



**The American
Stock Exchange**
An NASD Company

Michael J. Ryan, Jr.
Executive Vice President
and General Counsel

COMMENT

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Ms. Jean A. Webb
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C., 20581

Re: Designated Contract Markets in Security Futures Products
66 FR 29517 (May 31, 2001)

Dear Ms. Webb:

The American Stock Exchange LLC ("Amex" or "Exchange") submits the following comments in response to the Commodity Futures Trading Commission's ("CFTC" or "Commission") recent Federal Register notice regarding the above matter ("May 31 Notice"). Amex is registered as a national securities exchange under the Securities and Exchange Act of 1934 ("SEA").

1. Background

The Commodity Futures Trading Act of 2000 ("CFMA") permits the trading of futures contracts on individual equity securities, narrow-based indexes of equity securities, and options on such futures ("security futures products") on a national securities exchange that files a written notice with the CFTC to be designated as a contract market in security futures products ("SFPCM"). The CFMA defines a security futures product as both a "security" for purposes of the SEA, and as a "future" for purposes of the Commodity Exchange Act ("CEA"). The practical consequence of this dual definition is that exchanges that are otherwise subject to the regulatory jurisdiction of only the SEC or CFTC, but which seek to list securities futures products, are potentially subject to registration with, and regulation by, both agencies. The CFMA attempts to prevent potentially duplicative or inconsistent regulation by preserving the jurisdiction of the exchange's primary regulator, and reducing the jurisdiction of the other regulator. Accordingly, under new section 5f of the CEA, a board of trade that is primarily regulated by the SEC and that seeks to list security futures products is relieved from certain of the CFTC's otherwise applicable regulatory requirements. Section 5f(b)(4) of the CEA further permits the Commission to

exempt SFPCMs from any provision of the CEA or regulations thereunder "to the extent that exemption is necessary or appropriate in the public interest and is consistent with the protection of investors" and, requires the Commission to develop procedures which would allow SFPCMs to apply to the Commission for such exemptions. The Commission, accordingly, proposed four new rules in the May 31 Release:

- Regulation 41.31. This regulation would establish notice registration procedures.
- Regulation 41.32. As described in the May 31 Release, this regulation "would establish several, limited continuing obligations [on SFPCMs]."
- Regulation 41.33. This regulation would establish procedures for SFPCMs to request exemptive relief from unnecessary or unduly burdensome regulatory requirements.
- Regulation 41.34. This regulation would list the provisions of the CEA from which SFPCMs are exempted pursuant to Section 5f(b)(1) of the CEA.

2. The Commission Should Identify those of its Rules that SFPCMs must Comply with or, Alternatively, Enhance the Ability of SFPCMs to Obtain Exemptive Orders

Potential SFPCMs already are subject to a comprehensive scheme of regulation under the SEA that covers the vast majority of the regulatory concerns addressed by the CEA. As noted above, the Congress sought to avoid unnecessary regulation in adopting the CFMA by preserving the jurisdiction of the exchange's primary regulator [in the case of an SFPCM, the SEC], and reducing the jurisdiction of the other regulator [in the case of an SFPCM, the CFTC]. Congress further sought to reduce the possibility of overlapping regulation by specifically exempting SFPCMs from specified sections of the CEA, and giving the CFTC broad authority to exempt SFPCMs from any other section of the CEA or the Commission's regulations. The May 31 Release, however, does not identify the Commission's regulations that SFPCMs are expected to comply with. Instead, the Commission in the May 31 Release broadly sought to apply the CEA's regulatory framework to SFPCMs, stating:

Proposed Regulation 41.32 is not meant to be an exhaustive list of SFPCM regulatory requirements. It would simply establish several additional reporting requirements which the Commission believes are necessary to carry-out its statutory mandate relative to SFPCMs...*The Commission reiterates that SFPCMs would remain subject to all*

other applicable requirements of the Act and regulations thereunder. (Italics supplied. Footnote omitted. Page 29519.)

In proposing regulation 41.34, the Commission merely repeated those sections of the CEA from which SFPCMs already are specifically exempted by the CFMA. The May 31 Release did not identify the particular Commission's regulations with which SFPCMs were expected to comply. Consequently, a national securities exchange planning to become an SFPCM, or an operating SFPCM, is left unable to fully assess their CEA related compliance responsibilities. The regulatory uncertainties are illustrated by the following questions.

