



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5260
Facsimile: (202) 418-5527
www.cftc.gov

Division of
Market Oversight

CFTC letter No. 04-33
October 25, 2004
No-Action
Division of Market Oversight

Edward H. Fleischman
Senior Counsel
Linklaters
1345 Avenue of the Americas
19th Floor
New York, NY 10105

Re: Sections 5 and 5a – European Energy Exchange; Request for No-Action Relief from Contract Market Designation and Derivatives Transaction Execution Facility Registration Requirements

Dear Mr. Fleischman:

This is in response to your letter dated April 28, 2004 to the Division of Market Oversight (Division) of the Commodity Futures Trading Commission (CFTC or Commission).¹ By this correspondence, you request, on behalf of the European Energy Exchange (EEX or Exchange) and its operator, European Energy Exchange AG (EEX AG), that the Division confirm that it will not recommend enforcement action to the Commission against EEX, EEX AG or the trading participants of EEX², in connection with the installation and use in the United States³ of the EEX electronic trading terminals and/or the EEX electronic order routing system, without seeking designation as a contract market (DCM) or registration as a derivatives transaction execution facility (DTEF) pursuant to Sections 5 and 5a, respectively, of the Commodity Exchange Act (CEA or Act) and without compliance with the Commission regulations relating specifically to DCMs or DTEFs. (No-action request).

¹ Letter from Edward H. Fleischman, Senior Counsel, Linklaters, to Dr. Michael Gorham, Director, Division of Market Oversight, Commodity Futures Trading Commission (April 28, 2004).

² For purposes of the No-action request and the relief provided herein, references to the trading participants of EEX shall include any “affiliate” of any EEX trading participant that has been granted access by the EEX trading participant to the EEX electronic trading and order system. An “affiliate” of an EEX trading participant shall mean any person that: (i) owns 50% or more of the trading participant; (ii) is owned 50% or more by the trading participant; or (iii) is owned 50% or more by a third person that also owns 50% or more of the trading participant. EEX represents that, as a condition of access to the EEX electronic trading system, such affiliates would be required to comply with all EEX Rules and that EEX trading participants remain responsible to EEX for ensuring their affiliates' compliance.

³ For purposes of this letter and the relief provided herein, the term “United States” shall include the United States, its territories and possessions.

Specifically, EEX wishes to make its electronic system for trading and clearing energy forwards and energy derivative contracts (the System), which is identical to the Eurex electronic trading system, available to: (i) EEX trading participants in the United States who wish to trade for their proprietary accounts⁴ through the System; (ii) EEX trading participants who are registered with the Commission as futures commission merchants (FCMs) and wish to submit orders and trade for United States customers⁵ through the System; and (iii) EEX trading participants who are registered with the Commission as FCMs or are exempt from registration as FCMs pursuant to Commission Rule 30.10 (Rule 30.10 Firms)⁶ and who wish to accept orders from United States customers through the EEX automated order routing system⁷ for submission to the System.

As you know, on March 24, 1999, the Commission published proposed rules that would have governed the circumstances under which foreign futures exchanges could be accessed from electronic trading devices in the United States.⁸ On June 2, 1999, the Commission issued an order that withdrew those proposed rules and directed the Commission staff to begin considering requests from foreign exchanges for interim no-action relief to allow them to place trading systems in the United States on a temporary basis until the Commission itself promulgated rules

⁴ For purposes of this letter and the relief provided herein, the term “proprietary account” shall have the meaning set forth in Rule 1.3 (y). 17 C.F.R. § 1.3(y) (2004). Commission rules referred to herein are found at 17 C.F.R. Ch. 1 (2004).

⁵ For purposes of this letter and the relief provided herein, the term “United States customers” shall have the same meaning as the term “foreign futures or foreign options customers” as it is defined in Rule 30.1 (c).

⁶ Rule 30.10 permits a person affected by the requirements contained in Part 30 of the Commission's rules to petition the Commission for an exemption from such requirements. Appendix A to the Part 30 rules provides an interpretative statement that clarifies that a foreign regulator or self-regulatory organization (SRO) can petition the Commission under Rule 30.10 for an order to permit firms that are members of the SRO and subject to regulation by the foreign regulator to conduct business from locations outside of the United States for United States persons on non-United States boards of trade without registering under the Commodity Exchange Act, based upon the person's substituted compliance with a foreign regulatory structure found comparable to that administered by the Commission under the Act.

Among the issues considered by the Commission in determining whether to grant Rule 30.10 relief to a foreign regulatory or self-regulatory authority are the authority's: (i) requirements relating to the registration, authorization, or other form of licensing, fitness review, or qualification of persons through whom customer orders are solicited and accepted; (ii) minimum financial requirements for those persons that accept customer funds; (iii) minimum sales practice standards, including risk disclosures, and the risk of transactions undertaken outside of the United States; (iv) procedures for auditing compliance with the requirements of the regulatory program, including recordkeeping and reporting requirements; (v) standards for the protection of customer funds from misapplication; and (vi) arrangements for the sharing of information with the United States. Interpretative Statement with Respect to the Commission's Exemptive Authority Under § 30.10 of its Rules, 17 C.F.R. Part 30, Appendix A (2004).

⁷ For purposes of this letter and the relief provided herein, the term “AORS” shall be defined to include any system of computers, software or other devices that allows entry of orders through another party for transmission to a board of trade's computer or other automated device where, without substantial intervention, trade matching or execution takes place.

⁸ Access to Automated Boards of Trade, 64 Fed. Reg. 14159 (proposed March 24, 1999).

or guidelines in this area (June 2 Order).⁹ In accordance with this instruction, the Division has reviewed EEX's No-action request and the materials submitted in support thereof.

In connection with its No-action request, EEX has forwarded the following information to the Division:

- General information regarding EEX (*e.g.*, its location and organization);
- Banking Act (non binding translation);
- German Securities Trading Act;
- German Exchange Act;
- EEX Exchange Rules;
- Implementation Regulation pertaining to § 17 subsection 1 of the Exchange Rules of EEX (Technical equipment concerning the Xetra Electronic Trading System);
- EEX Examination Rules;
- EEX Clearing Conditions for Trading on the Futures Market;
- EEX Conditions for Trading;
- EEX Contract Specifications;
- EEX Spot Market Concept;
- EEX OTC Clearing Concept;
- EEX Derivates Market Concept;
- Eurex User Manual 6.1 (as of 1 September 2003);
- EEX Eurex Future Trading System-Market Result Interface Specification;
- EEX System Access Alternatives; and
- Confirmation from the German Federal Financial Supervisory Authority (BaFin) with respect to information sharing.

⁹ Order of the CFTC Withdrawing Proposed Rules Regarding Access to Automated Boards of Trade, Release No. 4274-99 (June 2, 1999).

