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Division of
Market Oversight

December 16, 2005

Michael M. Philipp, Esq.
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601-9703

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

Dear Mr. Philipp:

This is in response to your letter dated November 3, 2005 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 NYMEX Europe Limited (NEL or Exchange) that the Division confirm that it will not recommend enforcement action to the Commission against NEL or its members[2] in connection with the installation and use in the United States[3] of the NEL electronic trading and order matching systems known as NYMEX ACCESS® and NYMEX ClearPort(sm) Trading (each, an ETS and, collectively, the ETSs) 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).

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[1] Letter from Michael M. Philipp, Esq., Winston & Strawn LLP, to Richard Shilts, Acting Director, Division of Market Oversight, Commodity Futures Trading Commission (November 3, 2005).

[2] For purposes of the No-action request and the relief provided herein, references to the NEL members shall include Floor Traders, Floor Brokers, Non-Floor Members, Electronic Traders, and Electronic Brokers who are NEL members. Furthermore, references herein to NEL members shall include any affiliate of any NEL member that has been granted access by the NEL member to the NYMEX ACCESS® or NYMEX ClearPort(sm) Trading systems. An "affiliate" of a NEL member means any person that: (1) owns 50% or more of the member; (2) is owned 50% or more by the member; or (3) is owned 50% or more by a third person that also owns 50% or more of the member. NEL represents that, to the extent a member permits an affiliate to use the NYMEX ACCESS® or NYMEX ClearPort(sm) Trading systems, such affiliate will be required to comply with all of NEL's Rules relating to trading on the NYMEX ACCESS® or NYMEX ClearPort(sm) Trading systems and the member shall ultimately be responsible to NEL 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, NEL wishes to make NYMEX ACCESS® and NYMEX ClearPort(sm) Trading, both of which are owned and maintained by the New York Mercantile Exchange, Inc. (NYMEX), a DCM, available to: (1) NEL members who wish to trade for their own accounts through the ETSs in the United States; (2) NEL members who are registered with the Commission as futures commission merchants (FCMs) or who are exempt from such registration pursuant to Commission Regulation 30.10 (Rule 30.10 Firms)[4] and who wish to submit orders from or on behalf of United States customers[5] for transmission to the ETSs; (3) NEL members who are registered with the Commission as Commodity Pool Operators (CPO) or Commodity Trading Advisors (CTA), or who are exempt from such CPO or CTA registration pursuant to Commission Regulation 4.13 or 4.14, and who wish to submit orders on behalf of United States pools they operate or United States customer accounts for which they have discretionary authority, respectively, for transmission to the ETSs, provided that a NYMEX clearing member that is registered with the Commission as an FCM acts as clearing firm with respect to all activity conducted by such CPOs and CTAs through the submission of orders on the ETSs; and/or (4) NEL Members who are registered with the Commission as FCMs or who are Rule 30.10 Firms and who wish to accept orders for United States customers transmitted via automated order routing systems (AORS)[6] for submission to the ETSs.

NEL represents that NYMEX ACCESS® currently is available for electronic trading of its Brent Crude Oil Futures and Options and Northwest Europe Gasoil Futures contracts.[7] NEL currently intends to eventually migrate the electronic trading of its contracts from NYMEX ACCESS® to NYMEX ClearPort(sm) Trading, at which time NYMEX ACCESS® would no

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[4] 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 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: (1) 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; (2) minimum financial requirements for those persons that accept customer funds; (3) minimum sales practice standards, including risk disclosures, and the risk of transactions undertaken outside of the United States; (4) procedures for auditing compliance with the requirements of the regulatory program, including recordkeeping and reporting requirements; (5) standards for the protection of customer funds from misapplication; and (6) 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).

[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] For the purposes of this letter, the term "AORS" shall mean any system of computers, software or other devices that allows entry of orders through another party for transmission to a NYMEX ACCESS® or NYMEX ClearPort(sm) Trading computer or other automated device where, without substantial human intervention, trade matching or execution takes place.

[7] NEL desires to make its contracts available to members, including those located in the United States, through the ETSs to supplement NEL's physical trading floor in London.

longer be utilized by NEL. In addition, NEL represents that in the near future it may make a smaller-sized electronic version of the Brent Crude Oil Futures contract available on NYMEX ClearPort(sm) Trading. Thus, for a period of time, NEL indicates that it may operate both ETSs concurrently.

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

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

- General information regarding NEL (*e.g.*, its location and organization);
- NEL Rules;
- New York Mercantile Exchange (NYMEX) Clearing Rules, Chapter 9;
- Technology Services Agreement, NEL – NYMEX, dated September 9, 2005;
- Clearing Services Agreement with respect to NEL including monitoring of clearing members, NEL – NYMEX, dated September 9, 2005;
- General Services Agreement, NEL – NYMEX, dated September 9, 2005;
- Cooperation Agreement, NEL – NYMEX, dated September 9, 2005;
- External Memorandum, Michael M. Philipp, Esq., dated October 14, 2005;
- Certification of authorized representative of NEL as to the truth and completeness of the material facts set forth in the request for no-action relief; and
- Undertaking of authorized representative of NEL Administration and Management to notify Commission staff if, prior to the issuance of no-action relief requested in letter dated November 3, 2005, any material representation made in such request for no-action relief ceases to be true and complete.

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

[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 NEL regarding the structure of NEL, NEL's activities in the United States, NEL's membership criteria, the electronic trading and order matching systems known as NYMEX ACCESS® and NYMEX ClearPort(sm) Trading, the relevant regulatory regime in the United Kingdom, and the information-sharing arrangements applicable to NEL and its regulator are summarized in Sections I - V below. For purposes of its response to the No-action request, the Division has relied upon NEL's representations and information provided by NEL and has not conducted an independent review to confirm their accuracy.[10]

I. GENERAL INFORMATION REGARDING NEL

NEL is an indirect wholly-owned subsidiary of NYMEX Holdings, Inc. (NYMEX Holdings)[11] and is a sister affiliate of NYMEX. NEL was incorporated in England and Wales on March 24, 2005 as a private limited company under the Companies Act 1985 (as amended). Initially, NEL was incorporated as NYMEX UK Holdings Limited, and the name was subsequently changed to NYMEX Europe Limited on April 5, 2005. Since its establishment, NEL has operated in London and has its registered office in that city. NEL represents that it does not maintain a representative office in the United States, nor does it provide investment advice, solicit orders or direct trading from the United States.

NEL is recognized by the UK Financial Services Authority (FSA) as a Recognized Investment Exchange (RIE) for the purpose of trading futures contracts on certain commodities (primarily energy products). Initially, NEL has listed the following contracts: Brent Crude Oil Futures, Northwest Europe Gasoil Futures, and Brent Crude Oil Options. The Brent Crude Oil contracts are cash settled. The Northwest Europe Gasoil Futures contract is a physically settled contract with all delivery points in Northwest Europe. The contracts are traded primarily on NEL's open-outcry trading facilities on its trading floor, supplemented by electronic trading through the ETSs.

NEL is overseen by the Board of Directors of NEL (Board) comprised of eleven Directors. The Board includes four Directors appointed from members/customers of the Exchange and two independent Directors. The Board has overall responsibility for ensuring that NEL satisfies the recognition requirements and complies with its obligations under the UK's Financial Services and Markets Act 2000 (FSMA), including with respect to its activities as a UK recognized body. In addition, the Board is responsible for approving strategic decisions. The day-to-day management of the Exchange is the responsibility of the Chief Executive Officer (CEO) and the executive management team. The CEO is, in particular, responsible for helping to develop Exchange strategy and business plans and for implementing the Board's strategy. He is assisted by a full-time staff, including a compliance function.

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[10] As stated below, the no-action relief provided herein is contingent upon the accuracy of the representations made by NEL 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] NEL is 100% directly owned by NYMEX Europe Exchange Holdings Limited, an English company that is 100% owned by NYMEX Holdings. NYMEX, the DCM, is also 100% owned by NYMEX Holdings.

Certain of the Exchange's operations are outsourced to its sister affiliate, NYMEX, under arms-length commercial agreements covering technology hosting and other services pursuant to a Technology Services Agreement (TSA), and a range of management support and compliance services and regulatory cooperation pursuant to a General Services Agreement (GSA).[12] In addition, the clearing department of NYMEX (NYMEX Clearing), a Commission-registered derivatives clearing organization (DCO), provides clearance and settlement services to NEL pursuant to a Clearing Services Agreement (CSA).

