



## U.S. COMMODITY FUTURES TRADING COMMISSION

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### Office of General Counsel

CFTC letter No. 06-14  
July 10, 2006  
No-Action  
Office of General Counsel

Tina Woo, Esq.  
Clifford Chance US LLP  
31 West 52<sup>nd</sup> Street  
New York, NY 10019-6131

Re: Osaka Securities Exchange Co., Ltd.'s Request for No-Action Relief in Connection with the Offer and Sale in the United States of its Mini Futures Contract Based on the Nikkei 225 Stock Average Index

Dear Ms. Woo:

This is in response to letters, attachments, facsimiles and electronic mail dated from September 29, 2005 to April 26, 2006, requesting on behalf of your client, the Osaka Securities Exchange Co., Ltd. ("OSE"), that the Office of General Counsel ("Office") of the Commodity Futures Trading Commission ("Commission" or "CFTC") issue a "no-action" letter concerning the offer and sale in the United States ("U.S.") of OSE's mini futures contract based on the Nikkei 225 Stock Average Index ("Nikkei 225" or "Index").<sup>1</sup>

We understand the facts to be as follows. OSE currently is the largest equity derivatives exchange in Japan measured by trading volume and contract values.<sup>2</sup> The OSE is an incorporated organization established in accordance with Japan's Securities and Exchange Law (Law No. 25 of 1948, as amended) ("Securities and Exchange Law"). The OSE is licensed to act as a stock exchange by the Prime Minister of Japan pursuant to a license initially granted by the Minister of Finance of Japan under the Securities and Exchange Law. As a licensed stock exchange, the OSE is authorized to trade stocks, bonds and equity derivatives products. The equity derivatives products

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<sup>1</sup> This Office previously issued no-action relief with regard to OSE's standard-sized futures contract on the Nikkei 225. See CFTC Staff Letter No. 92-1 [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,209 (Jan. 16, 1992).

<sup>2</sup> See letter from Tina Woo, Esq., Clifford Chance US LLP, to David R. Merrill, Deputy General Counsel, CFTC, dated September 29, 2005, at 1.

authorized for trading include futures contracts and options on security indices and options on securities.<sup>3</sup>

Under the Securities and Exchange Law, the Prime Minister has supervisory authority over all stock exchanges in Japan. Among other things, the Prime Minister is authorized to grant licenses to stock exchanges, to approve their Articles of Incorporation, Business Regulations, and Brokerage Agreement Standards, and to approve futures contracts on security indices. The Prime Minister, in turn, has delegated these powers, other than the authority to grant licenses to stock exchanges, to the Commissioner of the Financial Services Agency of Japan (“FSA”). The FSA was established in July 2000 and results from the merger of the Financial Supervisory Agency and Financial System Planning Bureau of the Ministry of Finance. The FSA has broad supervisory responsibility for all aspects of financial services, including inspection, supervision and surveillance of financial activities.<sup>4</sup>

The Nikkei 225 is a broad-based, price-weighted composite security index consisting of highly capitalized and actively traded stocks currently listed on the First Section of the Tokyo Stock Exchange (“TSE”).<sup>5</sup> Managed and published by Nihon Keizai Shimbun, Inc., (“Nikkei Shimbun”), the Nikkei 225 is a widely observed index of stock market activity in Japan. The stocks represented in the Index account for 63.64% of the total market capitalization of the 1,640 stocks listed on TSE’s First Section.<sup>6</sup> As of April 20, 2006, the total market capitalization of the Nikkei 225 was approximately U.S. \$3.32 trillion. Also as of that date, the largest single stock by weight represented 3.28%, and the five most heavily weighted stocks represented 11.40%, of the Nikkei

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<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.*

<sup>6</sup> Nikkei Shimbun reviews the Nikkei 225 on an annual basis. At each annual review, Nikkei Shimbun selects the 225 component stocks in the Index based on several criteria. Nikkei Shimbun selects the 450 most liquid stocks listed on the TSE’s First Section based on trading value and rate of price fluctuation during the past five years. The Nikkei 225 is selected from this set of 450 stocks. The 75 most liquid stocks are included in the Nikkei 225. The remainder of the Index is composed of stocks selected to ensure balance across six industrial sector categories. Generally, notice of change in the composition of the Nikkei 225 is made two weeks prior to implementation, which occurs on the first trading day in October. Nikkei Shimbun also revises the Index on an ongoing basis when a component stock is removed from the TSE First Section, is moved to the liquidation post, is in bankruptcy, or is delisted. Replacements typically are added to the Index on the same day. The continuity of the Index is maintained by adjusting the divisor following each revision and whenever there is a non-market event. See letter from Ms. Woo to Mr. Merrill, dated September 29, 2005, at 3-4 & Appendix B.

