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New York
Mercantile Exchange

August 1, 2006

COMMENT

Ms. Eileen Donovan
Acting Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St. N.W.
Washington, D.C. 20581

Re: Boards of Trade Located Outside of the United States

Dear Ms. Donovan:

The New York Mercantile Exchange, Inc. ("NYMEX" or "Exchange") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") Federal Register Release dated June 8, 2006.[1] The CFTC requested comment on a series of questions pertaining to the interpretation and application of the language in Section 4(a) of the Commodity Exchange Act ("Act") referring to "boards of trade" located outside the U.S." In particular, the Commission solicited comment on the circumstances relevant to when (as a shorthand reference within this comment letter) a board of trade organized outside of the US, i.e., a Foreign Board of Trade ("FBOT") may be deemed to be no longer "located outside the U.S."

NYMEX is a for-profit corporation organized under the laws of the State of Delaware. It is the chief operating subsidiary of NYMEX Holdings, Inc., ("NYMEX Holdings").[2] As a designated contract market ("DCM") and a registered derivatives clearing organization, NYMEX is the largest exchange in the world for the trading and clearing of futures and options contracts on energy and metals commodities.

Summary Overview

[1] This letter restates and supplements the testimony that NYMEX staff provided at the CFTC's recent public hearing held on June 27, 2006.

[2] NYMEX Holdings' shares are not listed on a national market or exchange but are registered with the Securities and Exchange Commission ("SEC"), and as such, are subject to the rules and regulations of the SEC.

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The New York Mercantile Exchange, Inc., is composed of two divisions. The NYMEX Division offers trading in crude oil, heating oil, unleaded gasoline, natural gas, electricity, coal, propane, platinum, and palladium. The COMEX Division offers trading in gold, silver, copper, and aluminum.

NYMEX supports vigorous and fair competition and greater globalization of services and products. As global expansion is an important component of our long-term business model, we understand the concern of some U.S. exchanges regarding possible reactions by overseas regulators to the Commission's actions. But we believe that the current review is timely and appropriate and is urgently needed to address the critical need for regulatory parity and consistency as between U.S. exchanges and FBOTs providing direct access to U.S. participants pursuant to Commission staff no-action letters. We find the phrase "boards of trade located outside the United States" to be ambiguous on its face, and we believe that the Commission has authority to interpret this phrase. However, in light of the profound challenges associated with definitional line-drawing, we believe that the more productive and appropriate path for the Commission to take at this time would be to formalize the current staff no-action process. NYMEX believes that the no-action process offers the greatest opportunity for a flexible review that can achieve the Commission's policy objectives as well as facilitating the expansion of U.S. access to foreign markets.

However, it is vitally important to underscore the need to ensure that the Commission's regulatory decisions facilitate a "level playing field" among competing markets. The promotion of "fair competition" is now codified in the law (that the CFTC is charged with applying and enforcing) as one of the key purposes of that statute. Accordingly, we believe that it is vitally important that the Commission provide US exchanges subject to its jurisdiction with the same flexibility accorded to foreign boards of trade (who are operating in the US on the basis of CFTC staff no-action letters premised upon such exchanges being subject to comparable regulation abroad). Indeed, a commitment to such regulatory consistency is an inherent requirement for just and equitable treatment, regulatory fairness and substantive due process under the law.

NYMEX Support for Globalization

NYMEX has long been a champion of vigorous competition and of greater globalization of services and products, and global expansion is an important component of our long-term business model. As a rapidly growing global market presence, we have offices in London and Tokyo as well as an office that opened recently in Singapore. Our original electronic trading system commenced operations in June of 1993 and by the following year, we had received approval to provide electronic access to our markets to users in the United Kingdom and have since provided electronic access to our trading platforms there pursuant to our status as a "recognised overseas investment exchange" ("ROIE"). To date, we have confirmed 24 overseas jurisdictions that have either approved screen trading access to NYMEX products or confirmed that approval is not required, and we are adding to this list on a regular basis.

