U.S. COMMODITY FUTURES TRADING COMMISSION



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Office of General Counsel

CFTC letter No. 07-11 June 18, 2007 No-Action Office of General Counsel

Roberto Napoletani Legal Counsel, Legal Affairs and Market Policy Section Markets and Regulatory Eurex Deutschland Neue Börsenstraße 1 60485 Frankfurt/Main FEDERAL REPUBLIC OF GERMANY

Re: Eurex Deutschland's Request for No-Action Relief in Connection with the

Offer and Sale in the United States of its Dow Jones STOXX 600 Index Futures

Contract and its Dow Jones STOXX Mid 200 Index Futures Contract

Dear Mr. Napoletani:

This letter is in response to letters, attachments, facsimiles and electronic mail dated from November 4, 2005 to May 4, 2007, requesting on behalf of Eurex Deutschland ("Eurex") that the Office of General Counsel ("Office") of the Commodity Futures Trading Commission ("Commission" or "CFTC") issue a "no-action" letter concerning the offer and sale in the United States ("U.S.") of Eurex's futures contracts based on the Dow Jones STOXX 600 Index ("DJS 600") and the Dow Jones STOXX Mid 200 Index ("DJSM 200")(collectively, "Indices").

We understand the facts to be as follows. Eurex is a futures and options exchange located in Frankfurt, Germany and operated by Eurex Frankfurt AG. Eurex is regulated by and subject to active market surveillance by German regulatory agencies, including the Exchange

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¹ This Office previously has granted no-action relief to Eurex in connection with the offer and sale in the U.S. of its futures contracts based on the MDAX, *see* CFTC Staff Letter No. 06-06 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,203 (Mar. 14, 2006); the Dow Jones Italy Titans 30 Index, *see* CFTC Staff Letter No. 05-23 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,168 (Nov. 23, 2005); the Dow Jones Global Titans 50 Index, *see* CFTC Staff Letter No. 02-81 [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,094 (June 28, 2002); the STOXX 600 Banking Sector Index and EURO STOXX Banking Sector Index, *see* CFTC Staff Letter No. 02-38 [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,999 (April 2, 2002); the STOXX 50 Index and the EURO STOXX 50 Index, *see* CFTC Staff Letter No. 00-52 [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,114 (April 6, 2000); and the DAX Index, *see* CFTC Staff Letter No. 94-98 [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,277 (Dec. 20, 1994).

Supervisory Authority in the State of Hesse, where Eurex and the Frankfurt Stock Exchange ("FSE") are located, and by the German Federal Financial Supervisory Agency (Bundesanstalt für Finanzdienstleistungsaufsicht) (the "BaFin"). Pursuant to the German Securities Trading Act, the BaFin has responsibility for the supervision of German securities and derivatives trading and has the authority to cooperate with competent authorities of other countries in connection with the supervision of securities and derivatives markets and trading activity thereon, including by sharing non-public market surveillance information.²

The DJS 600 is a broad-based, free-float-market-capitalization-weighted, total-return security index maintained by STOXX Limited, a joint venture of Deutsche Boerse AG, Dow Jones & Company, and the SWX Group.³ A subset of the Dow Jones STOXX Total Market Index, the DJS 600 is comprised of 600 highly capitalized and actively traded stocks listed and traded on stock exchanges from 17 European countries.⁴ The DJSM 200 is a broad-based, free-float-market-capitalization-weighted, total-return security index that is a subset of the DJS 600. Specifically, the DJSM 200 is comprised of the middle 200 companies in the DJS 600 measured by free-float market capitalization.

Based on data supplied by Eurex, the total adjusted market capitalization of the DJS 600 was approximately U.S.\$ 14.943 trillion and of the DJSM 200 was U.S.\$ 3.27 trillion, as of December 15, 2006.⁵ Also as of that date, the largest single security by weight represented 2.42% of the DJS 600 and 0.97% of the DJSM 200.⁶ The five most heavily-weighted securities represented 9.77% of the DJS 600 and 4.51% of the DJSM 200.⁷ The securities comprising the lowest 25% of the DJS 600 and DJSM 200 had six-month aggregate dollar values of average daily trading volume in excess of U.S.\$ 30 million: approximately U.S.\$ 528 billion and U.S.\$ 74 billion, respectively, for the 6-month period ending December 2006.⁸ The Indices are

² See letter from Ekkehard Jaskulla, Head of Section, Eurex to Nanette R. Everson, General Counsel, CFTC, dated November 4, 2005, at 6.

³ *Id.* at 3.

⁴ See electronic mail from Roberto Napoletani, Eurex to Julian E. Hammar, Counsel, CFTC, dated March 12, 2007. Countries represented in the DJS 600 include Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom. *Id*.

⁵ *Id.* (attached spreadsheet).

⁶ *Id*.

⁷ *Id*.