Representations made by EEX regarding the structure of EEX, EEX's activities in the United States, EEX's trading participant criteria, the EEX Trading System, the relevant regulatory regime in the Federal State of Saxony and the Federal Republic of Germany (Germany), and the information-sharing arrangements applicable to EEX are summarized in Sections I - V below. For purposes of its response to the No-action request, the Division has relied upon EEX's representations and has not conducted an independent review to confirm their accuracy.¹⁰

I. GENERAL INFORMATION REGARDING EEX

Similar to other exchanges in the Federal Republic of Germany, EEX, located in the city of Leipzig, in the Federal State of Saxony, Germany, is an entity under public law.¹¹ The operator of EEX, EEX AG, is a company incorporated under German law and its registered office is located in Leipzig. EEX AG provides financial, personnel and material resources for EEX. Legal predecessors of the Exchange were LPX Leipzig Power Exchange in Leipzig and the European Energy Exchange in Frankfurt (Main), Germany. The shareholders of these two exchanges merged in 2002 to form EEX AG. Currently, EEX AG's largest shareholders are Eurex Zurich AG, located in Zurich, Switzerland (23.22%), Landesbank Sachsen Girozentrale, located in Leipzig (17.39%), and Nord Pool ASA, located in Oslo, Norway (17.39%). The remaining shares are distributed among 53 other entities from different stakeholder groups, none of which holds more than 3.5 percent.

EEX is a service provider offering comprehensive services in all areas of electricity trading to all participants. These services include trading and clearing services, as well as the transmission of information to electric utilities, municipal utilities, industrial customers, brokers, banks, trading firms and financial service providers. EEX acts as the central counterparty for each transaction in the two market segments it offers, the spot market and the futures market. As the central counterparty, EEX assumes the counterparty risk as well as the risk of financial performance. Furthermore, it provides financial settlements in spot and futures markets as well as current information regarding the electricity market on its website. On its spot market, power is traded on a day ahead basis. Thus, all trades from a given day must be physically settled on the next day (or, if traded on a Friday, for example, on the next three days).

¹⁰ As stated below, the no-action relief provided herein is contingent upon the accuracy of the representations made by EEX in support of its No-action request. Any materially different, changed, or omitted facts or circumstances may render the no-action relief void or cause the Division, in its discretion, to condition further, modify, suspend, terminate, or otherwise restrict the relief.

¹¹ Exchanges such as EEX are organized under the German Exchange Act (Exchange Act), which enables exchanges to be formed and provides a framework for exchange rules, serving a purpose similar to a private corporation's charter and articles of association. As a public entity, the exchange is owned by the state. The Exchange Act contemplates that the exchange will be operated by an operator (in the case of EEX, EEX AG, which is a private corporation), in accordance with the statutory obligations and pursuant to agreement(s) entered into with the exchange in accordance with the Exchange Act. Under German law, public entities, such as exchanges, are limited in their ability to pursue or comply with private law rights and obligations, which are assumed by the operator of the exchange. Thus, it is only through the combination of both the exchange and its operator that EEX and EEX AG can carry out all necessary activities and fulfill their duties under public and private civil law.

The other market segment is the futures market, on which standardized power futures are tradable. The products available include monthly, quarterly and yearly futures. The underlying price is determined by the so-called Physical Electricity Index (Phelix®). Phelix Base is the hourly weighted average price per day for all 24 hours at the spot market. Phelix Peak is the hourly weighted average price for the hours from 8:00 a.m. to 8:00 p.m. It is determined and published daily. As previously stated, the System for trading and clearing electricity futures is identical to the Eurex electronic trading system. As of January 30, 2004, there were 44 trading participants on the futures market. All transactions executed on the futures market are subject to German law.

EEX represents that it does not have a subsidiary, affiliate, or partner in the United States. It has not participated in any market fair as an exhibitor nor carried out any mailing or merchandising campaigns in the United States. However, addressees located in the United States may read information distributed by EEX via email. Information in English published on EEX's website is accessible to, but is not designed specifically for, potential market participants in the United States. EEX represents further that the Exchange performs no trade processing or clearing functions in the United States.

II. MEMBERSHIP

Only trading participants admitted to the Exchange may trade at EEX. The admission of participants pertains either to the spot or futures market or comprises both market segments. Companies admitted to the spot and/or futures market purchase and sell EEX's products either (i) in their own name and for their own account, (ii) in their own name but for the account of a third party or (iii) they act as intermediaries.

A. Trading Participants

The requirements for being admitted as a trading participant are set out in the Exchange Act and the EEX Exchange Rules.¹² In order to be admitted, a company must file a written application with EEX. The company must name authorized representatives who are responsible for business management and provide information concerning their personal reliability and professional qualifications. The company must ensure that transactions are carried out in an orderly manner. Furthermore, applicants must prove, in principle, that they have minimum equity capital resources of Euro 50,000¹³ as required under the Exchange Act.¹⁴ There may not be any indication that could raise doubts as to the applicant's financial reliability and ability to participate in Exchange trading in an orderly manner.

¹² A list of the trading participants is published on the EEX website.

¹³ As of the date of this letter, Euro 50,000=\$63,420.

¹⁴ The paid-in capital and the reserves are considered to be part of the equity capital after deduction of (i) withdrawals by the proprietor or personally liable shareholders, (ii) credit granted to such individuals and (iii) any excess debt related to the proprietor's free assets.

The applicant must obtain all state approvals, permits, licenses, admissions or similar agreements that are required for trade and execution of respective transactions on the EEX. For example, companies conducting business that requires a license under the German Banking Act must file the respective documents with the EEX. In addition, EEX's Board of Management, after due assessment of the circumstances, may conduct examinations at the expense of the applicant and require the applicant to submit statements and documentation as it deems appropriate. It is also allowed to request information from third parties, provided the applicant has received prior notice of the request.

Foreign companies applying for admission must prove that their intended business activities comply with the legal and regulatory requirements of their country of origin, *i.e.*, companies can only be admitted if their business activities are allowed under the laws of their country of origin. Foreign companies must provide that competent foreign authorities can exchange relevant information with the German authorities in order to supervise the trading participant. Moreover, companies located outside of Germany must appoint an authorized service agent with a registered office in Germany.

Trading participants may also apply for admission as market makers for one or several types of futures contracts, provided market making is applicable to such types of contracts. Admitted market makers must enter limited bids for the offer and the demand side (Quotes) into the System during trading hours. Transactions may then be concluded on the basis of the Quotes.¹⁵

Exchange traders appointed by the trading participant execute trading participants' transactions on the futures market. The trader places bids or offers on the EEX futures market for one participant. EEX admits traders who have proven their reliability and professional qualifications by passing the obligatory spot and/or futures market trading test. Exchange traders are subject to approval by the competent supervisory authority that, for EEX, is the Ministry of Commerce and Labor of the Federal State of Saxony (Exchange Supervisory Authority).

