

CFTC letter No.03-27
June 18, 2003
No-Action
Office of General Counsel

Philip McBride Johnson, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Re: EDX London Exchange's Request for Recognition as Successor-in-Interest to OM London Exchange Limited under the 1996 No-Action Letter Regarding the Offer and Sale of Futures Contracts on the OMX Index in the United States

Dear Mr. Johnson:

This is in response to your letters, attachments and electronic mail dated from March 21, 2003 to May 29, 2003, in which you request on behalf of the EDX London Exchange ("EDX"), that the Office of General Counsel ("Office") of the United States Commodity Futures Trading Commission ("Commission" or "CFTC") recognize EDX as successor-in-interest to the relief granted in the July 23, 1996 no-action letter issued to OM London Exchange Limited ("OML"), permitting the offer and sale of futures contracts on the OMX Index in the United States ("U.S.").^[1]

We understand the facts to be as follows. The futures contracts on the OMX Index that were the subject of the July 23, 1996 no-action letter, which were traded on OML, will now be traded instead on EDX, a joint venture corporation recently formed by OM AG, the parent organization of OML, and the London Stock Exchange, with holdings of 24% and 76%, respectively.^[2]

Like OML, EDX will be a Recognized Investment Exchange ("RIE") in the United Kingdom ("U.K.") and will otherwise comply with all applicable regulatory requirements under U.K. law;^[3] its operations will occur under EDX trading rules that are substantially identical to OML's trading rules; the electronic trading platform and clearing technology used by EDX will continue to be OM CLICK and OM SECUR; the OMX Index itself will remain the same (subject, as in the past, to routine adjustments); and the transactions in OMX futures contracts on EDX will continue to be cleared by OML.

The Commodity Exchange Act ("CEA"),^[4] as amended by the Commodity Futures Modernization Act of 2000 ("CFMA"),^[5] provides that the offer or sale in the U.S. of futures contracts based on a group or index of securities, including those contracts traded on or subject to the rules of a foreign board of trade, is subject to the Commission's exclusive jurisdiction,^[6] with the exception of security futures products,

^[7] over which the Commission shares jurisdiction with the Securities and Exchange Commission (“SEC”).^[8] Thus, the Commission’s jurisdiction remains exclusive with regard to futures contracts on a group or index of securities that are not narrow-based under CEA Section 1a(25).^[9]

CEA Section 2(a)(1)(C)(iv) generally prohibits any person from offering or selling a futures contract based on a security index in the U.S., except as permitted under CEA Section 2(a)(1)(C)(ii) or CEA Section 2(a)(1)(D).^[10] By its terms, CEA Section 2(a)(1)(C)(iv) applies to futures contracts on securities indices traded on both domestic and foreign boards of trade. CEA Section 2(a)(1)(C)(ii) sets forth three criteria to govern the trading of futures contracts on a group or index of securities on contract markets and derivatives transaction execution facilities:

- (1) the contract must provide for cash settlement;
- (2) the contract must not be readily susceptible to manipulation nor to being used to manipulate any underlying security; and
- (3) the group or index of securities must not constitute a narrow-based security index as defined in CEA Section 1a(25).^[11]

Pursuant to CEA Section 1a(25)(B)(v), futures contracts on security indices traded on foreign boards of trade that received no-action relief prior to the enactment of the CFMA, were not deemed narrow-based security indices for a period of eighteen months after the CFMA’s enactment. On June 6, 2002, the Commission and the SEC issued a Joint Order making permanent the exclusion from narrow-based security index status all foreign exchange traded security indices that had received no-action relief prior to the CFMA’s enactment, so long as all conditions of such relief continue to be met (“Joint Order”).^[12] In this regard, the Joint Order provided that an index is not a narrow-based security index if: (1) it is traded on or subject to the rules of a foreign board of trade; (2) the offer and sale in the U.S. of a contract of sale for future delivery on the index was authorized before the date of the enactment of the CFMA; and (3) the conditions of such authorization continue to be met.^[13]

EDX represents that the OMX Index satisfies the criteria of the Joint Order. Specifically, EDX is a foreign board of trade. The offer and sale in the U.S. of futures contracts on the OMX Index was authorized by the July 23, 1996 no-action letter, prior to the enactment of the CFMA. EDX represents that all conditions set forth in the July 23, 1996 no-action letter continue to be met.^[14] Thus, the OMX Index is not a narrow-based security index pursuant to the Joint Order. Moreover, EDX represents that its futures contracts on the OMX Index would otherwise qualify for no-action relief, because they satisfy the remaining criteria under CEA Section 2(a)(1)(C)(ii), namely, that the futures contracts are cash settled and that neither the OMX Index nor the futures contracts are readily susceptible to manipulation.

^[15] Commission staff have confirmed that, based on the information contained in the letters, attachments and electronic mail noted above, the OMX Index and EDX’s futures contracts based thereon, conform to

these requirements.