II. MEMBERSHIP

A. Members

A person may not trade directly on NEL, including through the ETSs, unless that person becomes a member of the Exchange. Membership is open to any individual, corporate body, partnership or unincorporated association, and each member will have one seat. Applicants may apply for any one of the following categories of membership: (1) floor traders, who may trade their own account or the account of any of their affiliates and any other member; (2) floor brokers, who may trade their own account, the account of any customer, or the account of other affiliates and other members.; (3) locals, who are floor traders who are individuals or companies of which at least ninety per cent of the issued share capital is beneficially held by a single individual, or entities with no share capital and at least ninety per cent of the votes exercisable at its general meetings are exercisable by a single individual; (4) non-floor members, who are not floor members and who do not have floor trading privileges but have the right to trade with or through a floor member for their own account or for customers; (5) electronic traders, who are electronic members who have been authorized by the Exchange to have access to the ETSs to trade their own account or the account of any of their affiliates and any other member; and (6) electronic brokers, who have been authorized by the Exchange to have access to the ETSs to trade their own account, the account of any customer, or the account of other affiliates and other members.[13]

In order to become a member of NEL, an applicant must satisfy certain specific criteria, including a requirement that the applicant: (1) if a sole trader, be the greater of 18 years old or the minimum age of majority required to be responsible for his/her contracts in each jurisdiction in which the applicant conducts business and consent to the designation of the General Manager as his or her agent for service of process concerning and limited to the activities and business he/she conducts on NEL; (2) be resident or established and carrying on its business in the UK or in another jurisdiction acceptable to NEL; (3) have, in the opinion of the Board, good character, commercial standing and business experience; (4) provide satisfactory evidence of its identity

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[12] The outsourcing arrangements also provide for NYMEX to assist NEL with respect to its trading floor operations, including technology and compliance assistance, on an on-going basis.

[13] Floor and electronic categories of membership are grouped as follows: (1) floor members includes floor traders, floor brokers, and locals; and (2) electronic members includes electronic traders and electronic brokers (electronic members on NYMEX ClearPort(sm) Trading, referred to as "Users", are included in the term electronic members as that term is used in this document). Floor members and non-floor members may also apply for electronic membership.

and the identity of its controllers as the Board may prescribe to enable NEL to comply with its obligations under the Money Laundering Regulations 2003; (5) if not a sole trader, provide such evidence as required as to its legal status and organization and as to its capacity to become a member of NEL without breaching applicable laws, regulations and rules; (6) submit an application, in the prescribed form, together with such supplementary materials as may be required; (7) pay the non-refundable application fee of such amount fixed by the Board from time to time; (8) execute an agreement in the prescribed form undertaking to be bound by the rules of NEL; (9) designate (in the prescribed form) an officer, employee or partner as the Exchange liaison, whom the Exchange may contact in order to obtain additional information or documentation in connection with any matter whatsoever provided in the rules of NEL; and (10) satisfy such other criteria and take such other steps as NEL may stipulate from time to time.[14]

Different additional criteria apply for the different categories of membership. To qualify as an electronic member, an applicant (whether an individual or a legal entity) must: (1) either be a clearing member or be guaranteed to trade on the ETSs by a clearing member that agrees to act as its primary clearing member (PCM), under the NYMEX Clearing Rules, with respect to trading on the Exchange;[15] and (2) if an electronic broker, be authorized by the FSA to execute customer orders[16] and comply with all applicable FSA or other regulatory capital requirements. In addition, an electronic member must: (1) be appropriately licensed or authorized to enable it to lawfully carry on its activities in any relevant jurisdictions outside the UK and provide evidence to the Exchange of its regulatory status in such jurisdictions; (2) provide evidence of its experience and competence; and (3) provide satisfactory evidence to enable NEL to comply with its obligations under the applicable anti-money laundering requirements.

Each electronic member must have at least one electronic trading privilege, which is the right attaching to an individual who is, or is employed by, an electronic member, to trade on the ETSs. An applicant may apply for as many electronic trading privileges as it needs to conduct its business in an orderly fashion by submitting the names of the individuals who will be exercising that electronic trading privilege on its behalf with the application. The Board may impose limits on the number of electronic trading privileges that each electronic member can hold based on constraints of the ETSs.

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[14] Members of NEL are subject to minimum financial requirements established by NEL and, with respect to clearing members, established by NYMEX.

[15] All members must clear through a clearing member of NYMEX who will clear through NYMEX Clearing. All current NYMEX clearing members are US-incorporated FCMs with their main businesses in the U.S. No guaranteed member may open a commodity account without the prior written consent of the member's PCM. In addition, each guaranteed member shall, among other things, notify, in writing, the PCM of each commodity account of the member, including every omnibus account and, unless otherwise requested, cause to be delivered to its PCM all statements and confirmations with respect to each commodity account in which the member has a direct or indirect interest or over which the member exercises direct or indirect control.

[16] Unless the electronic member can benefit from a safe harbor, *i.e.*, an exemption under the FSMA to enable it to carry on activities on the Exchange without becoming FSA-authorized, or an exclusion from the authorization requirement under the RAO to enable it to carry on activities on the Exchange without requiring FSA authorization.

B. Clearing Members

As previously stated, NYMEX Clearing, a CFTC-registered DCO, provides clearance and settlement services to NEL pursuant to a CSA. Each clearing member clearing trades at NEL must be a NYMEX clearing member and must satisfy the clearing member requirements of NYMEX Clearing.[17] As such, each successful applicant must, among other things, (1) have such business integrity and financial responsibility as to justify NYMEX Clearing in assuming the risk involved in the clearing of the applicant's trades; (2) sign a statement that if approved, the applicant will observe and be bound by the NYMEX Clearing Rules and all subsequent amendments thereto; and (3) provide a balance sheet prepared and certified to by a certified public accountant, and sworn to as to the substantial accuracy by the applicant, that shows working capital of not less than $5,000,000.

Each electronic member must be guaranteed to use the ETSs by a PCM or be a clearing member itself.[18] To guarantee a member, the PCM must execute such guarantees and other documents as required by NEL and NYMEX Clearing and all PCM guarantees must be approved by the NYMEX Clearing Board of Directors. In order to guarantee an electronic member, the PCM must: (1) agree to accept and clear all trades executed as a result of orders entered by authorized terminal users (ATU)[19] through use of the passwords issued to that electronic member and all trades executed as a result of any order entered by an ATU that do not clear, provided however that such PCM is not be required to accept any trade that is submitted to it for clearance after the close of that business day's session of regular trading hours; (2) agree to accept financial responsibility for all trades determined through the Exchange adjudication or arbitration process to have been executed as a result of orders entered through use of the passwords issued to that electronic member; (3) file with the NYMEX Clearing Board of Directors such guarantees and other documents as NEL and NYMEX Clearing require in connection with the PCM's guarantee of an electronic member; and (4) comply with the financial requirements for guarantors as set forth in the NYMEX Clearing Rules.

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[17] NYMEX clearing members need not be members of NEL merely because they clear for a NEL member. In fact, NYMEX members never automatically become members of NEL and must apply separately for membership.

[18] The guarantee by a PCM is subject to a number of qualifications, including the following: (1) no floor member that is guaranteed by a PCM for trades executed on the floor during regular trading hours may be guaranteed by a different PCM for trades executed during an Electronic Trading Session; (2) no member may be guaranteed by two PCMs at the same time; and (3) for each qualification in excess of 24 members, a clearing member is required to maintain working capital of $50,000 above that otherwise required by NYMEX Clearing Rules.

[19] Persons performing the equivalent responsibilities of ATUs on NYMEX ClearPort(sm) Trading are referred to as "User Agents" but are included in the term ATU as that term is used in this document. If access to the ETSs is provided by NYMEX on behalf of the Exchange, ATU means those employees and agents of the electronic member that an electronic member has designated to serve as terminal operators and has properly notified the Exchange and the NYMEX Customer Services Call Center (NCSCC). If access to the ETSs is via a front end trading application that is proprietary to the electronic member or provided by a third party and that is certified by NYMEX on behalf of the Exchange, ATU means those individuals or entities (including, without limitation, the electronic member's customers, employees, agents and independent contractors) that the electronic member has authorized to access the ETSs via a certified application and has properly notified the Exchange and the NCSCC.