⁸ *Id*.

calculated in real time and are disseminated by electronic means through major data vendors, including Bloomberg and Reuters.⁹

With the exception of the index underlying each contract, the terms and conditions for Eurex's futures contracts on the DJS 600 and DJSM 200 are identical. Prices for each contract are quoted in index points with each index point equal to 200 euros per contract. The minimum price movement is one-tenth of one index point. Eurex lists for trading the three nearest months of the March quarterly cycle (March, June, September and December). The last trading day of the contracts is the third Friday of the relevant expiration month (or, if such day is not a trading day, the trading day immediately preceding such Friday). Cash settlement occurs on the first trading day after the last trading day of the contracts. The final cash settlement price for each contract is the arithmetic mean of the relevant index levels that are calculated and disseminated every fifteen seconds between 11:50 a.m. and 12 noon (Central European Time) on the last trading day (41 values). ¹⁰

The Commodity Exchange Act ("CEA"),¹¹ as amended by the Commodity Futures Modernization Act of 2000 ("CFMA"),¹² 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,¹³ with the exception of security futures products,¹⁴ over which the Commission shares jurisdiction with the Securities and Exchange Commission ("SEC").¹⁵ Thus, the Commission's jurisdiction remains exclusive with regard to futures contracts on a group or index of securities that is broad-based pursuant to CEA Section 1a(25).¹⁶

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

⁹ See letter from Dr. Jaskulla to Ms. Everson, dated November 4, 2005, at 5.

¹⁰ *Id.* at 7.

¹¹ 7 U.S.C. § 1 et seq.

¹² Appendix E of Pub. L. No. 106-554, 114 Stat. 2763 (2000).

¹³ See CEA Section 2(a)(1)(C)(ii).

¹⁴ 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).

¹⁵ See CEA Section 2(a)(1)(D).

¹⁶ See CEA Section 2(a)(1)(C)(ii).

2(a)(1)(C)(ii) or CEA Section 2(a)(1)(D).¹⁷ By its terms, CEA Section 2(a)(1)(C)(iv) applies to futures contracts on security 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 designated contract markets and registered derivatives transaction execution facilities ("DTEFs"):

- (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. 18

While Section 2(a)(1)(C)(ii) provides that no designated contract market or DTEF may trade a security index futures contract unless it meets the three criteria noted above, it 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 U.S. 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 DTEF to trade those products.¹⁹

¹⁷ CEA Section 2(a)(1)(D) governs the offer and sale of security futures products.

3(a)(55)(C).

The first two criteria under CEA Section 2(a)(1)(C)(ii) were unchanged by the CFMA. With regard to the third criterion, an index is a "narrow-based security index" under both the CEA and the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a *et seq.*, if it has any one of the following four characteristics: (1) it has nine or fewer component securities; (2) any one of its component securities comprises more than 30% of its weighting; (3) the five highest weighted component securities in the aggregate comprise more than 60% of the index's weighting; or (4) the lowest weighted component securities comprising, in the aggregate, 25% of the index's weighting, have an aggregate dollar value of average daily trading volume of less than \$50 million (or in the case of an index with 15 or more component securities, \$30 million). See CEA Section 1a(25)(A)(i)-(iv); Exchange Act Section 3(a)(55)(B)(i)-(iv). Thus, an index that does not have any of these elements is not a narrow-based security index for purposes of CEA Section 2(a)(1)(C)(ii). See also CEA Section 1a(25)(B); Exchange Act Section

¹⁹ With regard to the third criterion, the CFTC and SEC jointly promulgated Rule 41.13 under the CEA and Rule 3a55-3 under the Exchange Act, governing security index futures contracts traded on foreign boards of trade. These rules provide that "[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." CFTC Rule 41.13, 17 C.F.R. § 41.13; Exchange Act Rule 3a55-3, 17 C.F.R. § 240.3a55-3.

Accordingly, this Office has examined the DJS 600 and DJSM 200, and Eurex's futures contracts based thereon, to determine whether the Indices and the futures contracts meet the requirements enumerated in CEA Section 2(a)(1)(C)(ii). Based on the information noted herein and as set forth in the letters, attachments, facsimiles and electronic mail noted above, we have determined that the DJS 600, the DJSM 200, and Eurex's futures contracts based thereon, conform to these requirements.²⁰

In determining whether a foreign futures contract based on a foreign security index is not readily susceptible to manipulation or being used to manipulate any underlying security, one preliminary consideration is the requesting exchange's ability to access information regarding the securities underlying the index.