We are also expanding our global presence through the listing of products whose characteristics are modeled upon underlying commodities that originate outside

the U.S. Thus, for example, NYMEX's global expansion includes the addition of cleared futures contracts for Singapore Fuel Oil, European Fuel Oil, Naptha and Gasoline. Additionally, NYMEX's affiliate, NYMEX Europe Limited, is a U.K.-based exchange that is fully recognized by the Financial Services Authority ("FSA") that lists contracts based on European energy products. Furthermore, in 2005, we announced the creation of the Dubai Mercantile Exchange, a joint venture with Tatweer Dubai, L.L.C, a subsidiary of Dubai Holding, to develop the first energy futures exchange in the Middle East to be located in the Dubai International Financial Centre and which is expected to list contracts based on Middle East and Far East energy products.

Because global expansion both in terms of products and market access is an important component of our long-term business model, we understand and are sensitive to the concerns expressed by other U.S. exchanges and intermediaries about possible reactions by non-U.S. regulators to the determinations to be made by the Commission on the FBOT issues under review.

We believe that the CFTC has exhibited strong leadership and has followed a practical and forward thinking approach to cross-border trading, which has resulted in substantial growth opportunities for both U.S. and foreign markets. We also have been generally supportive of the CFTC's staff no-action process exempting (under certain conditions) foreign boards of trade that provide direct electronic access to U.S. participants from the requirement to be registered with and regulated by the CFTC as a contract market.

However, we also recognize that circumstances have changed considerably since the no-action process first began nearly a decade ago. There have been substantial advances in technology since the former era of closed end proprietary trading systems. New exchanges have emerged that operate on a solely electronic basis, and products have now been listed under the no-action process that are parallel (if not identical) to contracts listed by U.S. exchanges that are subject to full CFTC regulation. Therefore, we believe that the current review being undertaken by the CFTC is timely and appropriate, and we commend the Commission for its willingness to address these difficult topics.

Background

In addition to the history cited in the Commission's Federal Register release, we believe that it is also very relevant to recall that, in June of 1999, in response to the no-action letters being issued by Commission staff and the Commission order withdrawing its proposed rules, the Chicago Board of Trade, the Chicago Mercantile Exchange ("CME") and NYMEX (collectively for purposes of this paragraph, the "Exchanges") jointly submitted a Section 4(c) petition to the Commission, seeking exemptive relief, including relief under which the Exchanges would be able to implement trading rules and procedures comparable to those of a competing foreign exchange operating under a Commission staff

no-action letter, *provided* that such rules and procedures would *only* apply to contracts listed by the U.S. exchange that were subject to direct competition from a contract listed by the foreign exchange.[3] Although the Commission subsequently published the petition for public comment,[4] no other action was ultimately taken on that petition.[5] However, this background indicates that the issue of regulatory parity or fairness is not a new issue and that this competition concern has yet to be fully resolved as a matter of public policy.

Commission's Authority to Interpret the Phrase "Board of Trade Located Outside the United States"

Contrary to those who would read Section 4(a) of the Act as a permissive subsection, we note that this subsection instead establishes a general prohibition with a limited carve-out. Specifically, Section 4(a) makes it unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or conduct any office or business anywhere in the U.S. for the purpose of soliciting or accepting any order or otherwise dealing in any transaction in, or in connection with, a futures contract, unless such futures transaction is: (1) conducted on or subject to the rules of a DCM or derivatives transaction execution facility; (2) conducted on or subject to the rules of a board of trade located outside of the U.S.; or (3) otherwise exempted by the CFTC pursuant to Section 4(c).[6]

First, it should be noted that the statutory prohibition is very broad; it applies to (1) any person (2) conducting any office or business in the U.S. (3) in connection with a futures contract. Second, the statute does not provide any guidance as to the meaning either of the phrases "conducting any office or business anywhere in the U.S." or "located outside of the United States."[7]

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[3] The Exchanges also sought the ability to list new contracts without Commission pre-approval and the ability to list new rules or rule changes ten days after the filing of such changes with the Commission. The Commodity Futures Modernization Act ("CFMA") of 2000 has clearly already addressed both of these areas of requested relief

[4] 64 FR 46536, August 25, 1999.