III. OVERVIEW OF THE NEL TRADING SYSTEM

At the outset, the Division notes that the description of the ETSs set forth herein is based upon representations made by NEL or its representatives. Nonetheless, it should also be noted that the electronic trading and order matching systems known as NYMEX ACCESS® and NYMEX ClearPort(sm) Trading have previously been reviewed by the Commission staff. On December 17, 1992, the Commission, following a thorough review by its staff, approved NYMEX's proposed new and amended rules which implemented the NYMEX ACCESS® Trading System. The Division has since reviewed the operation of NYMEX ACCESS® during, among other things, the course of rule enforcement reviews of NYMEX and reviews of electronic trading systems generally. On January 16, 2003, the Division acknowledged the self-certified submission by NYMEX of proposed new and amended rules in support of the launch of NYMEX ClearPort(sm) Trading. The Division has not, to date, recommended any alteration in its trading procedures.

A. Introduction

NEL's contracts are traded both by open outcry on the trading floor facilities in London and electronically through the ETSs. NEL has entered into the TSA with NYMEX pursuant to which NYMEX has granted NEL a non-exclusive, fully-paid, royalty-free, perpetual and non-terminable license to use certain proprietary NYMEX computer software and programs required for NEL's operations. The license includes customizations, upgrades and updates relating to the licensed software. The licensed software and programs include the electronic trading platforms for trading NEL products. NYMEX, through the NCSCC, provides back-up services which include, among other things, the processing of applications for electronic membership, processing of new ATUs, and suspension of access to the ETSs.

NYMEX ACCESS® was launched in June 1993, and uses a browser-based interface. Currently, NYMEX ACCESS® provides market participants the ability to conduct after-hours electronic trading for NYMEX's floor-based products. NYMEX ClearPort(sm) Trading was launched in January 2003, as an intended successor to NYMEX ACCESS®. NYMEX ClearPort(sm) Trading provides a trade execution system for 130 energy futures products which are based on commonly-traded over-the-counter (OTC) instruments. The system offers competitive trading in a product slate of energy futures contracts which is separate from the product slate offered on NYMEX ACCESS®.

The ETSs permit the trading of futures contracts via the Internet during the electronic trading hours of NEL. Traders using the ETSs can log on from any Internet-enabled computer and enter, modify and cancel orders. The ETSs provide a broad range of information and features not readily available during open outcry regular trading hours, including: (1) depth of market views and spread bid/offer views for specified commodities; (2) generation of implied prices (NYMEX ACCESS® only); (3) ability to perform market sweeps (entry of several different orders with different prices via the market depth window) in a single order transaction; (4) inter-commodity spreads and outrights links (NYMEX ACCESS® only); and (5) strip trading (*i.e.*, trading a series of two or more consecutive months) (NYMEX ClearPort(sm) Trading only).

The systems supporting NEL's electronic trading operations are hosted by servers located in the United States and operated and maintained by NYMEX. The systems to be hosted by NYMEX in New York (the Hosted Systems) initially include, among others: (1) Trade Management System (TMS), used for capturing NEL Trades; (2) Price Reporting System (PRS), used for the dissemination of price information from the market; (3) NEON, a trade order processing system; (4) TXN, a computerized surveillance system; and (5) the NEL Corporate Website.

B. The Order System

Customer orders submitted for execution on the ETSs must be entered into the ETSs' programs and database that accept, match and report executions of orders in the ETSs (Matching System)[20] via the Order Entry dialogue window in the ETSs within one minute of receipt.[21] Electronic members have a choice as to whether to place an order, hit an existing bid or offer or ask for a quote in the market. NEL Rules provide that trades in the ETSs are formed at the point of matching in the Matching System.[22]

NEL Rules prohibit electronic brokers and their ATUs from: (1) withholding or withdrawing from the market any customer order or any part of a customer order for personal benefit or for the convenience of another; (2) entering orders into the ETSs for their own accounts (including accounts of associates) ahead of customer orders; and (3) entering a proprietary or associated account order which is the opposite side of a customer order already resting in the Matching System, unless the customer order has rested in the Matching System for at least 10 seconds. NEL Rules also require each electronic broker and ATU to disclose the fact that it has a proprietary or associated account resting order in the Matching System, before accepting from any customer an order for the opposite purchase or sale of the same contract. In addition, NEL Rules prohibit electronic members and their ATUs who are employees or agents of the electronic member from entering orders for different principals as a cross trade into the ETS Matching System. Instead, an electronic member or ATU must enter orders into the Matching System strictly on the basis of the time of receipt of the orders. Each order has to rest in the Matching System for at least 10 seconds before an opposite order may be entered into the system.

NYMEX ACCESS® orders are executed on the basis of strict price and time priority with the first order in at the best price being the first order executed and with total anonymity and fairness. Each order submitted to the ETSs must be matched to its corresponding buy or sell

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[20] Under the TSA, this system will, as with the systems supporting NYMEX's operations in New York, be hosted by servers located in the United States and operated and maintained by NYMEX.

[21] If such orders cannot be timely entered into the Matching System, they must be recorded within one minute of receipt on a memorandum of the order, in non-erasable ink, and be time-stamped in accordance with NEL Rules and be entered into the Matching System as soon as practicable. The memorandum must also be timestamped when a report of execution is made.

[22] When a trader enters an order that exceeds the predefined system or user level limits, a system generated warning message will display. The trader then has the option of either confirming the order (despite the warning) or canceling the order.

counterpart in order to be considered a valid trade for updating into TMS and eventual transfer to C21®, a clearing system developed jointly with the Chicago Mercantile Exchange (CME) and used in connection with the clearing of trades. Once an order is matched in the Matching System, the relevant ETS transmits the trade records electronically to the clearing members of the customers or to the members on both sides of the trade.

At the point of matching of the trades within the ETSs: (1) where the electronic member trades as principal, a contract is formed between the electronic member and the clearing member carrying the account for which the order was submitted by that electronic member; (2) where the electronic member trades as agent, a contract is formed between the relevant customer, affiliate or other member on behalf of whom the electronic member was trading and the clearing member carrying the account for which the order was submitted by that electronic member; and (3) in either case, a contract is formed between the clearing member carrying the account designated by the electronic member and the clearing member carrying the account for the matching trade; and (4) no bilateral trade is formed between the electronic members inputting the data in the Matching System.

Orders designated as "day orders" that are not filled by the end of the trading day will generally be dropped from the system when the next trading day is established within the ETSs. However, within NYMEX ACCESS®, when an order is entered, the ATU can specify that the order is to carry forward to the next trading day. Such orders will appear marked "inactive" the next trading day and the ATU will have to activate them if they are to be matched on that day. If left inactive, the orders will be dropped from the system when the next trading day is established. For NYMEX ClearPort(sm) Trading, the unfilled portion of the orders entered with a Good Till Date (GTD) or a Good Till Cancel (GTC) designation will be retained in the system until the designated date, in the case of a GTD order, or until the contract expires, in the case of a GTC order. These orders will be carried from one trading session to the next and will be marked "inactive" requiring the electronic member to activate the orders if they are to be matched on that day.

C. The Trading Day

NEL's Trading Day currently includes up to three trading sessions: (1) an Electronic Trading Session (for the Brent Crude contracts, 12:00 a.m. - 9:30 a.m. UK time on Sunday and 8:15 p.m. - 9:30 a.m. UK time on Monday through Thursday; for the Gasoil contract, 12:00 a.m. - 8:45 a.m. UK time on Sunday and 8:15 p.m. - 8:45 a.m. UK time on Monday through Thursday); (2) a regular trading hours (RTH) Trading Session (for the Brent Crude contracts, 10:00 a.m. - 7:30 p.m. UK time on Monday through Friday; for the Gasoil contract, 9:15 a.m. - 4:30 p.m. UK time on Monday through Friday); and (3) a Post-Close Trading Session or an End of Week Trading Session.

NEL's Trading Day commences with the opening of the Electronic Trading Session, which may for certain products extend into RTH. The Trading Day ends at the close of the RTH Trading Session or at the end of the Electronic Trading Session, whichever is later. No business is conducted on Saturdays or Sundays with the exception of an Electronic Trading Session on

Sunday evening for the purpose of commencing Monday's Trading Day. NEL's Board reserves the right to change its trading hours at any time. For example, as previously noted, NEL represents that it may determine to list smaller sized electronic versions of certain of its floor-traded contracts that would trade after regular trading hours or side-by-side with the full-sized floor contracts.

D. Trade Registration / Audit Trail

Electronic members and their ATUs may not accept any order for execution on the ETSs unless it includes the following details: (1) commodity; (2) contract month; (3) purchase or sale; (4) customer account number (or certification that the order is for multiple accounts and is to be later allocated); (5) quantity; (6) limit price (except for stop, market discretion, market-if-touched or market orders); (7) clearing member who holds the account for the relevant customer or for the electronic member if trading on own account or for the account of affiliates; (8) strike prices, put or call (for options); and (9) any precondition for entry into the Matching System. The ETSs automatically record the time of, and retain a record of, each entry into the system. All relevant data are retained in a database for a period of five years.

