

November 9, 2007

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Mr. David A. Stawik
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Petition to Commingle Customer Funds Used to Margin CBOT Contracts Executed in OTC Markets, and Cleared by CME on behalf of the CBOT, with other Funds Held in Segregated Accounts

Dear Mr. Stawik:

The Board of Trade of the City of Chicago, Inc. ("CBOT®" or "Exchange") hereby petitions the Commodity Futures Trading Commission ("Commission") for an Order pursuant to Section 4d of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. §6d, which would prescribe terms and conditions for the commingling of customer funds associated with certain transactions cleared through Chicago Mercantile Exchange Inc. ("CME") on behalf of the CBOT.

Specifically, the CBOT seeks relief that would allow CME, a registered derivatives clearing organization ("DCO") that provides clearing services for the CBOT, and futures commission merchants ("FCMs") clearing through CME in such capacity, to commingle customer funds used to margin, secure, or guarantee certain contracts executed in the over-the counter ("OTC") markets, which are cleared by CME for the CBOT, with other funds held in segregated accounts maintained in accordance with Section 4d of the Act and Commission regulations, subject to appropriate terms and conditions.

I. The Commission's legal authority and precedent

Section 4d(a) of the Act provides that:

. . . [i]t shall be unlawful for any person to engage as a futures commission merchant or introducing broker in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market or derivatives transaction execution facility unless . . .

(2) such person shall, if a futures commission merchant, . . . treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such commission merchant or be used to margin or guarantee the trades or contracts, or to secure or extend the credit, of any customer or person other than the one for whom the same are held.

Section 4d(b) of the Act further states that:

. . . [i]t shall be unlawful for any person, including but not limited to any clearing agency of a contract market or derivatives transaction execution facility and any depository, that has received any money, securities, or property for deposit in a separate account as provided in paragraph (2) of this section, to hold, dispose of, or use any such money, securities, or property as belonging to the depositing futures commission merchant or any person other than the customers of such futures commission merchant.

However, Section 4d(a)(2) of the Act provides that:

. . . in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, such money, securities, and property of the customers of such futures commission merchant may be commingled and deposited as provided in this section with any other money, securities, and property received by such futures commission merchant and required by the Commission to be separately accounted for and treated and dealt with as belonging to customers of such futures commission merchant.

Therefore, the Act provides the Commission with the authority to grant the relief requested herein. Moreover, the Commission has previously issued Orders under Section 4d of the Act, permitting the New York Mercantile Exchange, Inc. ("NYMEX") and CME, and their clearing futures commission merchants, to commingle customer funds used to margin, secure, or guarantee OTC "cleared only" contracts with other funds held in segregated accounts, subject to specified terms and conditions.¹

II. The Exchange's OTC "cleared only" products

The CBOT currently lists the following cleared-only OTC swap products that are subject to the definition of "excluded swap transactions" in Section 2(g) of the Act: Denatured Fuel Ethanol Forward Month Swaps, Cash-Settled Options on Denatured Fuel Ethanol Forward Month Calendar Swaps, New York Harbor Denatured Fuel Ethanol Basis Swaps, Gulf Coast Denatured Fuel Ethanol Basis Swaps, and Los Angeles Denatured Fuel Ethanol Basis Swaps. In addition, the Exchange lists cleared-only OTC Cash-settled Denatured Fuel Ethanol Options that involve transactions in an exempt commodity under Section 2(h) of the Act.² The counterparties to these OTC contracts must meet the definition of eligible contract participants ("ECPs") under Section 1a(12)(C) of the Act. The current terms and conditions of each of these contracts are attached in Exhibit A. On October 25, 2007, the CBOT certified a new rulebook with the Commission, including new versions of the terms and conditions of these contracts. The new versions, which will become effective on November 29, 2007, only reflect changes in organization, and not changes in substance, and are attached in Exhibit B.

The Denatured Fuel Ethanol Forward Month Swap contract is referred to as the Ethanol Calendar Swap. These calendar swaps are negotiated directly between counterparties in the OTC market, and are then entered into the CME's clearing system by CBOT clearing members. The key

¹ See Orders of the Commodity Futures Trading Commission dated May 30, 2002, and February 10, 2004, regarding "Treatment of Funds Held in Connection with the Clearing of Over-the-Counter Products by The New York Mercantile Exchange" and Order of the Commodity Futures Trading Commission dated March 3, 2006, regarding "Treatment of Funds Held in Connection with the Clearing of Over-the-Counter Products by Chicago Mercantile Exchange Inc."