[5] In the wake of the landmark CFMA legislation, the petition for exemptive relief was neither formally acted upon by the Commission nor withdrawn by the Exchanges.

[6] Section 2(a) of the Act provides the CFTC with exclusive jurisdiction over transactions involving futures contracts.

[7] Thus, for example, the phrase "conduct any office or business anywhere in the U.S." could be interpreted to refer to a board of trade organized outside of the U.S. that: (1) maintains a marketing office and staff in the U.S.; (2) that maintains its computer host for its trade matching engine in the U.S.; (3) maintains computer servers, routers or other trade routing, matching, or reporting infrastructure in the U.S.; and/or (4) derives a substantial portion of its order flow from the U.S.

While the phrase "board of trade located outside the United States" is set forth in words that arguably could qualify as "plain English," it does not necessarily follow that the phrase has a "plain meaning" or is without ambiguity. In our view, the language of the statute that provides an exception (from the broad prohibition) for a board of trade located outside of the U.S. is, on its face, ambiguous. We do not believe that the phrase "board of trade located outside of the U.S." is unambiguous, i.e., capable of only one meaning or interpretation and leading to only one conclusion.[8] Instead, it could mean that the board of trade is organized outside of the U.S., or that its core operations are located outside of the U.S., or even that it does not maintain an office, personnel or any trade communication or matching equipment or infrastructure physically located in the U.S. Congress simply did not speak directly to the issue of what constitutes a "board of trade located outside of the United States", particularly in the context of electronic trading facilities. In other words, the phrase is at a level of generality that we believe that a number of possible interpretations could reasonably be assigned to it by the Commission through an interpretation or rule.

As a general matter, Section 8a (5) of the Act provides the CFTC with the authority to make and promulgate such rules and regulations, as in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act. Consequently, as to Section 4(a), the Exchange believes that it is clear that the CFTC has the authority, if it chooses to do so, to promulgate a new rule interpreting the scope of Section 4(a)'s exception for "board of trade located outside of the U.S." Moreover, under the Chevron doctrine,[9] the CFTC, as the federal functional regulator authorized

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[8] We note that, among those responding to the current request for comment, one commenter asserted that the phrase "board of trade located outside the United States" is unambiguous. Yet, the same commenter then went on to provide its own meaning of this term as referring to core operations being located outside the U.S., a definition that cannot be found either in the Act itself or in its legislative history.

[9]Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). Chevron requires courts to defer to the agency's interpretation when the relevant statute is "silent or ambiguous with respect to the specific issue" involved, so long as the agency's interpretation is "based on a permissible construction of the statute." Chevron, 467 U.S. at 843. Accordingly, when the statute does not "directly address [ ] the precise question at issue," reviewing courts must affirm the agency's interpretation if it represents a "reasonable choice within a gap left open by Congress." Id. at 866. Reviewing courts may not second-guess an agency's policy determinations; if Congress has not expressed a clear intent on the relevant issue, the only question before a court is whether the rules promulgated by the agency are reasonable, not whether those rules are appropriate in the court's view. Such judicial deference is required even if an agency changes its interpretation of a statutory term from time to time in response to complex and evolving circumstances. See id. at 863-64: Of course, an initial agency interpretation is not instantly carved in

under the CEA, is entitled to make a reasonable interpretation of a statute where the statute is itself ambiguous.[10]

We believe that the issue is not whether the Commission has the inherent authority to interpret this phrase under its current statutory authority. It does. Rather, the real issue instead is how best to apply that authority. As will be discussed in greater detail below, while we believe that it might be possible to cobble together a set of criteria that might serve as a definition of this phrase, we recognize, as does much of the rest of the industry, that such a process would be a profoundly challenging and difficult exercise for the Commission. Accordingly, while the Commission may want to reserve for the future the possibility to revisit this area, we believe that by far the best approach at this point in time would be to provide guidance to Commission staff in the continuation of the ongoing staff no-action letter process.