NEL Rules require that all members keep records of all transactions executed for at least five years. Records may be kept either in hard copy or on magnetic disk, but must also be kept in any other form if so required by another regulator with jurisdiction over the member and NEL transactions. NEL Rules also require that members must keep records for longer than five years if (1) they are required to do so by another regulatory body; or (2) the records relate to a transaction which is to be settled more that five years from the contract date, in which case the relevant records shall be kept until the contract has been settled.

E. Data Dissemination

NYMEX ACCESS® allows electronic members to view as many windows as they wish, including the following: (1) futures trading view, which includes the opening and previous day's settlement price, highest bids and lowest offers, last price, high price and low price, ask volume, and (covering both NYMEX ACCESS® and open outcry trading) open interest; (2) calendar spread view, which includes implied prices derived from the futures market; (3) market depth view, which displays the market size; (4) trades view, which shows an electronic member's completed trades for the current trading session; (5) order book view, which displays all orders entered during the current trading session; (6) volume summary, which displays total volume for futures, options, spreads and exchanges of futures for physicals (EFP); (7) a user monitor, which displays a list of ATUs within the firm and their connection status; and (8) an audit trail, which includes a summary of activity.

NYMEX ClearPort(sm) Trading allows electronic members to view a limited number of windows, including the following: (1) blotter (or trade blotter), which displays, among other things, the symbol, current best bid and offer prices and volumes, last price, user's own bids and offers, last trade price and volume, market state, and settlement price (the blotter contains all of the contract months available for the selected product); (2) several custom blotters, in which

traders can select and group individual contracts of their choosing to view the same information available in a blotter view but allowing contracts from different products to appear on the same custom blotter; (3) order view, which displays all orders entered during the current trading session; (4) trade view, which displays all trades executed by the electronic member for the current trading session; (5) spread view, which displays the current best bid and offer price and volume information for tradable spread contracts; (6) market depth view, which displays the market size; and (7) time and sales for each tradable contract.

NEL disseminates its electronic trading data (prices/quotes) to third party vendors such as Bloomberg and Reuters. In addition, NEL posts its market quotes on the exchange's website at http://www.nymexeurope.co.uk and on NYMEX's website at http://www.nymex.com on a 30-minute delayed basis.

F. Reliability and Failure Recovery

NYMEX monitors and measures the availability and performance of applications and host systems on a 24-hour basis. The monitoring system proactively notifies IT personnel via alerts generated by custom probe as soon as it detects a problem. IT personnel process and correlate the alert data with other information to analyze the potential problem. The monitoring system is installed in the Operations Room, where operators observe critical systems via dedicated monitors at all times.[23]

NYMEX represents that it also has in place systems and procedures for maintaining business continuity in the event of system or network failure. If a serious system event occurs at NYMEX's primary New York site, the systems supporting open outcry and the backup systems for the ETSs can be managed remotely in order to continue to provide support to NEL. If the NEL trading floor becomes inoperable, the backup will be the ETSs. In the event that NEL cannot be supported, a crisis management team will assess the situation and notify NEL of the event. If the problem occurs intra-session and results in discontinuation (or the threat of discontinuation) of trading, the crisis management team will seek to halt markets, notify the FSA, and monitor the event until it is resolved.[24]

With respect to back up, duplication of key components and tape management, NYMEX has a predetermined schedule for incremental and full back-ups. NYMEX maintains a back-up facility for all its IT systems at a geographically separate location that is on a separate power, water, and telecommunication grid from NYMEX's headquarters. The main facility and the back-up facility are linked with multiple redundant fiber optics lines, providing completely

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[23] In addition, for certain applications, such as C21®, NYMEX uses job-scheduling software to create system/application logs for monitoring actual batch submissions and processing, including: (1) jobs scheduled for execution; (2) actual job start and completion times; (3) any abnormal conditions during the execution; and (4) whether jobs were run to normal completion.

[24] In the event that an electronic member is unable to enter an order electronically due to an isolated system disruption involving that member's access to the ETSs, the member can place the order by telephone with either his or her clearing member or with another brokerage house, either of which can then enter the order on the member's behalf.

synchronized communications. NYMEX audits its back-up facilities on a quarterly basis. NYMEX rotation policy specifies that all previous weekday tapes are off-sited to a vaulting facility. Tape retention policy is seven years for all full backups and 60 days for all incremental ones. All backup tapes are retained at NYMEX's main business address and at the back up location.[25]

NYMEX represents that it will provide all reasonable assistance to NEL in developing, maintaining and implementing an appropriate disaster recovery and business continuity plan to ensure that NEL continues to meet the legal, regulatory and accounting requirements and standards applicable to it. NYMEX is required to maintain a business continuity plan for the equipment, systems and power supply, including backup arrangements for both processing and communications resources.

A redundant communication link between NEL and NYMEX's disaster recovery and secondary data center facilities provides back-up communications capability in the event that the primary communications link fails. In addition, one connection link terminates at each of the facilities to provide, in effect, a redundant high speed triangulated network backbone with multiple and distinct points of entry to the data centers. If these redundant communications links fail, NEL can communicate with NYMEX using a virtual private network over the Metropolitan Area Network or, if this is unavailable, a lower bandwidth internet connection.

G. System Security

NYMEX represents that it will enforce network security as part of the managed service it provides NEL under contract. The NYMEX Technical Operations group is responsible for network monitoring, including network routers, devices, and infrastructure. Outside service providers provide additional monitoring of internet and dark fiber connectivity as part of their paid service offerings. NYMEX also employs a managed and monitored firewall intrusion detection service to monitor data flows to and from the internet and alert on suspicious or malicious activity. In the event that malformed, malicious, or otherwise suspicious activity is detected, the 24/7 intrusion detection service support staff will notify the NYMEX Computer Incident Response Team (NCIRT). The NCIRT team assesses the criticality of the received alert and works towards its resolution.

Each electronic member receives one or more unique user identification numbers and passwords to enable access to the ETS for use by the electronic member and his ATUs. The electronic member is responsible for protecting and monitoring the use of its passwords and is required to provide the passwords only to persons that the electronic member has authorized to

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[25] NCSCC also performs back-up functions. At the end of the Trading Day, trade volume summary screens and trade detail screens (Trade Book and Order Book) are accessed by a NCSCC staff member within the ETSs. The screen details are copied and pasted into an Excel spreadsheet to create a daily repository on the LAN of trade activities for use the next Trading Day so as to address customer inquiries about alleged errant and/or missing trades. Access to the LAN directory is restricted to NCSCC staff and management. The LAN is backed up nightly as part of the NYMEX nightly LAN back-up process. In essence, every trade record is copied and stored in Excel, by trade date, for eventual retrieval by the NCSCC staff should someone wish to review the trade details.

use the system and for whom the electronic member has notified NEL in the manner provided by NEL Rules. Electronic members are under an obligation to notify NEL through the NCSCC immediately of any unauthorized disclosure or use of their passwords, unauthorized access to the system or any need to deactivate any passwords.

The electronic member with whom an ATU is registered is responsible and liable for all acts and omissions of that ATU. Further, an electronic member is responsible and liable for all trades entered into the system using its passwords, whether it has actually authorized such trades or not. The NCSCC, acting on behalf of NEL, has the right, at its sole discretion, to suspend, terminate or restrict an electronic member's access to and use of the system at any time in order to protect the integrity or operation of the system, to protect NEL, its market or other members.

H. Demarcation of Responsibilities and Liability

NEL Rules limit the Exchange's liability to members with respect to the operation of the ETSs. For example, in the absence of a finding of willful or wanton misconduct, NEL may not be held liable to any person, including a customer, for any losses, damages, costs or expenses arising from the following: (1) any failure or malfunction of the electronic trading platform or any exchange services or facilities used to support the electronic trading platforms (including TMS and C21®); or (2) any fault in delivery, delay, omission, suspension, inaccuracy or termination or any other cause, in connection with the furnishing, performance, maintenance, use of or liability to use all or any part of the electronic trading systems, data or other information made available on the ETSs, or any services or facilities used to support the same. NYMEX and NEL are liable (up to stated limited amounts) for certain negligent acts of the NCSCC and other employees provided by NYMEX and/or NEL to perform services on behalf of NEL for electronic members and ATUs with respect to the electronic trading platform.

