areas.”¹³ Thus, a non-U.S. broker that trades on a contract market for its non-U.S. customers is deemed to be a “foreign broker” (*see* Commission Regulation 15.00(a)(1)) that is not required to register as an FCM. It is true that members of Eurex may also be members of USFE and, in that capacity, execute trades for their own accounts and those of their non-U.S. customers. The Commission has not heretofore required firms in similar circumstances to register as FCMs (or in any other capacity) and the CME has articulated no reason why the Commission should apply a new, more restrictive approach to the Link.

Further, and most importantly, every trade that is made on USFE by or for a U.S. customer will be carried by an FCM. (Trades made on Eurex are “foreign futures,” governed by the Commission’s Part 30 Rules, for which FCM registration is not required.) In essence, therefore, the only persons who can trade on USFE without the intermediation of a registered FCM are non-U.S. persons.

¹¹ Dan Letter, at 6 n.2.

¹² The CBOT similarly suggested that segregated funds-secured amount relief for Phase II be conditioned on compliance by CCorp and FCMs with the same large trader reporting requirements that the Commission established in connection with Phase I. *See* Dan Letter at 11. We have no objection to this suggestion. Indeed, CCorp fully anticipates that both CCorp and any FCM that carries positions at CCorp (either indirectly or through a CCorp clearing participant) will be required to report “large trader” information to the Commission, regardless of whether those trades are executed on USFE or Eurex.

¹³ 48 Fed. Reg. 35248, 35621 (August 3, 1983), *quoting* 45 Fed. Reg. 18356, 18360 (March 20, 1980); *see* Interpretative Letter No. 98-80, Comm. Fut. L. Rep. (CCH) ¶27,503 (November 25, 1998).

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It is our understanding that Commission staff has in the past taken the position that a foreign firm that wishes to be a clearing member of a contract market must register as an FCM in order to avoid the creation of gaps in the Commission's financial system safeguards. That concern is wholly inapposite here, since it is Eurex Clearing, and not its clearing members, that will be obligated to CCorp for performance.

C. The Requested Relief is Appropriate and Prudent

The Order issued by the Commission in connection with the Euro Link permits CCorp and FCMs (including, where applicable, CCorp participants) to hold in a single combined account money, securities and other property ("customer funds") used to margin, guarantee or secure Euro Link (*i.e.*, Eurex) transactions with customer funds that are used to margin, guarantee or secure trades or positions in futures or commodity option contracts traded on a contract market or derivatives transaction execution facility. In essence, the Order allows CCorp and FCMs to hold in a segregated funds account – as opposed to separate segregated funds and foreign futures secured amount accounts – customer margin deposits and accruals for futures and option contracts that are traded either on a contract market or on Eurex, a foreign board of trade.¹⁴ CCorp accordingly requested that the Commission amend that Order (or issue an additional Order) to make this relief available for Phase II on the same terms that were approved for the Euro Link: "In its simplest terms, we are requesting nothing more than that the Commission revise the segregated funds and secured amount relief contained in the Euro Link Order to make it equally applicable to all Link transactions."¹⁵

The Phase II request is predicated upon Commission Regulation 1.49, which permits FCMs and DCOs to hold customer segregated funds with overseas financial institutions that satisfy certain criteria. Among other things, Rule 1.49 requires that any non-U.S. depository of customer segregated funds (i) be located in a money center country or in the country of origin of the currency that is being deposited, and (ii) be a bank or trust company that has in excess of \$1 billion in regulatory capital or whose commercial paper or long-term debt (or that of its holding company) receives one of the two highest ratings by a nationally recognized statistical rating organization. As we noted in the Phase II Request Letter, the requested relief does not in any way diminish the protections that are provided for segregated funds. Instead, the requested relief would "raise the bar" for the foreign futures and foreign options secured amount by making the requested relief available only if the combined segregated funds/secured amount accounts were held in strict compliance with the requirements of Regulation 1.49.

¹⁴ <http://www.cftc.gov/files/tm/tmclearingcorpphase1order.pdf>.

¹⁵ March 14, 2005 letter from Kenneth M. Rosenzweig to Jean A. Webb ("Phase II Request Letter"), <http://www.cftc.gov/files/tm/tmwebb-ltr.pdf>, at 2. The CBOT nonetheless takes the position that this modest, incremental extension of what the Commission has already approved would be inappropriate. Thus, the CBOT reprises its argument that CCorp must remain in compliance with the Core Principles. As demonstrated in the Carley-Shilts Letter (and discussed above), CCorp is and will remain in full compliance with the Core Principles.