B. Clearing Members

All trading participants in the EEX futures market must use the clearing facilities of EEX AG in accordance with the Clearing Conditions for the Futures Market (Clearing Conditions). Admission of clearing members, as well as the organization and settlement of clearing, are managed and executed separately from trading on EEX markets. In order to use the clearing functions, the Exchange trading participant must submit a written application for a clearing license to EEX AG.¹⁶ EEX AG issues either a general clearing license or a direct clearing license. Trading participants that are general clearing members (GCM) hold the general

¹⁵ At present, five trading participants are also market makers. The names of Exchange trading participants, including market makers, are published on the EEX website.

¹⁶ A trading participant without a clearing license (non-clearing member) must settle trades via a trading participant who has a clearing license (clearing member). This requires an agreement with the clearing member that prescribes the duty to provide security in accordance with such an agreement or the Clearing Conditions.

license and are authorized to clear their own transactions, their customers' transactions and the transactions of trading participants without clearing licenses.¹⁷ Trading participants that are direct clearing members (DCM) hold the direct license and are authorized to clear their own transactions, their customers' transactions and transactions of 100% affiliated trading participants without clearing licenses. As a prerequisite for a GCM license, the company applying must have regulatory equity capital of at least Euro 20 million or the corresponding equivalent in the country where the company is located.¹⁸ The corresponding minimum amount for DCMs is Euro 5 million.¹⁹ Deficits may be compensated through bank guarantees and/or collateral in the form of cash or securities.

In general, only institutions based in Germany, another European Union member state, or Switzerland can apply for clearing licenses at present. Clearing members must hold a full banking license in one of the member states of the European Union or Switzerland. Clearing members must prove that they have the appropriate technical equipment (back-office facilities), have paid their contribution to the clearing fund, have at least one sufficiently qualified staff member in the back-office who is in charge of the orderly fulfillment of clearing obligations, and have established specific accounts for clearing.²⁰

III. OVERVIEW OF THE EEX TRADING SYSTEM

At the outset, the Division notes that the description of the EEX Trading System set forth herein is based upon representations made by EEX or its representatives. Nonetheless, it should also be noted that the EEX system for trading and clearing energy futures is identical to the Eurex electronic trading system. Division staff has previously described the Eurex trading system in connection with the granting of foreign terminal no-action relief to the Deutsche Terminbourse²¹, Eurex Deutschland²², and Eurex Zurich Ltd.²³ Division staff also reviewed the Eurex trading system in its iteration as the a/c/e trading system.²⁴ Finally, Division staff, during its recent review of the application of the U.S. Futures Exchange, L.L.C. (EurexUS) for designation as a contract market, reviewed the enhanced version of the a/c/e trading system used by EurexUS.²⁵

¹⁷ Presently, seven banks act as GCMs.

¹⁸ As of the date of this letter, Euro 20 million=\$25,368,000.

¹⁹ As of the date of this letter, Euro 5 million=\$6,342,500.

²⁰ See Section III.H below for a description of settlement and clearing at EEX.

²¹ CFTC Staff Letter No. 96-28 (February 29, 1996).

²² CFTC Staff Letter No. 99-48 (August 10, 1999).

²³ CFTC Staff Letter No. 00-104 (November 16, 2000).

²⁴ Eurex had operated the a/c/e trading system in the U.S. as part of a joint venture with the Chicago Board of Trade since 2000. That joint venture ended December 31, 2003.

²⁵ EurexUS was designated by the Commission as a contract market on February 4, 2004.

A. Introduction

Trading on the EEX futures market is entirely electronic. EEX makes the Eurex trading system available to its participants on the basis of a service agreement with Eurex. Thus, all systems used for the EEX futures market segment are identical with those of Eurex, an exclusively computer-based, fully electronic trading system for the futures exchange. The EEX system is set up as a front-to-back system, whereby the front-end applications used by trading participants and clearing members are connected to the Exchange's back-end applications by way of data transmission lines. Each trading participant is responsible for securing access to and monitoring authorized access to its entry devices and other electronic data processing equipment connected to EEX.

B. The Order System

Orders that may be introduced into the System include market orders, limit orders, stop orders, and combined orders.²⁶ Market orders are those without price restrictions. They are immediately executed at the next price within the order matching range.²⁷ Limit orders include a price restriction and are executed at this price restriction or better. They may be entered as unrestricted (good until cancelled or good until a certain date); restricted (execute immediately or cancel); or valid only until the end of the trading period of a given trading day. Stop orders are entered into a separate order book and automatically become market orders in the futures contract if the price specified for the stop order is reached or exceeded or the price of the futures contract falls below the specified price. The stop orders will then be executed along with any other incoming market orders in the order of the times of their conversion into market orders. Combination orders and combination quotes²⁸ are individual orders and quotes entered simultaneously for the purchase and/or sale of an identical number of futures contracts for the same product that have different maturity dates (time spread). The execution of one order or quote is dependent on the execution of the other respective order or quote. Combination orders/quotes must name a specific price corresponding to the range between the bid and ask price of the two individual orders.

C. Trading Periods

Trading hours for futures trading on EEX are divided into four consecutive periods: (i) pre-trading period; (ii) opening period; (iii) trading period; and (iv) post-trading period. During the pre-trading period, the System generally accepts market orders, limit orders, stop orders and

²⁶ Orders must be identified upon entry as either proprietary or on behalf of customer accounts and as opening or closing trades. Cross trades or pre-negotiated trades are not permissible unless the buyer, prior to entering the order or quote, enters a cross request. The buyer and seller must enter the order or quote giving rise to the cross trade or pre-negotiated trade not earlier than five and not later than 65 seconds after having entered the cross request.

²⁷ If a market order cannot immediately be matched, it is automatically stored in the electronic order book but is not visible to other trading participants.

²⁸ A quote is the simultaneous entry of a limited bid and a limited ask order with different maturity dates. Quotes can only be assigned to market makers.

quotes without matching them. Combined orders or combined quotes cannot be entered. The opening period is comprised of the “pre-opening period“ and the balancing process. The purpose of the pre-opening period is to afford trading participants the opportunity to develop an adequate overview of the market and to initially react to the market situation at the commencement of trading. To the extent possible, the pre-opening period is concluded by setting an opening price for each future. The opening price is determined on the basis of both limit and market orders and quotes contained in the System as the price at which the maximum number of orders and quotes may be executed. During the balancing process, existing orders and quotes are matched at the opening price.²⁹

The trading period begins after the end of the opening period. Futures contracts are traded on a continuous basis during the trading period. Orders and quotes are automatically allocated to and matched with one another. The System ranks the orders and quotes initially according to price. The highest bid price and the lowest ask price are ranked first. Where the prices are identical, the ranking is determined by the chronological order of entry. Market orders entered during the trading period will only be executed with limit orders or quotes contained in the order book, the prices of which are within a certain range, as determined by the Board of Management, either above or below the last price at which the futures contract was effected. The final futures contract price is the price at which two limit orders or two quotes or one limit order and one quote were matched for a specific futures contract.