I. Adherence to IOSCO Principles

NEL represents that it will, in providing the ETSs to its members, adhere to the 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),[26]

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[26] The United Kingdom 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.

adopted by the Commission on November 21, 1990.[27] The FSA's predecessor in interest, the Securities Investments Board (SIB), endorsed the IOSCO Principles in April 1991.[28]

J. Settlement and Clearing

All contracts executed on NEL are submitted for clearing to NYMEX Clearing. The NEL-NYMEX CSA sets out a specification for clearing and settlement services and service levels. It also includes escalation procedures to enable NEL staff to solve any issues with respect to the services on a timely basis. NEL represents that NYMEX Clearing will clear all trades initiated on NEL on essentially the same basis as it clears trades initiated on the floor in New York. NEL's General Manager and CEO are responsible for ensuring that NYMEX Clearing complies with the standards and escalation procedures set out in the CSA, and will be on hand to resolve any emergency issue in relation to clearing.

Each contract transacted on NEL is a contract between the two clearing members to whose accounts the matching positions have been allocated, and on acceptance for clearing is replaced by two contracts with NYMEX Clearing: (1) one between the buying clearing member and NYMEX Clearing as seller, and (2) another between the selling clearing member and NYMEX Clearing as buyer.[29] Substitution occurs upon NYMEX Clearing's acceptance of a matched trade. As previously noted, all members must have in place guarantees with a clearing member whereby the clearing member (the member's PCM) will clear all trades through NYMEX Clearing that are not accepted for clearing by the customer's clearing member.[30]

Daily settlement prices for all contracts traded on NEL are determined by the Settlement Price Committee of NEL in accordance with its rules.[31] Daily settlement prices are transmitted on PRS and fed to market data vendors. NYMEX monitors changes in settlement prices on NEL. This function, which NYMEX Clearing provides to NEL in accordance with the CSA, requires NYMEX Clearing, on a daily basis, to: (1) review the change of the settlement prices for each month of each active NEL contract so as to determine NYMEX Clearing's exposure to volatile markets; (2) analyze settlement prices to determine the extent of its large trader reviews and the possible expansion of clearing member margin call submissions; (3) determine price

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[27] The Commission adopted the IOSCO Principles as a statement of regulatory policy for the oversight of screen-based trading systems for derivative products. Policy Statement Concerning the Oversight of Screen-Based Trading Systems, 55 Fed. Reg. 48670 (Nov. 21, 1990).

[28] SIB Endorsement of IOSCO's Principles for the Oversight of Screen-Based Trading Systems for Derivative Products, Guidance Release 2/91 (April 1991).

[29] This structure permits parties to trade with one another without individual credit determinations or counterparty credit risk.

[30] NYMEX Clearing does not have any direct contractual relationship with NEL members. Accordingly, NYMEX Clearing is not liable for any obligations of (1) a NEL member who is not also a clearing member of NYMEX, (2) a clearing member to a NEL member or customer, or (3) a clearing member to another clearing member who is acting for the clearing member as broker. Furthermore, NYMEX Clearing is not liable to customers of NEL members to make or take deliveries or otherwise.

[31] NYMEX Clearing has, in certain circumstances, the right to substitute its own settlement prices.

limit projections, analyzing whether additional exposure might be encountered by select clearing members or individual accounts; and (4) discuss volatile market exposure with clearing member management, where applicable.

NYMEX Clearing conducts clearing through its highly flexible C21® system, developed jointly with the CME and rolled out in 1999 and expected to support any anticipated growth in volume or business expansion for the next five to ten years. The C21® system was upgraded in autumn 2001 to permit clearing member access via the Internet, as well as to accommodate an enhanced product base, including the clearing of OTC contracts. The system enables NYMEX to perform functions relating to banking, settlement, asset management, delivery management, position management and margins.[32]

Through NYMEX Clearing, NYMEX maintains a system of guarantees for financial performance of obligations owed to buyers and sellers. This system of guarantees is supported by several mechanisms, including margin deposits and guaranty funds posted by clearing members with NYMEX Clearing. NYMEX Clearing collects both original margin and variation margin from its clearing members on a daily basis. Original margin is collected at least once daily and variation margin at least twice daily. The original margin requirement is a function of a clearing member's open positions and the margin rate. The margin rate is set by NYMEX Clearing using the system known as US Standard Portfolio Analysis of Risk (SPAN), developed by the CME and used by commodity clearing houses worldwide. Variation margin is calculated as being the difference between the trade price and the settlement price used for the particular variation margin call. On a daily basis, NYMEX's Compliance Department – Financial Surveillance & Risk Management Division will, in accordance with the standards set out in the CSA, conduct a detailed review of each clearing member's variation margin, earmarking stress thresholds and making enquiries if needed.[33]

The Exchange's arrangements for dealing with a defaulting member are based on the Default Rules Requirements and complemented by the NYMEX Clearing default arrangements. Under the UK's Default Rules Requirements, NEL must have rules that allow it to declare a member to be a defaulter and close out all open positions on that market.[34] However, the

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[32] NYMEX represents that it is in the process of developing upgrades to C21® which will not change the current user interfaces, but will improve on the C21® functionality by moving C21® into a Windows environment, which will make it more efficient and flexible. The changes will not be noticeable to users or clearing members, and processing rules and flows will remain the same.

[33] NYMEX Clearing's rules allow clearing members to post original margin using cash, various securities (subject to a haircut) and certain money market mutual funds. All variation margin must be posted in cash. NYMEX Clearing acts as a fiscal transfer agent, transferring money from the margin funds of traders who have experienced a decline in the value of their open positions to the margin funds of traders who have generated a gain - all via the customer or proprietary accounts of its clearing members. As required by the CFTC, NYMEX Clearing segregates margin deposited by clearing members for their customer accounts from margin received for their house accounts. NYMEX Clearing verifies on a daily basis that the cash it maintains is sufficient to cover its obligations to clearing members in accordance with the CFTC's segregation rules. NYMEX Clearing requires its clearing members to collect margin from their customers at set percentages in excess of the clearing members' requirement.

[34] NEL is not required to wait for formal insolvency proceedings to commence before such a declaration is made if it believes, in good faith, that the member will be unable to meet future obligations under market contracts. All

NYMEX default rules take precedence over the NEL default rules with respect to contracts to which NYMEX Clearing is party. If, therefore, a clearing member were to default, NYMEX Clearing would apply its default rules to the registered contracts, while NEL would deal with the back-to-back contracts between the defaulting clearing member and its clients and the non-clearing members for which it clears. If a non-clearing member were to default, only NEL's rules would apply as NYMEX would have no contractual nexus over it.

Pursuant to NYMEX's rules, in the event of the failure of a clearing member to deposit any margins as required, the president of NYMEX, with the approval of NYMEX's Board of Directors, may close out all or any part of such clearing member's trades in the best interest of NYMEX and such defaulting clearing member. In addition, NYMEX Clearing may apply against such defaulting clearing member's obligations the clearing member's: (1) margin on deposit, (2) deposit in the NYMEX Guaranty Fund, and (3) any other assets under the control of NYMEX[35]. NYMEX Clearing may apply these assets based on the type of default by the clearing member, as follows: (1) for defaults in the customer segregated account, NYMEX Clearing can use all assets; and (2) for defaults in the clearing member's house account and/or customer non-regulated account,[36] NYMEX Clearing can use that portion of the assets held in the house and/or customer non-regulated accounts. If the above assets are not sufficient, NYMEX Clearing rules provide that NYMEX will utilize other substantial financial resources in order to meet the obligations of the defaulting clearing member.

IV. OVERVIEW OF THE REGULATORY STRUCTURE IN THE UNITED KINGDOM

A. Introduction

NEL is subject to a comprehensive regulatory regime in the United Kingdom. This regulatory structure includes, among other things: (1) financial and other fitness criteria for industry participants; (2) reporting and recordkeeping requirements; (3) procedures governing the treatment of customer funds and property; (4) sales practice and other conduct of business standards; (5) provisions designed to protect the integrity of the markets; and (6) statutory prohibitions on fraud, abuse, and market manipulation. Responsibility for financial services legislation and broad policy in the United Kingdom lies with Her Majesty's Treasury, while responsibility for authorizing persons to conduct investment business, and regulating those persons in so doing, rests with the FSA. The FSA fulfills its regulatory responsibilities within the framework established by the FSMA and related legislation.

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actions taken by NEL in good faith under its default rules are protected from the normal working of UK insolvency law, and so are not open to challenge by liquidators or other insolvency officials.

[35] In addition, NYMEX may obtain funds from any guarantee provided by a parent company of the defaulting clearing member (if applicable) and from a sale of the defaulted clearing member's seats on NYMEX.