- Is it necessary or prudent for an SFPCM to undertake a review of all CFTC releases adopting rules pertaining to contract markets to determine whether a particular regulation was adopted under a section of the Act from which SFPCMs are exempted by Section 5f(b)?
- What are the compliance obligations of SFPCMs with respect to regulations that were adopted under various sections of the CEA, some of which are subject to a statutory exemption for SFPCMs and others that are not subject to the statutory exemption?
- In cases where a regulation is promulgated under several sections of the CEA, how can SFPCMs determine their compliance responsibilities?

The significance of the regulatory uncertainties facing SFPCMs is magnified by the discretionary nature of the exemptive process in proposed rule 41.33. Under this regulation, the Commission staff may, "in its sole discretion, decline to entertain an application [for an exemptive order] for any reason, without explanation, at any time during the review period."¹ SFPCMs, thus, do not know the rules they must comply with and lack a certain method for resolving such questions.

As a result of (1) the comprehensive scheme of regulation to which SFPCMs already are subject under the SEA, (2) the clear intent of Congress to avoid unnecessary and duplicative regulation in the trading of security futures products, (3) the uncertainty as to SFPCM compliance responsibilities under the May 31 Release, and (4) the absence of a certain procedure for clarifying SFPCM regulatory responsibilities under proposed regulation 41.33, the Exchange requests that the Commission undertake a rule making proceeding whereby it would publish for comment a comprehensive list of the rules that

¹ May 31 Release, page 29520.

SFPCMs should comply with. We think such notice is required as a matter of fundamental fairness. However, if the Commission determines that it will not provide the requested rule making, the Exchange requests that the Commission modify proposed rule 41.33: (1) to *require* Commission review of SFPCM requests for exemptive orders using the CFMA standard, that is, the "necessary or appropriate in the public interest and is consistent with the protection of investors" standard; and (2) to *require* the preparation of a written explanation upon request of the reasons for a denial of a request for an exemptive order. We believe that the Commission, in fulfilling the clear intent of Congress to avoid unnecessary and duplicative regulation in the trading of security futures products, should not adopt a regulation that would give its staff complete discretion to decline to review an application by an SFPCM for an exemptive order where the requested relief would be necessary or appropriate in the public interest and consistent with the protection of investors and the SFPCM has no certain means of ascertaining its compliance responsibilities.

3. The CFTC should Perform the Cost/Benefit Analysis Required by Section 15 of the CEA with Respect to its Rules that SFPCMs must Comply with

Section 15 of the CEA requires the Commission to consider the costs and benefits of a proposed action by the Commission, "prior to promulgating a regulation under this Act or issuing an order." In performing the required cost/benefit analysis in the May 31 Release, the Commission stated:

The Commission has endeavored to impose minimal costs – i.e., only necessary disclosure and record-keeping – on any of the entities involved, so that the benefits of the notice designation and exemptive processes intended by Congress can be fully realized. (Page 29522.)

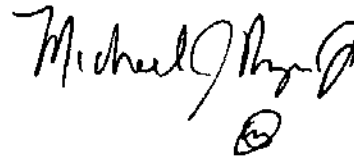
The cost/benefit analysis prepared by the Commission for the May 31 Release did not include an analysis of the costs and benefits of applying unidentified Commission regulations to SFPCMs. The Exchange, therefore, believes that prior to issuing an order that discusses and defines the on-going compliance responsibilities of SFPCMs under the CEA, the Commission must identify those of its rules with which SFPCMs must comply and perform the required section 15 cost/benefit analysis with respect to those rules. Such a cost/benefit analysis should specifically assess the impact of imposing duplicative burdens on exchanges and firms where the SEC and SFA impose similar requirements or provide a different regulatory approach (e.g., large trader reports).

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We would be pleased to further discuss our views on these matters with the Commission and its staff.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael J. Ryan". The signature is written in a cursive style with a large, stylized initial "M". Below the signature is a small, circular handwritten mark or stamp.

cc: Alan Seifert
David P. Van Wagner
Joshua Marlow
Annette Nazareth
Robert Colby
Elizabeth King