

# COMMENT

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Good morning, Chairman Rainer and members of the Commission. I am Dennis Dutterer, Interim President & CEO of the Chicago Board of Trade. I appreciate the opportunity to be here today to speak about the New Regulatory Framework you have proposed.

Let me first commend you, Chairman Rainer, Commissioners and Commission staff for the efforts you have devoted to developing this New Framework. We at the CBOT believe this proposal creates an environment in which the U.S. futures industry may compete effectively in the global derivatives marketplace. It identifies the public interest goals of regulation and then rationally tries to match a regulatory approach to those goals. It recognizes that effective regulation should provide oversight, not rigid mandates. It allows exchanges to choose how to conduct business, allowing us to do what we think is best to attract and retain customers. Allowing business to shed the current "one size fits all" brand of regulation will be of immense benefit to exchanges and other derivatives market innovators.

### Flexibility and Choice

For years, the Board of Trade has advocated that exchanges should be afforded the same type of flexible treatment that is enjoyed by the over-the-counter derivatives markets and overseas exchanges. Since 1993, when the CFTC adopted its swaps exemption, the Board of Trade has made numerous filings urging the CFTC to allow exchanges the same treatment as OTC swaps dealers. Our argument was: the same instruments traded among the same participants should have the same regulation.

By establishing three new market categories, this proposal goes a long way toward granting exchanges the flexibility we have long sought. Under the category of an Exempt Multilateral Transaction Execution Facility (Exempt MTEFs), an exchange could offer a derivatives market with roughly the same regulatory freedom as a swaps dealer. This feature provides maximum regulatory flexibility. In addition, exchanges would be able to operate markets regulated as Derivatives Transaction Facilities (DTFs) or Recognized Futures Exchanges (RFEs), under which detailed regulations would be replaced with Core Principles. Importantly, exchanges would decide and design how to meet those Core Principles.

### The Importance of Core Principles

The hallmark of the Commission's proposal really is this switch from specific statutory mandates to what the proposal calls "broad, flexible 'Core Principles.'" The Board of Trade strongly supports that change. Giving RFEs and DTFs, which I will call "exchanges" for short, the flexibility to decide how best to achieve common regulatory

objectives for their different markets is a sound public policy response for modern markets. The Commission should supervise, not dictate, how the exchanges meet those broad performance standards.

There are those, Mr. Chairman, who do not see your proposed framework in the same light. They have expressed concern about flexible core principles because a flexible standard in the hands of a misguided regulator could become a license to dictate business solutions, rather than oversee them. In short, if misapplied by the government, the virtue of a core principle's flexibility could become a significant vice.

This criticism of the Commission's proposal is quite valid in one sense. Some safeguards must be provided to make sure that the exchanges have broad discretion to apply these core principles.

One way to achieve that goal would be to fashion an appropriate mechanism for resolving differences of interpretation and application of core principles. From my experience, Mr. Chairman, as both a regulator and regulatee, I know that the CFTC and the exchanges will inevitably disagree on whether an exchange is satisfying the terms of a core principle. Hopefully those disagreements will be very infrequent. But when they do occur, they should be resolved in a manner that is balanced, expeditious and consistent with the thrust of the Commission's new oversight role.

Current law would resolve those disputes through contentious, drawn out and costly legal proceedings, whether administrative or judicial. In our view, those existing mechanisms do not reflect the new spirit of cooperative oversight that underlies the Commission's proposed framework. Just as core principles have been proposed to replace prescriptive rules, the Commission's new framework needs to adopt an alternative dispute resolution mechanism rather than rely solely on adjudicatory proceedings.

In our view, that new mechanism should reflect the underlying tenet of the Commission's proposal: the exchanges have considerable discretion in deciding how to satisfy a core principle. The Commission therefore should only challenge an exchange's compliance with a core principle only if the CFTC determines that the exchange has abused its discretion and so advises the exchange in writing. The exchange then should be afforded an opportunity to state its case in a written response to the Commission.

Once in receipt of the exchange's submission, the Commission could a) withdraw its preliminary conclusion; b) attempt to negotiate a compromise with the exchange; or c) initiate an alternative dispute resolution procedure to determine whether the exchange has abused its discretion. The choice would be the Commission's to make.

Alternative dispute resolution procedures could be created in a variety of ways. One approach would call for an independent third party who is acceptable to both the Commission and the exchange to resolve the dispute in a private and confidential manner. Both parties would agree to be bound by the outcome dictated by the decision-maker. Any decision would be based on at least the written submissions of both parties, and

would weigh the costs and benefits of the methods or mechanisms each party would recommend for satisfying the core principle at issue. This would be the exclusive remedy available to the Commission for the failure of an exchange to satisfy a core principle due to a claimed abuse of the exchange's discretion.

In egregious circumstances, if the Commission believed that an exchange was grossly abusing its discretion to satisfy an applicable core principle, the Commission could take immediate action under its current powers to seek an injunction or bring an administrative proceeding. If the Commission demonstrated by substantial evidence that the exchange was grossly abusing its discretion, the exchange could be ordered to comply with the Commission's recommended approach for satisfying the core principle at issue.

We urge the Commission to give serious consideration to this approach to resolving disputes arising out of core principles. In our view, developing an alternative dispute resolution mechanism along these lines would be the linchpin of the Commission's proposed new framework and is necessary to make the flexible core principles work as the Commission intends. We would be happy to work with the Commission toward a mutually satisfactory solution to this issue.

#### Other Comments

As with any proposal of this sort, the need to generate an acceptable level of consensus among affected parties results in compromises. Everyone here today has watched some such compromises unfold already in relation to this proposal and similar congressional legislation. On two points, the Board of Trade believes the results may be shortsighted. First, we believe the Framework and related legislation should allow for future expansion of the list of commodities that may be traded in a DTF. At some point, the Commission and industry may want to allow trading in agricultural commodities to qualify for DTF treatment. If such a determination is made, it would be better to have the framework in place to allow for that decision to be implemented expeditiously.

Similarly, while the Framework currently allows for trading of Treasury securities in Exempt MTEFs, the reality is that Congressional legislation will not. Again, we believe that flexibility to change that determination should be included in the Commission's regulations. While there are currently concerns about the now decreasing supply of Treasury securities, that may not always be the case. As in the above example, the Commission and industry may find it desirable and useful to allow trading of Treasury instruments in Exempt MTEFs. Again, it would be better to have that flexibility built in to the Commission's framework so that expanding the products available for trading on a MTEF could be achieved expeditiously, with the concurrence of the Commission and possibly even the Treasury Department in the case of U.S. Treasury security derivatives.

Finally, I would note that while the broad concepts of the New Framework have been public for several months now, we have had a relatively short time in which to review the official proposed rulemaking. We have some additional concerns that deal more with drafting details than broad concepts. In reviewing core principles, for example, we notice that the transparency principle for DTFs could be read to be more onerous than the transparency principle for RFEs. The two core principles should be the same. Otherwise

the Framework would create a disincentive to form DTFs. We, of course, reserve the right to raise this and other suggestions in our comment letter.

#### Conclusion

In conclusion, the Board of Trade supports the New Framework and believes it holds great promise for our exchange and our industry. It is the most business-oriented, forward-thinking proposal to emerge from the Commission in quite some time. We are eager to see the Framework put into effect and to begin to use the opportunities it provides us to take more control over the future shape of our business. Combining the framework with the changed viewpoint of a for-profit business, which is coming at the CBOT, we believe represents the best hope for structuring our business to meet the enormous challenges of this century. I thank you again for the opportunity to appear today and look forward to your questions and discussion of these important issues.