[36] Customer non-regulated accounts may hold customer funds deposited to support non-futures trading, *e.g.*, certain OTC options, for which NYMEX serves as clearing house.

The FSMA, and the various statutory instruments (regulations and orders) made under it, regulate the carrying on of regulated activities in the UK. In particular, the FSMA (Regulated Activities) Order 2001, as amended (RAO), defines the scope of FSA regulation by listing the activities which, when carried on in relation to specified investments, constitute regulated activities. These include, among other things, dealing in investments as principal or agent, arranging deals, establishing or operating a collective investment scheme, and giving investment advice. The RAO also stipulates a number of situations in which an activity which would normally constitute a regulated activity falls outside the FSA regime (*e.g.*, if the activity is carried on in a certain way or by or in relation to certain persons, as specified in the RAO). These safe harbors are known as exclusions.

The carrying on of regulated activities in the UK is prohibited unless those so engaged are FSA-authorized or have the benefit of an exemption from the authorization requirement. RIEs, such as NEL, are exempted under Part XVIII of the FSMA. However, since dealings on NEL by NEL members are likely to constitute the carrying on of one or more regulated activities, and it is unlikely that NEL members will be able to benefit from an exemption, most UK-based members of NEL will be authorized by the FSA.[37] In addition to complying with the FSMA and applicable FSA conduct of business and other rules, all those conducting investment activities on an RIE, such as NEL, are subject to the rules and trading procedures of the RIE.

The Division notes that the Commission previously reviewed the regulatory regime administered and enforced by the FSA applicable to transactions on exchanges in the UK in connection with the relief it granted to the FSA's predecessors. On May 19, 1989, the Commission issued a series of orders pursuant to Rule 30.10 that granted exemptive relief to the members of the Association of Futures Brokers and Dealers (AFBD), The Securities Association (TSA), the Investment Management Regulatory Organization (IMRO), and the Securities Investment Board (SIB).[38] The orders applied to brokerage activities on or subject to the rules of RIEs in the UK, or any non-U.S. exchange designated by the SIB as an investment exchange, undertaken by firms authorized to conduct investment business in the UK from a location in the UK. In each of these orders, the Commission noted that the standards for relief set forth in Rule 30.10 generally had been satisfied by each of the petitioning regulatory authorities, and compliance by the Rule 30.10 Firms with applicable United Kingdom law and the rules of the respective petitioning authority could be substituted for compliance with certain provisions of the Act and the Commission's rules set forth in the Commission's orders.[39] On October 10, 2003, the Commission consolidated and updated the relief set forth in the prior orders regarding the offer

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[37] Members who intend to trade only for their own accounts (and not for customers or other members) through the ETSs do not need authorization from the FSA, since the ETSs are matching systems.

[38] 54 Fed. Reg. 21599 (May 19, 1989) (SIB); 54 Fed. Reg. 21604 (May 19, 1989) (AFDB); 54 Fed. Reg. 21609 (May 19, 1989) (TSA); 54 Fed. Reg. 21614 (May 19, 1989) (IMRO). On April 5, 1991, the Commission issued a supplemental order confirming the continued validity of such previous orders following the merger of the AFBD and the TSA into the SFA. 56 Fed. Reg. 14017 (April 5, 1991). *See* note 4 for a summary description of the issues considered by the Commission in determining whether to grant Rule 30.10 relief to a foreign regulatory or self-regulatory authority.

[39] On March 7, 1997, the Commission issued an additional order to the SFA clarifying the procedures set forth in its prior orders regarding UK exchanges and their members. 62 Fed. Reg. 10447 (March 7, 1997).

and sale of foreign futures and options contracts to customers located in the United States by firms located in the UK to reflect the substitution of the FSA for the various UK regulatory and self-regulatory organizations.[40]

B. Regulation of NEL as an RIE

NEL is recognized as an RIE under the FSMA. RIEs are exempted persons for the purposes of the FSMA and do not require authorization for their activities with respect to the operation of their markets. In order to be recognized as an RIE, and to maintain that status once it has been achieved, an exchange must satisfy the FSA on an ongoing basis that it meets the requirements set out in Parts I and II to the FSMA (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001. The recognition requirements set out in Part I require an exchange to ensure that business conducted by means of its facilities is conducted in an orderly manner and so as to afford proper protection to investors. Furthermore, the exchange is required to have in place adequate systems and controls concerning, in particular, the transmission of information, the assessment and management of risks to the performance of the exchange's functions and the effecting and monitoring of on-exchange transactions. The exchange is also required to provide, or to make arrangements for a third party to provide, clearing and settlement of on-exchange transactions. Under the FSMA, an exchange that wishes to outsource the provision of clearing and settlement services may do so either to another RIE or to a Recognized Clearing House (RCH). NEL has chosen to outsource the provision of these services to NYMEX which, as a Recognized Overseas Investment Exchange (ROIE) is an RIE. The recognition requirements set out in Part II require RIEs to have default rules to deal with the default of one or more of their members.

RIEs are subject to oversight by the FSA. The FSA is responsible for ensuring that RIEs comply, on an ongoing basis, with the recognition requirements set out above. The FSA exercises this responsibility in a number of ways. The central element of the FSA's oversight is an ongoing assessment of whether an RIE's rules, procedures and practices are adequate for the protection of investors and the maintenance of an orderly market. To this end, RIEs are required by the FSMA to report changes to their rules and procedures to the FSA without delay. In practice, NEL notifies the FSA of significant changes to its rules or procedures before they are implemented. In this way, the FSMA makes RIEs accountable for their actions to the FSA and gives the FSA powers of direction and interest in other RIEs. There is no legal provision requiring RIEs to seek FSA approval for changes to their rules or procedures or for introducing new contracts or new trading mechanisms. However, as a practical matter, NEL will consult with the FSA regarding the introduction of new products and trading mechanisms and FSA will expect this as part of the close supervisory relationship which normally exists between the FSA and RIEs. The FSA must be notified at least 14 days in advance of changes to default rules and the FSA can direct the RIE not to proceed with any proposed change.

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[40] 68 Fed. Reg. 58583 (October 10, 2003). As stated below, the Division notes that nothing in the no-action relief provided herein abrogates or otherwise alters the obligations of FCMs or Rule 30.10 Firms under the Act, Commission regulations, or relevant Part 30 orders.

The FSA carries out an annual risk assessment of RIEs. The assessment identifies any regulatory risks that the FSA perceives may exist and communicates them to the RIE's Board following discussions with staff at the RIE. The FSA will expect that the RIE puts into place a plan to ensure that the risks are acknowledged and either eliminated or mitigated to the satisfaction of the RIE's Board and the FSA. The FSA also has produced formal guidance setting out what it considers certain of the recognition requirements to mean in practice. This includes guidance on "proper markets" in relation to on-exchange business.

C. Regulation of NEL Members

Because trading on NEL constitutes the carrying on of one or more regulated activities, most UK-based members of NEL that trade through the ETSs,[41] including each NEL member who trades for a customer, will be required to be authorized by the FSA and will be subject to FSA's rules. To obtain authorization, an applicant must satisfy, and continue to satisfy, certain threshold conditions established by the FSMA, including the requirement that it satisfy the FSA that it is "a fit and proper person" to carry on investment business and to provide the financial services in which it intends to engage. All applicants must demonstrate compliance with the applicable FSA financial resource requirements.[42] The FSA evaluates applications for membership to ensure that applicants are "fit and proper persons" to carry out investment business. In evaluating an applicant's fitness, the FSA may consider a variety of factors, including the applicant's integrity, honesty, competence, and financial soundness.

The FSA has also established Principles for Business (Principles), which are intended to form a universal statement of the standards expected of UK-regulated firms. These cover integrity, skill, care and diligence, internal management and controls, financial resources, market

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[41] Some activities which would normally constitute regulated activity in the UK fall outside the scope of FSA regulation if they are carried out in accordance with an "exclusion" in the RAO. One of the exclusions allows an "overseas person" to deal in derivatives as principal in the UK without FSA authorization if he or she does so with or through a person who is FSA-authorized (or who has been exempted from the requirement to be authorized). An "overseas person" is a person who does not carry on regulated activities from a permanent place of business in the UK. This enables an overseas person to deal with a regulated firm in the UK, and thus enjoy the regulatory protections provided by the FSA, without the overseas person itself being required to be licensed in the UK. NEL members dealing remotely (*i.e.*, from outside the UK) on NEL through the ETSs can take advantage of this exclusion and therefore would not need to be licensed under the FSMA.