Focus on Staff No-Action Process

In the Federal Register release, the Commission posed a number of questions aimed at identifying criteria that could be used to determine whether a FBOT's level of presence within the U.S. was so extensive as to require designation as a contract market. We recognize that this analysis generates profoundly difficult line-drawing challenges for the Commission.

There are a number of possible factors or criteria relating to a FBOT that could initially appear to be relevant to the analysis as to whether it is operating as a U.S. exchange, including where orders originate, location of the matching engine, whether U.S. produced and delivered commodities underlie the contracts, primary business activities located in the U.S., advertising and business solicitation in the U.S., etc. As NYMEX indicated during the hearing, a closer analysis of the various criteria likely could identify a number of shortcomings with different factors or indicia, such as with reliance on volume as discussed immediately below.

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stone. On the contrary, the agency, to engage in informed rule-making, must consider varying interpretations and the wisdom of its policy on a continuing basis. Accordingly, any new rule promulgated by the CFTC at the conclusion of its notice and comment procedures that is a "permissible construction" of section 4(a) of the CEA would be expected to be upheld on review.

[10]See Commodity Futures Trading Comm'n v. Schor et al., 478 U.S. 833, 844-45 (1986) (applying Chevron and according "considerable weight" to the CFTC's interpretation of the CEA); Commodity Trend Service, Inc. v. Commodities Futures Trading Comm'n, 233 F.3d 981, 987 (7th Cir. 2000) ("the CFTC's construction of the CEA is entitled to Chevron deference"); Thrifty Oil Co. v. Bank of America Nat'l Trust and Savings Ass'n, 322 F.3d 1039, 1058 n.24 (9th Cir. 2003) ("federal courts generally give 'great deference' to CFTC interpretations of the CEA") (citation omitted).

Level of U.S. Presence

The Commission has sought comment, among other things, on whether the extent of U.S. presence in the U.S. is an appropriate threshold. Presence of FBOT activities in the U.S., including management, back office operations, order matching/execution facilities, clearing facilities and the vast majority of its personnel, might suggest one basis for finding that the FBOT is no longer located outside of the U.S. As a historical matter, the no-action relief was clearly predicated upon representations by the FBOT that it had minimal presence in the U.S, [11] and to date, the staff no-action letters have been consistent in requiring the exchanges receiving such no-action letters to report quarterly volume to the Commission, in some instances, without being able to distinguish whether the order originated in the U.S. or abroad.[12]

However, NYMEX has been consistent over the years in identifying the shortcomings associated with reliance on the percentage of trading volume originating in the U.S. Thus, for example, NYMEX noted in a prior comment letter to the Commission on the CFTC's concept release regarding "placement" of foreign terminals that, given the inherent fluctuations in price for many commodities traded on futures markets, trading volume similarly could fluctuate considerably from one calendar quarter to the next.[13] In addition, as was discussed in some detail at the hearing, orders can be routed electronically through brokers anywhere in the world. Moreover, the difficulty of identifying U.S. customer orders from non-U.S. customer orders may require costly system changes at the firm level.

Similarly, location of the matching engine as the basic test presents difficulties as well, given the proliferation of screen-based trading and the declining significance of the location of the physical trading facility. The matching engine can be

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[11] For example, the International Petroleum Exchange (IPE now known as ICE Futures), in its original request for no-action relief, specifically represented that its principal business office was located in London, and that it maintained a single, representative office in the U.S. which employed two persons for the purpose of providing educational and marketing materials. Moreover, IPE represented that no trade processing or clearing functions were performed by IPE in the U.S. CFTC Letter No. 99-69 at p. 2 (November 12, 1999). Significantly, as a condition of the Commission's no-action letter, IPE was required to provide written notice to the Division of "[a]ny material change in the information provided in its No-Action Request." Id. at p. 14. The Division noted that "material" changes in the information provided would include, among other things, "the location of IPE's management, personnel, or operations (particularly changes that may suggest an increased nexus between IPE's activities and the United States)." Id. n. 61

[12] 71 FR 34070 (June 13, 2006). n. 26.