² The CBOT began offering cleared-only Ethanol Calendar Swaps on December 4, 2006, and began offering cleared-only Ethanol Basis Swaps and Cash-Settled Ethanol Options and Calendar Swap Options on October 15, 2007.

features of Ethanol Calendar Swaps are very similar to the features of the CBOT Ethanol futures contract. The primary differences between the Calendar Swap features and the futures contract features are the contract size and the settlement process. The size of the CBOT Ethanol Calendar Swaps is $\frac{1}{2}$ the size of the futures contract, i.e., 14,500 gallons. The swap products are also cash-settled, in contrast to the futures contract, which is physically-settled. The CBOT Ethanol Calendar Swaps are settled and marked to market daily. The daily settlement price for the Ethanol Calendar Swap contracts prior to their expiration month is equal to the daily settlement price for the corresponding futures contract. During the final month of clearing, the settlement price is calculated as the cumulative average of the settlement prices for the corresponding CBOT Ethanol futures contract. The final settlement price is the cumulative average of the settlement prices for the corresponding futures contract for each clearing day during the last month of clearing.

The value of a CBOT Cash-Settled Forward Month Swap put option at expiration is the difference between the strike price of the put option and the settlement price of the underlying CBOT Denatured Fuel Ethanol Forward Month Swap contract multiplied by 14,500 gallons or zero, whichever is greater. The value of a CBOT Cash-Settled Forward Month Swap call option at expiration is the difference between the settlement price of the underlying CBOT Denatured Fuel Ethanol Forward Month Swap contract and the strike price of the call option multiplied by 14,500 gallons or zero, whichever is greater. Cash-settled Options on Ethanol Forward Month Swaps are cash-settled on expiration day and cannot be exercised at any time during the life of the option.

CBOT Ethanol Basis Swaps are utilized to mitigate basis risk that cannot be hedged with trading Ethanol futures and/or CBOT Ethanol Calendar Swaps. Although the Exchange currently trades New York Harbor, Gulf Coast, and Los Angeles Ethanol Basis Swaps, the CBOT anticipates that it may develop Ethanol Basis Swaps for additional basis locations in the future. All of these contracts, like CBOT Ethanol Calendar Swaps, are OTC clearing-only products. The daily settlement price for the Ethanol Basis Swap contracts prior to their expiration month is equal to the cash price at the basis location minus the settlement price for the corresponding futures contract. During the final month of clearing, the settlement price is calculated as the cumulative average of the difference between the cash price at the basis location minus the settlement price for the corresponding CBOT Ethanol futures contract. The final settlement price is the average of the settlement prices for the applicable Ethanol Basis Swap for each clearing day during the last month of clearing.

The value of a Cash-Settled Denatured Fuel Ethanol put option at expiration is the difference between the strike price of the put option and the settlement price of the underlying CBOT Denatured Fuel Ethanol futures contract multiplied by 29,000 gallons or zero, whichever is greater. The value of a Cash-Settled Denatured Fuel Ethanol call option at expiration is the difference between the settlement price of the underlying CBOT Denatured Fuel Ethanol futures contract and the strike price of the call option multiplied by 29,000 gallons or zero, whichever is greater. Cash-settled Denatured Fuel Ethanol Options are cash-settled on expiration day and cannot be exercised at any time during the life of the option.

The Ethanol Calendar Swap and Ethanol Basis Swap products and the cash-settled options that are the subject of the CBOT's Petition differ from the NYMEX and CME products, which involve the substitution of either Exchange-traded futures or options contracts for the original bilateral contracts between the two counterparties to the OTC transaction. The CBOT's "cleared only" swaps and options remain OTC products and are not converted or substituted into Exchange-traded futures or options products.

III. Liquidity of the relevant underlying markets

In May 2006, prior to the introduction of the CBOT's Ethanol Calendar Swaps, the Exchange had conducted a survey of market participants who traded the CBOT's Ethanol futures contract. At that time, six of fifteen firms polled indicated that they participated in the OTC ethanol swap market, although all fifteen indicated that they expected to be involved in the OTC swap market in the future and supported the Exchange's efforts to design products that could be used to clear OTC ethanol transactions. In March 2007, about 12 participants were surveyed, and 6 participants indicated they were actively using basis swaps. Based on market feedback, it appears that participation in the basis and calendar swaps markets is growing quickly. There are currently approximately twenty active participants with respect to the CBOT's OTC cleared-only Ethanol swap and option product suite, representing commercial entities as well as trading firms.