NEL intends to distribute the ETSs internationally, which means that the ETSs will potentially be accessible by NEL members in a large number of jurisdictions in which investment activities are regulated. Members who wish to deal on NEL without having a physical presence in the UK are likely to be authorized or regulated by a foreign regulator rather than by the FSA. Notwithstanding this, they will be subject to NEL's Rules. NEL will only allow foreign entities to transact business directly on NEL where, among other things, the Exchange is satisfied that the relevant foreign regulator is willing and able to cooperate with NEL and the FSA through the exchange of regulatory information and otherwise. In any event, NEL members transacting business with United States customers are required to be registered with the Commission as FCMs, CPOs or CTAs (or exempt from such CPO or CTA registration pursuant to Commission Regulation 4.13 or 4.14), or operating pursuant to Rule 30.10 orders whether such members are based within or outside of the United Kingdom.

[42] The requirement for a particular member depends on the type of institution. A firm authorized by the FSA must at all times maintain financial resources in excess of its financial resources requirement.

conduct, customers' interests, communications with clients, conflicts of interest, clients' assets and relationship with regulators. The FSA has detailed conduct of business rules, and other general rules which apply to NEL members who are FSA-authorized, including rules relating to: (1) the handling and recording of customer complaints; (2) the responsibility of a firm for its employees and agents; (3) solicitation, advertising and publishing, including detailed restrictions on cold-calling; (4) risk and product information disclosure; (5) contents of customer agreements, including provisions for discretionary accounts; (6) "know your customer" and suitability of investment products for private customers; (7) disclosure of material interests; and (8) disclosure of charges and other remuneration. Violations of the FSA's requirements may result in fines and/or other disciplinary actions imposed by the FSA.

D. Internal Oversight

In addition to the regulatory requirements described above, all NEL members are required to comply with Exchange rules and any guidance that NEL may issue with respect to the application or interpretation of such rules. The Exchange is required to enforce its rules and to monitor compliance with its rules. With respect to market integrity and investor protection, NEL has outsourced financial surveillance and risk management to NYMEX. NYMEX Clearing is responsible for the risk management function and for collecting and maintaining margins and allocating margins according to the positions of the clearing members. The NEL Compliance Department, with assistance from NYMEX Compliance, carries out routine market surveillance and ensures that trading is conducted in an orderly manner. NEL represents that, based on a combination of its own resources and those of NYMEX, it has in place effective arrangements for monitoring compliance with its rules and settlement arrangements.

NEL represents that NYMEX has extensive surveillance and compliance operations and procedures to monitor and enforce compliance with the NYMEX Clearing rules and NEL's Rules pertaining to the trading, position sizes and financial condition of members. NYMEX Clearing has extended its daily, weekly, monthly and periodic surveillance operations to include trades entered into on NEL pursuant to the GSA. In addition to financial surveillance and risk management, NEL also has outsourced electronic trade surveillance and market surveillance to NYMEX, which uses its existing sophisticated surveillance programs, as adapted for NEL, to perform these roles.[43] NEL has in place rules, procedures, resources and systems designed to reduce the extent to which its facilities can be used for a purpose connected with market abuse and financial crime, and to facilitate the detection and monitor the incidence of such abuse and crime.[44]

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[43] As part of the market monitoring and electronic trade surveillance services to be provided by NYMEX under the GSA, NYMEX staff will report any transactions that are suspicious for money laundering to NEL's Chief Compliance Officer (CCO). NEL has implemented suspicious transaction reporting procedures to provide for reporting to the National Criminal Intelligence Service. All NEL employees, including floor staff, are trained in recognizing and reporting suspicious transactions.

[44] In addition, NEL Rules contain general prohibitions on a member committing any act or engaging in any conduct likely to bring the Exchange into disrepute.

NYMEX will use its computerized surveillance program (TXN) to detect possible trading violations on NEL and to assist in the investigation of trade practice abuses for the ETSs. TXN is a flexible system that permits analysts to select default or customized parameters in order to create reports that focus on particular types of trading violations, members, or suspected patterns of violations. Specifically, TXN is used to detect the following types of trading abuses: (1) trading ahead; (2) pre-arranged trading, such as wash trades; (3) "unfair" fill prices; (4) abusive trading at the high or low of any day/time period, including the open and close; (5) fraudulent trading activity in day trading accounts; and (6) illegal cross trades.

Enforcement of compliance with NEL's Rules and settlement arrangements is the responsibility of NEL's Compliance Department, in accordance with NEL's disciplinary rules, with further support from NYMEX, particularly in relation to information sharing and investigative assistance. NEL's Compliance Department, comprised of the CCO, a senior analyst and a floor assistant, generally leads investigations and disciplinary matters.[45] As part of its arrangements, NEL has in place procedures to deal effectively with complaints about the conduct of its members and users. Such complaints and any potential rule violations uncovered as a result of its surveillance regime will be investigated promptly and rigorously by the Compliance Department. The investigative process is subject to careful review by the Business Conduct Committee (BCC), comprised of members of NEL and one non-member. If the Compliance Department and BCC are satisfied that there is a reasonable basis to conclude that a rule violation has occurred, disciplinary action is taken. Infractions of floor rules and certain recordkeeping offences are subject to summary procedures. Potential rule violations may also be referred to other regulatory authorities for action as appropriate.

The disciplinary rules provide for a respondent's case to be heard and decided fairly and impartially, within a reasonable time, and for a respondent to be penalized appropriately if found to have breached a rule. Sanctions range from censures or fines and orders of restitution to suspension of or expulsion from membership or access to NEL's facilities (or some combination of these sanctions), and are designed to reflect the seriousness of the offense. Where financial penalties are imposed, insofar as these exceed the costs of enforcing the disciplinary rules, including the costs of NEL's outsourced facilities, they will be applied for charitable purposes. NEL Rules enable penalties to be imposed summarily for floor offences and certain audit trail and recordkeeping offences. NEL also has the power to suspend members and to terminate access to its facilities on the occurrence of specified events of default.[46]

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[45] NEL's Disciplinary Rules are largely the same as those that are in place at NYMEX, but they have been modified, primarily with a view to making them compliant with the European Convention on Human Rights. Furthermore, they have been brought into line with UK practice and requirements.

[46] In all disciplinary cases, NEL's decision may be appealed to an independent and impartial Appeal Committee, composed of disinterested members of NEL and an experienced lawyer who is otherwise not affiliated with NEL or its members. The procedures for the hearing of such appeals are such as to ensure that an appellant's case is dealt with promptly and fairly. Similar appeal procedures are available to those subject to summary action.

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 ETSs directly from NEL. Additional information relevant to the ETSs and ETS 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 FSA (or the SIB, its predecessor in interest) were parties. The agreements include, without limitation, the *IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMOU)* dated May 2002, the *Memorandum of Understanding on Mutual Assistance and the Exchange of Information between the United States SEC and the CFTC and the United Kingdom Department of Trade and Industry and the SIB* dated September 25, 1991, and the *Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations*, as amended March 1998 (commonly known as the Boca Declaration).[47] By letter dated December 13, 2005, the FSA confirmed 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 an FSA-regulated market or products traded through an FSA-regulated market.[48]

VI. CONCLUSION

Consistent with the Commission's June 2 Order, the Division has reviewed and considered NEL's No-action request and the information and documentation forwarded to the Division in support thereof. Among other things, the materials furnished by NEL indicate that NEL does not maintain a representative office in the United States, nor does it provide investment advice, solicit orders or direct trading from the United States. The materials also indicate that NEL and its members are subject to oversight in the UK by a legitimate regulatory authority that is responsible for ensuring their compliance with an extensive regulatory regime, NEL adheres to the IOSCO Principles, and the CFTC and the FSA are parties to the MMOU and

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[47] NEL is currently seeking to sign the companion memorandum of understanding to the Boca Declaration, which provides for the sharing of information between market authorities upon the occurrence of certain triggering events. As part of the NEL-NYMEX Cooperation Agreement, NYMEX has agreed to share all information relevant to NEL trades with NEL. NEL may, for the purposes of prevention or detection of financial crime, pass on any information it deems appropriate to the relevant authorities. The recognition requirements require an RIE to be able and willing to co-operate by the sharing of information or otherwise, with any authority, body or person having a responsibility in the United Kingdom for the supervision or regulation of any regulated activity or other financial service, or with an overseas regulator. FSA guidance states that in assessing this the FSA may have regard to the extent to which the constitution and rules of the RIE enable it to obtain information from members and to disclose otherwise confidential information to the FSA and other appropriate bodies and whether the RIE participates in appropriate international forums.