[13] Letter to Jean A Webb from R. Patrick Thompson, dated, October 7, 1998, at p. 7.

located anywhere in the world, with no relevance to where the market's corporate headquarters is located or to what country has jurisdiction. Delivery location for physically settled contracts has implications for the broader U.S. economy. However, we recognize that it potentially presents issues for U.S. exchanges whose futures contracts are delivered abroad. Finally, we, like other U.S. exchanges, fear repercussions from foreign jurisdictions where our electronic trading screens are located, to the extent that they may determine to impose additional regulatory burdens on our market.

Furthermore, the location of the governing board and/or the location of a trade matching engine or other technology may also be viewed as problematic in establishing a bright-line test. Should such factors be established as core criteria, it is possible to envision that a FBOT could respond over time by moving its hardware elsewhere as well as by reconstituting its governing board.

Exchanges organized and regulated abroad, but whose order matching infrastructure and order flow is primarily located in the U.S. and which list contracts that mimic contracts listed on U.S. regulated futures exchanges and target U.S. customers, are engaging in activity that we believe falls squarely within the CFTC's statutory mandate. This is particularly the case where the underlying commodity significantly impacts the U.S. economy, such as West Texas intermediate crude oil, which serves as a benchmark for domestic and global energy prices.

This was clearly not the scenario contemplated by the current no-action regime. Given the blatant use of the no-action relief process as a vehicle for regulatory arbitrage in what appears to be a deliberate effort to circumvent CFTC regulations for competitive gains, it is time to revisit this process. The competitive and regulatory policy issues that have arisen in this area are extremely serious and should not be taken lightly, given the potential long-term negative ramifications if not appropriately addressed.

Accordingly, in considering its statutory mission as part of the current review, we suggest that the Commission needs to assess the extent to which it is willing to rely on regulation by other regulators and on information-sharing arrangements with those regulators. While recognizing that there may be special circumstances from time to time where DCM registration must be seriously considered, we now believe that it is prudent for the Commission to make the greatest use possible of the no-action process to achieve its statutory objectives. As Commissioner Lukken has noted in a recent speech, agencies such as the CFTC do not have the resources to sufficiently monitor the breadth of the global marketplace and its

participants. Consequently, accomplishing the CFTC's mission may involve "coordination among those regulators abiding by the highest global standards."[14]

We also would suggest that the no-action process offers the greatest opportunity for a flexible review. Under this approach, Commission staff, acting on the basis of general guidance or standards provided by the Commission, can undertake an individualized review of each request that considers the facts and circumstances of that exchange and its regulatory regime and that allows staff to issue letters that may be specifically customized and tailored to that exchange and also revised over time.

In this regard, we join with the CME and others who would welcome a more formalized process akin to the ROIE category for overseas exchanges that is routinely utilized by the FSA. In our view, such a process would be the Commission path most likely to also facilitate expanding U.S. access to foreign markets.[15]

We further recommend that the Commission or Commission staff conduct a thorough review from time to time of foreign markets operating in the U.S. under existing no-action letters. In particular, in light of the many changes that have occurred in the futures industry since the outset of the foreign terminals no-action process, including the considerable advances in electronic trading systems, we believe that the staff analysis may need to take a closer look going forward in terms of what may be deemed to be "comparable." Moreover, with U.S. exchanges competing with foreign exchanges on the same products and for the same customers, mere "comparability" may no longer be the appropriate standard for U.S. exchanges to remain viable and competitive.