The trading period is followed by the post-trading period, which is divided into unrestricted and restricted periods. During the unrestricted period, which begins at the end of the trading period, participants may make inquiry of and enter data into the System. During the restricted period, which begins at the end of the unrestricted period, participants may only make inquiry of the System.

Immediately after the orders or quotes have been matched, EEX informs the trading participants of all material details of the transaction and enters the transaction into the trading participant’s transaction account. As more fully discussed below, executed orders are cleared by EEX AG as a clearinghouse. Thus, the contract becomes a trade between EEX AG and the clearing member of the Exchange trader (on the buyer’s side) as well as a trade between EEX AG and the clearing member (on the seller’s side). The clearing department tracks the delivery and payment of all transactions. In order to further ensure market transparency, the Board of Management publishes the prices and volume of basic transactions via electronic media. The current prices, volumes, and open interest are published on EEX’s website. Final settlement prices must be announced and are also available on EEX’s website. The order book, including bids and requests, is available to all Exchange participants. Additional information on the counterparty is not displayed on users' terminals in order to ensure post-trade anonymity.

²⁹ Immediately before the transition to the balancing process, EEX may, in order to assure an orderly balancing process, suspend the entry of additional orders and quotes or changes to or the cancellation of previously entered orders and quotes.

D. Trade Registration / Audit Trail

The prices of all transactions and the times that such transactions are executed are recorded automatically. EEX also creates extensive records of all entries made in the System. These records include the following information: (i) the terms and conditions of any order and any modification or cancellation of the order; (ii) the member's account to which the order or order instruction relates; (iii) the trader's identification number; (iv) the time of order entry and execution or cancellation; (v) the price of execution; and (vi) whether the member entered the order in its capacity as principal or agent. EEX retains extensive records of all entries made in the System for ten years.

E. System Response Time

Because EEX uses the Eurex trading system for its derivatives market, EEX represents that any order originating in the U.S. would be entered into the system within the same negligible time delays as specified in the documents that Eurex made available to the CFTC in Eurex's application for no-action relief. Thus, discrepancies in cross-border transmission times result from the differences in distance across the network among Exchange members in different locations.³⁰ However, the network is configured to provide relative equality of response time among all system users, subject to differences that amount to less than human reaction time.

EEX represents that its service provider, Deutsche Börse Systems AG, constantly monitors the network for irregularities in transmission time and has appropriate systems in place to correct such irregularities. Should delays in communication occur, Deutsche Börse Systems AG can verify whether the delay is a result of the network or of the trading participant's own system. In the event of a network delay or failure, the user is automatically switched over to a backup network connection when the problem is detected. Moreover, the System is continuously monitored in order to detect delays in confirming messages sent through the System. If a delay occurs, the System automatically reroutes the affected flow of information to the backup network connection. Should a trading participant continue to have difficulty entering trades due to a technical problem, EEX offers "Trading on Behalf" to its participants. This alternative allows trading participants to submit their orders by telephone to EEX personnel on a real-time basis until System access is restored. All trades using this alternative are confirmed in writing. EEX Rules also state that EEX may interrupt or extend trading hours, if necessary, to maintain orderly trading conditions.

F. Reliability and Failure Recovery

Trading participants must inform EEX without delay of any malfunctions with regard to EEX's technical equipment. If such a malfunction occurs, the Board of Management is entitled to take all necessary steps, including disconnecting respective trading participants from the

³⁰ Eurex's network extends from the central host processor to a port in each trading participant's electronic trading device. The transmission distance between a device located in Germany and the central host processor is much less than the distance between a device located in the United States and the central host processor.

System, in order to ensure that trading and settlement can be carried out in an orderly manner. Each trading participant must ensure its availability during Exchange hours.

EEX represents that, in the event of disruption in the network, the System utilizes an immediate back-up mechanism that prevents the loss of transactions. The retransmission facility built into the communications structure, coupled with the fact that transactions are connected to the central host, ensures that transactions entered by traders are processed and processed only once. To avoid failure, the System relies on more than one of each hardware component, *i.e.*, all components are doubled while trading participants can choose to use two leased lines connecting to two different access points in order to better deal with disturbances in power lines and communication server breakdown. Furthermore, Deutsche Börse Systems AG maintains a backup central host processor in a different location than the main central host processor.

G. System Security

EEX represents that the System has several security features. Since the network is private, only authorized users have access. Unauthorized access to the central host processor or between customers is blocked by corresponding network parameters and security router configurations. A user cannot access the communications structure without a password, which is assigned by EEX. User passwords are neither visible nor can they be changed by the trading participants. Moreover, transaction data are compressed by a bit level data compression algorithm before being sent through the network, thus providing a means of encryption and reducing the network load. Other data sent to customers through the network, such as files and reports, are encrypted using a customer-specific software password. Trading participants are obligated to take necessary measures in order to prevent misuse of their entry devices and other equipment linked to the System. In addition, they must constantly monitor access to this equipment.

EEX has other structures that can restrict access to the System. EEX will require U.S.-based EEX terminals to be connected to the System via a link which is separate from the one used by its members located outside of the U.S. This structure permits EEX to limit trading from U.S.-based EEX terminals to contracts that are permitted to be traded from those terminals. This capability helps to ensure that EEX trading participants operating in the U.S. will abide by the terms stipulated in any no-action relief granted to EEX and by any restrictions on products that can be traded from U.S.-based terminals.

H. Settlement and Clearing

Clearing is the settlement of daily margins, the final settlement of positions resulting from futures market trades and the respective security management. The clearing process is carried out separately from trading by EEX AG's Clearing Department (the clearing house for the Exchange), which acts as a counterparty for the cash settlement of EEX futures trades. Once a trade has been concluded, EEX AG steps in as the central counterparty between purchaser and seller. Thus, futures transactions are only executed between EEX AG and a credit institution that

is a clearing member.³¹ As previously noted, GCMs are authorized to clear their own transactions (proprietary trading) as well as those of their clients (agent trading) and non-clearing members. DCMs are entitled to clear their own transactions as well as those of their clients and non-clearing members that are 100% affiliates of the DCM.³² Trading participants that are non-clearing members execute their transactions through clearing members. Clearing members can check the status of individual trades. They can also complete registration by assigning trades to the correct account for margining and position-keeping, by adding account references and by allocating or claiming trades.