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The CBOT, perhaps recognizing that it cannot convince the Commission that it should repeal Regulation 1.49 and the associated bankruptcy framework,¹⁶ is reduced to arguing that the protections associated therewith “only apply” in the context of a bankruptcy of a U.S. FCM administered under U.S. bankruptcy law. The CBOT goes on to make the argument that funds held by an FCM in a foreign country may not be distributed in precisely the same manner as they would be if the funds had been held in the U.S. and were under the control of a bankruptcy court. But that possibility is already contemplated and addressed by the Commission’s Part 190 Rules, and nothing in the Phase II relief request would require the Commission to make any change to either Rule 1.49 or the Commission’s bankruptcy rules.

The CBOT next argues that “a shortfall in funds caused by the actions of a foreign clearinghouse or foreign clearing member could affect all customers of a bankrupt U.S. FCM.”¹⁷ The CBOT undermines the first prong of its argument, however, by acknowledging that Eurex Clearing’s rules require its clearing members to deposit their own funds as margin, rather than depositing customer funds.¹⁸ It is, of course, true that the failure of a foreign clearing member could affect the customers of an FCM. The Commission addressed that risk, however, by insisting that foreign financial institutions that hold customer segregated funds in accordance with Regulation 1.49 maintain at least U.S. \$1 billion in regulatory capital or have one of the two highest ratings (such as AAA or AAA-) from a nationally recognized statistical rating organization. Finally, while it is conceivable that such a shortfall could affect “all customers of a bankrupt U.S. FCM,” the Commission took steps to minimize this risk by designing Framework 2 to assign the risk of any such shortfall solely to the customers whose funds are held in the country where the shortfall occurred.¹⁹

D. Conclusion

The CME and the CBOT would have the Commission believe that Phase II of the Link is strikingly different from what has gone before and that it correspondingly requires the Commission to make profound decisions about the proper scope and interpretation of the Act and Regulations. It is true that the Link is better designed than its predecessors, but as the following

¹⁶ See 17 C.F.R. Part 190, Appendix B, Framework 2 (“Framework 2”).

¹⁷ Dan Letter, at 9-10.

¹⁸ *Id.* at 9 n.9; see Phase II Request Letter at 3 n.4 (“Eurex Clearing, therefore, will hold no U.S. customer segregated funds or secured amount deposits”).

¹⁹ The CBOT’s fallback position is that the Commission should defer making any decision until it has had the benefit of the views of its Global Markets Advisory Committee. The Advisory Committee is precisely that (“advisory”) and nothing in its charter requires the Commission to defer, much less cede its decision making authority, to a body whose membership includes representatives from the FCM community, USFE, the CBOT and the CME. Further, nothing the Commission does in response to the Phase II relief request precludes it from taking further or different steps at a later date, including modifying any relief that it may grant now. In other words, the Commission has the inherent authority to modify its Phase II order to conform it to whatever standards may be adopted in the future for the industry as a whole.

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synopses of their salient characteristics make clear, the Link fits squarely within the legal and policy framework that has been established by Commission action in respect of prior inter-clearinghouse linkages:

CME-SIMEX (1984): The “Mutual Offset System,” which continues to operate, allows a customer to trade on the CME and have that trade transferred through the inter-clearinghouse link and carried on SIMEX. Like the Link between CCorp and Eurex Clearing, the Mutual Offset System requires that each of the clearinghouses maintain an omnibus (“special clearing member”) account with the other. Commission staff concluded that the Mutual Offset System “can be most appropriately assessed as an alternative to trading which would be conducted solely on foreign futures markets were it not implemented through an inter-exchange arrangement...”²⁰ and granted no-action relief to permit customer segregated funds and the foreign futures secured amount to be held in combined accounts.²¹

Commodity Exchange, Inc. (“Comex”) – Sydney Futures Exchange (“SFE”) (1986): The Comex Clearing Association (“CCA”) was not required to register with the Australian authorities even though all linked transactions made on SFE were required to be submitted to CCA.²² Commission staff granted no-action relief to permit customer segregated funds and the foreign futures secured amount for Comex and SFE transactions to be held in combined accounts.²³

CBOT – London International Financial Futures and Options Exchange (“LIFFE”) (1997): The CBOT–LIFFE linkage envisioned the cross-listing of each exchange’s major financial futures (including Treasury Bonds and Notes and the U.K. Gilt) and futures options contracts on each exchange’s trading floor. U.S. customers were permitted to trade CBOT contracts only through an FCM, but could trade LIFFE contracts either through an FCM or through a Rule 30.10–authorized foreign firm. Trades were submitted to the local exchange’s clearinghouse (CCorp, then known as the Board of Trade Clearing Corporation, for the CBOT, and The London Clearing House for LIFFE), where they were matched and cleared before being transferred through the link

²⁰ Memorandum to the Commission from the Divisions of Trading and Markets and Economic Analysis, Proposed Mutual Offset System Between the Chicago Mercantile Exchange and the Singapore International Monetary Exchange, Ltd. (August 28, 1984), at 8.