[48] Letter from E. A. Morris, Manager, Derivatives Team, FSA, to Duane Andresen, Division of Market Oversight, Commodity Futures Trading Commission (December 13, 2005).

other information-sharing arrangements applicable to the activities of NEL.[49]

Based specifically upon these and other representations made by NEL in support of its No-action request, the Division has determined that granting no-action relief to NEL and its members 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 NEL or its members solely based upon NEL's failure to obtain contract market designation or DTEF registration pursuant to Sections 5 or 5a, respectively, of the CEA if: (1) NEL members trade for their own accounts through the ETSs in the United States; (2) NEL members who are registered with the CFTC as FCMs or who are Rule 30.10 Firms submit orders from or on behalf of United States customers for transmission to the ETSs; (3) NEL members who are registered with the CFTC as CPOs or CTAs, or who are exempt from such CPO or CTA registration pursuant to Commission Regulation 4.13 or 4.14, submit orders on behalf of United States pools they operate or United States customer accounts for which they have discretionary authority, respectively, for transmission to the ETSs, provided that a NYMEX clearing member that is registered with the Commission as an FCM acts as clearing firm with respect to all activity conducted by such CPOs and CTAs through the submission of orders on the ETSs; and/or (4) NEL members who are registered with the CFTC as FCMs or who are Rule 30.10 Firms accept orders for United States customers transmitted via AORS for submission to the ETSs.

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

- Brent Crude Oil Futures,
- Brent Crude Oil Options, and
- Northwest Europe Gasoil Futures

If additional futures and option contracts become available for trading through the ETSs, NEL may make such futures and option contracts available for trading through the ETSs 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.[50]

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[49] 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 NEL 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.

[50] 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 NEL 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 ETSs, 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 NEL 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 appropriately registered or exempt from such registration to engage in the offer or sale of a foreign futures contract or a foreign option 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 <u>and</u> 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 CPOs, CTAs, 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 ETSs 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 ETSs 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 ETSs 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:

1. NEL will continue to satisfy the criteria for recognition as an RIE under the applicable laws of the United Kingdom with respect to transactions effected through the ETSs.

2. The laws, systems, rules, and compliance mechanisms of the United Kingdom applicable to NEL will continue to require NEL to maintain fair and orderly markets; prohibit fraud, abuse, and market manipulation; and provide that such requirements are subject to the oversight of the FSA.

3. NEL will continue to adhere to the IOSCO Principles, as updated, revised, or otherwise amended to the extent consistent with United States and UK law.

4. Only members of NEL will have direct access (*i.e.*, not through an AORS) to the ETSs from the United States and NEL will not provide, and will take reasonable steps to prevent, third parties from providing such access to NEL to persons other than NEL members.[51]

5. All orders that are transmitted through the ETSs by a member of NEL that is operating pursuant to the no-action relief provided herein will be solely for the member's own account unless (i) such member is registered with the CFTC as an FCM or is a Rule 30.10 Firm, or (ii) such member is registered with the CFTC as a CPO or CTA, or is exempt from such registration pursuant to Commission Regulation 4.13 or 4.14, provided that a NYMEX clearing member that is registered with the Commission as an FCM acts as clearing firm with respect to all activity conducted by such CPO or CTA through the submission of orders on the ETSs.

6. All orders for United States customers accepted through an AORS and transmitted by NEL members through the ETSs will be intermediated by a NEL member that is either registered with the CFTC as an FCM or is a Rule 30.10 Firm.

7. Prior to operating pursuant to the no-action relief requested herein, NEL will require each current and prospective member that is not registered with the Commission as an FCM, a CTA or a CPO to execute and file with NEL a written representation, executed by a person with the authority to bind the member, stating that as long as the NEL member operates pursuant to the no-action relief provided herein, the member agrees to and submits to the jurisdiction of the CFTC with respect to activities conducted pursuant to the no-action relief. NEL will maintain the foregoing representations as long as the relevant member is operating pursuant to the no-action relief and shall make such representation available to the Commission upon the request of a CFTC representative.

8. Prior to their operating pursuant to the no-action relief provided herein, NEL will require each current and prospective member that is not registered with the CFTC as an FCM, a CTA or a CPO to execute and file with NEL a valid and binding appointment of a United States agent for

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[51] As stated above, "members" includes those persons identified in footnote 2 for the purposes of this no-action letter and the conditions imposed upon the relief provided herein.

service of process in the United States pursuant to which the agent is authorized to accept delivery and service of "communications" issued by or on behalf of the CFTC.[52] NEL will maintain the foregoing appointments as long as the relevant member is operating pursuant to the no-action relief and shall make such appointments available to the CFTC upon the request of a Commission representative.

9. Prior to operating pursuant to the no-action relief provided herein, NEL will file with the Division of Market Oversight, and maintain thereafter as long as NEL operates 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 or service of "communications", as defined above, that are issued by or on behalf of the CFTC.

10. Prior to their operating pursuant to the no-action relief provided herein, NEL will require each current and prospective member of the Exchange that is not registered with the CFTC as an FCM, a CTA or a CPO to file with NEL a written representation, executed by a person with the authority to bind the member, stating that as long as the member operates pursuant to the no-action relief provided herein, the member will provide, upon the request of the Commission, the United States Department of Justice and, 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 the ETSs is installed or used in the United States. NEL will maintain the foregoing representations as long as the relevant member is operating pursuant to the no-action relief. NEL will make such representations available to the CFTC upon the request of a Commission representative.

11. NEL 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:

a. For each contract available to be traded on the ETSs, (1) the total trade volume originating from electronic trading devices providing access to the ETSs in the United States, (2) the total trade volume for such products traded through the ETSs worldwide, and (3) the total trade volume for such products traded on NEL generally; and

b. A listing of the names, NFA ID numbers (if applicable), and main business addresses in the United States of all NEL members that have access to the ETSs in the United States.

12. NEL will promptly provide the Division with written notice of the following:

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[52] 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 by or on behalf of the Commission.

a.. Any material change in the information provided in its No-action request, including any information contained in the documents submitted in support thereof;[53]

b. Any material change in NEL's Rules or the laws, rules, and regulations in the United Kingdom relevant to futures and options;

c. Any matter known to NEL or its representatives that, in NEL's judgment, may affect the financial or operational viability of NEL, including, but not limited to, any significant system failure or interruption;

d. Any default, insolvency, or bankruptcy of any NEL member known to NEL or its representatives that may have a material, adverse impact upon the condition of NEL, NYMEX Clearing, or upon any United States customer or firm;

e. Any known violation by NEL or any NEL member of the terms or conditions of the no-action relief provided herein; and

f. Any disciplinary action taken by NEL against any NEL member 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 the ETSs or an AORS to submit orders to NEL and either (1) the NEL member against whom the disciplinary action is taken is located or based in the United States or (2) the disciplinary action results, in whole or in part, from conduct that: (i) involves the use of a terminal or an AORS that is located in the United States to accept or submit an order for trading through the ETSs; (ii) involves a United States customer or firm or registered FCM; or (iii) might have a material, adverse impact upon any United States customer or firm.

13. Satisfactory information-sharing arrangements between the Commission and the FSA will remain in effect.

14. The Commission will be able to obtain sufficient information regarding NEL and its members operating pursuant to the no-action relief provided herein, and NEL will provide directly to the Commission information necessary to evaluate the continued eligibility of NEL or its members for the relief, to enforce compliance with the terms and conditions of the 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 and DTEFs.

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[53] 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: NEL's membership criteria; the location of NEL's management, personnel, or operations (particularly changes that may suggest an increased nexus between NEL's activities and the United States); the basic structure, nature, or operation of the ETSs; or the regulatory or self-regulatory structure applicable to NEL members.

15. NEL will employ reasonable procedures, to be determined by NEL, 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 NEL's No-action request and the 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 NEL's activities in the United States to ascertain whether NEL'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 NEL and its members, 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 NEL will be subject to those rules or guidelines in that event.

If you have any questions regarding this correspondence, please contact Duane C. Andresen, Special Counsel, at dandresen@cftc.gov or by phone at (202) 418-5492.

Very truly yours,

Richard A. Shilts
Director

cc: Samuel Gaer, Chief Executive Officer, NYMEX Europe Limited
Christopher Bowen, General Counsel and Chief Administrative Officer, NYMEX
Gregory C. Prusik, Vice-President Compliance and Registration, NFA
Branch Chief, Audit and Financial Review Unit, Division of Clearing and Intermediary Oversight, Chicago Regional Office