EEX operates a two-tiered clearing system. Customers provide the assessed margin in cash or securities or book-entry securities accepted by EEX to their clearing bank/clearing member. In addition, the clearing bank provides cash margin or collateral in securities or book-entry securities for the benefit of EEX. The customers' security is safeguarded by the capital market regulations of the state where the respective clearing bank is located. Exchange rules stipulate that participants must provide sufficient security to meet at any time the obligations arising from transactions concluded on the Exchange and in an electronic trading system admitted on the Exchange. The amount of security provided must correspond to the risks involved in the respective transactions. Hence, there are various security mechanisms that secure the financial integrity of the transactions.³³ Trading participants are obligated to provide the assessed margin required for futures trading and to effect daily settlement payments when due. Clearing members must require margin and daily settlement payments from their respective clients and non-clearing members in an amount that at least equals the amount determined using EEX's calculation methods.³⁴ GCMs must immediately report to the Board of Management regarding affiliated non-clearing members who fail to provide margins or effect daily settlement payments when due.

Irrespective of other security, clearing members are also obligated to contribute to the clearing fund. EEX AG determines the amount of the contribution to be provided. Currently, each GCM has to contribute Euro 3 million to the clearing fund.³⁵ In the event a clearing

³¹ In addition, EEX offers the opportunity to clear bilateral futures transactions through an OTC clearing system. EEX AG acts as a central counterparty for all OTC trades that are identical to EEX futures.

³² As previously noted, a GCM must have regulatory equity capital of at least Euro 20 million or the corresponding equivalent in the country where the company is located. The corresponding minimum amount for a DCM is Euro 5 million.

³³ With respect to position accounts and position limits, transactions executed by trading participants are recorded in the System in separate internal accounts of principals, agents (for customers) and market makers. For each participant, EEX keeps a record of two position accounts for principals, two agent position accounts, two give-up accounts and two market maker position accounts. The Board of Management is entitled to set limits for individual participants and their respective clients with regard to positions. The limit restricts the number of futures contracts to which a participant and/or client can be party. Furthermore, a participant may not be engaged in any transaction for itself or a customer if there is any indication that the position limit would be exceeded by the number of positions of the participant and/or the customer as a result of that transaction (alone or jointly with others).

³⁴ The calculation method that clearing members apply for non-clearing members must be disclosed at the request of the non-clearing members.

³⁵ As of the date of this letter, Euro 3 million=\$3,805,200.

member defaults on any of the obligations under the clearing conditions of the futures market, EEX AG covers any resulting losses from these sources in the following priority order: (i) the security provided by the defaulting clearing member; (ii) the defaulting clearing member's contribution to the clearing fund; (iii) funds from its annual surplus that EEX AG is required to set aside as reserves for the clearing fund; and (iv) the clearing fund contributions from other clearing members on a *pro rata* basis.

I. Adherence to IOSCO Principles

EEX represents that Principles for the Oversight of Screen-Based Trading Systems for Derivative Products developed by the Technical Committee of the International Organization of Securities Commission (IOSCO-Principles) have been and will continue to be observed.³⁶

IV. OVERVIEW OF THE REGULATORY STRUCTURE IN GERMANY

A. Federal Supervision of Financial Service Activities

In Germany, the supervision of financial services that are provided to third parties with respect to German financial instruments, including commodity derivatives, are governed by federal and state legislation as well as by the rules and regulations of the exchange. Generally, federal law governs the activities of banks and other financial services institutions. Since May 2002, the responsibility for this regulatory supervision has been vested in the German Federal Supervisory Office for Financial Services, the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin). This supervisory authority combines the responsibility of supervision of credit and financial services institutions with the supervision of securities trading. Companies intending to provide relevant banking or financial services on the German market in relation to commodity derivatives must first obtain a license from BaFin pursuant to the German Banking Act. In certain cases, companies based outside of Germany also have to acquire a financial services license from BaFin. Once licensed, the company must at all times comply with all capital and organizational requirements pursuant to the German Banking Act.

³⁶ Germany was one of eight jurisdictions that participated in Working Party 7 of IOSCO (Working Party), whose mandate included, among other things, the identification of issues related to screen-based trading systems for derivative products. In considering the special concerns for screen-based trading systems, the Working Party identified and addressed the following issues: transparency, order execution algorithms, operational issues, security and system vulnerability, access, financial integrity, disclosure, and the role of system providers. The Working Party considered these issues and articulated for each a broad principle to assist regulatory authorities in overseeing screen-based trading systems. The IOSCO Principles were adopted by IOSCO on November 15, 1990 and set out in broad terms the international consensus as to the regulatory considerations to be addressed in reviewing mechanisms for cross-border screen-based trading. The Commission adopted the IOSCO Principles as a statement of regulatory policy for the oversight of screen-based trading systems for derivative products on November 21, 1990. Policy Statement Concerning the Oversight of Screen-Based Trading Systems, 55 Fed. Reg. 48670 (Nov. 21, 1990).

B. Federal Supervision of Derivatives Trading

Derivatives trading, including the trading of commodity derivatives, is subject to the German Securities Trading Act. The German Securities Trading Act, among other things, contains extensive regulations against market manipulation and stipulates the conduct and organizational requirements for investment service enterprises, which includes companies trading commodity derivatives. As mentioned above, BaFin is the competent authority for supervision of the German securities and derivatives markets. In addition to other tasks, BaFin is responsible for counteracting undesirable developments on the securities trading market that could adversely affect its proper operation. BaFin may issue orders necessary for eliminating or preventing such undesirable developments. BaFin cooperates on a national and international level with the competent authorities or public bodies responsible for supervising stock exchanges and other securities, derivatives and foreign exchange markets. Subject to certain exceptions, the authority may communicate facts required for such supervision to such other competent authorities. Investment service enterprises are, among other things, obligated to keep records of the orders and pertinent instructions of their customers as well as to document execution of the orders. BaFin monitors compliance with reporting requirements and rules of conduct. In order to do so, BaFin may require companies to provide information and submit documents, and may conduct examinations at its own discretion.

C. State Supervision of Exchanges

The organization, regulation, and supervision of exchanges is governed by the Exchange Act, which governs the establishment of the bodies of the Exchange and their main responsibilities and sets forth the legal framework for participation in trading activities on the Exchange. Under the Exchange Act, the supervisory authorities of the respective federal states are responsible, within their jurisdictions, for approving the establishment of an exchange and for its supervision. In the State of Saxony, where EEX is located, the Exchange Supervisory Authority is responsible for supervising EEX.³⁷ The Exchange Supervisory Authority monitors EEX's compliance with the Exchange Act, as well as with other relevant laws and regulations governing the proper execution of trading on the Exchange and the settlement of Exchange transactions.

In its supervision of EEX, the Exchange Supervisory Authority may, without specific reason, demand information and documentation from EEX and its market participants and may conduct its own inspections. It has the power to issue orders to EEX or EEX trading participants that are designed to prevent the violation of regulations or orders, or to eliminate or prevent abusive practices that could impair the orderly conduct of exchange trading or the settlement of exchange transactions. The bodies of the Exchange, discussed below, are required to support the Exchange Supervisory Authority in carrying out its duties. The Exchange Supervisory Authority is entitled to participate in discussions held by the Exchange bodies.