²¹ See Interpretative Letter No. 84-19, Comm. Fut. L. Rep. (CCH) ¶22,389, at 29,796 (August 9, 1984) (“An FCM need not, for segregation purposes, make any distinction between a CME trade executed on the SIMEX under the Mutual Offset System and any other regulated futures contract for which funds required to be segregated can be commingled...”).

²² See Interpretative Letter No. 86-26, Comm. Fut. L. Rep. (CCH) ¶23,359, at 32,990 n.6 (November 17, 1986).

²³ Interpretative Letter No. 86-26, *supra*.

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to the opposite clearinghouse.²⁴ CCorp and FCMs were permitted to treat all LIFFE contracts as foreign futures, even when those contracts were executed on the CBOT; to treat all CBOT contracts as domestic futures even when those contracts were executed on LIFFE; and to commingle customer segregated funds with foreign currency deposits and accruals that were held overseas to margin LIFFE (foreign futures) contracts.²⁵ The Commission additionally made corresponding amendments to its bankruptcy rules to establish a special bankruptcy convention for LIFFE link transactions.²⁶

CME – MEFF (2001): All transactions in certain MEFF stock index contracts were required to be cleared at the CME. MEFF, in turn, was permitted to become a special clearing member of the CME without having to register with the Commission as a DCO.²⁷ The CME additionally requested, and the Commission granted, relief from the segregation requirements of Section 4d of the Act and the secured amount requirements of Commission Regulation 30.7 in order to permit customer segregated and foreign futures secured amount funds to be held together in combined accounts.²⁸

As the foregoing makes clear, the Commission has never deemed it necessary to require a foreign linked exchange or clearinghouse to register or be designated. To the contrary, the Commission has granted relief from the segregation and secured amount requirements and taken other steps as necessary to facilitate the implementation of these other links. The structure of the Link between CCorp and Eurex Clearing, therefore, builds upon what has gone before. Our modest, narrowly tailored request for relief is entirely consistent with the decisions that the Commission has made in the past.

The comments submitted by the CBOT and CME are simply not persuasive. More importantly, they do not raise policy or legal issues that have not already been fully considered by the Commission and its staff. By contrast, our prior submissions demonstrate that the Link will provide market participants with global access to a wide range of debt and equity index benchmark products; will support the standardization of international operations and leverage market participants' and intermediaries' clearing and settlement infrastructure; will facilitate substantial cost reductions and savings for market users and intermediaries; and will permit the more efficient use of margin and firm capital. We therefore urge the Commission, having considered the record before it, to approve Phase II of the Link and CCorp's associated

²⁴ *See generally* Order: In the Matter of the Chicago Board of Trade Proposal to Implement a Trading and Clearing Link with the London International Financial Futures and Options Exchange (May 6, 1997) ("LIFFE Link Order").

²⁵ LIFFE Link Order, *supra*, at 7-8.

²⁶ *See* 62 Fed. Reg. 31708 (June 11, 1997) (amending Part 190 of the Commission's Rules to establish a special bankruptcy convention for LIFFE link transactions).

²⁷ *See* Interpretative Letter No. 02-29, Comm. Fut. L. Rep. (CCH) ¶28,990 (March 8, 2002).

²⁸ 66 Fed. Reg. 34110 (June 27, 2001).

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request for relief in respect of the holding of segregated and secured amount funds in combined accounts without further delay.

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We very much appreciate the opportunity to respond to the views expressed by the CME and CBOT. Please feel free to contact Kevin R. McClear, General Counsel of The Clearing Corporation (kevin.mcclear@clearingcorp.com // (312) 786-5763) or the undersigned (krosenzweig@mayerbrownrowe.com // (312) 701-8354) if you have any questions or if you would otherwise like to discuss this further.

Very truly yours,

/s/

Kenneth M. Rosenzweig

cc: Acting Chairman Sharon Brown-Hruska
Commissioner Walter L. Lukken
Commissioner Michael V. Dunn
Commissioner Fred Hatfield
Gregory Kuserk
James C. Carley
Patrick J. McCarty
Gregory G. Mocek
Richard A. Shilts