225.<sup>7</sup> The stocks comprising the lowest 25% of the Nikkei 225 had a six-month aggregate dollar value of average daily trading volume in excess of U.S. \$30 million: approximately U.S. \$3.07 billion for the 6-month period ending April 2006.<sup>8</sup> The Nikkei 225 is calculated in real time and disseminated by QUICK Corporation, a subsidiary of Nikkei Shimbun, through electronic means every minute during the trading day. The OSE publishes the Nikkei 225 daily on its website (<http://www.ose.or.jp/e/>), and the Index is widely available through electronic and print media, including Reuters and Bloomberg, LP.<sup>9</sup>

OSE's mini futures contract on the Nikkei 225 provides for cash settlement. The notional value of the contract is determined by multiplying the Index level by 100 Japanese yen. Prices are quoted in Index points with each Index point equal to 100 Japanese yen per contract. The minimum price fluctuation is 0.05 Index point (five yen per contract). OSE lists for trading the two nearest months of the March quarterly cycle, and the last trading day of the contract is the business day prior to the second Friday of each contract month. Cash settlement must be completed by the second business day following the last trading day based on the final settlement price. The final settlement price for the contract is a special opening quotation of the Index on the business day following the last trading day.<sup>10</sup>

The Commodity Exchange Act ("CEA"),<sup>11</sup> as amended by the Commodity Futures Modernization Act of 2000 ("CFMA"),<sup>12</sup> provides that the offer or sale in the U.S. of futures contracts based on a group or index of securities, including those contracts traded on or subject to the rules of a foreign board of trade, is subject to the Commission's exclusive jurisdiction,<sup>13</sup> with the exception of security futures products,<sup>14</sup>

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<sup>7</sup> See electronic mail from Tina Woo, Esq., Clifford Chance US LLP, to Julian E. Hammar, Counsel, CFTC, dated April 26, 2006.

<sup>8</sup> *Id.*

<sup>9</sup> See letter from Mr. Woo to Mr. Merrill, dated September 29, 2005, at 2.

<sup>10</sup> *Id.* at Appendix E.

<sup>11</sup> 7 U.S.C. § 1 *et seq.*

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

<sup>13</sup> See CEA Section 2(a)(1)(C)(ii).

<sup>14</sup> Security futures products are defined as a security future or any put, call, straddle, option, or privilege on any security future. See CEA Section 1a(32). A security future is defined as a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, with certain exceptions. See CEA Section 1a(31).

over which the Commission shares jurisdiction with the Securities and Exchange Commission (“SEC”).<sup>15</sup> Thus, the Commission’s jurisdiction remains exclusive with regard to futures contracts on a group or index of securities that are broad-based pursuant to CEA Section 1a(25).<sup>16</sup>

CEA Section 2(a)(1)(C)(iv) generally prohibits any person from offering or selling a futures contract based on a security index in the U.S., except as permitted under CEA Section 2(a)(1)(C)(ii) or CEA Section 2(a)(1)(D).<sup>17</sup> By its terms, CEA Section 2(a)(1)(C)(iv) applies to futures contracts on security indices traded on both domestic and foreign boards of trade. CEA Section 2(a)(1)(C)(ii) sets forth three criteria to govern the trading of futures contracts on a group or index of securities on designated contract markets and registered derivatives transaction execution facilities (“DTEFs”):

- (1) the contract must provide for cash settlement;
- (2) the contract must not be readily susceptible to manipulation nor to being used to manipulate any underlying security; and
- (3) the group or index of securities must not constitute a narrow-based security index.<sup>18</sup>

While Section 2(a)(1)(C)(ii) provides that no board of trade or DTEF may trade a security index futures contract unless it meets the three criteria noted above, it does not explicitly address the standards to be applied to a foreign security index futures contract

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<sup>15</sup> See CEA Section 2(a)(1)(D).

<sup>16</sup> See CEA Section 2(a)(1)(C)(ii).