³⁷ As previously noted, for EEX the Ministry of Commerce and Labor of the Federal State of Saxony is the Exchange Supervisory Authority.

D. Internal Oversight

As an SRO, EEX has a comprehensive set of rules. Pursuant to the Exchange Act, the rules aim to ensure that the Exchange is capable of fulfilling its duties and must include provisions regarding, among others, the scope of business and organization of the Exchange, the types of trading, and the publication of prices and quotes. Exchange rules must be approved by the Exchange Supervisory Authority, which may require certain provisions to be included in the rules to the extent necessary to fulfill the statutory obligations of the Exchange or the Exchange Supervisory Authority.

EEX is governed by a 17- member Exchange Council (Council) which is responsible for, among other things, the adoption of Exchange rules, the supervision of the Board of Management (Board), and the appointment and removal of members of the Board, in consultation with the Exchange Supervisory Authority. The 17 Council members, elected pursuant to the Exchange Ordinance enacted by the Exchange Supervisor Authority, represent the energy trading industry, including large-scale supply, public municipal supply, energy trading companies, other industry companies, credit institutions and associations. In principle, managers authorized to represent their companies, proprietors of businesses, executive employees and members of other bodies of the companies are eligible for the Council. In practice, members of the Council have extensive experience in and profound knowledge of the business.

The Board is responsible for handling the day-to-day management of the Exchange. The activities of the Board are supervised by the Council and Board decisions in principal matters are subject to the prior consent of the Council. Board members are appointed for a term of up to five years and may be re-appointed. Generally, the Board fulfils duties and exercises powers assigned to it by the Exchange Act in order to further public interest and is responsible for all duties that are not expressly allocated to other governing bodies of the Exchange. The Board and its representatives may take all actions necessary for proper trading on EEX and the handling of Exchange transactions. Companies and persons permitted to execute transactions on the Exchange must comply with the instructions issued by Board members and their representatives. Companies and individuals who breach existing regulations or do not observe such instructions can be temporarily suspended from trading if and for as long as they disrupt orderly trading procedures. The Board has the authority to withdraw, revoke, or suspend admission and to exclude from trading.

If it becomes aware that one or more of the requirements for admission had not actually been fulfilled when the admission was granted, the Board may withdraw the admission of a trading participant and/or an exchange trader. The Board may revoke admission, if, after it has been granted: (i) one or more of the prerequisites is no longer being met; (ii) the respective company fails to provide the security required; (iii) the company fails to make daily clearing payments; or (iv) fails to make other deliveries or payments or settle other charges in due time

according to the EEX Conditions for Trading or Clearing Conditions.³⁸ The Board may also suspend admission for the reasons mentioned above. In addition, based upon the founded suspicion that one or more of the requirements for admission was not complied with or has not been met, the Board may order the suspension of admission for a maximum period of six months.³⁹ Should a DCM or GCM fail to pay the margin or daily settlement according to requirements or fail to make another due payment or to perform a delivery obligation, the Board may exclude the company from trading. This would also result in the exclusion of the respective company's non-clearing members, and would remain in effect for the duration of the respective default. The Board is also permitted to take such measures with respect to similar defaults committed by a non-clearing member.

Pursuant to the Exchange Act, EEX operates a Market Surveillance Office (Surveillance Office) for continuous and comprehensive monitoring of trading on the Exchange and the settlement of Exchange transactions in accordance with the requirements of the Exchange Act. The Surveillance Office systematically and thoroughly records and evaluates data regarding Exchange trading and the settlement of transactions and also conducts any necessary investigations. The Exchange Supervisory Authority may issue instructions to the Surveillance Office and take over such investigations. The Board may instruct the Surveillance Office to conduct investigations within the scope of the above-mentioned duties. The head of the Surveillance Office reports regularly to the Exchange Supervisory Authority. With the consent of the Exchange Supervisory Authority, the Board may assign other duties to members of the Surveillance Office.

The Surveillance Office may exercise the authority of the Exchange Supervisory Authority in several areas. To the extent necessary to fulfill its duties and without giving any specific reason, it may require information and documentation from the Exchange and the enterprises and exchange traders admitted to the Exchange for trading, and may conduct inspections. If there is evidence justifying the conclusion that Exchange law provisions or orders are being violated or that other irregularities exist which may impair orderly Exchange trading or the settlement of Exchange transactions, it may require that trading participants disclose the identity of their customers and the persons obligated under or benefiting from the transactions executed, as well as any changes in the trading participants' holding of securities or derivatives which are traded on the Exchange. If such evidence exists, it may require that the customers and individuals obligated under or benefiting from the executed transactions provide information concerning such transactions, including the identity of the persons involved in the transactions.

³⁸ In addition, clearing banks and clearing houses may apply for revocation of admission. Once its admission has been revoked, the company must close its positions or transfer them to another company. It must cancel any orders and quotes entered into the System and is not allowed to open new positions. The company shall ensure that its customers can transfer their positions to other companies. The company's admission expires after these and other obligations with respect to EEX AG or the relevant clearing member have been fulfilled. The same rules apply with regard to the admission of market makers.

³⁹ The same applies to an admitted company or trader that defaults on a payment. The suspension continues until the defaulted payment has been settled.

To the extent that it is necessary to perform the duties of the Exchange Supervisory Authority and/or Surveillance Office, the Exchange and the trading participants must permit personnel from those entities to enter their property and business premises during normal working hours. The Surveillance Office may transmit data with respect to the execution of transactions to the Board and Surveillance Office of another exchange to the extent necessary for the fulfillment of the duties of the recipients. It may also transmit data with respect to the execution of transactions to those authorities responsible for monitoring trading on foreign exchanges, and receive data from them, to the extent that this is necessary to ensure orderly trading and the settlement of exchange transactions. Such data may only be transmitted to the authorities if they and the individuals commissioned by them are bound by an obligation of confidentiality and are aware that they may only use the information for its intended purpose. The Surveillance Office must inform the Exchange Supervisory Authority, the Board and BaFin of what data it intends to exchange with which authorities in other countries.