The analysis should be designed to instill greater discipline and rigor into the comparability analysis with particular focus on FBOT rules with regulatory and competitive implications for U.S. markets and customers. A primary goal should be a "regulatory gap" analysis that can identify significant regulatory differences in the FBOT's program that may raise significant competition concerns with a U.S. exchange. Once identified, the Commission staff could ensure parity and fundamental fairness for U.S. exchanges either by adding additional requirements to the no-action letters where appropriate (such as when there are

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[14] Keynote Address of CFTC Commissioner Walter L. Lukken before the International Swaps and Derivatives Association's Energy, Commodities and Developing Products Conference, Houston, Texas, June 14, 2006.

[15] While we believe that an eventual statutory codification of such a category would be beneficial in adding greater legal certainty to the existing no-action process, we note nonetheless that the current no-action process has been left undisturbed by Congress both in 2000 and during the current reauthorization review that should be finalized shortly.

directly competing products) or by providing appropriate relief to domestic exchanges. To that end, the Commission should consider a measured approach that will further the Commission's regulatory and public policy objectives and deepen and enhance the strong relationships that have been developed with other international regulators.

Finally, we strongly encourage the Commission to be vigilant and proactive in ensuring that U.S. exchanges are not competitively disadvantaged by foreign exchanges operating under more flexible regimes than those imposed on U.S. markets and to incorporate regulatory parity and consistency principles as fundamental components of the review process of applications being submitted to CFTC staff by overseas exchanges.

Regulatory Parity and a Level Playing Field

It is critical to the continued success of U.S. markets that the Commission ensures that its regulatory decisions do not unwittingly create a competitive disadvantage for our markets relative to foreign markets. A primary goal of the CFMA was to facilitate a level playing field for U.S. exchanges in the competitive battle with other markets with varying levels of regulation, including both OTC and foreign markets. The promotion of "fair competition" is now embodied in the law as one of the key purposes of the statute. that the CFTC must enforce. Both Congress and the CFTC have emphasized continually the importance of "fair competition" and of "even-handed regulation." Accordingly, we continue to believe that it is vitally important that the Commission provide U.S. exchanges subject to its jurisdiction with the same flexibility afforded to foreign boards of trade operating in the U.S. on the basis of CFTC staff no-action letters.

NYMEX is particularly concerned about the apparent lack of regulatory parity as it pertains to position limits. We acknowledge at the outset that there are other factors that contribute to decisions on where to trade energy contracts. Indeed, as I noted during my testimony at the hearing, there are a number of business or market factors that currently affect the intense competition between NYMEX and ICE Futures. Several of these factors are within NYMEX's control, and we are moving aggressively to address these matters. We also acknowledge and accept that it may be appropriate to have somewhat different treatment depending on whether a particular contract involves physical delivery or cash settlement.

However, we strongly believe that the regulatory imbalance on matters such as position limits is clearly a significant factor in this competition that does directly sway trading decisions, and this factor—the imbalance in applicable regulatory treatment—is within the CFTC's purview. As was noted several times during the recent hearing, traders often tend to seek the path of least resistance. This recognition is consistent with our own experience and with feedback that we have received from numerous users of our markets. In the face of the current

regulatory imbalance, traders respond in several ways: 1) some shift their business over to the less restrictive market as they approach the limits on our contracts; 2) some have a preference for not dealing with the hedge limit exemption process and therefore shift all of their market share to the market with no limits; and 3) others simply prefer a less restrictive regulatory environment generally and similarly shift their trading activity to the less restrictive market.

In our recent experience, "regulatory arbitrage" is not a hypothetical concern but is actually already underway for certain of our listed products. This process harms markets because of the distortion of market efficiency occurring when customers make choices among the same or similar products on the basis of differences in regulatory treatment among providers rather than on the basis of intrinsic distinctions in the products themselves or in related services.

We believe that a level playing field is absolutely necessary in order to ensure fair competition between NYMEX and the FSA-regulated ICE Futures Exchange. In this regard, it may be useful to recall that Core Principle 5 for designated contract markets does not formally require use of position levels or position accountability levels. Instead, Core Principle 5 by its terms provides that DCMs adopt such tools only "where necessary or appropriate."