Between the launch of the CBOT's Ethanol Forward Month Swaps in December 2006 and October 2007, the total volume in these contracts was approximately 38,500 contracts. If the volume remains relatively constant, an extrapolation to the projected annual volume would be about 46,000 CBOT Ethanol Calendar Swaps per year. At 14,500 gallons of ethanol per contract, the value of such contracts would total approximately 667 million gallons per year. The CBOT interviewed five parties that trade CBOT Ethanol Calendar Swaps and they all agreed that the number of non-cleared OTC transactions is at least as large as the number of cleared transactions. As such, the size of the ethanol swap market, both cleared and non-cleared, appears to be at least approximately 1.3 billion gallons per year.

The estimated production of ethanol in the U.S. for calendar year 2007 is approximately 8 billion gallons, indicating that a significant portion of the underlying ethanol market is hedged in products other than ethanol swaps. The CBOT's Ethanol futures market, as of October 31, 2007, had open interest of 1,642 contracts, which is equivalent to 47.6 million gallons. Combined with the estimated size of the ethanol swap market of 1.3 billion gallons, it appears that ethanol futures and swaps are currently being used to hedge about 2 billion gallons of ethanol, which is approximately equal to three month's U.S. production of ethanol.

Industry sources also indicate that the New York Mercantile Exchange's RBOB Gasoline futures contract is used to cross hedge ethanol price risk. As of October 31 2007, the open interest in NYMEX RBOB futures was 191,028 contracts (8 billion gallons) and volume on October 31, was 70,301 contracts (3.0 billion gallons). Since ethanol is used primarily as a blendstock to augment gasoline supplies, its price is affected by many of the same factors that affect RBOB prices. Based on RBOB and Ethanol futures settlement prices from January 2006 through May 2007, RBOB prices show a .4 correlation with ethanol prices.

IV. The current financial treatment of CBOT's Cleared-Only Ethanol Products

On April 24, 2007, the Exchange issued the Notice regarding Financial Reporting for the CBOT's Ethanol Calendar Swaps, which is attached as Exhibit C. CBOT clearing firms were advised that because these contracts were executed "off-exchange", they could not be reflected in the customers' segregated account; however they could be classified in either a customer Part 30 or a customer non-regulated account. Clearing firms were informed that if they chose to reflect Ethanol Calendar Swaps as part of their 30.7 liabilities, they must also include that amount as part of the total risk margin for their 30.7 accounts. As a result, these contracts would be subject to the 8% minimum capital requirement, whereas they would not be subject to this minimum capital requirement if a firm chose to reflect the contracts as non-regulated. Nevertheless, clearing firms were notified that the Exchange's Financial Compliance Committee expected that such firms would exercise prudent risk management practices and maintain excess net capital sufficient to cover 8% of the risk in non-regulated accounts with positions in CBOT Ethanol Calendar Swaps.

V. Margin treatment

The CME Clearing House calculates performance bond/margin requirements for CME and CBOT clearing firms using its proprietary SPAN® (Standard Portfolio Analysis of Risk®)³ software. The SPAN software has also been used for some time, and will continue to be used, for the purpose of determining customer level margin for CBOT products.

SPAN simulates the gains and losses of futures and options portfolios to determine their overall risk, under changing market conditions, using current and historical price and volatility data. CME reviews performance bond/margin requirements for CBOT products on a regular basis, and makes modifications, as appropriate. The futures maintenance performance bond/margin levels for CBOT and CME products cover expected one-day price moves at least 95% to 99% of the time, based on historical volatility. However, because the CME Clearing House routinely assesses its markets based on a number of factors in addition to the volatility of the markets, including concentration, event risk, and fat-tail risk (the risk of an unforeseen event occurring), among others, the actual performance bond/margin levels that are set by the CME Clearing House may exceed these levels on a product by product basis.

The CME Clearing House will continue to utilize its normal and customary margin procedures, as described above, with respect to the CBOT's cleared-only OTC Ethanol products. The CBOT would be willing to agree to a condition that the performance bond must be set with a 99% confidence level. However, since a multi-day period does not necessarily equate to higher risk coverage, the Clearing House should retain the flexibility to evaluate the appropriate time frame as the markets for Ethanol Calendar Swaps, Ethanol Basis Swaps, and Cash-Settled Ethanol Options and Options on Ethanol Calendar Swaps mature. Therefore, the CBOT should be permitted to set customer margin rates consistent with a 99% level of confidence that such margin rates would reflect the risk of price movement over a one-day period for at least 90 days after issuance of the Commission's Order, after which time the CBOT would submit a report to the Commission analyzing the adequacy of these margin requirements.