V. INFORMATION-SHARING

As set forth more fully below, pursuant to the terms and conditions of the no-action relief provided herein, the Division will be entitled to receive certain specified information regarding the System directly from EEX. Additional information relevant to the System and System trading participants will be available to the Commission and its staff under the terms of certain information-sharing arrangements to which both the CFTC and the Federal Authority for Securities Trading (BAWe), the predecessor of BaFin, were parties. The agreements include, without limitation, a *Memorandum of Understanding concerning Consultation and Cooperation in the Administration and Enforcement of Futures and Options Laws*, entered into on October 17, 1997, and the *Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations*, as amended March 1998 (commonly known as the Boca Declaration). By letter dated March 18, 2004, the BaFin confirms that the information-sharing arrangements would extend to information requested by the Commission in connection with the activities conducted pursuant to any no-action relief granted by the Commission, or any Division thereof, in connection with the placement in the United States of electronic facilities providing access to a BaFin-regulated market or products traded through a BaFin-regulated market.⁴⁰

VI. CONCLUSION

Consistent with the Commission's June 2 Order, the Division has reviewed and considered EEX's No-action request and the information and documentation forwarded to the Division in support thereof. Among other things, the materials furnished by EEX indicate that EEX does not maintain any office or staff in the United States, provide investment advice, solicit orders, or direct trading from within the United States, or maintain any order-matching or clearing facilities in the United States. The materials also indicate that EEX and its members are subject to oversight in Germany by a legitimate regulatory authority that is responsible for ensuring their compliance with an extensive regulatory regime, EEX adheres to the IOSCO

⁴⁰ The Division understands that this information would include relevant information provided by EEX, its trading participants, or the System to the Exchange Supervisory Authority.

Principles, and the CFTC and the BaFin are parties to various information-sharing arrangements applicable to the activities of EEX.⁴¹

Based specifically upon these and other representations made by EEX in support of its No-action request, the Division has determined that granting no-action relief to EEX and its members, pending the adoption by the Commission of rules or guidelines regarding access to foreign boards of trade from electronic trading devices in the United States, would not be contrary to the public interest. Accordingly, subject to compliance with the terms and conditions stated herein, the Division will not recommend that the Commission institute enforcement action against EEX or its members solely based upon EEX's failure to obtain contract market designation or DTEF registration pursuant to Section 5 or 5a, respectively, of the CEA if: (i) EEX trading participants located in the United States trade for their proprietary accounts through the System; (ii) EEX trading participants who are registered with the Commission as FCMs submit orders and trade for United States customers through the System; and (iii) EEX trading participants who are registered with the Commission as FCMs or who are Rule 30.10 Firms accept orders from United States customers through the EEX automated order routing system for submission to the System.

The Division's no-action position shall become effective immediately with respect to the following contracts:

- Base Load Month Futures,
- Peak Load Month Futures,
- Base Load Quarter Futures,
- Peak Load Quarter Futures,
- Base Load Year Futures, and
- Peak Load Year Futures.

If additional futures and option contracts become available for trading through the System, EEX may make such futures and option contracts available for trading through the System in the United States without obtaining written, supplemental no-action relief from Commission staff in accordance with the terms, conditions, and exceptions of the Commission's Statement of Policy regarding the listing of new futures and option contracts by foreign exchanges that are operating electronic trading devices in the United States pursuant to Commission staff no-action relief.⁴²

⁴¹ The Division notes that the foregoing is not intended to be an exhaustive list of the factors relevant to its decision to grant the no-action relief requested by EEX nor of the factors that the Division might consider when analyzing no-action requests from other exchanges. No-action requests, by their nature, require case-by-case evaluation and the Division's conclusion regarding any particular no-action request will be based upon the facts and circumstances presented at the time of its review of that request.

⁴² Notice of Statement of Commission Policy Regarding the Listing of New Futures and Option Contracts by Foreign Boards of Trade that Have Received Staff No-Action Relief to Place Electronic Trading Devices in the United States, 65 Fed. Reg. 41641 (July 6, 2000).

The scope of the Division's no-action position is restricted to providing relief from the requirement that EEX obtain DCM designation or DTEF registration pursuant to Sections 5 and 5a of the CEA and regulatory requirements that flow specifically from the DCM designation and DTEF registration requirements if the above-referenced contracts are made available in the United States for trading through the System, in the manner set forth herein. The Division's no-action position does not extend to any other provision of the CEA, any other Commission regulations, or to any registered futures association rules and does not excuse EEX or its members from compliance with any applicable requirements thereunder. Nor does the no-action position alter, restrict, or expand the coverage of existing Commission exemptions for particular products.

The Division specifically notes that its no-action position does not alter the general requirement that a firm operating pursuant to the no-action relief provided herein must be a registered FCM or be operating pursuant to Rule 30.10 relief to engage in the offer or sale of a foreign futures contract or a foreign options transaction for or on behalf of a United States customer. For example, nothing in this letter is intended to alter current Commission rules that require that any foreign firm that clears trades on a fully-disclosed basis on behalf of United States persons (including where the United States person is a non-clearing member of a foreign board of trade trading solely for its own account) be a registered FCM or a Rule 30.10 Firm. However, if a foreign firm solely carries accounts on behalf of United States customers that are the foreign firm's or any registered FCM's proprietary accounts (as defined in Rule 1.3(y)) or the foreign firm is either a member of the relevant foreign board of trade or is a foreign affiliate of a registered FCM and its sole contact with a United States customer is that it carries the FCM's omnibus account, then the firm need not register under Rule 30.4 nor confirm relief under Rule 30.10.

Moreover, the Division's no-action position does not amend, revise, or negate the obligations of FCMs and Rule 30.10 Firms under the CEA, Commission regulations, or Rule 30.10 orders. For example, Rule 30.10 Firms continue to be prohibited from maintaining a presence in the United States. Thus, Rule 30.10 Firms cannot provide direct access to the System in the United States (although they would be permitted to accept orders overseas from customers located in the United States that submit such orders by telephone or through an AORS located in the United States). FCMs or Rule 30.10 Firms who solicit or accept orders from United States customers for trading on the System remain responsible for, among other things, complying with risk disclosure, the handling and allocating of customer orders, and the segregation of customer funds.

The Division's no-action position does not affect the Commission's ability to bring appropriate action for fraud or manipulation. The Division specifically notes that the use of AORSs to transmit orders to the System shall be subject to all existing Commission rules and regulations and to any future rules or guidance issued by the Commission or the Division. Finally, this letter does not address issues that might arise under the Securities Act of 1933, the Securities Exchange Act of 1934, or any other applicable federal securities law or rule promulgated thereunder.