With regard to the stocks underlying the Indices listed and traded in Germany on the Frankfurt Stock Exchange ("FSE"), both Eurex and the FSE are subject to active market surveillance by the Exchange Supervisory Authority in the State of Hesse and by BaFin. Concerning stocks underlying the Indices listed and traded outside Germany, all of these stocks are from countries where the regulators are members of the Committee of European Securities Regulators ("CESR"), with the exception of Switzerland. Members of CESR, which include the BaFin, have entered into a Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance Activities that provides for sharing of certain market surveillance data among CESR members. Morever, the BaFin has entered into a bilateral information sharing memorandum of understanding with Switzerland. Eurex may request that BaFin obtain information from other regulators pursuant to these arrangements, as necessary. In addition, Eurex's Trading Surveillance Office is authorized under the German Exchange Act to obtain information directly from, and share information directly with, similar trading surveillance offices of other exchanges or regulators inside and outside of Germany.²¹

Thus, Eurex should have access to information necessary to detect and deter manipulation. In the event that Eurex is unable to obtain access to adequate surveillance data in

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²⁰ In making this determination, Commission staff has concluded that the DJS 600 and DJSM 200 do not have any of the elements of a narrow-based security index as enumerated in CEA Section 1a(25)(A), and accordingly the Indices would not be narrow-based security indices if traded on a designated contract market or DTEF.

²¹ See electronic mail from Mr. Napoletani to Mr. Hammar, dated March 12, 2007.

this regard, or is unable, either directly or through the BaFin, to share such data with the CFTC, this Office reserves the right to reconsider the position we have taken herein.²²

In light of the foregoing, this Office 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 Eurex's futures contracts based on the DJS 600 and DJSM 200 are offered or sold in the U.S. Because this position is based upon facts and representations contained in the letters, attachments, facsimiles 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 on the continued compliance by Eurex with all regulatory requirements imposed by the BaFin, and the applicable laws and regulations of Germany and the State of Hesse. 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.

Eurex also has requested that, upon issuance of the relief granted herein, it be permitted to make the DJS 600 and DJSM 200 futures contracts available for trading through the electronic trading terminals of its U.S. members in accordance with the terms of the August 10, 1999 foreign terminals no-action letter ("August 10, 1999 letter") issued by Commission staff to Eurex.²³ In this regard, Eurex has certified that it is in compliance with the terms of the August 10, 1999 letter and that Eurex's futures contracts on the DJS 600 and DJSM 200 will be traded in accordance with the terms and conditions of the August 10, 1999 letter.²⁴ We have consulted with the Commission's Division of Market Oversight ("Division"), which is the Division in the Commission that administers foreign terminal no-action letters. The Division has concluded that allowing Eurex to make its DJS 600 and DJSM 200 futures contracts available for trading pursuant to the August 10, 1999 letter would not be contrary to the public interest. Accordingly,

²² Eurex has confirmed that it is willing and able to cooperate through information sharing and other means with the Commission in relation to the trading of Eurex's DJS 600 and DJSM 200 futures contracts. *See* letter from Dr. Jaskulla to Ms. Everson, dated November 4, 2005, at 6. Eurex also is a signatory to the International Information Sharing Memorandum of Understanding and Agreement signed on March 15, 1996, at Boca Raton, Florida. Moreover, the BaFin's predecessor, the BAWe, and the CFTC entered into a Memorandum of Understanding concerning Consultation and Cooperation in the Administration and Enforcement of Futures Laws on October 17, 1997. The BaFin also is a signatory to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information of the International Organization of Securities Commissions ("IOSCO MOU"), to which the Commission also is a signatory. In addition, the BaFin, through its predecessor, is a signatory to the Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations for the sharing of large exposure information, signed on March 15, 1996, at Boca Raton, Florida.

 $^{^{23}}$ See CFTC Staff Letter No. 99-48 [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) \P 27,572 (Aug. 10, 1999).

²⁴ See letter from Dr. Jaskulla to Ms. Everson, dated November 4, 2005, at 1.

on behalf of the Division, this Office hereby confirms that the no-action relief granted to Eurex in the August 10, 1999 letter extends to Eurex's DJS 600 and DJSM 200 futures contracts.²⁵

The offer and sale in the U.S. of Eurex's futures contracts on the DJS 600 and DJSM 200 is, of course, subject to Part 30 of the Commission's regulations, which governs the offer and sale of foreign futures and foreign option contracts in the U.S.²⁶

Sincerely,

Terry S. Arbit Acting General Counsel

²⁵ Please be advised that if Eurex intends to list options on its DJS 600 and DJSM 200 futures contracts, it may offer and sell those options in the U.S. with no further action from this Office, *see* 61 Fed. Reg. 10891 (March 18, 1996). However, if Eurex intends to make such options available for trading via direct access from electronic trading terminals in the U.S., Eurex must so notify the Division in accordance with the Notice of Revision 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 Provide Direct Access to Their Automated Trading Systems From Locations in the United States, issued on April 18, 2006. *See* 71 Fed. Reg. 19877 (April 18, 2006).

²⁶ See 17 C.F.R. Part 30.