Based on the correlation between the products, the minimum maintenance margins for the CBOT's Ethanol Calendar Swaps and Ethanol futures contracts (in a 2:1 ratio) are currently subject to an 85% inter-market spread credit for accounts with identical ownership. The CME Clearing House may also determine to apply a spread credit with respect to spreads involving Ethanol Basis Swaps, which would depend on a high and sustained correlation between the Ethanol Basis Swaps and other related products. Those spread credits would generally cover a 99th percentile of market moves between the products over different time periods.

VI. Risk Management and Financial Surveillance

The CBOT's products are cleared by the CME Clearing House, which remains in compliance with the Core Principles of the Act applicable to DCOs with respect to risk management and financial surveillance, and will continue to do so, if the relief requested herein is granted.⁴

³ "SPAN" and "Standard Portfolio Analysis of Risk" are trademarks of Chicago Mercantile Exchange, Inc. Chicago Mercantile Exchange, Inc. assumes no liability in connection with the use of SPAN by any person or entity.

⁴ In particular, Core Principle B requires that a DCO must demonstrate that it ". . . has adequate financial, operational, and managerial resources to discharge the responsibilities of a [DCO]". Section 5b(c)(2)(B) of the Act. Core Principle D requires that a DCO must ". . . have the ability to manage the risks associated with discharging the responsibilities of a [DCO] through the use of appropriate tools and procedures." Section 5b(c)(2)(D) of the Act.

CME provides the financial guarantees for all CBOT contracts that it clears. The CME Clearing House uses the same systems, procedures and processes to clear the CBOT's suite of OTC cleared-only Ethanol products as it does for other CBOT products.

The CME's annual Form 10-K financial statement, as of December 31, 2006, reflects the substantial financial and operational resources of the CME and its Clearing House.⁵ In 2006, the CME Clearing House cleared an average of 8.6 million transactions per day, and it moved an average of approximately \$1.7 billion in settlement funds through its clearing system on a daily basis. As of December 31, 2006, the aggregate performance bond deposits by all clearing firms (in cash and securities) were approximately \$47.4 billion. Moreover, CME had a minimum amount of total assets available for default that exceeded \$4.6 billion, which consisted of the security deposits of CME and CBOT clearing firms, the value of pledged CME shares and memberships, surplus funds, and the CME's limited assessment powers. These additional assets would be available, if a clearing firm that is eligible to clear both CME and CBOT products were unable to meet its obligations to the CME Clearing House, after the application of the defaulting firm's performance bonds, security deposit and any other assets of that firm on deposit with the CME Clearing House.

CME also has a secured, committed line of credit agreement with a consortium of domestic and international banks in the amount of \$800 million. The line of credit is collateralized by clearing members' security deposits, which were valued at almost \$1.2 billion, as of December 31, 2006. The line of credit may be utilized to ensure that CME could pay settlement variation to CME or CBOT clearing members, if there is a temporary disruption of the domestic payments system that would delay settlements with such clearing members, or in the event of a CME or CBOT clearing member default.

The CME Clearing House applies the same risk management practices and procedures to manage the risks associated with the CBOT's suite of cleared-only Ethanol products as it utilizes with respect to the risks associated with other CBOT products. CME monitors the risk of CBOT and CME clearing member firms every day, in part through reviewing daily reports showing the combined settlements (pay/collect) from all domestic clearing houses for every clearing member firm, and comparing the applicable settlements to each such firm's regulatory capital. Thus, throughout the day, CME monitors the ability of each CBOT and CME clearing member to meet its daily settlements.

CME also performs major market move surveillance and stress testing for CBOT and CME clearing members. CME conducts risk-based financial examinations of those member futures commission merchants ("FCMs") for which it is the Designated Self-Regulatory Organization ("DSRO") and of those CBOT member FCMs for which the CBOT is the DSRO. CME performs financial surveillance of all CBOT Clearing Members, utilizing its sophisticated programs for analyzing financial statements to determine capital compliance and to detect unfavorable financial trends. CME also conducts periodic reviews of CME and CBOT Clearing Members' risk management practices, including such firms' liquidity needs, risk management procedures, and stress testing abilities, as necessary. In addition, the CME Clearing House routinely reviews the credit risk and credit rating of clearing member firms.