By comparison, the FSA, which seemingly has been deemed by CFTC staff to be comparable on various regulatory fronts including market surveillance, does not require either position limits or position accountability levels either for physically settled contracts (such as the ICE Futures gasoil futures contract that has been available on the screen to US participants for several years) or for financially settled contracts (such as the contracts listed more recently by ICE Futures). It would seem that the FSA has demonstrated to Commission staff that position limits are not necessarily the only way to achieve the common goal of preventing market manipulation.[16] A flexible regulatory approach is essential to allowing U.S. exchanges to compete against foreign markets offering the same product to the same customers.[17]

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[16] As we understand it, the CFTC staff review looks at the totality of circumstances of an overseas regulatory regime to assess, among other things, how the absence of an approach commonly used by the Commission might be addressed in other ways. Similarly, a DCM is provided with reasonable discretion pursuant to Core Principle 1 in "establishing the manner in which it complies with the core principles." We believe that this totality of circumstances approach is also translatable to a DCM's showing as to how it continues to comply with the core principles. In other words, we believe that a concern with a hypothetical "race to the bottom" is misplaced and is inconsistent with the current method of compliance with the core principles.

[17] We believe, for example, that the replacement, for certain physically settled contracts listed on a DCM, of hard position limits with flexible position accountability standards should be seriously explored and could strengthen the competitiveness of U.S.

We believe that a commitment to such regulatory consistency is an inherent requirement for just and equitable treatment, regulatory fairness and substantive due process under the law. A Commission stance of following a similar regulatory approach for similar activities would be consistent not only with the Administrative Procedures Act but also with the protection of the due process clause of the Fifth Amendment to the U.S. Constitution. There is a long line of precedent that has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently. Transactive Corp. v. U.S., 91 F. 3d 232, 237 (D.C. Cir. 1996). See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 57, 103 S. Ct. 2856, 2874, 77 L. Ed. 2d 443 (citing Greater Boston Television Corp. v. FCC, 444 F 2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, 91 S. Ct. 2229, 2233, 29 L. Ed.2d 701 (1971)); Airmark Corp. v. FAA, 758 F.2d 685, 691-692 (D.C. Cir. 1985); Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862, 872 (D.C. Cir. 1978).

Thus, for example, the D.C. Circuit has ruled that once an agency has agreed to allow exceptions to a rule, it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar. Green Country Mobilephone v. FCC, 765 F.2d. 235, 237 (D.C. Cir. 1985), citing NLRB v. Washington Star Co., 732 F.2d 974, 977 (D.C. Cir. 1984).

Furthermore, we would respectfully suggest that a Commission approach of recognizing that similar activities should be treated in a similar manner also would be consistent with its statutory obligations under Section 15 of the Act. Section 15 provides in pertinent part that the CFTC must consider the public interest to be protected by the anti-trust laws and endeavor to take the least anti-competitive means of achieving the objectives, policies and purposes of the Act. A no-action process under which foreign exchanges may operate in the U.S. under regulatory approaches at considerable variance from various CFTC regulatory burdens while continuing to impose such burdens upon domestic exchanges creates a lopsided regulatory environment that is inherently anti-competitive.

Conclusion

We believe that a commitment to regulatory parity is an inherent requirement for just and equitable treatment, regulatory fairness and substantive due process under the law. Time is of the essence for NYMEX on this issue. We urge the Commission to move quickly to establish a process that will ensure true regulatory parity and fundamental fairness

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exchanges facing challenges from foreign exchanges offering identical products to identical customers.

Should you require any additional information or have any comments or questions regarding this comment letter, please do not hesitate to contact me at any time.

Very truly yours,

James E. Newsome
President and
Chief Executive Officer

cc: Reuben Jeffery III, Chairman
Walt Lukken, Commissioner
Michael Dunn, Commissioner
Fred Hatfield, Commissioner