The Division's no-action position is subject to compliance with the following conditions:

- EEX will continue to satisfy the criteria for designation as a regulated market under the applicable laws of Germany with respect to transactions effected through the System.
- The laws, systems, rules, and compliance mechanisms of Germany applicable to EEX will continue to require it to maintain fair and orderly markets, prohibit fraud, abuse, and market manipulation, and provide that such requirements are subject to the oversight of appropriate regulatory authorities.
- EEX will continue to adhere to the IOSCO Principles, as updated, revised, or otherwise amended to the extent consistent with United States and German law.
- Only trading participants of EEX will have direct access (*i.e.*, not through an AORS) to the System from the U.S. and EEX will not provide, and will take reasonable steps to prevent third parties from providing, such access to EEX to persons other than EEX trading participants.⁴³
- All orders that are transmitted through the System by a trading participant of EEX that is operating pursuant to the no-action relief provided herein and that is not registered with the Commission as an FCM or that is not a Rule 30.10 Firm will be solely for “proprietary accounts,” as defined herein, of such EEX trading participant.
- All orders for United States customers accepted through an AORS and/or and transmitted by EEX trading participants through the System will be intermediated by an EEX trading participant that is registered with the Commission as an FCM or is a Rule 30.10 Firm, to the extent required by Commission regulation.
- Prior to their operating pursuant to the no-action relief provided herein, EEX will require current and future trading participants of EEX who are not registered with the CFTC as FCMs to file with EEX a written representation, executed by a person with the authority to bind the trading participant, stating that as long as the EEX trading participant operates pursuant to the no-action relief provided herein, the trading participant agrees to and submits to the jurisdiction of the Commission with respect to activities conducted pursuant to the no-action relief. EEX will maintain the foregoing representations as long as the relevant trading participant is operating pursuant to the no-action relief and shall make such representations available to the Commission upon the request of a Commission representative.
- Prior to their operating pursuant to the no-action relief provided herein, EEX will require current and future trading participant of EEX who are not registered with the CFTC as FCMs to file with EEX a valid and binding appointment of a United States agent for service of process in

⁴³ As stated above, “trading participants” includes those persons identified in footnote 2 for the purposes of this no-action letter and the conditions imposed upon the relief provided herein.

the United States pursuant to which the agent is authorized to accept delivery and service of “communications”⁴⁴ that are issued by or on behalf of the Commission. EEX will maintain the foregoing appointments as long as the relevant trading participant is operating pursuant to the no-action relief and shall make such appointments available to the Commission upon the request of a Commission representative.

- Prior to their operating pursuant to the no-action relief provided herein, EEX will require current and future trading participants of the Exchange who are not registered with the CFTC as FCMs to file with EEX a written representation, executed by a person with the authority to bind the trading participant, stating that as long as the trading participant operates pursuant to the no-action relief provided herein, the trading participant will provide, upon the request of the Commission, the United States Department of Justice or, if appropriate, the National Futures Association (NFA), prompt access to original books and records maintained at their United States offices as well as to the premises where EEX is installed or used in the United States. EEX will maintain the foregoing representations as long as the relevant trading participant is operating pursuant to the no-action relief. EEX will make such representations available to the Commission upon the request of a Commission representative.
- Prior to operating pursuant to the no-action relief provided herein, EEX will file with the Division, and maintain thereafter as long as EEX, its trading participants, or the System operate pursuant to the no-action relief, a valid and binding appointment of a United States agent for service of process in the United States, pursuant to which the agent is authorized to accept delivery and service of “communications,” as defined above, that are issued to EEX by or on behalf of the Commission.
- EEX will maintain the following updated information and submit such information to the Division on at least a quarterly basis, and at any time promptly upon the request of a Commission representative:
 - For each contract available to be traded through the System, the total trade volume originating from electronic trading devices providing access to the system in the United States compared with the total trade worldwide volume for such products traded through the System and the total worldwide trade volume for such products traded on EEX generally; and
 - A listing of the names, NFA ID numbers (if applicable), and main business addresses in the United States of all EEX trading participant that have access to the System in the United States.
- EEX will promptly provide the Division with written notice of the following:

⁴⁴ For purposes of these conditions, “communications” is defined to include any summons, complaint, order, subpoena, request for information, or notice or any other written or electronic documentation or correspondence issued on behalf of the Commission.

- Any material change in the information provided in its No-action request, including any information contained in the documents submitted in support thereof;⁴⁵
 - Any material change in EEX Rules or the laws, rules, and regulations in Germany relevant to futures and options;
 - Any matter known to EEX or its representatives that, in EEX's judgment, may affect the financial or operational viability of EEX, including, but not limited to, any significant system failure or interruption;
 - Any default, insolvency, or bankruptcy of any EEX trading participant known to EEX or its representatives that may have a material, adverse impact upon the condition of EEX, EEX AG's Clearing Department, or upon any United States customer or firm;
 - Any known violation by EEX or any EEX trading participant of the terms or conditions of the no-action relief provided herein; and
 - Any disciplinary action taken by EEX against any trading participant of EEX operating pursuant to the no-action relief provided herein that involves any market manipulation, fraud, deceit, conversion or that results in suspension or expulsion and that involves the use of an EEX terminal or of an AORS to submit orders to the System.
- Satisfactory information-sharing arrangements between the Commission and the relevant regulatory authorities will remain in effect.
 - The Commission will be able to obtain sufficient information, provided directly by EEX, regarding EEX operating pursuant to the no-action relief provided herein necessary to evaluate the continued eligibility of EEX or its trading participants for the relief, to enforce compliance with the terms and conditions of that relief, or to enable the Commission to carry out its duties under the CEA and Commission regulations and to provide adequate protection to the public or United States contract markets.
 - EEX will employ reasonable procedures, to be determined by EEX, for monitoring and enforcing compliance with the terms and conditions of the no-action relief provided herein.

The no-action position taken herein is taken by the Division only and does not necessarily reflect the views of the Commission or any other unit or member of the Commission's staff. It is based upon the information and representations contained in EEX's No-action request and the

⁴⁵ The Division notes that "material" changes in the information provided to it in support of this No-action request would include, without limitation, a modification of: EEX's trading participant criteria; the location of EEX's management, personnel, or operations (particularly changes that may suggest an increased nexus between EEX's activities and the United States); the basic structure, nature, or operation of the System; or the regulatory or self-regulatory structure applicable to EEX trading participants.

materials submitted in support thereof. Any materially different, changed, or omitted facts or circumstances may render this letter void. The Division specifically notes that it will examine the volume information submitted as a condition to the no-action relief provided herein as well as any changes in the nature or extent of EEX's activities in the United States to ascertain whether EEX's presence in the United States has increased to a level that might warrant reconsideration of the no-action relief.

As with all no-action letters, the Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion. Finally, the Division wishes to emphasize that the no-action position set forth herein is intended to provide immediate, interim relief to EEX and its trading participants, pending any adoption of rules or guidelines by the Commission regarding the use and placement in the United States of automated trading systems or AORSs that provide access to the products of foreign boards of trade. Thus, this letter will cease to be effective in the event that the Commission or its staff adopts generally applicable rules or general guidelines regarding the issues addressed herein, and EEX will be subject to those rules or guidelines in that event.

If you have any questions regarding this correspondence, please contact Duane C. Andresen, an attorney on my staff, at (202) 418-5492.

Very truly yours,

Richard A. Shilts
Acting Director

cc: Gregory C. Prusik, Vice-President Compliance and Registration, NFA
Branch Chief, Audit and Financial Review Unit, Division of Trading and Markets,
Chicago Regional Office