VII. Terms and Conditions

The CBOT seeks an Order under the provisions of Section 4d(a)(2) of the Act to permit the commingling of customer funds relating to its OTC cleared-only products in segregated accounts, subject to the following terms, conditions and representations.

⁵ The CME's Form 10-K, as of December 31, 2006, is available at <http://investor.cme.com/edgar.cfm?DocType=Annual&Year=>.

1. This relief will apply to, and is limited to, cleared-only OTC contracts in the following eligible products: Denatured Fuel Ethanol Forward Month Swaps, CBOT Cash-settled Options on Denatured Fuel Ethanol Forward Month Calendar Swaps, CBOT Cash-settled Denatured Fuel Ethanol Options, New York Harbor Denatured Fuel Ethanol Basis Swaps, Gulf Coast Denatured Fuel Ethanol Basis Swaps, and Los Angeles Denatured Fuel Ethanol Basis Swaps.
2. The CME Clearing House will apply appropriate risk management procedures to transactions and open interest in the eligible products. CME will conduct financial surveillance and oversight of FCMs clearing the eligible products, and the CME Clearing House and FCMs acting pursuant to this Order will take all other steps necessary and appropriate to manage risk related to clearing the eligible products.
3. Each eligible product will be marked-to-market on a daily basis, and final settlement prices will be established, as described in this submission.
4. The CBOT will make available open interest and settlement price information for eligible products on a daily basis in the same manner as it does for contracts that are listed for trading on the CBOT.
5. The CBOT will adopt position accountability levels for each of the eligible products of 200 contracts in the spot month and 1,000 contracts in a single month or all months combined. The CBOT will also establish a 25 contract reportable level for each of the eligible products.
6. The SPAN margining system will be applied to the eligible products, and customer margin rates will be set that are consistent with a 99% level of confidence that such margin rates would reflect the risk of price movement over a one-day period. The CBOT would submit a report to the Commission analyzing the adequacy of these margin requirements within 90 days after issuance of the Commission's Order.
7. Participating FCMs must utilize a customer initial margin requirement that is at least 135% of the clearing member margin requirement.
8. All money, securities, and property received by a participating FCM to margin, guarantee, or secure eligible products, shall be deemed to have been received by the participating FCM and shall be accounted for and treated and dealt with as belonging to the customers of the participating FCM consistently with Section 4d of the Act.
9. Subject to the terms and conditions herein, notwithstanding any provision to the contrary in the Commission's regulations (including, but not limited to, Regulations 1.20(a), 1.22 and 1.24), the money, securities, and property described herein may be commingled with money, securities, and property received by a participating FCM to margin, guarantee, or secure trades or positions in commodity futures or commodity option contracts executed on a Designated Contract Market or a Derivatives Transaction Execution Facility, or accruing as a result of such trades or contracts, and otherwise required to be segregated under the Act and Commission regulations.
10. Such relief shall not provide an exemption from any provision of the Act or Commission regulations not specified herein.

The CBOT also requests that the Commission confirm that all money, securities, and property received by a participating FCM to margin, guarantee, or secure eligible products, which may be commingled with other funds held in segregated accounts maintained in

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accordance with Section 4d of the Act and Commission regulations, pursuant to a Commission Order, will be subject to the same protections set forth in the Commission's Part 190 bankruptcy rules that are applicable to other funds held in such segregated accounts.⁶

If you have any questions or need any additional information regarding this Petition, please contact Anne C. Polaski, Associate Director and Regulatory Counsel, at (312) 338-2679 or anne.polaski@cmegroup.com, or David Lehman, Director, Commodity Research and Product Development, at (312) 347-3848 or david.lehman@cmegroup.com.

Sincerely,



Paul J. Draths
Vice President and Secretary

cc: John Lawton
David Van Wagner
Phyllis P. Dietz
Donald Heitman
Martin Murray

⁶ See Interpretative Statement Regarding Funds Determined to be Held in the Futures Account Type of Customer Account Class, 69 FR 69510, 69511 (November 30, 2004), in which the Commission stated that:

... in a situation where by Commission order or direction, customers are required or allowed to contribute to a Commission Regulation 1.20 segregated account, those customers also should benefit from the distribution of that account proportionately to their contributions in the event of an insolvency.