Accordingly, in light of the foregoing, this Office confirms that it will not recommend any enforcement action to the Commission based on Sections 2(a)(1)(C)(iv), 4(a), or 12(e) of the CEA, as amended, if EDX's futures contracts based on the OMX Index are offered or sold in the U.S. Because this position is based upon facts and representations contained in the letters, attachments and electronic mail cited above, it should be noted that any different, omitted or changed facts or conditions might require a different conclusion. This position also is contingent upon EDX's obtaining RIE status from the U.K. Financial Services Authority ("FSA"), and EDX's continued compliance with all regulatory requirements imposed by FSA, and all applicable U.K. laws and regulations. In addition, this position may be affected by any rules that the Commission may adopt regarding futures contracts based on non-narrow-based security indices.

The offer and sale in the U.S. of EDX's futures contracts on the OMX Index is, of course, subject to Part 30 of the Commission's regulations, which govern the offer and sale of foreign futures and foreign option contracts in the U.S.^[16] Please also be advised that the views herein expressed represent the views of Commission staff and not necessarily the views of the SEC. As you are aware, the SEC was a party to the Joint Order, and accordingly, you may wish to consult with that agency regarding the applicability of the Joint Order to EDX's futures contracts on the OMX Index.

Sincerely,

Patrick J. McCarty
General Counsel

^[1] CFTC Interpretive Letter No. 96-54 Re: OMLX, The London Securities and Derivatives Exchange Limited Request for No-Action Letter for Futures Contracts based on the OMX Stock Index, [1994-96 Transfer Binder] Comm. Fut. L. Rep. ¶ 26,759 (July 23, 1996). The OMLX was renamed OM London Exchange Limited subsequent to the issuance of the 1996 no-action letter.

^[2] See letter from Philip McBride Johnson, Esq., Skadden, Arps, Slate, Meagher & Flom, LLP to Patrick J. McCarty, General Counsel, CFTC, dated April 8, 2003.

^[3] EDX represents that the process for obtaining RIE status in the U.K. is essentially complete. See electronic mail from Philip McBride Johnson, Esq., Skadden, Arps, Slate, Meagher & Flom, LLP to Harold L. Hardman, Senior Assistant General Counsel, CFTC, dated May 9, 2003.

^[4] 7 U.S.C. § 1 *et seq.*

[5] Appendix E of Pub. L. No. 106-554, 114 Stat. 2763 (2000).

[6] *See* CEA Section 2(a)(1)(C)(ii).

[7] Security futures products are defined as a security future or any put, call, straddle, option, or privilege on any security future. *See* CEA Section 1a(32). A security future is defined as a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, with certain exceptions. *See* CEA Section 1a(31).

[8] *See* CEA Section 2(a)(1)(D).

[9] *See* CEA Section 2(a)(1)(C)(ii).

[10] CEA Section 2(a)(1)(D) governs the offer and sale of security futures products.

[11] While Section 2(a)(1)(C)(ii) does not explicitly address the standards to be applied to a foreign security index futures contract traded on a foreign board of trade, this Office has applied those same three criteria in evaluating requests by foreign boards of trade to allow the offer and sale within the United States of their foreign security index futures contracts when those foreign boards of trade do not seek designation as a contract market or registration as a derivatives transaction execution facility to trade those products. *See also* Commission Regulation 41.13, 17 CFR § 41.13 (“[w]hen a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market or registered derivatives transaction execution facility”).

[12] 67 Fed. Reg. 38941 (June 6, 2002).

[13] *Id.* at 38942.

[14] In this regard, EDX reconfirms all of the undertakings and representations associated with the July 23, 1996 no-action letter including, but not limited to, that EDX is willing and able under applicable law and its own organizational documents to share information of a regulatory nature with the Commission in relation to the OMX Index. *See* letter from Mr. Johnson to Mr. McCarty, dated April 8, 2003.

[15] *See* letter from Mr. Johnson to Mr. McCarty, dated April 8, 2003. *See also* letter from Philip McBride Johnson, Skadden, Arps, Slate, Meagher & Flom, LLP to Harold L. Hardman, Senior Assistant General Counsel, CFTC, dated March 21, 2003. EDX further confirms that it has established

information sharing arrangements with the Stockholm Stock Exchange, where the securities underlying the OMX Index are traded, on the same lines as the existing arrangements made by OML. *See* electronic mail from Derek Oliver, EDX to Harold L. Hardman, Senior Assistant General Counsel, CFTC, dated May 29, 2003. EDX also intends as the opportunity arises to join as a signatory to the major MOUs that exist among industry participants or with international regulators. *See* letter from Mr. Johnson to Mr. McCarty, dated April 8, 2003.

[\[16\]](#) *See* 17 C.F.R. Part 30.