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

<sup>18</sup> The first two criteria under CEA Section 2(a)(1)(C)(ii) were unchanged by the CFMA. With regard to the third criterion, an index is a “narrow-based security index” under both the CEA and the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78a *et seq.*, if it has any one of the following four characteristics: (1) it has nine or fewer component securities; (2) any one of its component securities comprises more than 30% of its weighting; (3) the five highest weighted component securities in the aggregate comprise more than 60% of the index’s weighting; or (4) the lowest weighted component securities comprising, in the aggregate, 25% of the index’s weighting, have an aggregate dollar value of average daily trading volume of less than \$50 million (or in the case of an index with 15 or more component securities, \$30 million). See CEA Section 1a(25)(A)(i)-(iv); Exchange Act Section 3(a)(55)(B)(i)-(iv). Thus, an index that does not have any of these elements is not a narrow-based security index for purposes of CEA Section 2(a)(1)(C)(ii). See *also* CEA Section 1a(25)(B); Exchange Act Section 3(a)(55)(C).

traded on a foreign board of trade. This Office has applied those same three criteria in evaluating requests by foreign boards of trade to allow the offer and sale within the U.S. of their foreign security index futures contracts when those foreign boards of trade do not seek designation as a contract market or registration as a DTEF to trade those products.<sup>19</sup>

Accordingly, this Office has examined the Nikkei 225 and OSE's mini futures contract based thereon to determine whether the Index and the mini futures contract meet the requirements enumerated in CEA Section 2(a)(1)(C)(ii). Based on the information noted herein and as set forth in the letters, attachments, facsimiles and electronic mail noted above, we have determined that the Nikkei 225 and OSE's mini futures contract based thereon conform to these requirements.<sup>20</sup>

In determining whether a foreign futures contract based on a foreign security index is not readily susceptible to manipulation or being used to manipulate any underlying security, one preliminary consideration is the requesting exchange's ability to access information regarding the securities underlying the index. As noted above, all the securities underlying the Nikkei 225 are traded on the TSE. OSE and TSE have been working in a mutual cooperative framework for market surveillance in order to prevent unfair transactions in the Japanese derivatives markets and cash stock markets under the administrative guidance of the FSA.<sup>21</sup> OSE represents that it is able to obtain all necessary information from TSE for surveillance under this framework.<sup>22</sup> Thus, OSE should have access to information necessary to detect and deter manipulation. In the event that OSE is unable to obtain access to adequate surveillance data in this regard,

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<sup>19</sup> With regard to the third criterion, the CFTC and SEC jointly promulgated Rule 41.13 under the CEA and Rule 3a55-3 under the Exchange Act, governing security index futures contracts traded on foreign boards of trade. These rules provide that "[w]hen a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market or registered derivatives transaction execution facility." CFTC Rule 41.13, 17 C.F.R. § 41.13; Exchange Act Rule 3a55-3, 17 C.F.R. § 240.3a55-3.

<sup>20</sup> In making this determination, the Commission staff has concluded that the Nikkei 225 does not have any of the elements of a narrow-based security index as enumerated in CEA Section 1a(25)(A), and accordingly the Index would not be a narrow-based security index if traded on a designated contract market or DTEF.

<sup>21</sup> See letter from Ms. Woo to Mr. Merrill, dated September 29, 2005, at 6.

<sup>22</sup> *Id.*

or is unable to share such data with the CFTC, this Office reserves the right to reconsider the position we have taken herein.<sup>23</sup>

In light of the foregoing, this Office will not recommend any enforcement action to the Commission based on Sections 2(a)(1)(C)(iv), 4(a), or 12(e) of the CEA, as amended, if OSE's mini futures contract based on the Nikkei 225 is offered or sold in the U.S. Because this position is based upon facts and representations contained in the letters, attachments, facsimiles and electronic mail cited above, it should be noted that any different, omitted or changed facts or conditions might require a different conclusion. This position also is contingent on the continued compliance by OSE with all regulatory requirements imposed by the FSA, and the applicable laws and regulations of Japan. In addition, this position may be affected by any rules that the Commission may adopt regarding futures contracts based on non-narrow-based security indices.

The offer and sale in the U.S. of OSE's mini futures contract on the Nikkei 225 is, of course, subject to Part 30 of the Commission's regulations, which governs the offer and sale of foreign futures and foreign option contracts in the U.S.<sup>24</sup>

Sincerely,

Nanette R. Everson  
General Counsel

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<sup>23</sup> OSE has agreed that it will cooperate with CFTC requests for information made pursuant to this no-action letter. *Id.* at 7. Moreover, OSE is a signatory to the International Information Sharing Memorandum of Understanding, dated March 15, 1996. OSE also is an affiliate member of the Intermarket Surveillance Group ("ISG"), which consists of representatives from securities and futures exchanges in the U.S. and other countries. The members of ISG have agreed to share information to ensure coordinated surveillance of intermarket trading abuses. *Id.* In addition, OSE's regulator, the FSA, signed a Statement of Intent Concerning Cooperation, Consultation and the Exchange of Information ("SOI") with the SEC and the CFTC, on May 17, 2002 (as amended January 2006).

<sup>24</sup> See 17 C.F.R. Part 30.